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HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS

Guidelines for the regulation of computerized personal data files

Report of the Secretary-General

CONTENTS

I. INTRODUCTION

1. At its fortieth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, by its resolution 1988/29 of 1 September 1988, and subsequently the Commission on Human Rights, by its resolution 1989/43 of 6 March 1989, considered the draft guidelines for the regulation of computerized personal data files submitted by the Special Rapporteur, Mr. Louis Joinet, and contained in his final report (E/CN.4/Sub.2/1988/22).

2. On the recommendation of the Commission on Human Rights, the Economic and Social Council, by its resolution 1989/78 of 24 May 1989, decided to transmit to the General Assembly the final report by the Special Rapporteur (E/CN.4/Sub.2/1988/22) and requested the Secretary-General to bring that report to the attention of all Governments and to invite them to communicate their comments to him before 1 September 1989. The Council also requested the Secretary-General to submit to the Assembly for consideration at its forty-fourth session the final report of the Special Rapporteur and a report containing the views expressed thereon by Governments; and recommended that the Assembly consider, as a matter of priority, the adoption and publication of the guidelines on the use of computerized personal files.

3. Subsequently, a note verbale was sent to all Governments requesting them to submit their comments on the draft guidelines.

4. As at 20 September 1989, replies had been received from the following Governments: Burundi, Germany, Federal Republic of, Japan, Netherlands, Norway, Sweden, United Kingdom of Great Britain and Northern Ireland.

5. The present report summarizes in an analytical way the comments received by the above-mentioned Governments. Any further comments will be contained in addenda to the present report.

6. The final report of the Special Rapporteur (E/CN.4/Sub.2/1988/22) is contained in the annex to the present report.

II. GENERAL COMMENTS AND SUGGESTIONS

7. The Governments of Burundi, Norway and Sweden expressed the view that the proposed guidelines for the regulation of computerized personal data files were well suited for their purpose and that the stated principles were basic for the protection of the human rights of privacy and freedom.

8. In the view of Burundi and Norway, the necessity of elaborating an international instrument was highly desirable as safeguards because of the extensive increase of transborder data flows.

9. Norway also noted that the consignment of data to the archives should not endanger a person's "right to oblivion". One must therefore ensure that the data

from archives were not used again by any administrative agency or by others as a basis of decisions or for publication, without the consent of the person involved.

10. The Government of the Netherlands stated that it was most interested in the final text of the draft guidelines and was pleased to note that account had been taken on various points of the observations made by the Netherlands in respect of a previous version of the guidelines.

11. The Government of Japan pointed out that, since measures for the protection of personal information are different in each country because of their respective domestic legal systems, national sensibilities, and social, cultural and traditional backgrounds, the guidelines should be of such a nature and have a degree of flexibility as to permit each country to introduce its own domestic rules and regulations, which it deems most appropriate, taking into careful consideration such factors as domestic social characteristics of the individual country.

12. Proceeding from that, Japan considered that the following should be stipulated in the instrument:

"(a) These guidelines impose no legal obligations on States;

"(b) The ways and means of how to implement these guidelines should be left to the discretion of each State."

III. COMMENTS AND PROPOSALS IN RESPECT OF PRINCIPLES STATING THE MINIMUM GUARANTEES TO BE INCORPORATED INTO NATIONAL LEGISLATION

A. Principle of lawfulness and fairness

13. Regarding principle (1) (appendix 1), on lawfulness and fairness, in the guidelines (see annex), no comments have been received.

B. Principle of accuracy

14. With regard to principle (2), on accuracy, in the guidelines, the United Kingdom held the view that a requirement for regular checks on the accuracy and relevance of files for their updating regularly, or whenever information was used, was too specific and procedurally exacting a requirement for an international instrument. It should be sufficient to state the underlying requirements that personal data should be accurate, kept up to date where necessary and relevant to the purpose for which the data is gathered. National jurisdictions should be left to decide how to give effect to these requirements in statutory and administrative terms. The United Kingdom agrees with the objections to the notion on the International Court of Justice of "completeness" contained in paragraph 14 of the final report.

15. Japan proposed the following wording of that principle:

"Persons responsible for the compilation of files or those responsible for keeping them should make an effort to conduct, with the purpose of keeping the data, regular checks on the accuracy and relevance of the data recorded and to ensure that they are kept up to date regularly or when the information contained in a file is used."

C. Principle of purpose-specification

16. Concerning principle (3), on purpose-specification, the Federal Republic of Germany pointed out the following:

"The requirement that the purpose of a file be made publicly known before it is established is not envisaged in either the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with Regard to Automatic Processing of Personal Data or the guidelines of the Organization for Economic Co-operation and Development (OECD) of 23 September 1980 governing the protection of privacy and transborder flows of personal data. On the other hand, one should lay down in principle 3 of the draft guidelines not only the principle of purpose-specification, which is reflected in the first half of article 8 b of the said data protection convention, but also everyone's right to ascertain the existence of a file and its main purposes, along the lines of article 8 a of that Convention. The first sentence of principle 3 should therefore read as follows:

"'The purpose which a file is to serve should be specified, legitimate and ascertainable to everyone before it is established, in order to make it possible subsequently to ensure that' ...".

17. Japan suggested to add the following words at the end of subparagraph 3 (b):

"In cases where personal data is used or disclosed for a distinct purpose, such as public service, in accordance with the domestic laws and regulations, without prejudicing unduly the rights or interests of the persons concerned or of third persons, such usage or disclosure of the data is not prohibited."

18. Norway found the content of the principle to be satisfactory. It felt, however, that if a persons's consent was impossible to obtain, it might be useful to give a competent national body an authorization to give dispensations. In its view, the suggestion made by the Netherlands and contained in paragraph 15 of the final report would "make it too easy to evade the guidelines".

19. With reference to the second line of principle (3), the United Kingdom considered the word "when" to be preferable to the word "before".

D. Principle of interested-person access

20. In connection with principle (4), on interested-person access, the Government of Japan considered that the question that non-resident persons of a foreign nationality in a State be allowed access was a matter of the legislative policy of that State. Therefore, it is not appropriate to include it as a minimum rule in the proposed guidelines. For this reason, amendments should be made so that this paragraph simply implies the aim or endeavour.

21. The Government of the United Kingdom noted that the penultimate sentence is vague. In its view, it ought to be made clear that remedies should be available for breach of any of the provisions described in the preceding sentence.

E. Principle of non-discrimination

22. With reference to principle (5), on non-discrimination, the Netherlands stated as follows:

> "Principle 5 contains an express prohibition on the compilation of certain data, except where principle 6 permits exceptions to be made. The scope of this prohibition is not entirely clear. For example, the question arises of whether the compilation of the data in question under circumstances which could give rise to unlawful or arbitrary discrimination is meant, or the compilation of such data irrespective of the cirucmstances under which this is done. If the latter were the case, the provision would appear to be too broad in its scope because it would then cover cases in which there is no risk of discrimination at all. For example, there is no reason to place restrictions on political parties, trades unions, religious associations and so on establishing records of their members. The Government of the Netherlands feels there is a need to clarify this issue."

23. In the view of the Federal Republic of Germany, principle (5) should be phrased as follows:

> "Data likely to give rise to unlawful or arbitrary discrimination, especially information on racial or ethnic origin, colour, sex-life, political opinions, religious, philosophical and other beliefs, as well as membership of an association or a trade union, should not be compiled.
>
> "Compilation is permitted by way of exception if the person concerned has given his consent or if compilation is necessary for the sake of the general public or a third party and the person concerned has no protectible interest in compilation being excluded, taking due account of the International Bill of Human Rights 1/ and other relevant instruments in the field of protection of human rights and the prevention of discrimination.
>
> "Even if these requirements are met, compilation is impermissible if national law does not guarantee adequate protection against discrimination."

24. The same government further noted that the resultant need for legislation on a case-by-case basis is not feasible in view of the diverse situations covered that cannot be individually delimited. It is therefore essential to delimit in the principle itself the requisite exceptions and the criteria permitting the compilation of data, with these criteria not being alterable at the national level. The requirement that the compilation of data be in the interest of the general public or a third party and that protectible interests of the person concerned be taken into account meets the conditions laid down by the Federal Constitutional Court in its judgements concerning the limitation of the right to self-determination in respect of personal data. The restrictions now included in principle 5 have the same substance as those originally envisaged in principle 6.

25. Concerning principle (5), the Government of Japan made the following comments:

> "The guidelines itemize racial or ethnic origin, colour, sex-life, political opinions, religious, philosophical and other beliefs, as well as membership of an association or a trade union as information that should not be recorded, but it is not appropriate to specify those items to be applicable in common to all States, because data falling under the sensitive category may differ among States and individuals. Therefore, this is a matter on which a decision should be made by each State in accordance with its traditions, the needs of its administrative public services and other relevant circumstances".

26. According to the view of the United Kingdom, the opening phrase would be clearer if it read "Subject to the exceptions provided for in principle (6) ...".

F. Power to make exceptions

27. The Federal Republic of Germany pointed out that taking into account its amendment to principle (5), the requirement in the second paragraph of principle (6) in the draft guidelines that any exceptions be restricted by the provisions of the International Bill of Human Rights and similar instruments is now met by weighing the interests of the general public or a third party, on the one hand, and the protectible interests of the person concerned, on the other. That paragraph can therefore be dispensed with.

28. Japan stated that the guidelines allowed exclusion from the application of the principles given therein only in respect of national security, public order, public health or morality or the rights and freedoms of others. As the sort of files that are to be given exemption from the application may differ from State to State, depending on legislative judgements or other circumstances of the particular State regarding the matter, it considered that the kind of files to be granted exemption ought to be specified by each State according to its own criteria. That view should be clearly stated. Japan was also of the view that the words "criminal search" should be excluded from the application of the principles.

29. The United Kingdom noted that the wording of the principle was very close to that of the Council of Europe Convention, and the United Kingdom would be content with it.

G. Principle of security

30. Norway and the United Kingdom expressed their consent with the content and wording of principle (7) on security.

H. Supervision and penalties

31. The Government of Norway considers that, relating to principle (8), "the goal must be to establish an authority with the greatest possible independence of the Government".

32. In the view of the Government of the Federal Republic of Germany, "the authority to be set up to supervize observance of the principles contained in the guidelines should be not only impartial, but also independent of the bodies responsible for keeping the files".

33. Japan noted that what was important was how to secure the implementation of the guidelines and the appropriate measures. Whether criminal penalties should be imposed or not should be decided in accordance with the domestic law of each State.

34. The Government of the United Kingdom is of the opinion that the last sentence of the text would be clarified by saying "... principles, criminal penalties and individual remedies should be available".

I. Transborder data flows

35. The Government of the United Kingdom suggested the following amendments to the text of the principle: in the second line, the words "more or less equivalent" would be better expressed as "comparable". The last sentence would be better expressed thus by: "If there are no comparable safeguards, limitations on such flows should not be unduly imposed and then only in so far as the protection of privacy requires". The United Kingdom noted that it was content that the protection of privacy should be the only criterion mentioned in the last sentence of the text.

J. Field of application

36. According to the Norwegian reply, the rules should cover computerized as well as manual files and legal persons should also be protected by the privacy legislation.

37. The Government of Sweden is of the view that the clause concerning principle (10) is to be understood as relating to primarily computerized files, whether public or private. As far as manual files are concerned, the clause is to be understood as though the principles of the proposed guidelines are applicable only to such files when compiled and kept for the purpose of compiling and keeping computerized files.

38. The Federal Republic of Germany pointed out that in the explanations on the guidelines it should be made clear that "manual file" was to be understood to mean a manually kept data file and not a conventional office file.

39. The Government of the United Kingdom considered that, as it is made clear in their title, these guidelines relate to computerized personal data files. Manual files and non-personal data lie outside the terms of reference and this article should not introduce them. On the substance, the United Kingdom could not in any case accept that the principles of individual privacy should apply to non-personal data; manual files would be very expensive to cover by such measures and extension of the principles to them should at the most be optional; and such issues as access to manual files would in any case need to be considered separately in the context of freedom of information. As regards the last sentence of the text, it was of the view that the words "if requested" were unclear (requested by whom?); and, in any case, the sentence should be rephrased to make it clear that States had the option if they wished of extending the principles to cover files on legal persons when they contained some information on individuals.

40. Japan is of the view that manual files should be excluded from the application of the guidelines, or the decision on this application should be entrusted to each State. It may take much time to search manual files and consequently that would place a great burden on the authorities.

K. Application of the guidelines to personal data files kept by governmental international organizations

41. The Government of Norway is of the opinion that international organizations filing sensitive data, should follow the rules of the guidelines, and should register in the United Nations, stating that they would follow the principles in the guidelines. According to the same view, an authority to supervise the observance of the guidelines should be within the United Nations.

Notes

1/ Comprising the Universal Declaration of Human Rights (General Assembly resolution 217 A (III), the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the Optional Protocol thereto (General Assembly resolution 2200 A (XXI), annex).

ANNEX

Guidelines for the regulation of computerized personal data files

Final report submitted by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*

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* Previously circulated under the symbol E/CN.4/Sub.2/1988/22.

I. BACKGROUND TO THE DRAFT GUIDELINES

1. At its thirty-sixth session, the Sub-Commission on Prevention of Discrimination and Pretection of Minorities, by its decision 1983/8, and subsequently, the Commission on Human Rights, by its resolution 1984/27, endorsed the conclusions of the study on the relevant guidelines in the field of computerized personal files submitted by the Special Rapporteur, Mr. Louis Joinet (E/CN.4/Sub.2/1983/18).

2. By its resolution 1984/12 of 29 August 1984, the Sub-Commission consequently requested the Secretary-General to transmit to Member States and to all relevant international organizations the provisional draft guidelines proposed by the Special Rapporteur, with a request that they should submit their views thereon. By a note verbale of 6 November 1984, the Secretary-General carried out the above-mentioned consultation.

3. At its thirty-eighth session, the Sub-Commission, noting the insufficient number of answers forwarded to the Centre for Human Rights, requested the Secretary-General, by its resolution 1985/14 of 29 August 1985, to continue to obtain the comments and suggestions of Governments. By successive notes verbales of 18 November 1985 and 29 April 1987, the Secretary-General accordingly reiterated his request.

4. The list of replies received (see appendix II) shows the increasing interest of United Nations organs and specialized agencies in the draft guidelines, owing, it would seem, to the increasing number of personal files they are keeping.

5. The purpose of this report is to:

(a) Identify the main trends emerging from the comments made by the members of the Sub-Commission during the discussion of the interim report submitted at the thirty-eighth session (E/CN.4/Sub.2/1985/21), as well as from the analysis of the answers received;

(b) Submit, for the approval of the Sub-Commission, the revised final draft guidelines with a view to their transmission to the Commission on Human Rights.

II. GENERAL COMMENTS AND SUGGESTIONS

6. A consensus emerges from the comments received on the desirability of encouraging the formulation of guidelines in this area, both for Member States wishing to adopt domestic legislation a/ and for international organizations and agencies in respect of the status of their own personal data files (see also para. 30).

7. General comments and suggestions worthy of particular attention are summarized below. As far as the human rights affected by the computerization of personal data are concerned, it should be borne in mind that:

(a) The concept of privacy has features peculiar to each legal system (International Court of Justice) and that it is therefore advisable not to try to define it legally (International Federation of Human Rights (IFHR));

(b) Other freedoms are equally affected by computerization. Apart from his privacy, the individual may be threatened in his daily social life (working conditions, collective activities, etc.).

8. The implications of the most recent technological developments on the guidelines should not, however, call them fundamentally into question as they stand (France) apart from making a few gradual adjustments (for example: a relaxation of the formalities prior to undertaking processing operations).

9. As regards the implementation of the principles, the option remains open between general legislation, covering all sectors (the European approach) or sectoral legislation (the American approach). The latter is in favour in the world of employment; for example, the International Confederation of Free Trade Unions (ICFTU) intends to study an international trade-union guideline to assist trade unionists responsible for negotiating collective agreements.

10. The ICFTU also proposes that safeguards should be envisaged for employees who might refuse to carry out a processing operation because of its unlawful or arbitrary character.

11. The principle of the right to oblivion should not, generally speaking, be understood as involving the destruction of data - which would be disastrous for history - but rather their consignment to the archives.

12. On the desirability of elaborating an international instrument:

(a) The Council of Europe recalls that its convention of 28 January 1981 has now entered into force with 11 signatures and 7 ratifications (France, Germany, Federal Republic of, Luxembourg, Norway, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland) and that it is open to non-member States;

(b) Several replies advocate the elaboration of an additional protocol to article 12 of the International Covenant on Civil and Political Rights (Yugoslavia and the International Federation of Human Rights). It will be for the Sub-Commission to make such a proposal to the Commission on Human Rights.

III. COMMENTARY ON PROPOSED AMENDMENTS

A. Proposals in respect of the principles on which national legislation should be based

1. Principle (1) of fairness

13. Having become the "Principle of lawfulness and fairness" (United Nations Educational, Scientific and Cultural Organization (UNESCO)), this principle has been completed (United Nations University) by a provision drawing attention to the fact that such files should not be used to pursue ends contrary to the purposes and

principles of the Charter of the United Nations. This was done, for example, by the Nazis, who made use of certain files, to carry out raids which enabled the mass deportation of Jewish populations to be organized.

2. Principle (2) of accuracy

14. Reverting to its initial opinion, the International Court of Justice ended by stressing that it was unrealistic to demand that the information should be "complete". Personal information can never in fact be "complete" (Office of the United Nations High Commissioner for Refugees (UNHCR)). As far as regular updating is concerned, it seemed preferable to keep a certain degree of flexibility so that the purpose of the files may be borne in mind. In any case, updating should be carried out at least once a year (UNESCO), unless the system enables a routine check to be carried out, whenever a file is used, of the accuracy and relevance of the data recorded (UNHCR).

3. Principle (3) of purpose-specification

15. The concept of "purpose-specification" of the file, considered to be too narrow, has been replaced by that of "main purpose-specification" (International Labour Organization (ILO) and International Court of Justice), since these purposes need to be not only specified but also "legitimate".

16. Most of the suggestions focus on the essential openness of the purposes; appropriate notification measures should therefore enable the public to take cognizance of them. Any use or disclosure beyond the specified purpose should have the consent of the person concerned (Organisation for Economic Co-operation and Development (OECD)). Public sector files should be confined strictly to the performance of each administration's specific functions (El Salvador). It appeared that the wording proposed by UNESCO, which takes account of most of these suggestions, could largely be adopted.

17. The Netherlands proposes, however, that the expression "used or disclosed (...) for a purpose other than that so specified" should be replaced by the expression "used or disclosed for purposes incompatible with those specified".

4. Principle (4) of interested-person access

18. The exercise of this right implies that the person concerned proves his identity (Venezuela). Should access be free of charge? (Libyan Arab Jamahiriya). There is no consensus on this point other than on the cost of rectifications made following the exercise of individual right of access (UNESCO and IFHR). Explicit provision should be made for a remedy in the event of a dispute between the person responsible for the file and the person having the right of access to its (ILO, ICFTU and IFHR). Further, it was requested that the word "copy" (Federal Republic Germany) and the term "if the need arises" (Netherlands) should be deleted.

5. Principle (5) of non-discrimination

19. The draft initially submitted to the Sub-Commission did not contain such a provision. Because a major threat was involved, not only to private life but also to fundamental freedoms, it was suggested that non-discrimination should be made a principle. It would be stated as a general rule in the way it is already stated in most of the national laws in force that the compilation of information, the use of which might lead to unlawful or arbitrary discrimination, should be prohibited (racial or ethnic origin, colour, sex-life, political opinions, religious, philosophical or other beliefs, membership of associations or trade unions). It was stressed that it was not so much the sexual identity that was to be protected as information on "sex-life", a term that was preferred to that of "sexual proclivities", originally chosen.

20. It should be specified that "unlawful or arbitrary discrimination" is understood to be that referred to, for example, in article 1, paragraph 1 (a) and (b) of ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, or article 1, paragraph 1, of the UNESCO Convention on the Prevention of Discrimination in Education of 14 December 1960. These instruments consider as discriminatory any "distinction, exclusion or preference ... which has the effect of nullifying or impairing equality of opportunity or treatment" or, a fortiori, which violates the principle of equality of rights laid down in articles 2 and 7 of the Universal Declaration of Human Rights.

21. As it stands, this principle underscores the fact that, on the contrary, certain types of discrimination may be either lawful (when they concern, for example, distinct legal categories, provided that there is no discrimination between the members of the same category, c/ or non-arbitrary when they tend to restore equal opportunity or treatment, provided that these measures "shall not be continued after the objectives for which they were taken have been achieved". d/

22. For all these reasons, the concept of "unlawful or arbitrary discrimination" (Canada, the Netherlands and UNHCR) has been retained and conditions for exercising the power to make exceptions are taken up under principle (6), in the general context of the exceptions that may be allowed.

23. The important question raised by both UNHCR and Amnesty International seems to us to call for the same approach. We consider that a total ban on the collection of information on the origins, beliefs or affiliations of individuals might frustrate the goal sought when the purpose of the compilation is to end a violation of the rights of an individual. e/

24. We know that what is called the clause of measures (of restriction, exception and derogation) necessary in a democratic society f/ extends the power to make exceptions (envisaged when "national security, public order, public health or morals" g/ are concerned) to measures necessary for the protection of the "rights and freedoms of others" h/ or to the "fundamental rights and freedoms of others" i/ or, more precisely "to protecting the data subject and the rights and freedoms of others". j/ The file on victims of enforced or involuntary disappearances established in the United Nations by the Centre for Human Rights, or the file on

refugees of the UNHCR are cases in point. k/ It is therefore proposed that there should be a "humanitarian clause" allowing the power to make exceptions to be used in the cases concerning the activities of humanitarian organizations in defence of human rights and of persecuted individuals or their humanitarian assistance.

6. Principle (6) of the power to make exceptions

25. The problem is to spell out the rules for implementation and the limits to be set on the "clause of measures necessary in a democratic society". These measures must be specified by the law, be accompanied by appropriate safeguards (Argentina, Libyan Arab Jamahiriya and Rwanda) and concern either the public interest (national security, etc.) or the protection of individuals (protection of the person concerned and of the rights and freedoms of others) (Amnesty International).

26. The replies sent by Governments indicate that almost all national legislation in force or in the course of preparation contains provisions:

(a) Restricting right of access in the following cases:

(i) Maintenance of public order (files on police inquiries, judicial investigations or criminal convictions, etc.);

(ii) The defence and security of the State (files on military personnel and on intelligence agencies), which are also frequently restricted;

(iii) Public health (access by the patient to his medical file);

(b) Relaxing the regulation of files on:

(i) Policy-making (census files, population registers, surveys, etc.);

(ii) Scientific research and statistics. It is interesting to note that the European Sciences Foundation adopted on 19 November 1985 a revised version of the guidelines "on the protection of privacy and the use of personal data for research purposes" in effect since November 1980. It soon became apparent that some of the safeguards originally envisaged were hampering the development of science in a manner that was excessive and contrary to the general interest;

(iii) Journalistic activities in order to avoid, there again, unduly hampering the freedom of the press.

27. Regarding more particularly exceptions to the ban on using data concerning racial origin, belief and affiliations (principle (5) of non-discrimination), it was suggested quite rightly that, in addition to the safeguards required for exceptions to principles (1) and (4), it should be made clear that such exceptions would be possible only within the strict limits provided by the International Bill of Human Rights and the other relevant instruments in the field of the protection of human rights and the prevention of discrimination.

7. Principle (7) of security

28. The intention is to take appropriate measures not only against natural dangers (accidental loss, destruction, etc.), but also against human dangers (malice, unauthorized access, etc.).

8. Supervision and penalties

29. Although national legislation is moving more and more towards the creation of an independent and technically specialized authority, it appeared premature to establish this evolution as a principle, however desirable it might be. Reference will therefore be made to the authority designated in accordance with the domestic legal system. In the event of violation of the provisions of the national laws promulgated to implement the aforementioned principles, penalties, including criminal penalties, should be decreed.

9. Transborder data flows

30. The national rules relating to the protection of personal data should not unduly restrict the freedom to seek, receive and impart information regardless of frontiers, as provided for in article 19 of the International Covenant on Civil and Political Rights, especially when the legislation of the countries concerned by the flow offers equivalent safeguards in respect of the protection of privacy (Argentina, France, Germany, Federal Republic of and UNHCR).

10. Field of application

31. There is broad consensus on the need to apply the guidelines to both: public and private sector files; and computerized and manual files.

32. It was noted that all personal data files carry the risk of infringing privacy and freedom and that automated files merely increase the danger because of their greater capacity.

33. On the other hand, only one proposal was made to apply the guidelines to files of legal persons (ICFTU). At most, an option to extend them to such files might be envisaged if they contained some information on individuals (International Federation of Human Rights). This is the case in the existing law of some countries (Denmark, Luxembourg and Norway).

B. Special case of files kept by international organizations and agencies

34. Since the interim report on guidelines (E/CN.4/Sub.2/1985/21) was submitted to the Sub-Commission, many international organizations, in conformity with the proposals of the Special Rapporteur, have taken initiatives at the internal level:

(a) The International Criminal Police Organization (IPCO-INTERPOL) has developed guidelines based on the present proposals, compliance with which is assured by a supervisory commission for data files made up mainly of members from outside the organization and which began its work in December 1985;

(b) The Consultative Committee on Administrative Questions included this question on the agenda for its sixty-second session in March 1985;

(c) UNHCR, in co-operation with the Special Rapporteur, is engaged in setting up internal protective machinery;

(d) UNESCO has recently set up (1988) an intersectoral working group on the use of personal data within UNESCO;

(e) The World Intellectual Property Organization has stated that in future it will be guided by the present guidelines in establishing internal regulations;

(f) The International Atomic Energy Agency, which had informed the Special Rapporteur in 1985 of its intention to provide internal regulations, has kept its word by adopting in 1987 rules for the protection of confidential information concerning staff;

(g) OECD has recently adopted principles regulating the protection of privacy in the establishment and use of computerized personal files concerning OECD staff;

(h) The Council of Europe was one of the first to develop, by Order No. 175 of 29 January 1976, rules concerning the holding of individual files on staff members of the Council of Europe, as well as access to these files;

(i) The International Committee of the Red Cross (ICRC) is about to undertake studies along these lines;

(j) Amnesty International has been endeavouring for four years to promote at the international level, in co-operation with the conference data protection commissioners, the adoption of standards for the files of organizations at work in the field of human rights and humanitarian activities, especially the adoption of an "humanitarian clause" (see para. 22 above).

35. When international organizations envisage issuing internal regulations, they should bear in mind the distinction between files whose purpose is internal and those whose purpose is external.

(a) The category of files for internal use comprises those relating to the organization's administrative procedures - for example, personnel management, wages and salaries, social security and retirement schemes, and to a lesser degree on experts and consultants; likewise covered by this category, in our view, are certain files relating to persons outside the organization (subscribers, visitors, etc.);

(b) The category of files for external use comprises those intended to enable the organization to achieve greater efficiency in carrying out its statutory tasks (for example, UNHCR files on refugees, the files of the Centre for Human Rights on disappearances, the file on activities, and certain applications by the ICRC and Amnesty International, etc.).

36. Opinions are divided on the question of a body to supervise observance of the guidelines:

(a) Some, including the Special Rapporteur, consider that it would be advisable to set up a collegiate body with members from outside the organization (for instance ICPO-INTERPOL) in the interest of greater independence (Federal Republic of Germany and the International Court of Justice).

(b) Others believe that the task should be left to the hierarchical or institutional bodies already in existence within the organizations. It is therefore proposed, as matters stand, to leave it to the governing bodies of each organization to decide on the institutional arrangements for supervision.

Notes

a/ Legislation in force (11 countries): Austria, Canada, Denmark, Finland, France, Germany, Federal Republic of, Iceland, Luxembourg, Norway, United Kingdom of Great Britain and Northern Ireland, United States of America; draft legislation (nine countries): Australia, Belgium, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Switzerland.

b/ See the study on the concept of privacy prepared in 1972 by the International Court of Justice with the sponsorship of UNESCO, currently being updated.

c/ See, for example, article 1 of ILO Convention No. 111, or article 2 of the UNESCO Convention on the Prevention of Discrimination in Education.

d/ See, for example, articles 5 and 2 of ILO Convention No. 111, or in particular, articles 1 and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

e/ Louis Joinet, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities report entitled "Study of the relevant guidelines in the field of computerized personal files"; part I, chap. II.B (computerized personal data files used by organizations specializing in the protection of human rights) and part III (E/CN.4/Sub.2/1983/18).

f/ Mireille Delmas-Marty, "Seminar on criminal policy and human rights: the measures of restriction, exception and derogation necessary in a democratic society", 1986 to 1988, Institute of Comparative Law of the University of Paris II. Unpublished.

Notes (continued)

g/ See, for example the International Covenant on Civil and Political Rights, General Assembly resolution 2200 A (XXI), annex, articles 12, 18, 19, 21 and 22.

h/ Ibid., articles 1, 21 and 22.

i/ Ibid., article 18.

j/ Convention for the Protection of Individuals with regard to Automatic Data Processing of Personal Data, articles 9 and 1 (b). Council of Europe, 28 January 1981.

k/ See footnote d/ above, E/CN.4/Sub.2/1983/18.

APPENDIX I

Guidelines concerning computerized personal data files

I. Principles stating the minimum guarantees to be incorporated into national legislation

1. Principle of lawfulness and fairness

Information about persons should not be collected or processed in unfair or unlawful ways, nor should it be used for ends contrary to the purposes and principles of the Charter of the United Nations.

2. Principle of accuracy

Persons responsible for the compilation of files or those responsible for keeping them have an obligation to conduct regular checks on the accuracy and relevance of the data recorded and to ensure that they are kept up to date regularly or when the information contained in a file is used.

3. Principle of purpose-specification

The purpose which a file is to serve should be specified, legitimate and publicly known before it is established, in order to make it possible subsequently to ensure that:

(a) All the personal data collected and recorded remain relevant and adequate to the purpose so specified;

(b) None of the said personal data is used or disclosed, except with the consent of the person concerned, for purposes incompatible with those specified;

(c) The period for which the personal data are kept does not exceed that which would enable the achievement of the purpose so specified.

4. Principle of interested-person access

Everyone who offers proof of identity has the right to know, irrespective of nationality or place of residence, whether information concerning him is being procesed and to obtain it in an intelligible form, without undue delay or expense, and to have appropriate rectifications or erasures made in the case of unlawful, unnecessary or inaccurate entries. Provision should be made for a remedy. The cost of any rectifications shall be borne by the person responsible for the file.

5. Principle of non-discrimination

Subject to cases of exceptions restrictively envisaged under Principle (6), data likely to give rise to unlawful or arbitrary discrimination, especially information on racial or ethnic origin, colour, sex-life, political opinions,

religious, philosophical and other beliefs, as well as membership of an association or trade union, should not be compiled.

6. Power to make exceptions

Departures from the application of principles (1) to (4) may be authorized only if they are necessary to protect national security, public order, public health or morality or the rights and freedoms of others, including persons being persecuted, and are specified in a law or equivalent regulation promulgated in accordance with the internal legal system which expressly states their limits and sets forth appropriate safeguards.

Exceptions to principle (5) relating to the prohibition of discrimination, in addition to being subject to the same safeguards as those prescribed for exceptions to principles (1) to (4), may be authorized only within the limits prescribed by the International Bill of Human Rights and the other relevant instruments in the field of protection of human rights and the prevention of discrimination.

7. Principle of security

Appropriate measures should be taken to protect the files against both natural dangers, such as accidental loss or destruction, and human dangers, such as unauthorized access or fradulent misuse of data.

8. Supervision and penalties

The law of every country shall designate the authority which, in accordance with its domestic legal system, is to be responsible for supervising observance of the principles set forth above. This authority shall offer guarantees of impartiality and technical competence. In the event of violation of the provisions of the national law implementing the aforementioned principles, criminal penalties should be envisaged together with the appropriate remedies.

9. Transborder data flows

When the legislation of two or more countries concerned by a transborder data flow offers more or less equivalent safeguards for the protection of privacy, information should be able to circulate as freely as inside each of the territories concerned. If there are no reciprocal safeguards, limitations on such circulation may not be admitted unduly and only in so far as the protection of privacy demands.

10. Field of application

The present principles should be made applicable, in the first instance, to all public and private computerized files, including, subject to appropriate adjustments, manual files. Special provision should also be made, if requested, to extend all or part of the principles to files on legal persons whenever they contain some information on individuals.

II. Application of the guidelines to personal data files kept by governmental international organizations

The present guidelines should apply to personal data files kept by governmental international organizations, subject to any adjustments required to take account of any differences that might exist between internal files concerning staff and comparable categories and external files concerning third parties having relations with the organization.

A derogation from these principles may be specifically provided for (humanitarian clause) when the purpose of the file is the protection of human rights and fundamental freedoms of the individual concerned or humanitarian assistance. Each organization should designate the authority statutorily competent to supervise the observance of these regulations.

A similar provision should be provided in national legislation for the non-governmental international organizations to which this law is applicable, as well as for governmental international organizations whose headquarters agreement does not preclude the implementation of the said national legislation.

APPENDIX II

List of Governments, United Nations organs, specialized agencies, regional organizations and non-governmental organizations that have followed up the consultation

Origin of replies received by the Special Rapporteur:

I. Governments

Argentina
Benin
Canada
Congo
Cyprus
Ecuador
El Salvador
Equatorial Guinea
Finland
France
Germany, Federal Republic of
Iceland
Iraq
Israel
Libyan Arab Jamahiriya
Luxembourg
Mauritius
Netherlands
Nigeria
Panama
Rwanda
Sao Tome and Principe
Sudan
Sweden
Togo
Uruguay
Venezuela

II. United Nations organs

Centre for Social Development and Humanitarian Affairs
Consultative Committee on Administrative Questions
United Nations Children's Fund
United Nations Development Programme
United Nations Environment Programme
United Nations University
Economic Commission for Africa
Economic and Social Commission for Western Asia
Office of the United Nations High Commissioner for Refugees

International Court of Justice
Joint Inspection Unit

III. Specialized agencies

International Labour Organisation
Food and Agriculture Organization of the United Nations
United Nations Educational, Scientific and Cultural Organization
World Bank
Universal Postal Union
World Intellectual Property Organization

IV. Regional organizations

European Economic Community
European Parliament
Organization of American States

V. Intergovernmental organizations

International Atomic Energy Agency
International Criminal Police Organization (ICPO-INTERPOL)
Organization for Economic Co-operation and Development

VI. Non-governmental organizations

Amnesty International
European Science Foundation
International Commission of Jurists
International Confederation of Free Trade Unions
International Federation of Human Rights
International Federation of Social Workers
International Institute of Human Rights
International Press Institute
