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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

**Expanded working paper on the difficulties of establishing guilt
and/or responsibilities with regard to crimes of sexual violence
submitted by Lalaina Rakotoarisoa***

* This working paper was submitted late in order to allow the expert sufficient time to complete her research.

Summary

By decision 2003/107, the Sub-Commission on the Promotion and Protection of Human Rights, taking into account the working paper submitted by Ms. Lalaina Rakotoarisoa (E/CN.4/Sub.2/2003/WG.1/CRP.1), decided to request her to prepare an expanded working paper on the difficulties of establishing guilt and/or responsibility with regard to crimes of sexual violence, and to submit it to the Sub-Commission at its fifty-sixth session with a view to identifying best practice.

Ms. Rakotoarisoa elaborates in her expanded working paper on the forms and causes of sexual violence and abuse. Her working paper focuses on the increase in the number of investigations and relevant statements by children, female victims and witnesses of sexual abuse, taking into account the special needs of children, women, witnesses and survivors. Ms. Rakotoarisoa focuses on the gathering of evidence, including forensic evidence, rules of evidence, the attitude of the investigating authorities, the creation of a genetic database of sex offenders, and rules of criminal and civil procedure, including the extraterritoriality of judicial competence regarding sex tourism. Sexual abuse of persons in detention, including sexual exploitation and the spreading of AIDS, paedophilia and cyber criminality are also examined. Ms. Rakotoarisoa analyses the issue of protection of witnesses and survivors before, during and after legal proceedings, rules on the disclosure of the identity of the suspect and the victim, and the need to guarantee the rights of the defendant.

In order to combat sexual violence and abuse, the author concludes that the process of gathering evidence regarding this crime should be reviewed and judicial systems harmonized, taking into account best practices. Ms. Rakotoarisoa underlines the need for a strengthening of international judicial cooperation, specifically in the field of extraterritorial judicial competence and cyber criminality.

Ms. Rakotoarisoa recommends better coordination among United Nations bodies with a view to increasing efficiency in the fight against sexual violence and abuse.

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Introduction

1. In its decision 2003/17 the Sub-Commission on the Promotion and Protection of Human Rights, taking into account the working paper submitted by Ms. Lalaina Rakotoarisoa (E/CN.4/Sub.2/2003/WG.1/CRP.1) on the difficulty in obtaining evidence in cases of sexual abuse, decided to request her to prepare an expanded working paper on the difficulties of establishing guilt and/or responsibility with regard to crimes of sexual violence, and to submit it to the Sub-Commission at its fifty-sixth session.

2. The present working paper takes a general look at the types of evidence as a whole and at their impact on criminal trials insofar as the establishment of guilt or responsibility is concerned. The author has considered it necessary to set limits, not to restrict the scope, but to avoid any repetition, to the extent possible. For example, the question of the criminalization of serious acts of sexual violence committed during an armed conflict or a generalized or systematic attack on the civilian population are subjects for another study.

3. The phenomenon of sexual abuse is not new; in recent years, however, the number of reported victims has continued to increase. The victims become enmeshed against their will in the machinery of the judicial and medico-psycho-legal system. This resurgence has mobilized many different actors, who have had to develop their own system of institutional intervention and models of investigation and action. Despite the active search for evidence and physical and psychological indicators, it has not been possible to simplify these activities.

4. In essence, the phenomenon of abuse is a direct reflection of an imbalance in the relationship of force or an inequality between the two parties involved. The parties may have had a past relationship that was characterized by authority and trust. Studies show what impact a relationship based on force can have on the testimony of victims of sexual abuse. Sexual abuse of minors implies subjects who are immature and dependent when engaging in sexual activities that they are incapable of understanding or to which they are unable to consent or which may violate a society's taboos surrounding family roles.¹ It should be noted that sexual aggression does not necessarily take place between a child and an adult. In fact, such encounters often take place between children or adolescents. Many such cases are acts of paedophilia involving young boys.

5. In 2002 the World Health Organization (WHO) defined sexual abuse as a form of sexual exploitation based on the notion of abuse and its modalities, both passive, as a protective act in a climate of incest, and active, implying fondling and even prostitution. Some legislative systems do not recognize incest and contemplate authority over the victim solely as an aggravating circumstance.

6. Among the literature in English, Krugman and Jones define sexual abuse as the participation of a child or adolescent minor in sexual activities that he or she is unable to understand and which are inappropriate to his or her psychosexual development, regardless of whether they are experienced through force, violence or seduction, or transgress social taboos.

7. Many phenomena in today's society help to encourage sexual abuse, namely promiscuity among certain social groups, the media's focus on social messages about child and adult sexuality, the increased freedom given to children and so forth. Because of the extent of sexual violence and abuse, it is necessary to recall the various forms they can take and their causes.

I. SEXUAL VIOLENCE AND ABUSE: FORMS AND CAUSES

8. Sexual violence can take place within the family: sexual ill-treatment of girls within the home, incest, dowry-related violence, genital mutilation and other traditional practices harmful to women, violence related to exploitation.

9. Ritual genital mutilation is commonplace, and many countries still engage in this practice, particularly Nigeria, Mali and Senegal. Such practices can have psychological and somatic consequences.

10. Sexual and psychological violence can occur within the community and may take the form of rape, sexual ill-treatment and intimidation in schools, hospitals and prisons, and in the practice of procuring and forced prostitution.

11. In this type of sexual abuse, the abuser is part of the administrative or care-providing staff. An atmosphere of violence, overt or insidious, often reigns in such institutions, which explains the victims' vulnerability. The victims are intimidated by orders to remain silent on pain of reprisals from the authority in charge, who is worried about the consequences in the media and the legal repercussions for the establishment. Residents who are disturbed can also be the source of such acts if there is a lack of supervision.

12. Trafficking in women and girls poses a growing threat to the community. Poor women are a major key target group for offenders. Some of these women participate in such activities voluntarily in order to escape from poverty, while others are forced to participate and to prostitute themselves against their will. Trafficking implies the abduction or displacement of women and girls for illegal purposes - prostitution and sexual exploitation - by illegal means - fraudulent or forced consent in exchange for payment or advantages given to the parents or other persons.

13. Official figures tend to show that the prostitution of minors is a marginal phenomenon. In some countries, however, the phenomenon is alarming: 500,000 children in India and China, 400,000 in Thailand.² Europe is currently affected, particularly Eastern Europe. Estimates put the total number of child prostitutes worldwide at 3 million. A large number of prostitutes participate in rings and agree to the procurers' conditions in order to survive; in some cases, it is the parents who consign their own children to prostitution or pornography for financial gain. Apart from the psychic and social consequences, prostitution also leads to infection with sexually transmitted diseases, including AIDS. Prostitution is often associated with deviant behaviour, such as drug addiction, and thus involves physical and psychological traumas. The victims' complicity makes the search for evidence even more difficult.

14. In some societies women are abused, constrained, sold and forced into prostitution. Women can be prostituted without knowing it, with the complicity of their families, as is the case in Nepal and Bangladesh: poor families trade their daughters for money in the form of loans, thus keeping the daughters in a form of servitude to pay off the debt, and they remain in the money-lender's service for as long as he wants. Such families live in extreme poverty and are looking for any way to survive. In other cases, given promises of work, women who have signed an employment contract so that they can work outside their country of origin are misled as to the nature of the service they are to provide and find themselves forced to work as prostitutes. The conditions to which they are subjected - and to which they did not agree - can only be classified as slavery.

15. Some religious sects advocate or tolerate sexual freedom, even among minors, and even sexual punishments for certain privileged members of the sect, thereby making a mockery of human rights. Several cases have been cited in the media following accusations of sexual abuse. In their teachings all religions seek to protect human rights, but it is interpretations, customs and practices invented by man in the name of religion that discriminate against women.

16. In certain cases pregnancy can constitute evidence of abuse, but in the case of adolescents it is often diagnosed long after the abuse has occurred. The victim hides her pregnancy until it is obvious and refuses to tell what happened to her. This delay in reporting poses an obstacle to legal termination of the pregnancy. The problem of pregnancies resulting from rape raises particular problems in countries where abortion is banned. Laws that prohibit abortion or extend the ban to pregnancy resulting from rape discriminate against women in general and rape victims in particular. The State exacerbates the injury done to the victim by prohibiting her from interrupting her pregnancy and deprives women of their right to dispose of their own bodies as they see fit and make their own reproductive choices. Moreover, pregnancy marginalizes adolescents within society and their families, since it may even lead to rejection by the family. These circumstances will surely have consequences for the rights of the children born of such pregnancies.

17. Domestic violence cuts across all levels of society. It is seldom proved, for the victims are submissive, fearful and powerless. Parents' values and behaviours are often passed on to their children. This has adverse consequences for women's life expectancy. The influence of domestic conflicts on children's psychological development is considerable. They experience their parents' fights with a sense of anxiety and guilt, and they suffer from emotional stress and a sense of isolation. Their images of their parents are disturbed and their points of reference within the family are blurred. The children develop symptoms and behaviours typical of abused children that are in fact defensive strategies.³

18. All sexual violence is an affront to the physical integrity of the person. Victims are vulnerable whatever their age, especially if they are not in a position to protect themselves owing to their age or to physical or mental disabilities. Thus any person who knows that sexual abuse has occurred may be obligated to denounce it or report it to the competent authorities. Doctors,

paramedics and social workers who provide information about instances of ill-treatment and assaults of which they are aware cannot cite professional issues of confidentiality. In diagnosing the effects and treating victims, doctors are privileged witnesses, since many victims are often unable to complain of their abusers because of the psychological effects or pressure brought to bear on them.

19. Violence can also be psychological and moral, such as sexual harassment in the workplace or classroom, forced or early marriage, prostitution, debauchery and paedophilia.

20. Early marriage may be considered to be an indirect form of the sale of children. Girls are betrothed in exchange for a dowry at a very young age. This tendency is worsening with time in certain countries.

21. Sexual harassment is an assault constituting both a moral and a physical affront that generates fear and violates the rights to physical integrity, education and freedom of movement. It can be viewed as a means of control and intimidation that makes it possible to regulate in some way the situation of a woman in a socially subordinate role. It is most commonly practised in the workplace and in academic institutions. Civil rights legislation in the United States of America defines it as unwelcome sexual advances, the soliciting of sexual favours or any other act, expression or behaviour of a sexual nature that is presented as a condition of employment or a disruption of an employed victim's professional life such as a dismissal, promotion or salary that is determined on the basis of the victim's reaction to such advances.

II. TYPES OF EVIDENCE OF SEXUAL VIOLENCE AND ABUSE AND THEIR IMPACT ON VICTIMS' RIGHTS

1. Factors affecting the testimony of victims of sexual violence

22. Like women, many children are victims of sexual abuse. For some years now there has been a growing awareness of this issue. An increasing number of cases of sexual abuse of children are being reported, which has led to an increase in the number of prosecutions and thus of children testifying who are victims of or have witnessed abuse. According to a number of experts, and in view of children's vulnerability, the fact of subjecting children to the same process of testifying as adults is highly detrimental to children, both emotionally and in terms of their credibility. In reality, this difference is not taken sufficiently into account.

23. It is extremely complicated to investigate an act of sexual abuse, given that accusations are based largely on statements by the presumed victim, and the alleged perpetrators either deny or seek to minimize the conduct of which they are accused. Unfortunately, the accusations of victims who have experienced or been subjected to extreme situations are not always precise or easy to interpret, and are susceptible to misinterpretation. Professionals have many questions as to the credibility of testimony by children.

24. Children enjoy no special status in many legal systems, and their testimony is treated in the same way as an adult's. In cases of sexual abuse, however, children's testimony is characterized by a number of emotional and cognitive factors that must be taken into account, or

else the testimony becomes invalid or is rejected. For example, it is their very status as adults that allows adults to have access to children, and it is the relationship of power or the inherent position of dependence implicit in such a relationship that characterizes the generational inequality between the parties involved. Adults buy children's silence through threats, fear or their authority over them to ensure that their secret is kept.

25. Unlike adult victims of sexual aggression, children do not usually feel that they have been assaulted in the true sense of the term. They are naturally guided by a tendency to loyalty to the adult or by a fear of reprisals. They are gently led into ongoing and repeated acts of abuse by a person in whom they have complete trust and who has authority over them, and they do not display the anger of a person who has been abused or violated.

26. In the case of both women and children, however, the judicial process is generally a source of stress and confusion that threatens to seriously affect the quality of their testimony. People who are frightened or confused tend to be suggestible and have a tendency to retract their statements. One must also bear in mind that the main criteria for validating a testimony are clarity, accuracy, coherence and consistency. Many cases fall apart because the victim's testimony is not considered credible or because the interrogators or the judge did not receive relevant information or assess it properly. The trauma suffered by the victims during a trial can last for years and only prolongs their anguish.

27. The time that elapses between the commission of an act of abuse and the victim's testimony in court can extend for several years, and events may also occur that can affect the individual's capacity to give an accurate and coherent account of the incident as it actually occurred, for the memory grows cloudy with time.

28. The number of intermediate interrogations, which generally involve the use of leading or loaded questions, end up destabilizing the woman or child testifying, and can cause them to contradict themselves even if the incidents really happened. A sequence of interrogations may threaten to become a form of brainwashing. Yet a peculiar feature of a sexual assault is the fact that it involves an internal event that takes place in the very body of the victim and should thus elicit a minimum of modesty in everyone.

29. In order to spare child victims of sexual abuse from repeatedly recounting what they suffered, since to retell is to relive, several States in the United States currently accept the practice of *res gestae*, in which a professional speaks on behalf of the child. Several experts have confirmed that a sexually abused child suffers from a particular kind of stress or post-traumatic stress syndrome; the symptoms of such stress have the effect of reducing access to the painful reality.

30. In most cases, women rape victims, unfairly, encounter such prejudices as the notion that their behaviour was provocative or that they sought to victimize themselves. All such witnesses need to do is contradict themselves during repeated interrogations for a case to collapse, on the assumption that the accusation was false. Repeated questioning confirms in the eyes of the victim that people have doubts about their version of events and may push them into remaining silent or retracting their testimony. Such a situation favours impunity. In addition to the

disturbing and traumatizing experience they have undergone, victims must now deal with what they are told is their share of responsibility, which makes them feel shame, unworthiness, doubt and guilt, since they are unable to see a connection between what really happened and rape as defined by law.

31. One of the reasons that the percentage of rapes reported is so low is the presence of inherent obstacles and discrimination in the justice system, namely the excessive requirement of evidence and the rejection of testimony that is not corroborated, whereas the circumstances of the act of rape itself do not generally lend themselves to the presence of witnesses, recollection of the past, the insistence on the degree of resistance brought, etc. Some legislation allows testimony relating to the victim's sex life, making the question of virginity legally relevant, without taking into account the acts of sexual violence committed by the defendant.

32. In many countries virginity is a primordial element in the prosecution of rape. Medical examinations are ordered to determine whether the victim was a virgin or had already had sexual experience. This practice automatically results in discrimination, and some types of people will lose their case at the very outset even if they have actually been raped. Forced to answer humiliating questions, such victims feel as if they are being tried instead of the accused. Child victims of abuse often encounter the same prejudices as adult rape victims.

33. False accusations of sexual abuse are most common in applications for custody of children and visitation rights in divorce proceedings. While there are no empirical data to suggest that children always fabricate accusations, children in such cases are exposed to a gradual contamination as the result of repeated leading questions, more or less intentional, that can come from either parent. The child thus sees his or her world fall apart and experiences a deep sense of being torn apart inside.

34. Testifying about sexual abuse puts women and children in an uncomfortable situation, for in addition to their role as accuser and victim they must talk about the harm that was done to them, and it is their word alone that constitutes the evidence. Only rarely is there other evidence to corroborate what the victims say. While exaggeration is rare, false accusations do in fact occur.

35. Judicial proceedings can lead to the abuser's being convicted in a criminal or civil court. Criminal proceedings are not the only legal means available to victims: they have the option of pursuing the matter in the civil courts. The advantage there is that the requirements in terms of evidence are less stringent; the complainant is required to prove his or her allegation on the basis of strong probability rather than incontrovertible evidence. Remedies ordered in court proceedings reflect society's solemn recognition of the abuse, which requires that the victim be dealt with through a multidisciplinary approach that takes into account both the suffering and the action taken.

2. Establishment of a database of genetic markers of convicted sex offenders

36. Such computerized databases of the genetic markers of convicted sex offenders have already been set up in France and the United Kingdom. In the United Kingdom the genetic markers of all suspects, guilty and innocent, are kept on file. The question arises as to whether or not the practice of matching genetic markers that have been taken by force is justified in the light of the individuals' right to have their physical integrity respected. In France this database is intended to centralize the genetic markers of convicted sex offenders with a view to facilitating the search for and identification of perpetrators of rapes followed by murder, torture or acts of barbarism, the corruption of minors, the fabrication, transport, marketing or even simple dissemination of messages that are violent or pornographic or are likely to constitute a serious affront to human dignity. It also serves to prevent recidivism.

37. The application of genetic marker technology to sex crimes entails finding a sample of the deoxyribonucleic acid (DNA) left by the perpetrator of an offence on the body of the victim or at the scene of the crime and comparing it with the DNA of a suspect or a witness or DNA samples obtained from a database. With these elements the prosecution and the defence can carry out an investigation with a view to determining the suspect's innocence or guilt.

38. This technology, which is employed chiefly during the preliminary investigation, is not specific to sex crimes. It can be used in civil law, particularly in paternity suits, as well as in criminal cases whenever the offender leaves traces at the crime scene that make it possible to identify his or her DNA.

39. The database contains the results of identifications made using genetic markers derived from samples of biological material taken from unknown individuals that have been collected in the course of an investigation together with information concerning the court proceedings. Despite the unquestioned effectiveness of this technology, given that every individual, with the exception of identical twins, has a unique genetic makeup, certain technical difficulties limit the usefulness of genetic markers in investigations:

(a) The need for prompt action after an offence has been discovered or reported to ensure that biological materials that are subject to putrefaction (sperm and blood) do not deteriorate;

(b) The diversity of methods for analysing DNA, which differ from country to country and even from one laboratory to another. It is imperative that the criteria for identifying suspects and methods of DNA analysis be harmonized in order to prevent judicial errors, which can have adverse - and often irreversible - consequences, and to ensure respect for fundamental rights;

(c) Genetic markers are an effective form of evidence that make it possible to identify the perpetrators of an offence, confirm their guilt and exonerate other individuals, particularly in the case of persons who have made a confession, under some form of pressure, of crimes they did not commit, confessions that are subsequently disproved by an analysis of genetic markers.

40. It should be noted that the results of expert analysis of genetic markers is not binding on the judge even if the technology used is fairly reliable.

41. Apart from the strictly technical nature of this process, the legal question of its compatibility with the need to respect the fundamental rights of the individual arises. The main issue is whether the judicial authorities can legally require that a suspect supply samples of genetic material for analysis of genetic markers with a view to identifying the perpetrator of an offence. The law in some countries, including the United States, Germany, the Netherlands, Sweden and Norway, allows the mandatory collection of samples, provided that it is done under the supervision of a judge. In other countries, such as France, the law makes the collection of samples for genetic testing subject to the authorization of the individual concerned, as such a procedure is considered to constitute an infringement of the integrity of the human body. The genetic marker database plays a dual role: identifying offenders and preventing recidivism. At the same time, it helps to enhance preventive measures to combat sex crimes.

42. Recommendation No. R (92) 1 of the Council of Europe Committee of Ministers, addressed to member States in 1992, states that, where the domestic law admits that samples may be taken without the consent of the suspect, such sampling should only be carried out if the circumstances of the case warrant such action.

3. Extraterritorial jurisdiction with regard to sex tourism

43. Territorial sovereignty is an important rule of international law. It implies that States enjoy control over their nationals within the limits of their territory. When offences are committed in another country, some countries are opposed to the extradition of their own nationals and prosecute them in their own country. These are cases of extraterritorial jurisdiction, which is an extension of the competence of national courts to punish acts of sexual exploitation committed abroad. The broadening of jurisdiction to cover sex crimes is aimed primarily at sex tourism and the sexual exploitation of minors in developing countries where minors do not enjoy adequate legal protection. Criminal responsibility in this area is attributable to both individuals and legal persons, including travel agencies and hotels. The fact that an offence may not be punishable under the legislation of the country in which it was committed, or that the victim or other persons entitled to bring a complaint may not have done so, or that the victim may have been officially denounced by the authorities of his or her country of origin do not stand in the way of proceedings. Some countries, such as France, Belgium and Germany, have adapted their legislation to facilitate the prosecution of sexual assaults on children and to ensure that sex tourism is in fact punished. Organizations active in combating sexual exploitation are authorized to act jointly with the public prosecutor, and the normal requirement that the consent of the victim or his or her parents must be obtained is waived. In 1994 Australia took legal steps to deal with crimes related to sex tourism that involve children through the Crimes Amendment Act in order to ensure that its extraterritorial jurisdiction applied also to the sexual abuse of children abroad.

44. Other countries, such as Japan, the Netherlands, Norway, Sweden and Switzerland, apply extraterritorial jurisdiction as a general principle. It applies in the category of serious crimes. There are no special measures for dealing with crimes related to sex tourism.

45. Linguistic and cultural differences, like differences in legal and police systems, make extraterritorial jurisdiction difficult to apply in practice. While a crime may have been committed in a particular country, the evidence must be obtained by the police of the country that will conduct the prosecution. Evidence must be kept under very strict conditions for submission in court, and this can pose practical problems for the police. Cooperation between jurisdictions, in the form of explaining to each other their respective methodologies for the collection of evidence, is imperative. Mutual legal assistance agreements are essential to such cooperation. Such agreements may call for authorization to obtain testimony in the requested State, access to relevant documents, reports and so forth.

46. Given the difficulties encountered in applying this principle, extraterritorial jurisdiction must be viewed as a secondary instrument of international law, available only when other channels are not operational. The normal course of prosecution implies that an offender should be prosecuted in the country where the offence was committed and where the victim, witnesses and evidence are located. When an offender escapes the jurisdiction of the place where the offence was committed, and several countries apply the principle of non-extradition of their own nationals, the use of extraterritorial jurisdiction remains the best way to prevent impunity.

47. Points of view diverge considerably: some countries require that exceptions be allowed for extraditable crimes and that agreements be concluded to provide a legal basis for extradition, with conditions set to guarantee equitable treatment of offenders, on the grounds that prosecution will be swifter and less costly for the offender's country of origin.

48. The sexual exploitation of children can have serious lasting consequences that may jeopardize the physical, psychological, spiritual, moral and social development of children for the rest of their lives, including the possibility of early pregnancy, maternal mortality, physical injuries, delayed development, physical incapacity and sexually transmitted diseases, including AIDS. As children are all too familiar with the risks associated with sexuality, customers are becoming interested in children who are younger and younger, and thus less aware.

49. The sexual exploitation of children often operates on shaky ground. A number of factors contribute to the expansion of a prostitution industry linked to sex tourism, including poverty, unemployment, lack of education, corruption, illiteracy, a lack of training on the part of those in charge of such exploitative activities. Cultural prejudices relating to the sexual emancipation of young girls and economic arguments relating to financial support for the family are the grounds often advanced to justify such behaviour.

50. The originality of this policy of combating sex tourism lies in combining prevention with punishment, but also in its emphasis on victim protection and the social reintegration of offenders. The social reintegration of offenders implies that they receive mandatory medical treatment, but the fact of imposing medical treatment on a convicted person may not be consistent with the need to respect fundamental human rights. If viewed within the context of a criminal policy to combat sexual abuse, however, this solution does not seem to be in conflict with fundamental human rights, given that the treatment in question is supposed to help the sexual offender keep from relapsing while helping to protect and prevent any new victims.

4. The use of credibility experts to establish guilt

51. The assessment of victim credibility is almost systematic in proceedings relating to sex offences. A psychologist is called in, not to address the victim's suffering, but to assess the victim's credibility. The psychologist analyses how the truth is revealed in terms of personality, subjectivity, speech and non-verbal communication. In fact, the subject's personality may be of no use in determining whether or not facts are material and uncover the truth, which is the sole objective of criminal research. To assign psychological tests, which are by definition based on interpretations of an individual's acts, gestures and speech, the value of evidence is to accommodate any number of variations and uncertainties.

52. The gap between legal procedures and psychological procedures cannot be overlooked. In practice, they are somewhat similar, and in fact the judicial process may overlap with the therapeutic process. But the notion of truth has different meanings, depending on whether one is acting as a clinician, an investigator, a judge or an expert. Guilt must be determined on the basis of evidence that proves the facts constituting the offence, and the personality of the guilty party should be taken into account only in determining the severity of the sentence. Inviting a psychologist to participate in an investigation as an expert threatens to introduce some confusion of the two functions. The results of tests by experts must not prevent judges from assessing the facts leading to a decision on guilt. The psychologist plays a primordial role in addressing the psychic problems of the victim. However, the responsibility of judges in combating sexual abuse lies in the way in which they render justice correctly, with respect for human rights. Nor must they lose sight of the fact that the purpose of introducing the social sciences into criminal proceedings is to treat those who are brought to justice more humanely.

53. What is essential in a criminal trial is to distinguish between the finding of a guilty verdict and the determination of the sentence, both of which have their basis in definitions of offences in terms of their constituent elements and procedural mechanisms, strictly interpreted. The use of testing by experts can be explained by the difficulty professionals have in dealing with disputes involving children who are coming to terms with sexuality and trauma.

54. The knotty problem of sexual abuse in amateur sports is also beginning to be discussed, for the world of sports, originally thought to be a safe environment, is no different from any other milieu, with sexual abuse unfortunately present. The aggressor, who is in a position of authority, trust and intimacy vis-à-vis the child, takes advantage of this situation to achieve his ends.

55. Evidence of sexual abuse among persons with disabilities is much more difficult to report, given the absence or inadequate means of defence, language, credibility, as well as the physical dependence, emotional neediness and institutionalization that do not always allow the disabled person's interests to prevail over the interests of the family or the image of the institution. All the prerequisites for vulnerability are there, and it is hard to obtain an accurate picture of what is involved. In the absence of any verbal communication, the delayed discovery of sexual ill-treatment has heightened consequences, while physical signs can disappear. In such cases, the intervention of psychiatric and psychological experts is indispensable.

5. Recovered memory or false memory syndrome

56. The phenomenon of recovered memory appeared in the United States in the early 1980s. Psychotherapy draws on the theory of the recovered memory; memories allegedly recovered generally have to do with sexual abuse experienced in early childhood, and yet none of these alleged childhood memories seem to have existed before psychotherapy began. According to this theory, retrieving memories that have allegedly been completely suppressed can solve real psychological problems. Such therapists explain the suffering of their patients in terms of real trauma: incest and ill-treatment. The question arises as to whether this is a technique that is being used to reconstruct the past and find a person's identity, or whether it is a misapplication in which the therapist's persistent efforts push the victim to retrieve memories as a result of leading questions, by actively focusing on ill-treatment and sexual abuse. Convinced of the reality of their memories and with the support of their therapist, the patients accuse their parents of incest and complicity.

57. According to Boris Cyrulnik, a neuropsychiatrist, imagined incest is a common occurrence. Through their power of suggestion, psychotherapists transform fantasies into memories. In 1994 an Australian psychologists' association criticized the possibility that memories could be suggested. In 1997 the Royal College of Psychiatry called on psychiatrists in the United Kingdom to avoid any technique that reactivated memories based on the assumption of sexual abuse in the distant past that the patient had forgotten about. Other statements urge psychiatrists to follow their patients' lead rather than leading them or exerting pressure on them. The reality of sexual abuse should not be denied or minimized, but there is a need to discuss such practices, for they do exist and may go against human rights and freedoms.

58. The question of false memories has begun to be viewed with serious concern by the justice systems in the United States and English-speaking Canada. Since the late 1980s the courts have had to look into this sensitive issue in trials of incest and sexual abuse cases. After years of therapy, some people claim to have recovered painful suppressed memories of abuse by their own parents, and the number of accusations continues to increase. Caution is the watchword, for lawyers and for therapists alike. "The unconscious is not a deep-freeze" warns Georges Trano, a Montreal psychologist who is often called as an expert by the courts: "What we can recover through hypnosis, the interpretation of dreams or other techniques is often reworked by the imagination and reworked even further by the therapist's imagination. As a general rule, we have to consider them as symbolic elements. In fact, these techniques are far from effective. By lowering psychological barriers, they make the subject extremely vulnerable to suggestion".

59. This theory is a disturbing phenomenon that affects many societies in many ways. If the prosecutions cannot be carried out beyond the time limits set, it is because of the difficulty in obtaining evidence. Evidence can disappear with time, creating a serious risk of judicial error when alleged incidents took place too far back in the past. Evidence is the only thing that distinguishes a legitimate accusation from malicious slander.

60. The recovered memory syndrome is a practice that has been legitimized in certain countries. The author of the present report believes that the question must be considered in depth

and that all its moral, legal and medical implications must be established in order to have a better understanding of its complexity. There is a risk that such a therapy may lead to judicial error, resulting in the conviction of innocent persons.

6. Sexual abuse during detention or in prisons

61. The sexual abuse of persons in detention is a current practice in some countries. The threat of rape can in itself provoke a major psychological trauma in a manner not unlike an act of torture. Ill-treatment and torture are exacerbated by the discrimination suffered by children on account of their poverty or their belonging to a racial or religious minority. Street children are particularly exposed to arbitrary arrest and thus to ill-treatment. It is estimated that 100 million children live and work in the street, surviving by begging, prostitution or other activities that attract the attention of the police.

62. One of the things that victims of sexual abuse and ill-treatment in detention facilities all experience, regardless of the circumstances, is the virtually full impunity enjoyed by the perpetrators. These individuals know that their victims are fearful and vulnerable and lack the necessary confidence to report them. Many victims prefer to keep silent out of fear of further threats or reprisals.

63. In 1998 Amnesty International reported the steps it had taken to help 180 children who had been detained in the prison at Zomba, Malawi, actions which had led the Malawian authorities to collaborate with Penal Reform International (PRI) in dealing with detained minors in order to put an end to the prostitution networks in prisons and in preventing the spread of the AIDS virus, given that 40 per cent of all deaths registered in 1997 had been due to AIDS.

64. The use of drugs in penitentiaries is another factor that aggravates the spread of the human immunodeficiency virus (HIV), along with the ban on condoms and the risky body piercing and tattooing carried out in unsanitary conditions.

65. Opinion is divided as to whether condoms should be distributed in prisons. There are those who oppose such an initiative on the grounds that it might be interpreted as an invitation to prisoners to engage in sex, and consequently as an encouragement to debauchery. Yet while if the distribution of condoms in prisons may seem to be the result of an ambiguous moral argument, the social and economic cost is even heavier.

66. Indeed, in many countries, sexual activity is prohibited in prison, but it must be acknowledged that such activity takes place and that infection with HIV/AIDS, although it may occur inside prisons, does not remain behind bars, for the prisons environment should not be considered to constitute an isolated case. The disease raises the same public health issues in prisons that it does in other places. And even if a person is a prisoner, his or her fundamental human rights must be respected. Prevention is vital, and condoms are part of prevention. Various reinforcing measures must also be instituted, such as prisoner education and information.

7. Sexual exploitation as a vector for the spread of AIDS

67. The link between the spread of HIV/AIDS and the sexual exploitation of children is one of the most disturbing and complex aspects of the question. In some regions, especially Asia and Africa, very young girls are particularly sought after, for the spread of HIV/AIDS runs up against people's ignorance, and myths concerning the curative powers of virginity abound. In reality, then, it is children who are by nature more vulnerable and not in a position to insist on safe sex or to repel a violent aggressor. In some of the most seriously affected countries the infection rate for adolescents is five to six times higher than for adults. It is estimated that there are 13 million young people between the ages of 15 and 24 who carry the AIDS virus.

68. During the preparatory meeting for the Yokohama Congress at Rabat, African delegates highlighted the link between HIV/AIDS and the sexual exploitation of children. In sub-Saharan Africa AIDS has killed the parents of nearly 12 million children. These orphans have abandoned their education and have found themselves drawn towards the sex trade. They are forced to fend for themselves and live in ever greater poverty. Coupled with this situation is the increasing demand for younger children on the sex market, a demand justified by the belief that children are less likely to get infected with sexually transmitted diseases and AIDS. In most cases, sexual abuse of children is almost never reported; discovery occurs when a child contracts a sexually transmitted disease and must be treated. All these factors increase children's vulnerability.

69. There are certain violations of human rights that also increase the risk of HIV/AIDS infection, such as religious intolerance, which results in a lack of access to information on how to prevent infection. One of the main sources of vulnerability is ignorance of the way in which HIV is transmitted and the inability to recognize potentially dangerous situations that call for protective measures as well as the various violations of physical integrity by genital mutilation, polygamy and forced prostitution, not to mention the discrimination by the community against persons infected with AIDS. The problem of marginalization becomes more acute and renders these persons even more vulnerable.

8. Paedophilia and cyber crime

70. Paedophilia, despite the growing concern it has elicited among the general population and public authorities, remains a phenomenon shrouded in confusion. It has not even been possible to agree on a definition in psychological, legal and media circles. One must resort to the psychiatric definition, which classifies paedophilia as a sexual disorder consisting of a sexual attraction to prepubescent children. It must also be distinguished from incest, which is strictly limited to the family context.

71. Situational paedophilia is distinguished from preferential paedophilia and refers to cases in which the aggressor engages in the act without having previously fantasized about children. Moreover, a true paedophile seeks out an attractive, vulnerable target who poses little risk; he must therefore engage in a series of choices and rational acts: identifying the hunting ground, choosing a potential victim, making contact and assessing the risks before carrying out the assault. Paedophiles rationalize to the extent of seeking to convince their victims of the justification of their sexual advances. They often try to convince themselves that their acts are neither immoral nor deviant nor criminal. They cite justification for paedophilia and look for

anything that can support their arguments, particularly cultural phenomena. In many cases their actions take the form of seduction rather than coercion. The phenomenon of “sugar daddies” shows how fuzzy the situation can be in the trading of sex for money and material goods, such as clothing, meals, luxury items and tuition. Paedophiles appear outwardly quite normal and can be particularly devoted to their profession which places them in contact with children.

72. It is now possible to use virtual images to create child pornography. This is a pernicious practice in that it can reinforce the deviant sexual interests of those who design it.

73. Although most paedophiles tend to act on their own, they may also form rings and use new technologies to chat via Minitel or the Internet, where they can exchange information, pornographic materials and even children.

74. Asia is traditionally the continent most affected by this phenomenon, but there is at present a disturbing growth in paedophilia in Latin America, Africa and Central and Eastern Europe. The situation in Eastern Europe, where growing numbers of stray children become potential victims of paedophiles, is a source of concern.

75. International cooperation between the United Nations, Interpol and non-governmental organizations (NGOs) is necessary, since sexual exploitation is assuming greater dimensions throughout the world and is accelerating with the use of new computer-related communication technologies.

76. “Actually, the Internet appeared on the scene somewhat insidiously. There was no single event that occurred, but it gradually became evident that paedophiles had discovered a new, virtually unlimited medium. For a long time paedophiles had operated in small groups. Now they have the possibility of offering or acquiring photographs or videos around the world. And all this just by typing at a keyboard”, says Agnès Fournier de Saint Maur, who heads a specialist group on crimes against children at Interpol headquarters in Lyon.

77. Customers who know exactly what they want go to web sites that “offer” pornographic photographs of children. These sites are free: Japan, for example, has no legislation governing such images. The customer chooses a site, gives his credit card number and after a few operations obtains photos that he may use to supply a ring. Other paedophiles prefer to operate through newsgroups or discussion forums, where exchanges are made directly and are virtually impossible to intercept.

78. In Europe, Australia and the United States, agents specializing in crimes against children have all received training in the Internet. “We don’t have teams of computer specialists but police officers who can gather information on the web and carry out their investigations” explains commissioner Marcel Faure. According to experts meeting in London, “the absence of a central Internet monitoring body considerably slows efforts to combat the dissemination of paedophilic materials”. The creation of an electronic library for police use that catalogues all images of child pornography available on the Internet has been proposed. Better international cooperation is indispensable to win the fight against paedophilia.

79. If the Internet has done away with borders, legislation remains entirely national and inconsistent from country to country, posing a recurring difficulty. There is currently no effort to harmonize legislation to criminalize paedophilia or even combat it. For example, in the United Kingdom the police may infiltrate rings, while in France this practice is illegal, and the age at which sexual relations are permissible varies from one country to the next.

III. WITNESS PROTECTION

80. A witness as understood here is a person who has either furnished or agreed to furnish information or evidence as part of the investigation or prosecution of an offence, or has participated or agreed to participate in such an undertaking and thus may require protection if his or her safety is threatened.

81. Factors to be taken into consideration are:

- The nature of the risk to the witness's safety;
- The danger to the community posed by the witness's enrolment in a protection programme;
- The witness's role in the investigation or prosecution and the nature of the latter;
- The value of the witness's participation and the information or evidence that he or she has provided or agreed to provide.

1. Guarantees of protection to ensure the safety of children during a trial

82. A child who has been the victim of or a witness to a sexual assault may receive special treatment and care before, during and after the trial. Through their representatives, child victims can obtain reparation, either through criminal proceedings or a civil complaint, for the injury they have suffered. In some countries, children's rights NGOs have the authority to represent child victims in court when the parents or legal representatives are unable to do so.

83. Other countries, such as the United Kingdom, allow testimony in the form of videotaped interviews conducted in the presence of a social worker. A child is also entitled to present evidence on closed-circuit television broadcast from a location adjacent to the court; to prevent the child from seeing the defendant, the televised testimony is shown on a screen set up in the courtroom. In many States in the United States, as noted earlier, a professional may speak on behalf of the child to prevent the child from reliving the experience, since to retell is to relive the act that was perpetrated. Witness protection varies from country to country and depends not only on legislative and regulatory measures, but also on the financial, material and human resources available in the countries concerned.

84. The procedure varies from country to country, but many countries, such as France or Madagascar, hear cases involving minors in closed session, and only the parents, guardians,

social welfare organizations, experts and social workers may attend. In these same legal systems children may be removed from the family environment and placed in a centre or public agency if their health, safety or morality are at risk from abuse or ill-treatment perpetrated within their own family.

2. Protection of identity

85. In some countries it is forbidden to knowingly communicate, directly or indirectly, any information as to the whereabouts or new identity of a former or current witness.

86. However, when the public interest so warrants, primarily in order to prevent the perpetration of a serious offence, for purposes of national security or defence or because there is reason to believe that the protected witness is involved in the perpetration of a serious offence or may be able to provide important information or evidence relating thereto, or when communication is vital to establish the innocence of a defendant in a criminal case, the witness's identity may be revealed.

IV. LEGAL FRAMEWORK FOR COMBATING SEXUAL VIOLENCE AND ABUSE

87. The Declaration on the Elimination of Violence against Women provides a general framework in this area, even if it is not of a binding character. It calls on States to condemn sexual violence and to refrain invoking any custom, tradition or religious consideration to avoid their obligations in that respect. It encourages States to take measures to prevent acts of violence against women. In article 4, paragraph (j), of the Declaration, States are requested to "adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority of either of the sexes and on stereotyped roles for men and women". States must radically revise social paradigms that tend to undermine women and establish a social climate that will foster the elimination of violence.

88. Sexual abuse is in any case prohibited by international human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

89. The Convention on the Rights of the Child is the instrument with the largest number of ratifications: nearly all States, with the exception of the United States and Liberia, have ratified it. It stresses the State's responsibility for the protection of minors (up to the age of 18 years) and for ensuring their well-being. It constitutes a synthesis of human rights, covering all aspects of children's lives. Articles 18, 19 and 34 are of particular importance with regard to the ill-treatment of children and set out the respective responsibilities of the parents and the State as well as the measures to be taken to protect minors from sexual exploitation and abuse.

90. The Tourism Bill of Rights and Tourist Code adopted in 1985 set standards of conduct for States, tourism professionals and tourists relating to the issue of sexual exploitation. The Bill of Rights invites States to adopt measures to prevent the possibility of using tourism for the purposes of sexual exploitation.

91. Principle 2 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 18 December 1982, states that “it is a gross violation of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment”.

V. CONCLUSION AND PRELIMINARY RECOMMENDATIONS

92. **The types of evidence in cases of sexual violence and abuse should be inventoried and reviewed, given that the disparities in the judicial systems and procedural aspects of investigations and prosecutions in different countries can give rise to major discrepancies, and an effort should be made to harmonize them with a view to determining best practices. Mutual legal assistance should be provided, particularly in the application of extraterritorial jurisdiction and in the area of cyber crime.**

93. **Better coordination among all United Nations bodies working with sexual violence and abuse is needed to enhance the effectiveness of the efforts made; these bodies include the Committee on the Rights of the Child, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Sessional Working Group on the Administration of Justice, the Working Group on Contemporary Forms of Slavery, the United Nations Children’s Fund (UNICEF) and the Commission on the Status of Women.**

94. **The establishment of a network of contacts comprising all actors involved the effort to combat sexual violence and abuse, including civil society, is needed to collect evidence with the help of specialized organizations.**

Notes

¹ C. Henry Kempe, founder of the International Society for Prevention of Child Abuse and Neglect, author of “The Battered Child Syndrome”.

² S. Bourcet and Y. Tyrode, “*Les maltraitances de l’enfant et de l’adolescent*”.

³ Schuman, 1980, quoted in Van Gijseghem, “*La recherché de la vérité et de l’expertise des enfants*”, 1991.
