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HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS

Guidelines for the regulation of computerized
personal data files

Final report submitted by Mr. Louis JOINET

Special Rapporteur

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INTRODUCTION

Background to the draft guidelines

1. At its thirty-sixth session, the Sub-Commission, 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 answers received, attached at annex, shows the increasing interest of United Nations organs and specialized agencies in the draft guidelines due, it would seem, to the increasing number of personal files they are keeping.
5. The purpose of this report is to:

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;

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.

Part I

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 1/ 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:

The concept of privacy has features peculiar to each legal system (ICJ) ^{2/} and that it is therefore advisable not to try to define it legally (IFHR);

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 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:

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

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

Part II

Commentary on Proposed Amendments

A. PROPOSALS IN RESPECT OF THE PRINCIPLES ON WHICH NATIONAL LEGISLATION SHOULD BE BASED

Principle (1) of Fairness

13. Having become the "Principle of lawfulness and fairness" (UNESCO), this principle has been completed (UNU) 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.

Principle (2) of Accuracy

14. Reverting to its initial opinion, the ICJ ended by stressing that it was unrealistic to demand that the information should be "complete". Personal information can never in fact be "complete" (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).

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" (ILO and ICJ) since these purposes need to be not only specified but also "legitimate".

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 (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.

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".

Principle (4) of interested-person access

16. 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 it (ILO, ICTFU and IFHR). Further, it was requested that the word "copy" (Federal Republic of Germany) and the term "if the need arises" (Netherlands) should be deleted.

Principle (5) of non-discrimination

17. 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.

18. It should be specified that "unlawful or arbitrary discrimination" is understood to be that referred to, for example, in article 1, paragraph I (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 of 14 December 1960 on the prevention of discrimination in education. 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.

19. 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, 3/ 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". 4/

20. For all these reasons, the concept of "unlawful or arbitrary discrimination" (Canada, 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.

21. 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. 5/

22. We know that what is called the clause of measures (of restriction, exception and derogation) necessary in a democratic society 6/ extends the power to make exceptions (envisaged when "national security, public order, public health or morals" 7/ are concerned) to measures necessary for the

protection of the "rights and freedoms of others" 8/ or to the "fundamental rights and freedoms of others" or, more precisely "to protecting the data subject and the rights and freedoms of others". 10/ 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. 11/

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 the defence of human rights and of persecuted individuals or their humanitarian assistance.

Principle (6) of the power to make exceptions

23. 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) (AI).

24. 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:

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

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

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

(b) Relaxing the regulation of files on:

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

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;

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

25. 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.

Principle (7) of security

26. 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.).

Supervision and penalties

27. 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.

Transborder data flows

28. 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).

Field of application

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

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.

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

30. 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:

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.

The CCAQ included this question on the agenda for its sixty-second session in March 1985.

UNHCR, in co-operation with the Special Rapporteur, is engaged in setting up internal protective machinery.

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

WIPO has stated that in future it will be guided by the present guidelines in establishing internal regulations.

AIEA (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.

OECD has recently adopted principles regulating the protection of privacy in the establishment and use of computerized personal files concerning OECD staff.

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.

ICRC is about to undertake studies along these lines.

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 a "humanitarian clause". (See above, para. 22).

31. 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.

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.).

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.).

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

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 (Germany, Federal Republic of, ICJ).

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

1/ (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;

(b) Draft legislation (9 countries): Australia, Belgium, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Switzerland.

2/ See the study on the concept of privacy performed in 1972 by the ICJ with the sponsorship of UNESCO, currently being updated.

3/ For example, article 1 of ILO Convention No. 111 or article 2 of the aforementioned UNESCO Convention.

4/ For example, articles 5 and 2 of ILO Convention No. 111, referred to above, or in particular, articles 1 and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

5/ Cf. L. Joinet, Special Rapporteur "Study of the relevant guidelines in the field of computerized personal files"; part I, Ch. 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).

6/ 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.

7/ For example: the International Covenant on Civil and Political Rights, arts. 12, 18, 19, 21 and 22.

8/ Ibid., arts. 1, 21 and 22.

9/ Ibid., art. 18.

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

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

ANNEX 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 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 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 a 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 fraudulent 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.

11. 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 guidelines.

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.

* * *

ANNEX II

LIST OF GOVERNMENTS, UNITED NATIONS ORGANS, SPECIALIZED AGENCIES, REGIONAL ORGANIZATIONS AND NON-GOVERNMENTAL ORGANIZATIONS WHICH 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 (CCAQ)
Economic Commission for Africa
Economic Commission for Western Asia
International Court of Justice
Joint Inspection Unit
United Nations Development Programme (UNDP)
United Nations Environment Programme (UNEP)
Office of the United Nations High Commissioner for Refugees (UNHCR)
United Nations Children's Fund
United Nations University (UNU)

III. SPECIALIZED AGENCIES

International Labour Organisation (ILO)
Food and Agriculture Organization of the United Nations (FAO)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
Universal Postal Union (UPU)
World Bank
World Intellectual Property Organization (WIPO)

IV. REGIONAL ORGANIZATIONS

European Economic Community (EEC)
European Parliament
Organization of American States (OAS)

V. INTERGOVERNMENTAL ORGANIZATIONS

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

VI. NON-GOVERNMENTAL ORGANIZATIONS

Amnesty International (AI)
European Science Foundation
International Commission of Jurists
International Confederation of Free Trade Unions (ICFTU)
International Federation of Human Rights (IFHR)
International Federation of Social Workers
International Institute of Human Rights
International Press Institute (IPI)