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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

	<u>Paragraphs</u>	<u>Page</u>
I. INTRODUCTION	1 - 6	2
II. GENERAL COMMENTS AND SUGGESTIONS	7 -- 12	2
III. COMMENTS AND PROPOSALS IN RESPECT OF PRINCIPLES STATING THE MINIMUM GUARANTEES TO BE INCORPORATED INTO NATIONAL LEGISLATION	13 - 41	3
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		9

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 1989/143 of 6 March 1989, **considered** the draft guidelines for the **regulation** of computerised 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 verbals 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 Government⁶: Burundi, Germany, Federal Republic of, Japan, Netherlands, *Norway*, Sweden, United Kingdom of Great Britain and Northern Ireland,
5. This 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

Prom 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 Europa'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 E1 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 (A), on interested-person **access**, the Government of Japan considered that the question that non-resident **persons** of a foreign nationality in a State ha 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 circumstances 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 reluctant need for **legislation on a care-by-care 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** moots 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 itemise 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 judgement or other circumstances of the particular State regarding the **matter**, it can be said 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 word "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 supervise observation 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 computerised 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.

A/44/606

English

Page a

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 resulation of commwuterized
personal data files

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

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
I. BACKGROUND TO THE DRAFT GUIDELINES	1 - 5	10
II. GENERAL COMMENTS AND SUGGESTIONS . . .*	6 - 12	10
III. COMMENTARY ON PROPOSED AMENDMENTS	13 - 36	11

Awwendices

I. Guidelines concerning computerized personal data files	19
II. List of Governmerts, United Nations organs, specialized agencies, regional organizations and non-governmental organizations that have followed up the consultation	22

* 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 Protection 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 organisations 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 and for international organisations 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 summarised below. As far as the human rights affected by the computerisation 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 remain8 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 tradr-union **guideline to assist** trade unionists responsible for negotiating collective agreements.

10. The ICFTU also **proposes th... safeguards should be envisaged for ● mplocees** 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 **his tory - 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 20 January 1981 has now entered into force with 11 signatures and 7 ratification6 (**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 Organisation (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 population 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 function (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 prove his identity (**Venezuela**). Should access be free of charge? (**Library Arab Jamahiriya**). There is no **consensus** on this point other than on the **cost** of rectification 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 it (**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, g/ 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 affiliation of individuals might frustrate the goal sought when the purpose of the compilation is to end a violation of the rights of an individual, g/

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 morale" 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 disappearance 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 organisations 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 ruler 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 1955 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, unauthorised access, etc.).

8. Supervision and penalties

29. Although national legislation is moving more and more towards the creation of an independent and technically specialised 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 computerised 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 organisations, in conformity with the proposals of the Special Rapporteur, have taken initiatives at the internal level:

(a) The International Criminal Police Organisation (ICPO-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 organisations 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 organisation'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 organisation (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 computerised 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)

Q' 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,

b/ 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 computerised 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 processed 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 rectification 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 authorised 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 fraudulent misuse of data.

8. Suoversion and venalties

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 computerised 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 organisations

The present guidelines should apply to personal data files kept by governmental international organisations, 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 organisation.

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
● 8rirtanca. Each organisation 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 organisations to which this law is applicable, as well as for governmental international organisations whose headquarters are located in the country. This should 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 Organisation of the United **Nations**
United Nations Educational, Scientific and **Cultural Organisation**
World **Bank**
Universal Postal Union
World Intellectual Property Organisation

IV. Regional organizations

European Economic Community
European Parliament
Organisation of American **States**

V. Intergovernmental organizations

International Atomic Energy Agency
International Criminal Police Organisation (ICPO-INTERPOL)
Organisation 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 **Praxis** Institute
