



Third Study Commission
Criminal law and procedure

Meeting in Yerevan, 7 - 11 September 2008

Conclusions

SEX OFFENCES: TODAY'S PROBLEMS AND EFFECTIVE SOLUTIONS

General Report

I. INTRODUCTION

The Third Study Commission examined several aspects of sexual assault prosecutions.

The questionnaire addressed evidentiary issues that arise in sexual assault proceedings, special protections available to sexual assault complainants, and special sentencing provisions for sexual assault offenders. The questionnaire also briefly touched on sex trade offences and internet child pornography, it being recognized that each of these subjects could provide a basis for individual study at future meetings.

II. SURVEY & DISCUSSION

The Commission received 28 responses to the questionnaire. Delegates from over 30 countries participated in the two Study Commission sessions and provided valuable contributions to our discussions. Small group discussions were included in the meeting format, along with a program evaluation form. Charts summarizing the questionnaire responses are annexed to this report. There appears to be a similar approach to consent and “grooming” issues, the first two topics discussed, in common-law and non-commonlaw member countries.

A. Age of Consent to Sexual Activity

The age of consent ranges between 13 years (e.g. Japan, Spain) and 18 years (e.g. Ivory Coast). The majority of questionnaire responses, however, were within the range of 14 to 16 years. It would appear that member countries have ensured that sexual offences are gender-neutral. There was general agreement that it is not enough for the accused person to say that he/she assumed the complainant was of legal age; it must be plausible that he/she held that *bona fide* belief.

Marital status and gender affect the age of consent in some member countries. For example, Israel’s age of consent is 14 years. However, “unauthorized consensual sex” with a woman between 14 and 16 years of age, outside a marital relationship, is an offence.

Some countries have legislation in place that criminalizes, in certain circumstances, sexual intercourse that would otherwise be consensual, for example, where the accused person is in a position of trust or authority, or there is a relationship of dependency or of an exploitative nature (e.g. Canada, Switzerland, and the Netherlands).

B. “Grooming” Legislation

Approximately half of the questionnaire responses refer to legislative provisions that criminalize conduct that is intended to lead to sexual assault. A common example is unlawful trespass with the intent to commit sexual assault. Other examples include: the administration of substances or “date rape” drugs; attempts to render unconscious or incapable of resistance; and “grooming”.

The Netherlands will shortly be criminalizing grooming via the internet. Canada has done so. Iceland criminalizes acts that entice a child by deception, gifts or payment. All member countries criminalize attempts to commit sexual offences but it was noted that the offence of attempt may not cover

preparatory types of offences, where there may be no present intent to have actual physical contact with the victim (e.g. inducing a child by internet to sexually touch himself/herself). Appropriate labeling of such offences was suggested by Italy (e.g. corruption of a minor) and by Scotland (e.g. libidinous conduct toward a minor).

There appeared to be substantial divergence of approach between common-law and noncommon-law member countries to questioning the complainant about prior sexual conduct, accessing the complainant's private records, and admitting evidence of the accused person's record of prior sexual assault offences.

C. Questioning Complainant re: Prior Sexual Conduct

Approximately half of the questionnaire responses referred to legislative provisions and/or evidentiary rules that prevent/limit these types of questions during the interrogation/cross-examination of the complainant. Private hearings (automatic or upon request) are consistently indicated as being the forum in which these types of questions may be asked. Most member countries referred to both legislation and evidentiary rules as providing the basis on which to limit such questioning. The underlying concern for these limits on questioning is their impact on the complainant's personal dignity, his/her right to privacy, and stereotypical thinking about the relevance of a complainant's sexual history to issues such as consent.

D. Accessing Complainant's Private Records

Generally speaking, in non-common-law member countries, the admission of such evidence is at the discretion of the judge conducting the trial. The concern is for privacy and the personal dignity of the complainant.

In Canada, legislative provisions require an accused person to follow a specified procedure on an application to access such private records. In the United States, the accused person must demonstrate both relevancy and necessity relative to the production of these records.

E. Other Sexual Offences in Evidence Against Accused Person

Generally speaking, non-common-law member countries permit the prosecutor to introduce at trial evidence of prior sexual offences committed by the accused person.

For example, in Sweden, the courts will permit such evidence if it is considered necessary and/or relevant. Many non-common-law countries will not permit a dated record to be placed in evidence (e.g. record of offences where a conviction was entered over 5 years prior to trial.)

The rules of evidence of common-law member countries limit the admission of evidence of other similar acts depending on the position taken by either the prosecutor or defence counsel at trial. There is an underlying concern that such evidence not be admitted to blemish the character of the accused person and to demonstrate the likelihood of the accused person having committed a similar offence based on his/her prior offences.

F. Special Protections for Sexual Assault Complainants

In both common-law and non-common-law member countries, special protections are available for sexual assault complainants during the investigation process and trial.

There is a tension between protecting the complainant from direct confrontation with the accused person and the right of an accused person to a fair trial. Almost all responses indicate some manner in which the complainant can testify in the absence of the accused person, whether through video-recorded statements or video-conferencing, written statements, or limiting the complainant's visual contact with the accused person in the courtroom through the use of a screen. Other protections adopted by several member countries include support persons and/or legal representatives for the complainant, closed courtrooms, publication bans to protect the complainant's identity (discussed below), witness protection measures, and even protective transport.

G. Publication Bans

All member countries have provisions or allow the judge to exercise discretion in favor of banning the publication of the name of the sexual assault complainant. In general, noncommon-law member countries will only publish the accused person's initials, not his full name. In common-law member countries, the name of the accused person is published unless publication will reveal the identity of the complainant. In Ireland, there is an increase being noted in the number of post-conviction applications by complainants who become adults during the proceeding to publish their names, thereby resulting in the publication of the convicted person's name.

H. Sentencing Sexual Assault Offenders

Slightly less than half the questionnaire responses refer to established guidelines for sentencing sexual offenders. Most examples include minimum and maximum prison terms, as well as aggravating and mitigating factors. In Brazil, for examples, higher penalties are to be imposed where the complainant is under 14 years, suffers from a mental disorder, was unable to offer resistance, or has been physically harmed. Higher penalties are also imposed when the offender is in a position of trust toward the complainant. The United States considers abduction an aggravating factor, while in Lithuania, the offer of money or reward to a child is aggravating. Israel considers the presence of an accomplice as an aggravating circumstance.

More than half the questionnaire responses indicate that they have special sentencing provisions applicable to sexual offenders. Almost all these responses note some form of restriction on the offender's appearance in certain locations (e.g. schools, playgrounds), places of employment where minors work, living arrangements excluding minors, orders prohibiting contact with the complainant, and restrictions on internet access (to prevent luring). Another common sentencing provision is mandatory participation in rehabilitation programs. For example, in Spain, sex offenders may be committed to psychiatric or medical centers, specialized schools, social health institutions or training programs, and sex education programs.

Other sentencing provisions include sex offender registration (e.g. Canada, Ireland, and the U.S.) and a requirement to provide a DNA samples for storage in a central DNA databank (e.g. Canada).

I. Special Provisions to Address the Impact of Sexual Abuse on Complainant

Slightly less than half the questionnaire responses refer to special provisions to deal, at the sentencing stage, with the impact of the sexual assault on the complainant. The majority of responses note that a victim impact statement, either oral or written, may be presented during the sentence hearing.

Interestingly, both Germany and Israel indicate that there is an opportunity for the complainant to have a more active role in the proceedings. In Israel, the complainant may express his/her opinion regarding plea bargains, the sentence, and any pardon being considered. In Germany, the complainant is able to join the public prosecution as a private accessory prosecutor, which includes the right to be present, challenge experts, ask questions, object to orders and questions, apply for evidence to be taken, and make statements.

J. Sex Trade Offences – International Conventions on the Subject

All questionnaire responses refer to domestic legislation that pertains to human sexual trafficking, namely prostitution and sexual slavery. Some responses indicate the specific international conventions that have been ratified; however, there is little discussion as to how those international conventions are adopted domestically.

Various countries referred to specific international conventions and, for ease of reference, we have appended a handout entitled "Signed and Ratified International Conventions" that identifies those countries that have signed and ratified certain conventions.

We also discussed the need to educate judges on the application of international conventions to their work in the courtroom. The delegates from the Netherlands described Eurojust, an organization whose objective is to facilitate international contacts within Europe among prosecutors and judges. The

Netherlands has created in the District Court of Amsterdam the European Chamber, which deals with cases involving European law.

III. TOPIC FOR 2009

The topic chosen for next year's questionnaire and conference is the interception of communications and its impact on privacy rights.

IV. STUDY COMMISSION ELECTION

Mary Moreau (Canada) - President, Frans Bauduin (the Netherlands) and Messey Momble (Ivory Coast) – Vice Presidents, were returned by acclamation for another term of office.

[Summary](#)

APPENDIX A

SIGNED & RATIFIED INTERNATIONAL CONVENTIONS

*Information based on those member responses submitted as of Monday, September 1, 2008.

**Taiwan bound by China.

League of Nations:

International Convention for the Suppression of the Traffic in Women and Children, 30 September 1921, 13 U.N.T.S. 53 (entered into force 15 June 1922).

Signed and ratified by all countries, except:

- Iceland
- Israel
- Niger
- United States of America

Slavery Convention, 25 September 1926, 60 L.N.T.S. 253 (entered into force 9 March 1927);

Protocol Amending the Slavery Convention signed at Geneva on 25 September 1926, 23 October 1953, 182 U.N.T.S. 51 (entered into force 7 December 1953).

Signed by all countries, except:

- Brazil
- Iceland
- Japan

Ratified by all signatories, except:

- Lithuania

With reservations:

- United States of America

International Convention for the Suppression of the Traffic in Women of Full Age, 11 October 1933, 150 L.N.T.S. 431 (entered into force 24 August 1934).

Signed by all countries, except:

- Canada
- Denmark
- Estonia
- Iceland
- Israel
- Japan
- Macedonia
- United States of America

Ratified by all signatories, except:

- Germany
- Lithuania
- Spain
- Taiwan (China)

With reservations:

- Belgium

United Nations:

Protocol to amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933, 53 U.N.T.S. 13 (entered into force 12 November 1947).

Signed and ratified by all countries, except:

- Estonia

- France
- Iceland
- Israel
- Japan
- Lithuania
- Macedonia
- Portugal
- Slovenia
- Spain
- Switzerland
- United States of America

***Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, 96 U.N.T.S. 271 (entered into force 25 July 1951).**

Signed by all countries, except:

- Austria
- Canada
- Estonia
- Germany
- Iceland
- Ireland
- Lithuania
- Netherlands
- Sweden
- Switzerland
- Taiwan (China)
- United States of America

Ratified by all signatories, except:

- Denmark

***Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 226 U.N.T.S. 3 (entered into force 30 April 1957).**

Signed and ratified by all countries, except:

- Estonia
- Japan
- Lithuania

***Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) (entered into force 3 September 1981).**

Signed by all countries.

Ratified by all signatories, except:

- United States of America

With reservations:

- Austria
- Ireland
- Israel
- Niger
- Switzerland

***Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989) (entered into force 2 September 1990).**

Signed by all countries.

Ratified by all signatories, except:

- United States of America

With reservations:

- Austria
- Canada
- Denmark
- France
- Germany
- Japan
- Netherlands
- Switzerland
- Taiwan (China)

***Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 6 October 1999, 2131 U.N.T.S. 83 (entered into force 22 December 2000).**

Signed by all countries, except:

- Estonia
- Israel
- Ivory Coast
- Japan
- Taiwan (China)
- United States of America

Ratified by all signatories, except:

- Switzerland

***United Nations Convention against Transnational Organized Crime*, 15 November 2000, 40 I.L.M. 335 (2001), UN Doc. A/55/383 at 25 (2000), UN Doc. A/Res./55/25 at 4 (2001) (entered into force 29 September 2003).**

Signed by all countries.

Ratified by all signatories, except:

- Iceland
- Ireland
- Ivory Coast
- Japan

With reservations:

- Macedonia
- Taiwan (China)
- United States of America

***Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 40 I.L.M. 335 (2001), UN Doc. A/55/383 at 25 (2000), UN Doc. A/Res./55/25 at 4 (2001) (entered into force 29 September 2003).**

Signed by all countries, except:

- Ivory Coast
- Taiwan (China)

Ratified by all signatories, except:

- Iceland
- Ireland
- Japan

With reservations:

- Lithuania
- United States of America

***Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime*, 15 December 2000, 40 I.L.M. 384 (2001), UN Doc. A/45/49 (Vol. 1) (2001) (entered into force 28 January 2004).**

Signed by all countries, except:

- Israel
- Ivory Coast
- Niger
- Taiwan (China)

Ratified by all signatories, except:

- Iceland
- Ireland
- Japan

With reservations:

- Lithuania
- United States of America

***Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, UN Doc. A/54/263 (2000) (entered into force 18 January 2002).**

Signed by all countries, except:

- Ivory Coast

Ratified by all signatories, except:

- Germany
- Hungary

With reservations:

- United States of America

Council of Europe:

***Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, E.T.S. 5 (entered into force 3 September 1953).**

Ratified by all European countries.

With reservations:

- Austria
- Estonia
- France
- Ireland
- Portugal
- Spain

***Council of Europe Convention on Action against Trafficking in Human Beings*, 16 May 2005, E.T.S. 197 (entered into force 1 February 2008).**

Signed by all European countries, except:

- Estonia
- Switzerland

Ratified by all signatories, except:

- Belgium
- Germany
- Hungary
- Iceland
- Ireland
- Lithuania
- Macedonia
- Netherlands

- Sweden

With reservations:

- Denmark

- Portugal

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007, E.T.S. 201 (not yet entered into force).

Signed by all European countries, except:

- Estonia

- Hungary

- Spain

- Switzerland

Not ratified by any signatory.

International Labour Organization:

Worst Forms of Child Labour Convention, 1999 (No. 182), 17 June 1999 (entered into force 19 November 2000).

Signed and ratified by all countries.