

ASEAN Guidelines for Harmonised and Comprehensive National Legislation Against All Forms of Online Child Sexual Exploitation and Abuse

2023



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ASEAN Guidelines for Harmonised and
Comprehensive National Legislation Against
All Forms of Online Child Sexual
Exploitation and Abuse

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Foreword

The ASEAN Guidelines for Harmonised and Comprehensive National Legislation Against All Forms of Online Child Sexual Exploitation and Abuse are an important milestone towards increasing the prosperity, connectivity, resilience, and security of children of ASEAN Member States.

The Guidelines are implementing activity 1.2.5. of the 2021 Regional Plan of Action for the Protection of Children from All Forms of Online Exploitation and Abuse in ASEAN which as developed to effectively implement the 2019 Declaration on the Protection of Children from all Forms of Online Exploitation and Abuse in ASEAN. Both documents highlight the importance of legislative reform to ensure effective protection of children in the online sphere.

We anticipate that the Guidelines will be highly beneficial for ASEAN Member States when they develop new legislation or amend existing legislation which aims to enhance the protection of children online. We also expect that the Guidelines will serve as a reference point for the development of a comprehensive legal prevention and response framework across relevant legal areas.

ASEAN appreciates the technical assistance of the United Nations Children’s Fund (UNICEF) East Asia and Pacific Regional Office and ECPAT International

which facilitated the process, in collaboration with a wide range of partners from national government agencies, international, regional and national research and academic institutions, nongovernmental organisations, and civil society groups. We are grateful, too, for the leadership, foresight and collaborative spirit of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and Senior Officials Meeting on Social Welfare and Development (SOMSWD) Technical Working Group on Strengthening National Legal Standards, Integrated Survivor Support Services. We also thank the ASEAN Secretariat (ASEC) for their consistent support for, and input to, the process. Last but not least, we acknowledge that without the aspirations and leadership of the ministries of Member States, these Guidelines would never have come to fruition.

With such a wide-ranging group of contributors and supporters in both government, non-government and civil society, We are confident these Guidelines will assist in accelerating ASEAN-wide adoption of comprehensive legal frameworks enhancing the protection of children online and all the benefits that will follow.

ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)

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The ASEAN Secretariat (ASEC) also deserve our gratitude for coordinating the partners' contributions to the Guidelines.

We would also like to thank the United Nations Children's Fund (UNICEF) East Asia and Pacific Regional Office and ECPAT International for their technical support in the development of these Guidelines.

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Acronyms

AMS	ASEAN Member States
ASEAN	Association of Southeast Asian Nations
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
CRC	UN Convention on the Rights of the Child
CSAM	Child Sexual Abuse Material
ICTs	Information and Communication Technologies
ITU	International Telecommunication Union
MLA	Mutual Legal Assistance
MLAT	ASEAN Treaty on Mutual Legal Assistance in Criminal Matters
NGO	Non-Governmental Organisation
OCSEA	Online Child Sexual Exploitation and Abuse
OPSC	UN Convention on the Rights of the Child Optional Protocol on the sale of children, child prostitution and child pornography
RPA	ASEAN Regional Plan of Action for the Protection of Children from All Forms of Online Exploitation and Abuse in ASEAN (2021)
SOMSWD	ASEAN Senior Officials Meeting on Social Welfare and Development
UN	United Nations
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime

A. Introduction

Thirty years after the adoption of the United Nations Convention on the Rights of the Child (hereafter: CRC), the role and impact that the online world has played in the lives of children had not been imagined. The internet has provided positive opportunities for children. However, the Internet is also a domain in which children are vulnerable to violence, including different forms of online child sexual exploitation and abuse (hereafter: OCSEA) – a risk which grows exponentially with the rapidly increasing internet penetration. The internet exposes children to risks not only from offenders in their vicinity, but from offenders across the region and the globe. OCSEA is a grave child rights violation. The CRC and its Optional Protocol on the sale of children, child prostitution and child pornography (OPSC) protect children from all forms of abuse and exploitation, including sexual, both online and offline (see Arts 34 -36 CRC, Arts 2 and 3 OPSC).

Globally, Asia is the region with the highest proportion of children accessing the internet. In 2017, around 72 per cent of young people ages 15-24 in East Asia and the Pacific had used the internet in the previous three months.¹ Regardless of their economic situation, most children find a way of getting online. Almost all children between 12 and 17 years are internet users in Thailand (94 per cent)² and the Philippines (95 per cent)³. In Mongolia, 88.4 per cent of girls 15-17 years old have used the internet at least once a week.⁴

At the same time, increasing cases of online child exploitation and abuse have been documented across Association of Southeast Asian Nations (ASEAN) Member States (AMS) by law enforcement, hotlines and civil society working to address the challenge. The National Centre for Missing and Exploited Children (NCMEC) reported a significant increase in referrals of reports involving Child Sexual Abuse Material (CSAM) to ASEAN governments for their action between 2017 and 2019. In 2017, NCMEC referred a total of 290,800 reports to ASEAN countries for their action. In 2018 this number rose to 1,406,500 and by 2019 the number of referrals had risen to 1,011,400.⁵ Further, in 2020, following the onset of the COVID-19 pandemic, some AMS began recording an increase in cases of OCSEA. Figures from the 2022 Disrupting Harm studies (UNICEF Innocenti/ECPAT International/INTERPOL) show that 20 per cent of internet using children aged 12-17 years in the Philippines and 9 per cent in Thailand were victims of clear examples of online sexual exploitation and abuse.⁶ Both studies also showed that very few children used formal reporting mechanisms such as police, social workers, or helplines, if they even spoke about their experiences at all.

To better understand the drivers and root causes of child sexual exploitation and abuse, including technology-facilitated abuse and exploitation, it is important to understand its interlinkages with offline child exploitation and abuse. While the Internet has created new forms of child sexual abuse, such as live-streaming of child sexual abuse, it also facilitates a continuum between offline – that is, contact – child sexual abuse and online child sexual abuse.⁷ As many cases involving child sexual abuse material begin with a contact offence, there is

1 ITU, *ICT Facts and Figures 2021*.

2 ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in Thailand – Evidence on online child sexual exploitation and abuse, 2022*.

3 ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in the Philippines – Evidence on online child sexual exploitation and abuse, 2022*.

4 UNICEF, *MICS Mongolia, 2018*.

5 UNICEF, *Report of ASEAN Regional Conference on Child Online Protection, 25-27 February 2020, Bangkok Thailand, Bangkok 2020*.

6 ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in Thailand – Evidence on online child sexual exploitation and abuse, 2022*; ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in the Philippines – Evidence on online child sexual exploitation and abuse, 2022*.

7 ECPAT International, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015.

constant exchange and interaction between online and offline abuse, and between the digital and the analogue space.⁸ As an example, the Disrupting Harm in Thailand data reveals that 'labelling child sexual exploitation and abuse as 'online' or 'offline' does not do well to reflect the realities of sexual violence that children are subjected to. Children can be abused or exploited while they spend time in the digital environment, but offenders can also use digital technology to facilitate violence, for example, social media or instant messaging can be used to convince or coerce children to meet offenders in person, leading to 'offline' child sexual exploitation and abuse'.⁹

This also manifests in the victimisation risk factors. Victimisation risk factors typical for contact child sexual abuse such as gender, prior abuse and family dysfunctionality, poverty and migration are equally risk factors for online abuse and exploitation.¹⁰ Similar to offline child sexual exploitation and abuse, online child sexual exploitation and abuse has devastating effects on the physical, mental and psychological wellbeing of children. This can be further exacerbated by the nature of the digital environment and the possibility to create a lasting depiction of the child's victimisation. The documentation of their abuse and the circulation of this material online makes it very difficult for victims to close the chapter¹¹: every time the material is shared, the depicted child is re-victimised. Victims also live in the constant anxiety that someone will recognise or expose them¹², further hampering their healing process.

OCSEA is hence an established threat to children's health and wellbeing across AMS and requires an urgent Harmonised and comprehensive legal response to ensure offenders are brought to justice, victims are not re-traumatised throughout the justice process and all actors within the multi-sectoral response play their role in protecting children online.

8 Sonia Livingstone/Jessica Mason, *Sexual rights and sexual risks among youth online*, London 2015; Daniel Kardefelt-Winther/Catherine Maternowska, *Addressing violence against children online and offline*, Nature Human Behaviour 2019.

9 ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in Thailand – Evidence on online child sexual exploitation and abuse*, 2022.

10 UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015.

11 Najat M'jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HCR/12/23 (13 July 2009).

12 Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London 2011; UNICEF, *The State of the World's Children 2017*, New York 2017.

B. Background

In November 2017 in Bangkok, Thailand, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) organised the Regional Workshop for Promoting Comprehensive and Harmonised National Legislation aimed at Preventing and Combating Online Child Sexual Exploitation in ASEAN Member States (hereafter: AMS). Subsequently, the Inter-Sectoral Dialogue on Integrated National Responses to End Sexual Exploitation and Abuse of Children Online in ASEAN was held in Jakarta, Indonesia by the ASEAN Senior Officials Meeting on Social Welfare and Development (hereafter: SOMSWD) in February 2018.

In November 2019, the Declaration on the Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN (hereafter: Declaration) was adopted at the 35th ASEAN Summit. The Declaration stated seven main recommendations for the AMS: legislations, law enforcement capacity, national specialised unit, child protection and support services, data collection, education programme and engagement with private sector, with an aim to better protect children from online risk and harm. To effectively implement the ASEAN Declaration, and to provide a detailed framework with clear and measurable results, a Regional Plan of Action for the Protection of Children from All Forms of Online Exploitation and Abuse in ASEAN in ASEAN (hereafter: RPA) was developed under the leadership of ACWC and SOMSWD in cooperation with relevant ASEAN Sectoral Bodies in the three ASEAN Community Pillars, with the support of UNICEF East Asia and Pacific Regional Office and ECPAT International. The RPA was noted at the 38th and 39th ASEAN Summit in October 2021.

The RPA elaborates on and provides guidance for the implementation of the commitments articulated in the Declaration. Focus Area 1 of the RPA deals with the promotion, development and implementation of comprehensive national legal frameworks across all ASEAN Member States. Considering that OCSEA is typically a transnational crime due to the transnational nature of the Internet, aligned legal standards are key to facilitate cross-border investigation, extradition and mutual legal assistance.

Against this background, activity 1.2.5. RPA provides that ASEAN will develop Guidelines for Harmonised and comprehensive national legislation to ensure protection of children from all forms of online sexual exploitation and abuse (hereafter: the Guidelines).

C. Purpose and objectives of the Guidelines

The Guidelines seek to provide a framework against which AMS can review and strengthen legislation for the protection of children from all forms of OCSEA and enhance support and justice for child victims.

The Guidelines aim to assist AMS in establishing Harmonised and comprehensive national legislation against all forms of OCSEA across AMS. Such a Harmonised approach pursues the following objectives:

- Demonstrate a strong alliance against all forms of OCSEA across AMS, by recommending standards for the legal response to such offences;
- Acknowledge that a legal response to OCSEA goes beyond mere criminalisation of such conduct, including other relevant areas of procedural criminal law, civil law and private sector regulation;
- Create an enabling environment for extradition and mutual legal assistance interventions, which often require acts to constitute offences in both the requesting and requested States¹³;
- Facilitate exchange of relevant evidence within ASEAN and beyond to facilitate cross-border law enforcement collaboration.

These Guidelines will be highly beneficial for AMS when they develop new legislation or amend existing legislation to ensure their legal framework is 'fit for purpose' to keep children safe online. The Guidelines will give AMS a reference point for a comprehensive legal prevention and response framework across legal areas, identify the legal elements required to be included in each provision and guide AMS to best practice examples from the region and beyond.

These Guidelines take a child-rights based approach. This means that the Guidelines acknowledge that children's rights are non-hierarchical, interdependent and indivisible. They will follow the principle of proportionality in resolving conflicts between conflicting children's rights or children's rights and human rights more broadly, while applying the principle of the best interests of children as a primary consideration.

¹³ 'Double criminality standard'.

D. Key considerations

This section sets out key considerations for the strengthening of OCSEA legislation. Before embarking on a legal reform journey, AMS are encouraged to take the below key considerations into account so that the legislative undertaking is evidence-based, strategic and complements the existing legal framework:

- 1. Mapping existing legislation on OCSEA:** In order to ensure that legislative reform addresses existing gaps in the national legal framework, as highlighted in the RPA, each AMS should carry out a comprehensive legislative review on violence against children that includes a review of its legislation against applicable international and regional commitments related to online violence, abuse and exploitation of children (see Activity 1.1.1 RPA). This mapping exercise will provide lawmakers with an overview of existing provisions and be a key starting point to develop a legislative strategy which does not duplicate or contradict existing legislation¹⁴.
- 2. Legislative reform should be evidence-based:** Understanding the scope, prevalent forms and emerging risks of OCSEA within a specific country context are key to develop legislation which meet the needs of victims.¹⁵ This should also include victims', caregivers' and frontline workers' experiences of accessing justice and legal remedies. Their views and perspectives are key to develop procedural legislation and regulations which meet the needs of victims as identified by the victims themselves.¹⁶ NGOs, private sector and academia should also be consulted as appropriate in the legislative reform process.¹⁷ In the same vein, meaningful child participation in the law-making process is crucial to take children's views into consideration. Such consultations should include particularly vulnerable children, such as children with disabilities, to ensure a wide range of representation and diverse views. However, while basing legislative reform on context-specific evidence is the ideal sequencing, the lack of context-specific evidence should not be considered a hindrance to develop legislation in the first place. Such legislative efforts can be based on regional evidence until national evidence is made available.
- 3. 'Future-proofing' legislation:** When developing legislation on OCSEA, AMS need to consider that technology is constantly evolving, as do crime patterns. As legislation will be in place for a certain period of time before further amendments might be pursued, the phrasing of the law needs to be broad enough to also cover possible new phenomena which might emerge in the years after the legislation is enacted. Legislation should therefore be formulated in a technology-neutral language.¹⁸ As an example, instead of explicitly criminalising the 'live-streaming' of online child sexual exploitation and abuse, the legislation should criminalise the 'dissemination' and 'accessing' of online child sexual exploitation and abuse. This language covers incidents of live-streaming while at the same time being generic enough to also cover possible new phenomena whereby material is not permanently stored on a digital medium.

¹⁴ Please note that an initial mapping and analysis of OCSEA legislation has been conducted through the Disrupting Harm project for 6 ASEAN countries. ECPAT International and UNICEF have also mapped legislation on some crimes/aspects of sexual exploitation/violence against children/OCSEA for the remaining ASEAN countries. A mapping exercise can leverage these existing resources where available, with some updates and/or complementary research.

¹⁵ See for example ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in Thailand – Evidence on online child sexual exploitation and abuse*, 2022; ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in the Philippines – Evidence on online child sexual exploitation and abuse*, 2022.

¹⁶ UNICEF, *Legislating for the Digital Age*, New York 2022.

¹⁷ UNICEF, *Legislating for the Digital Age*, New York 2022.

¹⁸ UNICEF, *Legislating for the Digital Age*, New York 2022.

4. **Finding a suitable ‘home’ for OCSEA provisions:** Another consideration is which piece of legislation should ‘host’ OCSEA criminal provisions. Countries generally have the option to integrate such provisions into overall child protection laws, into the criminal code (as part of sexual offences or as a subsection of cybercrime) or as part of a separate cybercrime law. Whichever option or combination of options is chosen, it is important to ensure that victims benefit from existing victim protection mechanisms (e.g. procedures on child friendly justice), that there is a link with the overall child protection law (e.g. by acknowledging that OCSEA victims are children in need of protection, consequently activating the case management response) and that cyber-specific criminal procedural law is applicable to OCSEA offences (e.g. provisions on admissibility of digital evidence). One way of achieving this is through cross-referencing relevant sections of the existing legal mechanism to ensure victims of OCSEA benefit from all the above legal provisions and services.
5. **Create linkages with legal reform interventions on gender-based violence:** Efforts to strengthen the legal framework around gender-based violence can be leveraged as a vehicle to include specific provisions on online violence against children, in particular OCSEA¹⁹; while these forms of online violence share similarities and dynamics, specific attention should always be paid to the vulnerabilities of children; for instance, law makers should pay specific attention to the vulnerabilities of boys to child sexual abuse and exploitation, including online, and remove any gender bias which considers the sexual abuse of a boy a less serious offence compared to an offence with a female victim²⁰; these Guidelines can serve as an advocacy tool and legislative guideline to ensure children’s vulnerabilities in the digital environment are sufficiently taken into consideration.

19 UNICEF, *Legislating for the Digital Age*, New York 2022.

20 UNICEF, *Research on the Sexual Exploitation of Boys: Findings, ethical considerations and methodological challenges*, New York 2020; ECPAT International, *A Global Literature Review of existing literature on the sexual exploitation of boys*, Bangkok 2021; ECPAT International/Thailand Institute of Justice, *Global Initiative to explore the sexual exploitation of boys. Thailand report*, Bangkok 2021; see also ECPAT’s Global Boys Initiative, available here: <https://ecpat.org/global-boys-initiative/>.

E. Scope and limitations

The content of the Guidelines is based on the standards set out in activities 1.2.1 – 1.2.4 RPA, Annex 3 RPA. In line with Annex 2 RPA, these Guidelines draw on relevant international and regional commitments such as the CRC and OPSC.²¹ These Guidelines also note international and regional developments such as the CRC Committee’s 2019 *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (hereafter: the OPSC Guidelines)²² and the CRC Committee’s *General comment No. 25 (2021) on children’s rights in relation to the digital environment*²³. Further, the Guidelines draw on the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (‘Lanzarote Convention’) and the Council of Europe Cybercrime Convention (‘Budapest Convention’).

The RPA acknowledges that protecting children from OCSEA spans across a variety of legal areas, including substantive criminal law, criminal procedure law, civil law, as well as private sector regulation. For each legal standard, the Guidelines will provide for an explanation on its importance and meaning and elaborate on the principles and key areas which should be considered for the development of such a legal provision. However, please note that national legal provisions should be adapted to the national context and do not necessarily have to be phrased in the way proposed in these Guidelines as long as the respective content as set out in the key areas is covered. Where appropriate, legal standards will refer to a best practice example stemming from national or international law, with a priority given to showcasing best practice examples stemming from AMS and the wider region.

21 UN Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography.

22 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, adopted on 30 May 2019.

23 CRC Committee, *General comment No. 25 (2021) on children’s rights in relation to the digital environment*, CRC/C/GC/25, adopted on 24 March 2021.

F. Guidelines for Harmonised and Comprehensive National Legislation Against All Forms of Online Child Sexual Exploitation and Abuse

I. Tiered approach to OCSEA legislative reform

These Guidelines will provide for comprehensive recommendations on the development of legislation relevant for combatting OCSEA. The content of the Guidelines is based on the standards set out in activities 1.2.1 – 1.2.4 RPA, Annex 3 RPA.

However, it has to be acknowledged that the recommendations for law reform set forth in the RPA are ambitious and might be difficult to implement as a whole for some AMS, especially considering the different stages of OCSEA legislation across AMS.

Therefore, these Guidelines propose a tiered approach to legal reform:

- **Tier 1** sets out the legal interventions which all AMS should make their key priority, as comprehensive substantive and procedural criminal law provisions on OCSEA are key to ensure that OCSEA victims receive adequate protection when they participate in the criminal justice process.
- **Tier 2** focuses on complementing Tier 1 by adding relevant criminal procedure provisions for victim protection and enabling victims to seek compensation through the civil law avenue. It further adds obligations for companies offering digital products, platforms and services.
- **Tier 3** focuses on the bigger picture of preventing and responding to different forms of OCSEA and focuses on relevant regulations for the financial sector and other relevant actors. These regulations should not be seen in silo, as private sector companies may also take voluntary action or have sector-specific standards and Guidelines in place.

Naturally, AMS will find themselves in different stages of legislative progress regarding OCSEA offences and hence will find themselves in different tiers. This tiered approach should not be understood as interventions in a later tier being less important than interventions in an earlier tier. Instead, this tiered approach should be seen as a recommendation for strategically approaching OCSEA-related legislation and needs to be interpreted in line with the AMS' country context.

Tier 1	<p>Substantive Criminal Law:</p> <ul style="list-style-type: none"> • Child sexual abuse material (including live-streaming of child sexual abuse) • Online grooming of children for sexual purposes • Sexual extortion
	<p>Criminal Procedure Law:</p> <ul style="list-style-type: none"> • Child victim-friendly justice • Extraterritorial jurisdiction • Mutual Legal assistance and extradition
Tier 2	<p>Criminal Procedure Law:</p> <ul style="list-style-type: none"> • Ex officio prosecution • Statutes of limitation
	<p>Civil Law:</p> <ul style="list-style-type: none"> • Compensation • Child victims of OCSEA as children in need of protection
	<p>Private sector regulation:</p> <ul style="list-style-type: none"> • Private sector companies offering digital services, products and platforms
Tier 3	<p>Private sector regulation:</p> <ul style="list-style-type: none"> • Financial institutions and related actors • Data protection and privacy rules for children • Data retention and preservation

II. Tier 1: Criminalisation of OCSEA, child friendly justice and law enforcement collaboration

Substantive criminal law is the entry point for any form of law enforcement action. The rule of law prescribes that only conduct which is criminalised through a legislative act can be sanctioned by the state and hence investigated by law enforcement. Substantive criminal law typically consists of a definition of the subject of the provision and a catalogue of offences which details which type of behaviour in relation to the subject matter should be criminalised.

For all provisions under this section, AMS are encouraged to:

- also criminalise auxiliary actions such as aiding and abetting of such offences; and
- criminalise the attempt to commit any of such offences.

For jurisdictions in which the criminalisation of auxiliary actions or attempt only applies when explicitly mentioned in the criminal provision, such subsections should be added to the legal provisions as appropriate.

1. Child sexual abuse material

Definition

Standard: The RPA defines ‘child sexual abuse material’ as ‘any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes’²⁴.

The comprehensive criminalisation of actions related to child sexual abuse material (formerly known as ‘child pornography’) is at the core of OCSEA legislation.

Terminology:

It is important to note that the CRC Committee endorsed a terminology shift away from ‘child pornography’.²⁵ The reasoning is that ‘pornography’ usually describes adults engaging in consensual sexual activity which is depicted and distributed for sexual arousal. Therefore, the labelling of ‘child sexual abuse material’ as ‘pornography’ might create the impression that the child is consenting to the sexual activity and hence can be categorised as legitimate sexual material. Therefore, the CRC Committee recommends using the terms suggested in the so-called Luxembourg Guidelines²⁶, which recommend the terms ‘use of children in pornographic performances and materials’, ‘child sexual abuse material’ or ‘child sexual exploitation material’²⁷.

24 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, p. 3.

25 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156 (10 September 2019).

26 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156 (10 September 2019).

27 ECPAT International, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016.

As a minimum the definition of ‘child sexual abuse material’ enshrined by law should cover the below elements²⁸:

- **Any representation, by whatever means²⁹**: this phrasing reflects the vast variety of depictions of child sexual abuse material, including, but not limited to, visual, audio, and written material, as well physical objects such as sculptures³⁰;
- **of a child**: Art 1 CRC defines a child as every human being below the age of 18 years. In the context of the definition of ‘child sexual abuse material’, the term ‘child’ should not only cover human beings below the age of eighteen years but also include virtual (i.e. computer-generated) children as well as persons made to appear as minors (i.e. an adult posing as a child)³¹; the reason for the inclusion of virtual children and persons made to appear as minors is that such pornographic material normalises the sexual abuse and exploitation of children and is hence harmful in and of itself;
- **engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes**: this element of the definition describes the conduct the child is engaged in; this includes the child’s engagement in sexual activities and the depiction of the sexual parts of a child for a primarily sexual purposes; the CRC Committee’s Guidelines define the term ‘sexual activities’ to include ‘at a minimum and whether real or simulated, all forms of sexual intercourse and intentional sexual touching involving a child, independent of the sex of all involved persons, and any lascivious exhibition of the genitals or the pubic area of a child’.³²

Best practice example: definition of ‘child sexual abuse material’:

The South Korean Act on The Protection of Children and Youth Against Sex Offense [Enforcement Date 10. Dec, 2020.] [Act No.17352, 09. Jun, 2020., Amendment By Other Act] provides a clear definition of ‘child or youth sexual exploitation material’ in its Article 2:

‘The term “child or youth sexual exploitation materials” means depiction of children or youth, or persons or representations that can be obviously perceived as children or youth, doing any act defined in any of subparagraph 4 or engaging in any other sexual act, in the form of a film, video, game software, or picture, image, etc. displayed on computers, or other communications media.’

An act as defined in subparagraph 4 includes the following:

- ‘(a) Sexual intercourse;*
- (b) Pseudo-sexual intercourse using part of the body, such as the mouth and anus, or implements;*
- (c) Contacting or exposing all or part of the body, which causes sexual humiliation or repugnance of ordinary people;*
- (d) Masturbation’.*

Please note that the above definition is lacking a clear reference to ‘any representation of the sexual parts of a child for primarily sexual purposes’ as set out by the OPSC. Such a reference should be added in any future legislation.

28 Largely based on Art 2 OPSC, with some additions; see also UNICEF, *Legislating for the Digital Age*, New York 2022.

29 Wording as set out in Art 2 OPSC.

30 ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016.

31 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156 (10 September 2019); see also the extended definition of ‘child pornography’ in Art 9(2) Council of Europe Convention on Cybercrime.

32 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

Further guidance on self-generated material³³ by children: It has to be noted that the **consent of the child is irrelevant** in the context of child sexual abuse material as children can never consent to their own abuse or exploitation.³⁴ This is particularly important when assessing the emerging category of ‘self-generated’ material, i.e. material which the child produced him- or herself. As set out by the RPA, the category of ‘self-generated’ material includes both *voluntary* produced material as a form of experimentation within a child’s peer group, as well as *coerced* material. According to the CRC Committee’s Guidelines, any material which is ‘self-generated’ as a result of coercion or blackmail, should be categorised as child sexual abuse material³⁵, meaning that the child’s consent is irrelevant. In contrast to this stands self-generated material which is produced and shared on a *voluntary* basis between consenting adolescents as part of a developmentally appropriate sexual relationship (also called ‘sexting’). Online sexual exploration such as ‘sexting’ is becoming a significant component of adolescents’ sexuality.³⁶ The CRC Committee’s Guidelines acknowledge that ‘sexting’ is increasingly considered normal by adolescents.³⁷ Sexuality, identity, intimacy, and interpersonal connection are matters of interest to adolescents in their journey of identity exploration and construction. While these areas have been traditionally explored through in-person interactions, an increasingly important realm for such activities is the Internet. Therefore, self-generated material which is produced and shared in the above context might not be exploitative or abusive *per se*, which means that adolescents under very narrow circumstances can be considered able to give consent.

The CRC Committee’s Guidelines recommend that ‘States parties should not criminalise adolescents of similar ages for consensual sexual activity’³⁸ and applies the same standard to online sexual activity, stating that ‘children should not be held criminally liable for producing images of themselves’.³⁹ Therefore, it is recommended to include an exemption clause for sexual material produced amongst consenting adolescents who have reached the age of consent and who produce and possess this material for their private use only.⁴⁰ In order to ensure that such an exemption clause is sufficiently narrow, it should observe the below elements as **collective** elements:

1. only for possession and production of sexual material depicting children (not: dissemination) AND
2. only for children who have reached the age of consent to sexual activity AND
3. for material possessed and produced with their consent (material is either jointly produced and possessed, or produced by one party (e.g. through a selfie) and then consensually received and possessed by the other party) and only for private use (hence not for commercial use or for sharing with third parties).

33 This term should not be interpreted to put any blame on the victim, see UNICEF, *Legislating for the Digital Age*, New York 2022.

34 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156 (10 September 2019).

35 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

36 Noting that teenagers increasingly consider sexting to be ‘normal’, CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

37 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

38 See also CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156; acknowledging that the setting of an age of sexual consent recognises children’s evolving capacities, ECPAT, *Explanatory Report to the Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Bangkok 2019.

39 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

40 See for detailed elaboration on this subject matter UNICEF, *Legislating for the Digital Age*, New York 2022.

At the same time, the Committee also recommends that in cases where initially consensually produced material is further distributed without the consent of the depicted child, the distributors should be held criminally liable.⁴¹ This covers cases where one of the children involved shares the material with other people, without the consent of the depicted child, for example after the relationship ends. Situations where the depicted child withdraws their consent and the other child continues to possess, i.e. does not delete, the material despite the clearly elaborated wish of the depicted child should be treated similarly. In such cases, the Committee stresses that 'legislative and other measures to combat sexual offences should explicitly differentiate between adult and child offenders, with particular emphasis on the reformability of the latter. In considering the definition and prohibition of sexual offences, it is important to avoid drawing children and adolescents into the criminal justice system, due to their special status. Children should always be dealt with in specialised systems, which should divert them to therapeutic services where appropriate and avoid criminal records or inclusion in registers.'⁴² This approach is confirmed by the RPA, which stresses under Activity 1.2.3 that children in conflict with the law should be provided with emotional, psychological and social support, and measures should focus on rehabilitation and reintegration into their families and communities.⁴³

Best practice example: exemption clause consensual 'sexting' between adolescents for private use only:

Art 20 (3) Lanzarote Convention is the only international instrument providing for such an exemption clause which reads as follows:

Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material [...] involving children who have reached the age set in application of Article 18, paragraph 2 [age of consent], where these images are produced and possessed by them with their consent and solely for their own private use.

Catalogue of offences

Standard: The RPA in its Annex 3 stresses that in particular the mere possession, production, dissemination of child sexual abuse material and live-streaming of child sexual exploitation and abuse should be criminalised.⁴⁴

The catalogue of offences in relation to child sexual abuse material needs to attach a criminal consequence to the conduct of each participant in the chain, from production to possession/consumption.⁴⁵ A comprehensive catalogue of offences should at least cover the below acts:

- **producing child sexual abuse material:** this covers acts such as filming, photographing or writing, but also creating virtual child sexual abuse imagery or screen-shooting the live-streaming of child sexual exploitation and abuse;

41 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

42 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

43 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, p. 7.

44 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3.

45 UNICEF, *Legislating for the Digital Age*, New York 2022.

- **offering, selling or making available child sexual abuse material:** this covers acts of dissemination which are targeted at a specific person or a specific group of persons, e.g. as part of an exchange with another person or 'payment' to get access to a child sexual abuse forum;
- **importing or exporting child sexual abuse material:** this covers acts of bringing child sexual abuse material in and out of a specific country;
- **distributing or transmitting child sexual abuse material:** this covers acts of dissemination to an unspecified group of persons, e.g. uploading material to a website;
- **possessing child sexual abuse material:** the RPA stresses that in particular the 'mere' possession of child sexual abuse material (meaning possession without intent of further distribution, dissemination etc.) should be criminalised; this emphasis stems from a gap in the OPSC, which criminalises possession of child sexual abuse material only for the purposes of distributing, disseminating, importing, exporting, offering or selling⁴⁶; the CRC Committee's Guidelines acknowledge that such a 'conditional' possession is too narrow and hence recommends the criminalisation of the 'mere possession' of child sexual abuse material⁴⁷;
- **obtaining access to child sexual abuse material:** this phrase expands the catalogue of offences to acts whereby child sexual abuse material is not permanently stored and hence possessed, e.g. because the material is not downloaded;
- **accessing online child sexual exploitation and abuse:** this particularly covers situation of live-streaming, which the RPA defines as 'child sexual exploitation and abuse (CSEA) carried out in real-time and viewed through streaming (and sometimes recording) the content online, while the victim and perpetrator are in different or in the same countries'⁴⁸. As streamed content is technically not a 'material' since it leaves no digital trail and is not preserved as digital media, livestreaming or similar acts might not be considered to fall under the previous point (obtaining access to child sexual abuse material).

Best practice example: Catalogue of offences (child sexual abuse material)

The Republic of Korea Act on the Protection of Children and Youth against Sex Offense [Enforcement Date 10. Dec, 2020.] [Act No.17352, 09. Jun, 2020., Amendment By Other Act] provides a comprehensive catalogue of offences for 'child or youth sexual exploitation material' in its Article 10:

- (1) *Any person who produces, imports, or exports child or youth sexual exploitation materials shall be punished by imprisonment with labor for an indefinite term or for a limited term of at least five years.*
- (2) *Any person who sells, lends, distributes, or provides child or youth sexual exploitation materials for commercial purposes, or possesses, transports, advertises or introduce them for any of such purposes, or publicly exhibits or displays them shall be punished by imprisonment with labor for not more than five years.*

46 See art 3 (1) c. OPSC: 'Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.'

47 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

48 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, p. 3.

(3) Any person who distributes or provides child or youth sexual exploitation materials, advertises or introduces them for any of such purposes, or publicly exhibits or displays them shall be punished by imprisonment with labor for not more than three years.

(4) Any person who procures a child or youth for a child or youth sexual exploitation materials producer, knowing that he or she is to be used for producing child or youth child or youth sexual exploitation materials, shall be punished by imprisonment with labor for at least three years.

(5) Any person who purchases child or youth sexual exploitation materials or possesses or views them with the knowledge that it is a child or youth sexual exploitation materials, shall be punished by imprisonment with labor for at least one year.

(6) Any person who attempts to commit an offense prescribed in paragraph (1) shall be punished.

Please note that the above does not make explicit reference to accessing online child sexual exploitation and abuse. This aspect should be added in any future national legislation.

2. Grooming

Standard: The RPA defines ‘grooming’ as ‘the process of an adult establishing or building a relationship with a child either in person or through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with the child’⁴⁹.

Grooming can include sharing CSAM with the child to ‘normalize’ sexual abuse, encouraging and then coercing the child into producing images or videos of sexual acts. Technology may also be used to facilitate access to a child in real life, or to progress grooming tactics from non-sexualised contact to sexual contact in cases where the perpetrator already knows the child.

Cases of child sex offenders grooming children via chatrooms and social media sites are increasingly being documented in Southeast Asia. The practice of grooming children for subsequent sexual exploitation has been identified in particular in Cambodia, the Philippines, Thailand and Viet Nam.⁵⁰ In order to avoid detection, offenders move the conversation from public to private messaging platforms or use multiple platforms at the same time.⁵¹

Against this background, the elements of a ‘online grooming of children for sexual purposes’ offence should include the following elements:

- **Contacting a child:** child should be defined as a person below the age of 18 years, as per the RPA⁵²;
- **Through the use of information and communication technology:** this covers broadly all technology enabling communication, such as devices, platforms, networks and other telecommunication avenues;

49 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, p. 3.

50 ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in Thailand – Evidence on online child sexual exploitation and abuse*, 2022; ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in the Philippines – Evidence on online child sexual exploitation and abuse*, 2022; ECPAT International/INTERPOL/UNICEF, *Disrupting Harm in Viet Nam – Evidence on online child sexual exploitation and abuse*, 2022.

51 WeProtect Global Alliance, *Global Threat Assessment 2021*, 2021.

52 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021.

- **With the intent of luring or inciting the child to engage in any sexual activity by any means, whether online or offline:** firstly, it is important to note that the intended abuse can take place online or offline, as per the RPA: even though the wording of some treaties such as the 2007 Lanzarote Convention require an intent to meet the child in person (and hence offline), it has become increasingly common for offenders to sexually abuse children without an explicit intention to meet and abuse them in person, by, for example, manipulating them into self-generating and sharing sexual content through digital technologies. Positively, in 2015 the Lanzarote Committee issued an opinion recommending that states should extend the crime of grooming for sexual purposes to include “cases when the sexual abuse is not the result of a meeting in person, but is committed online”⁵³; further, the mere *intent* to abuse the child online or offline is sufficient to constitute grooming; it is not necessary that the intended abuse actually takes place; grooming hence criminalises **preparatory actions** to online or offline child sexual abuse, acknowledging the potential harm grooming can inflict on the child.

Best practice example: grooming

The Argentinian Penal Code, Law 11.179, criminalises grooming as follows:

Article 131. *Anyone who, by means of electronic communications, telecommunications or any other data transmission technology, contacts a minor, with the purpose of committing any crime against the sexual integrity of the minor will be punished with imprisonment from six (6) months to four (4) years.*

3. Sexual extortion

Standard: The RPA defines sexual extortion as the ‘blackmailing of a child with the help of images of that child, including self-generated images of that child in order to extort sexual favours, money, or other benefits from her/him under the threat of sharing the material beyond the consent of the depicted child (e.g. posting images on social media)’⁵⁴ and recommends it explicit Criminalisation.⁵⁵

Similarly, the CRC Committee defines ‘sexual extortion’ as ‘a practice whereby a child is forced into agreeing to give sexual favours, money or other benefits under the threat of sexual material depicting the child being shared on, for example, social media’.⁵⁶ Sexual extortion is often linked to grooming or self-generated material, whereby the initial material which is later used to blackmail the child might have been shared by the child as part of an initial exchange between child and perpetrator.⁵⁷ Another strategy is to superimpose images of child victims on pornographic images from other sources, and then threaten the child to widely disseminate this material or directly send it to the child’s family and friends.⁵⁸

53 ECPAT, *Legislation addressing online child sexual exploitation and abuse in the Disrupting Harm countries. Disrupting Harm Data Insight*, Bangkok (forthcoming publication).

54 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, p. 2.

55 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3.

56 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

57 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156; UNICEF, *Legislating for the Digital Age*, New York 2022.

58 UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015.

Against this background, the elements of a 'sexual extortion' offence should include the following elements:

- **Blackmailing, forcing or pressuring a child:** a child should be defined as a person below the age of 18 years; blackmailing, forcing or pressuring should be understood from a child's perspective, i.e. did the child feel that they had no other choice than complying, rather than asking whether the child could *de facto* have resisted the requests; considering the developmental stage of the child and its individual characteristics, this needs to be assessed on a case by case basis;
- **into agreeing to give sexual favours, money or other benefits, both online or offline, to the offender or another person:** by using the term 'agreeing to give benefits' it is clear that benefits indeed do not have to be given, the mere agreement from the child's side is sufficient; further, the benefits can favour either the perpetrator or another person;
- **under the threat of sharing sexual images of the child without its consent with third parties:** this could include self-generated material which the child produced as a result of grooming (see above), material depicting the sexual abuse of the child or any other avenues through which the perpetrator collected sexual images of the child.

Best practice example: sexual extortion

The Ghanaian Cybersecurity Act (No. 1038), 2020 introduced a new crime of online sexual extortion:

66. (1) *A person shall not threaten to distribute by post, email, text, or transmit, by electronic means or otherwise, a private image or moving images of the other person engaged in sexually explicit conduct, with the specific intent to*

- (a) harass, threaten, coerce, intimidate or exert any undue influence on the person, especially to extort money or other consideration or to compel the victim to engage in unwanted sexual activity; or*
- (b) actually extort money or other consideration or compel the victim to engage in unwanted sexual activity.*

(2) *A person shall not threaten to distribute by post, email, text, or transmit, by electronic means or otherwise, an intimate image of a child engaged in sexually explicit conduct, with the specific intent to*

- (a) harass, threaten, coerce, or intimidate the person, especially with intent to extort money or other consideration or to compel the victim to engage in unwanted sexual activity; or*
- (b) actually extort money or other consideration or compel the victim to engage in unwanted sexual activity.*

4. Extraterritorial jurisdiction

Standard: The RPA encourages AMS to aim to establish extraterritorial jurisdiction, in accordance with each AMS' relevant obligations under Art 4 OPSC, for all offences of sexual exploitation of children, including those occurring in the online environment.⁵⁹

Jurisdiction is based on two principles: territoriality and extra-territoriality.⁶⁰ The CRC Committee's Guidelines define the extra-territorial jurisdiction as jurisdiction over offences which are committed outside a state's territory.⁶¹ Considering that OCSEA offences often include a child and a perpetrator from two different countries, the establishment of extra-territorial jurisdiction allows AMS to prosecute criminal offences even where these have not been committed on the country's territory. As extra-territorial jurisdiction potentially violates the sovereignty of another state, the default rule is that extra-territorial jurisdiction can only be exercised if there is a specific permissive rule.

The RPA hereby makes specific reference to Art 4 OPSC. Article 4 (1) of the OPSC requires a State party to establish its jurisdiction over offences committed in the State party's territory (territorial jurisdiction), including ships and aircrafts registered in the concerned state. Art 4 (2) OPSC provides a States parties with the discretion to have extraterritorial jurisdiction and extends jurisdictions to offences where the alleged offender is a national of that State or a person who has his habitual residence in its territory and to cases where the victim is a national of that State.

Therefore, extraterritorial jurisdiction as recommended in the RPA can extend to offences which include:

- An offender who is a national of the state; or
- An offender who has habitual residence in the state; or
- A victim who is a national of the state.

In addition, the CRC Committee's Guidelines encourage states to extend extraterritorial jurisdiction to victims who have habitual residence in the state.⁶² This goes beyond the wording of Art 4 OPSC but is recommended to provide victims full protection and is especially relevant for child victims who are on the move or do not reside in their country of nationality.⁶³

59 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3.

60 Alisdair Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019.

61 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

62 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

63 For more in-depth info see UNICEF, *Legislating for the Digital Age*, New York 2022 and ECPAT, *Extraterritorial Jurisdiction and Extradition Legislation as tools to fight the Sexual Exploitation of Children*, 2022.

Best practice example: extraterritorial jurisdiction

Art 4 OPSC, which is explicitly mentioned by the RPA as legal standard, reads as follows:

1. *Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State.*
2. *Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, in the following cases:*
 - (a) *When the alleged offender is a national of that State or a person who has his habitual residence in its territory;*
 - (b) *When the victim is a national of that State.*

Best practice example: extraterritorial jurisdiction⁶⁴

The **Cambodian Criminal Code** extends extraterritorial jurisdiction to offences committed by Cambodian nationals or offences committed against Cambodian nationals outside its territory, but does not include offences committed by Cambodian residents as set out in Art 4 (2) OPSC:

Article 19:

In a criminal case, the Cambodian Law is applicable to any felony committed by a Cambodian citizen outside the territory of the Kingdom of Cambodia.

Art 20:

In a criminal case, the Cambodian Law is applicable to a felony committed outside the territory of the Kingdom of Cambodia by a Cambodian citizen or by a foreigner when the victim is of Cambodian nationality right at the time the offence was committed.

5. Framework for international and regional cooperation: extradition and mutual legal assistance

Standard: The RPA recommends that AMS ensure that ‘a framework for international and regional cooperation is in place for the purposes of victim identification, and the investigation and prosecution of child sex offenders’.⁶⁵

Event though not explicitly mentioned, this includes the establishment of extradition and mutual legal assistance agreements. Mutual Legal Assistance (hereafter: MLA) and extradition regimes are in most countries governed by a two-pronged system comprising national legislation and bi- or multilateral treaties. While national legislation sets out the domestic procedure for facilitating the requests, many countries require a bi- or multilateral treaty

64 See ECPAT, *Cambodia – Legal Checklist: Key Legal Interventions to Protect Children from Sexual Exploitation in Travel and Tourism*, available here: <https://ecpat.org/country/cambodia/>.

65 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Activity 3.3.

regulating and legitimising such requests at a transnational level with the requesting or receiving state. It is against this background that ASEAN concluded its Treaty on Mutual Legal Assistance in Criminal Matters (hereafter: MLAT) in 2006. The treaty entered into force in 2013 and will be discussed in the context of OCSEA in the below sections.

Extradition

Definition: *Extradition can be defined as ‘the formal process by which one jurisdiction asks another for the enforced return of a person who is in the requested jurisdiction and who is accused or convicted of one or more criminal offences against the law of the requesting jurisdiction’.*⁶⁶

A common requirement in extradition treaties between the requested and requesting states is the double criminality standard.⁶⁷ The double criminality standard means that the conduct must be considered a criminal offence in both the requesting and the requested state. This is endorsed in the Model ASEAN Extradition Treaty⁶⁸. Even though the legal framework within AMS is largely criminalising key aspects of OCSEA offences, the double criminality standard can still be an issue within ASEAN if emerging threats such as live-streaming are concerned which is not criminalised across all AMS. Further, the double criminality standard can be an obstacle when working with other countries outside of ASEAN, which might not have similar elements of crime in their substantive criminal law on OCSEA. It is noted that the CRC Committee’s Guidelines recommend the **abolition of the double criminality standard** for OCSEA offences.⁶⁹ Within the region, the Philippines have abolished the double criminality standard for trafficking in persons offences, which can include OCSEA offences⁷⁰.

Best practice example: extradition

The French Criminal Code. Article 222-22, as amended by Law 2021-478 of 21 April 2021, does not require double criminality for proceeding with active extraterritorial jurisdiction for offences related to sexual exploitation of children committed by French nationals or habitual residents abroad. This removes an obstacle to the exercise of extraterritorial jurisdiction over travelling child sex offenders.⁷¹

Mutual legal assistance

Definition: *Mutual legal assistance in criminal matters is a process by which States seek and provide assistance in gathering evidence for use in criminal cases.*⁷²

Formal processes in the area of Mutual Legal Assistance (MLA) may take a long time and may be cumbersome. It can take months and years to obtain crucial evidence needed for an ongoing investigation. Considering that OCSEA offences are committed through the use of information and communication technologies, the collection of digital evidence becomes a key priority for cross-border investigation. Taking the volatile nature of digital crime scenes into account, it is crucial to have MLA mechanisms in place which are tailored towards digital

66 UNODC, *Manual on Mutual Legal Assistance and Extradition*, New York 2021.

67 ECPAT, *Extraterritorial Jurisdiction and Extradition Legislation as tools to fight the Sexual Exploitation of Children*, 2022.

68 See Option 2 for Paragraph 1 in ASEAN, *Model ASEAN Extradition Treaty*, Vientiane 2018.

69 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156; in comparison, Art 25 (4) Lanzarote Convention abolishes the double criminality requirement only for offences typically committed by travelling sex offenders.

70 See section 26A Expanded Anti-Trafficking in Persons Act of 2012, the Philippines.

71 ECPAT, *Extraterritorial Jurisdiction and Extradition Legislation as tools to fight the Sexual Exploitation of Children*, 2022.

72 UNODC, *Manual on Mutual Legal Assistance and Extradition*, New York 2021.

evidence. Given that in online child sexual abuse cases the depicted child might be under continuous threat of further abuse and exploitation, the situation places immense pressure on law enforcement.

Within ASEAN, Art 1 MLAT sets out that *'the Parties shall, in accordance with this Treaty and subject to their respective domestic laws, render to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings'*. This is followed by a comprehensive list of specific cases when MLA should be rendered, for example for the execution of search and seizures, locating and identifying witnesses, or taking of evidence or voluntary statements from persons. Article 11 (1) describes that *'the Requested Party shall, subject to its domestic laws, arrange to have evidence, including sworn or affirmed testimony, documents or records taken or obtained from witnesses for the purpose of a criminal matter for transmission to the Requesting Party'*. Even though the wording of the provision does not make specific reference to digital evidence types, the MLAT can still form the legal basis for digital evidence if it falls into any of the categories of evidence mentioned above. However, AMS should consider putting in place specific provisions on MLA in the context of digital evidence, which are tailored towards the volatile nature of such evidence.

As an example for such a digital evidence specific MLA regime, the Council of Europe's Budapest Convention and its Second Additional Protocol is the only international treaty with cyber-specific mutual legal assistance and extradition provisions. The so-called Budapest Convention,⁷³ a treaty on cybercrime and international collaboration in this field, is open for signature and ratification by Council of Europe member states but also non-Council of Europe member states. Important global players such as the US, Australia, Canada and Japan are member states, and with the Philippines also an AMS is a member state to the Budapest Convention. Vanuatu and Fiji are currently holding observer status.⁷⁴

Chapter III of the Budapest Convention (International cooperation) contains extradition provisions and a wide range of MLA ones that apply even where no MLA treaty exists between the parties. Specific provisional MLA regulations are complemented by a 24/7 network for speedy mutual assistance among parties. Further, Arts 29 and 30 the Budapest Convention set out provisional measures for the preservation of data, which take the volatile nature of digital evidence into account. On 17 November 2021, the Council of Europe adopted the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence. The Protocol provides a legal basis for disclosure of domain name registration information and for direct co-operation with service providers for subscriber information, effective means to obtain subscriber information and traffic data, immediate co-operation in emergencies, mutual assistance tools, as well as personal data protection safeguards.⁷⁵

In order to create an enabling environment for efficient and timely law enforcement collaboration in OCSEA cases, ASEAN and AMS should consider creating multilateral treaties and national legislation which are tailored towards the processing of digital evidence.

73 Official title: Council of Europe Convention on Cybercrime.

74 See ratification status here: <https://www.coe.int/en/web/cybercrime/parties-observers>.

75 See the text of the Second Protocol here: <https://rm.coe.int/1680a49dab>.

Tip for facilitating extradition in OCSEA cases:

Article 5(2) of the OPSC provides that in the event that a State party makes extradition dependent on the existence of an international treaty, the **OPSC shall serve as legal basis for such an extradition** request. The OPSC covers OCSEA offences. Given that 176 states have ratified the OPSC, the provision can facilitate extradition between States parties to the OPSC, which includes between AMS and between AMS and non-ASEAN countries, subject to their respective domestic legislation.

Art 5 (2): If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the present Protocol to be a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by the law of the requested State.

6. Child victim-friendly justice system

Standard: The RPA encourages AMS to develop child victim-friendly justice systems for children who come into contact with the law as victims, witnesses, offender or complainants to respect both their rights and specific needs and vulnerability⁷⁶.

The Disrupting Harm studies collected valuable information on access to justice for child victims of OCSEA, their caregivers and justice professionals. The evidence shows that ‘children and caregivers who participated in interviews about their engagement with justice processes frequently described feelings of confusion and helplessness throughout police investigations and court procedures. They spoke of receiving little information about what processes to expect, how long procedures would take, or even who would be involved. They regularly had to actively follow up themselves to ensure cases progressed – particularly at the investigation stages⁷⁷. Further, the study revealed that ‘when cases did proceed to court, the disempowerment of many children through these processes was striking. Children and caregivers gave accounts of the court processes that reflected they had little agency and were rarely consulted on whether they understood proceedings or their legal options⁷⁸. In the study, a girl victim from Thailand speaks about her experience in the courtroom testifying in her case and feeling unsafe:

‘I felt so worried because the offenders were sitting behind me, and I was in the middle of the courtroom. They could hear what I was saying. I was afraid that they would hate it. I was afraid they would hate me, and one day... they would take revenge because I had ruined their futures.’⁷⁹

This shows that urgent action is required to create a child victim-friendly justice system for OCSEA victims. As the RPA does not provide for any further detail on how to establish a child victim-friendly justice system, these Guidelines will be based on Art 8 OPSC, which provides detailed guidance on establishing a child victim-friendly justice systems for victims of OCSEA offences. The CRC Committee recommends an interpretation of Art 8 OPSC in line with the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime⁸⁰.

76 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3 vii.

77 ECPAT, *Access to Justice and Legal Remedies for Children Subjected to Online Sexual Exploitation and Abuse*, Bangkok 2022.

78 ECPAT, *Access to Justice and Legal Remedies for Children Subjected to Online Sexual Exploitation and Abuse*, Bangkok 2022.

79 ECPAT, *Access to Justice and Legal Remedies for Children Subjected to Online Sexual Exploitation and Abuse*, Bangkok 2022.

80 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

As AMS are encouraged to ratify the OPSC, they are also encouraged to consider implementing the following points in the OPSC:

Art 8 OPSC lays out standards for child victim-friendly justice:

1. *States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:
 - (a) *Recognising the vulnerability of child victims and adapting procedures to recognise their special needs, including their special needs as witnesses;*
 - (b) *Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;*
 - (c) *Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;*
 - (d) *Providing appropriate support services to child victims throughout the legal process;*
 - (e) *Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;*
 - (f) *Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;*
 - (g) *Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.**
2. *States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.*
3. *States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.*
4. *States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.*
5. *States Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organisations involved in the prevention and/or protection and rehabilitation of victims of such offences.*
6. *Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.*

Child victim-friendly procedures to avoid secondary trauma

Art 8 1) sets out the appropriate measures States parties shall adopt to protect child victims of OPSC at all stages of the criminal justice process. As a first measure, Art 8 1) (a) requires States parties to recognise the vulnerability of child victims and to adapt procedures to recognise the special needs of child victims and witnesses. Regarding the establishment of child victim-friendly and gender-sensitive criminal procedures, States parties should create an enabling environment which avoids secondary traumatisation of the child victim by any means necessary.⁸¹ Forensic interviews should be conducted in a child victim-friendly environment using evidence-based protocols. Avoiding multiple interviews with the child is equally important, as otherwise the child might be under the impression that they are not being believed.⁸² Testimonial aids, such as anatomically correct dolls, can further be helpful to assist the child in expressing themselves.⁸³ Overall, interference with the child's right to privacy should be limited, while ensuring that highest standards of evidence collection are upheld.⁸⁴

A key component to avoid re-traumatisation of the child in the court room environment is to avoid direct confrontation between the child and the accused. Depending on the country context, suitable measures may include using a CCTV system connected to a separate witness room, using one-way mirrors between witness room and court room, or simply alternating the presence between child and accused in the court room.⁸⁵ At the same time, CCTV systems should be used with caution in cases where digital means, such as cameras, were involved in the abuse of the child.⁸⁶ In these cases, the suitability of the use of such measures should be discussed with the child in an age-appropriate manner.

Child's rights to be informed

The child's right to be informed of their rights, their role, the status of the proceedings and the disposition of their cases is a key element of a child victim-friendly justice system.⁸⁷ Child victims of OCSEA might often feel a sense of not being in control of their own lives, as they have been robbed of this control and agency by the violence they experienced. Keeping the child informed at all stages of the criminal trial is therefore key to ensure the child is at the centre of the proceedings. It is essential that the child is informed in a language that the child understands, in an age-appropriate manner and taking any other vulnerabilities such as disabilities into account.⁸⁸

Child's right to be supported throughout the justice process

Art 8 1) (d) OPSC requires States parties to provide appropriate support services throughout the entire legal process. Even though the exact type of services is not specified, this could include the full range of multisectoral support services including legal, medical, social welfare, psychological, psychiatric and any other expertise which might improve the overall wellbeing of the child victim.⁸⁹

81 As stipulated in the context of child rights violations in the digital environment, see CRC Committee, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25.

82 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/15; UN Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, E/CN.15/2005/L.2/Ref.1.

83 UN Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, E/CN.15/2005/L.2/Ref.1.

84 UN Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, E/CN.15/2005/L.2/Ref.1.

85 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156; UN Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, E/CN.15/2005/L.2/Ref.1.

86 ECPAT, *Explanatory Report to the Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Bangkok 2019.

87 Art 8 (1) (b) OPSC.

88 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156; see also WeProtect Global Alliance, *The Sexual exploitation and abuse of deaf and disabled children*, available here: <https://www.weprotect.org/wp-content/uploads/Intelligence-briefing-2021-The-sexual-exploitation-and-abuse-of-disabled-children.pdf>.

89 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

Child's right to privacy during the justice process

Art 8 1) (e) OPSC obliges States parties to protect, as appropriate, the privacy and identity of child victims and to take measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims. Adequately protecting child victims' privacy will enable a conducive court environment where the child feels protected enough to freely speak about the violence they have experienced. Where appropriate and in accordance with national laws, court cases should be held in closed chambers, and States parties should ensure that no information about the child's identity is disclosed to the general public.

Child's right to be protected during the justice process

Art 8 1) (f) and Art 8 5) OPSC oblige States parties to provide, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation. States parties should also, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organisations involved in the prevention and/or protection and rehabilitation of victims of offences under the OPSC. Child victims of OCSEA offences might be exposed to intimidation and retaliation. If the child was violated in the context of organised crime, the child might be exposed to serious threats to stop the child from participating in the criminal justice process. If the child was violated by a family or community member, the child might be pressurised to stop participation in the justice process due to the fear of losing face or bringing 'shame' over the family. AMS should also consider including victims of OCSEA into witness protection programmes or consider them for any witness protection measures as appropriate under national law, on a case-by-case basis. To make the safety of the child victim the utmost priority, a risk assessment needs to be conducted upon the first contact with the justice system. The risk assessment then needs to be constantly reviewed to ensure appropriate protective measures are taken. Such measures can include restraining orders, pre-trial detention of the accused or setting special 'no contact' bail conditions or putting a child victim under witness protection.⁹⁰

Uncertainty regarding the age of the child victim

Art 8 2) OPSC obliges States parties to ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim. Legal identity documents such as birth certificates are an important pre-condition for many children to access the justice system. If they do not have such documents, they might either not be considered a 'child' as their age is not clear, or they might not be considered citizens. States parties are encouraged to ensure that all children, even the ones without legal identity documents, can enjoy legal protection.⁹¹

Training for multi-sectoral stakeholders

As set out in Art 8 4) OPSC, States parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences in the OPSC. Such training for multi-sectoral stakeholders could help avoid any secondary trauma for the child victim⁹² and can include training on understanding and responding to child victims of OCSEA (including information on child development, trauma, effects of testifying in court, disclosure, and memory and others).⁹³

90 UN Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, E/CN.15/2005/L.2/Ref.1.

91 UNICEF, *Legislating for the Digital Age*, New York 2022; ECPAT, *Explanatory Report to the Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Bangkok 2019.

92 UN Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, E/CN.15/2005/L.2/Ref.1.

93 ECPAT, *Explanatory Report to the Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Bangkok 2019.

Best practice example: Child victim-friendly justice⁹⁴

The **Thai Criminal Procedure Act** provides for multiple provisions on the protection of child victims in the criminal justice system:

Section 133 bis: *In a case of a sexual offence, ... a case of offence under the law on protection and suppression of women and children trafficking ..., if the victim or witness is a child not yet over its eighteenth year, the inquirer shall, upon application of such child, interrogate it separately at a place suitable for it and in presence of a psychologist or social worker, a person applied for by it and a public prosecutor. Should the psychologist or social worker entertain an opinion that the interrogation of any child or any question would have a severe impact upon the mental condition of the child, the inquirer shall raise his questions through the psychologist or social worker in a manner that the child is prevented from hearing such questions. Nonetheless, the child shall not be questioned repeatedly without justifiable ground.*

It shall be the duty of the inquirer to inform the psychologist or social worker, the person applied for by the child and the public prosecutor, including the victim or witness being a child, of the rights set forth in paragraph 1.

The victim or witness being a child may enter a challenge against the psychologist, social worker or public prosecutor participating in its interrogation. In this respect, the person so challenged shall be replaced. Subject to section 139, the inquirer shall cause the interrogation of the child under paragraph 1 to be recorded audiovisually by the means allowing a continuous broadcasting in order to bear witness thereof.

In case of an urgent need where it is reasonably unable to await the participation of the psychologist or social worker, the person applied for by the child and the public prosecutor, the inquirer may interrogate the child in presence of any of the persons set forth in paragraph 1, but the grounds whereon such participation cannot be awaited shall be noted down in the inquiry file and the interrogation conducted in such manner shall be deemed lawful.

Section 133 ter: *Where the inquirer deems it is necessary to have the victim or witness being a child not yet over its eighteenth year identifying any person, he shall organise such identification at a place suitable for the child, and by the means of preventing the person to be identified from directing any gaze towards the child, and in presence of a psychologist or social worker, a person applied for by the child and a public prosecutor, save the case of necessity where any of such persons cannot be found or awaited and the child does not require the presence or does not desire to await that person anymore, in which event the inquirer shall note such necessity down in the inquiry file.*

Where the person to be identified is a child not yet over its eighteenth year, the inquirer shall organise such identification at a place suitable for the child and by the means of preventing the child from laying its eyes onto the identifier.

94 See ECPAT, *Thailand – Legal Checklist: Key Legal Interventions to Protect Children from Sexual Exploitation in Travel and Tourism*, available here <https://ecpat.org/resource/thailand-legal-checklist-key-legal-interventions-to-protect-children-from-sexual-exploitation-in-travel-and-tourism/>.

Section 172 ter (2): ... If ... a child witness is not over eighteen years of age or any party requests with reasonable cause which is considered that it may be detrimental to a child if permission is not given as requested, the Court may arrange to reproduce before the parties the image and voice of an injured person or a witness who is a child nor more than eighteen years of age having been recorded in the stage of inquiry under section 133 bis or the stage of preliminary examination under section 171 paragraph two, and it may, if it thinks fit, deem the preserved image and voice of the testimony as a part of his testimony in the stage of trial, by allowing the parties to proceed with more witness examination cross-examination or re-examination, all this must be made as it is necessary and within extent which the Court thinks fit.

III. Tier 2: Ex officio prosecutions, statute of limitations, compensation and holistic care for OCSEA victims, obligations for companies offering digital platforms and services

1. Prosecutions to be initiated without the need for a victim's report

Standard: The RPA in Annex 3 states that criminal investigations and prosecutions should by law be permitted

- a. to be initiated without the need for a report to be made by the victim and
- b. to allow the proceedings to continue even if the victim withdraws⁹⁵.

The right to initiate criminal investigations and prosecutions without a report by the victim are key in OCSEA offences, as in many cases the victim might not be known to the investigator and indeed remain unknown throughout the entire justice process. This will predominantly be the case when investigating the possession and dissemination of child sexual abuse material, as most offenders in the criminal chain have not been involved in the initial production of the material and hence never had direct contact with the child. In order to ensure that law enforcement can however still investigate cases of possession and dissemination where the offender was never in direct contact with the depicted child, it is important to make it clear in the legislation that a victim's report is not required to initiate the criminal justice process. The CRC Committee's Guidelines recommend a similar approach, encouraging States parties to the OPSC to 'allow for the possibility of the prosecution starting an investigation without the victim's complaint'⁹⁶.

Secondly, AMS are encouraged to allow the criminal proceedings to continue even if the victim withdraws from the case. This encompasses cases where the victim is generally known to law enforcement, but either refuses to participate in the investigation from the beginning or withdraws from the case at a later stage. It is important to note that it is the child's decision whether they want to participate in the criminal justice process, hence there should never be an obligation for the child victim to participate. Even in cases where a child victim-friendly justice system exist, children might opt not to participate as it is too difficult for them to relive their experience by telling their story or they might deny that the offence happened in the first place due to trauma. Some children might opt to close the chapter and try to move on with their lives, and this choice should be respected.

However, in appropriate cases, law enforcement and prosecution should be allowed to continue the proceedings. This should be an option provided for by the law, not an obligation. The decision to continue the case without the victim has to be made on a case-by-case basis, depending on whether the prosecution has sufficient

⁹⁵ ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3 x.

⁹⁶ CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

corroborative evidence to prove their case. If the child was the only victim and witness and no corroborative evidence exists, it would not be resourceful to force prosecution to proceed with the case, as it will not have any chance of being successful. AMS should consider including factors in their national legislation or other policy documents which assist prosecution in making this decision, to create a more uniform approach within the criminal justice system. In order to be able to continue with such cases, the CRC Committee's Guidelines urge States parties to 'make full and effective use of crime scene evidence, including digital evidence, and the introduction of such evidence in courts, and of evidentiary rules'⁹⁷. This is directly linked to the Focus Area 2 and 3 RPA which focus on strengthening law enforcement, judicial and legal professional capability investigate and prosecute OCSEA offences.

Best practice example: ex officio prosecution

Art 55 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, better known as the **Istanbul Convention**, encourages member states to include **ex officio prosecution** for offences set out under the Convention. This can also serve as best practice example for OCSEA cases.

Art 55 1): Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependant upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.

2. Statutes of limitation

Standard: The RPA in Annex 3 encourages AMS to 'ensure statutes of limitations for initiating proceedings do not start to run until the victim reaches the age of eighteen'⁹⁸.

Statutes of limitation pose a considerable hurdle of access to justice for child victims of OCSEA offences. Statutes of limitation put an 'expiry date' to specific offences and after the period has passed, prosecution cannot be initiated anymore. They effectively determine a period after which child victims cannot seek justice through the formal criminal justice system anymore. Statutes of limitation differ across AMS, but generally reach from 5 to 20 years for child sex offences.⁹⁹

Such statute of limitations limits the possibility of child victims to seek justice as victims of such offences often report years after they occurred due to a feeling of guilt, shame or fear. Immediate disclosure after a sexual abuse or exploitation incident is the exception rather than the rule. Further facts playing a role in the disclosure process include the nature of the abuse, the impact of the abuse on the child, parental support and family and community support. Often times the child is pressurised to remain silent by the offender, secured by *inter alia*, threats by the perpetrator, a fear of the consequences of the disclosure, denial by the perpetrator and feelings of loyalty towards the perpetrator, especially in cases of intra-family abuse. Male victims have additional unique barriers, such as shame being exacerbated, in wanting to disclose, and that there are other uniquely male fears delaying disclose. In conclusion, disclosure is a gradual process for many children and is more typical in adulthood than in childhood.¹⁰⁰

⁹⁷ CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

⁹⁸ ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3.

⁹⁹ ECPAT/AIPA, *Legal Checklist – key legal interventions to protect children from sexual exploitation in travel and tourism (Cambodia, Indonesia, Philippines, Thailand, Viet Nam)*, Bangkok.

¹⁰⁰ Karen Muller/Karen Hollely, *The Disclosure Process in Cases of Child Sexual Abuse*, Port Elizabeth 2016.

It is against this background that the RPA recommends that the statute of limitations in OCSEA cases should only start running when the child turns eighteen.¹⁰¹ The CRC Committee's Guidelines recommend abolishing statutory limitations altogether, and where this is not feasible, they should only start to run once the victim turns 18 years old.¹⁰²

Best practice example: statute of limitations¹⁰³

In the **Philippines**, section 14 of the **Expanded Anti-Trafficking in Persons Act 10364 (2012)** prescribes that the Statute of limitation period only begins to run after the child turns 18 years old.

SEC. 12. Prescriptive Period. – Trafficking cases under this Act shall prescribe in ten (10) years: Provided, however, that trafficking cases committed by a syndicate or in a large scale as defined under Section 6, or against a child, shall prescribe in twenty (20) years.

*The prescriptive period shall commence to run from the day on which the trafficked person is delivered or released from the conditions of bondage, or **in the case of a child victim, from the day the child reaches the age of majority [...]***

3. Compensation mechanisms for OCSEA victims

Standard: The RPA encourages AMS to provide, in accordance with domestic legal frameworks, accessible mechanisms for legal remedies, such as compensation for child victims of OCSEA¹⁰⁴. Further, the RPA encourages AMS to consider improvements to the victim compensation mechanism (including, as appropriate, developing victim compensation Guidelines) for child victims of OCSEA, and consider establishment of a victim's compensation fund.¹⁰⁵

The RPA provides guidance on adequate and timely compensation for child victims in OCSEA cases, where appropriate. These standards should be interpreted in line with Art 9 (4) OPSC, which provides that States parties shall ensure that all child victims of offences described in the OPSC have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.

The CRC Committee's Guidelines further specify the actions States parties are encouraged to undertake to provide adequate compensation to victims. Firstly, the CRC Committee's Guidelines state that various forms of compensation, not only financial payments, should be available to the victim. To decide which form of compensation is most suitable for a child victim, their specific situation, personal opinion and prospects for life should be taken into consideration. As an alternative or addition to financial compensation, support could be provided for educational or income-generating activities.¹⁰⁶

101 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3.

102 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

103 See ECPAT, *Philippines – Legal Checklist: Key Legal Interventions to Protect Children from Sexual Exploitation in Travel and Tourism*, available here <https://ecpat.org/resource/philippines-key-legal-interventions-to-protect-children-from-sexual-exploitation-in-travel-and-tourism/>.

104 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Activity 1.2.2.

105 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Activity 4.1.5.

106 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

There are various avenues available to the child to seek compensation, depending on the national legal system. Some countries integrate compensation claims into their criminal proceedings, others require children to file a separate lawsuit at the civil courts. Another option is to seek compensation from state managed victim compensation funds.¹⁰⁷ Generally, children face considerable challenges in accessing compensation. Children might lack legal representation, or they may not be made aware of the compensation schemes available to them; state compensation funds might not be tailored towards child victims and they are often intertwined with the criminal justice process; the complexity of transnational cases might create barriers to access compensation.¹⁰⁸ In order to mitigate these challenges, the CRC Committee's Guidelines recommend that children should be supported in their efforts to seek compensation, for example through providing free legal aid.¹⁰⁹ States should also consider ensuring that children are not considered ineligible for compensation schemes if they suffered injuries due to the offences, even if they were also involved in the offences in question. Lastly, if children can only seek compensation through civil courts, the same child victim-friendly and gender-sensitive measures discussed under Art 8 OPSC in the context of criminal procedures should be applied to the civil procedures¹¹⁰ (see section on child victim-friendly justice above). States are also encouraged to provide in their money laundering laws that child victims, as appropriate, can get paid from forfeited assets.¹¹¹

In terms of determining the damage a child has suffered from an OCSEA-related offence, factors to be considered should include the physical and psychological harm, including costs for counselling or loss of earnings due to the victim's inability to work, and the continuous violation of the victim's privacy and dignity. The financial compensation, especially when it comes directly from the perpetrator, is an important aspect in the reparation paid to the victim.¹¹² Besides the financial reparation, additional measures should be put in place to assist the victim's restoration, such as specialised counselling by trained personnel who understand the complex trauma OCSEA victims may experience.¹¹³

In summary, compensation regimes under national law for OCSEA victims should consider the following aspects in accordance with domestic legal frameworks:

- Easily accessible avenues for children to access compensation, such as seeking compensation from the perpetrator or through a national victim compensation fund;
- National Guidelines on victim compensation in OCSEA cases (see best practice example from Philippines below);
- Free legal aid for children who wish to seek compensation, where possible and as appropriate;
- Child victim-friendly and gender sensitive measures used also for civil court proceedings (see section on child victim-friendly justice);
- Wide range of eligible damages, such as physical and psychological harm, including costs for counselling or loss of earnings due to the victim's inability to work, and the continuous violation of the victim's privacy and dignity;

107 ECPAT, *Barriers to Compensation for Child Victims of Sexual Exploitation*, Bangkok 2017; UN Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, E/CN.15/2005/L.2/Ref.1.

108 ECPAT, *Barriers to Compensation for Child Victims of Sexual Exploitation*, Bangkok 2017.

109 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

110 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

111 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156.

112 Suzanne Ost, *A new paradigm of reparation for victims of child pornography*, Legal Studies, Vol. 36 (2016).

113 Suzanne Ost, *A new paradigm of reparation for victims of child pornography*, Legal Studies, Vol. 36 (2016).

- Wide range of compensatory options, such as financial compensation or support for educational or income-generating activities.

Best practice example: compensation for OCSEA victims

Section 44/1 of the Thai Criminal Procedure Code states that the victim is entitled to claim compensation for death, bodily harm, mental harm or loss of bodily freedom, reputation or property injury arisen from the accused person's offence. The victim can file a request with the court holding the criminal proceedings to force the accused person to pay compensation to the victim. Alternatively, OCSEA victims can claim compensation from a state compensation scheme under the **Damages for the Injured Person and Compensations and expenses for the accused in the Criminal Case Act B.E. 2544**, if the injury causing act is considered a criminal offences under the 'Offences relating to Sexuality' Chapter of the Thai Penal Code B.E. 2499 (1956).

One example from the region is the approval of **Compensation Guidelines for victim survivors in the Philippines in 2018**. In addition, the Philippines currently provide free access to legal services, including child-friendly information about children's rights, the procedure of filing complaints, claims for compensation and other legal remedies.

The Guidelines '*prescribe the procedure and flow on processing and management of compensation for victim-survivors of child pornography, which includes, but is not limited to child sexual abuse and exploitation materials (i.e. pornography) and livestreaming.*

1. *To identify accountable officers in the management of compensation for victim-survivors.*
2. *To establish monitoring mechanisms to ensure the efficient and appropriate delivery of services to victim-survivors.*
3. *To establish proper coordination with the children of age beneficiary in the awarding of his/her compensation.'*

4. Considering child victims of OCSEA as children in need of protection and care

Standard: The RPA encourages AMS to review, revise and enact policies, laws, regulations and procedures to ensure appropriate support for child victims is provided throughout investigation and judicial proceedings, including the provision of emotional and psychological support, with attention given to the specific needs of child victims whose parents or guardians are offenders or facilitators of the exploitation and abuse.¹¹⁴

In order to access various child protection services, including solving intra-family abuse and related procedures, a child victim of OCSEA may need to be considered a child in need of protective services as defined by national child protection law. Similar to children who experience offline abuse and exploitation, victims of OCSEA should equally receive support from the multi-sectoral child protection system, where appropriate. The entry point for this is the definition of 'child in need of care and protection' (or a comparable terminology) in national child protection legislations. Such definitions specify which children are considered specifically vulnerable and hence in need of protection by the state. This often includes children who are at risk or have become victims of sexual offences, or criminal offences more generally. Relevant legislation should hence include OCSEA in

¹¹⁴ ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Activity 1.2.2.

its definitions of sexual offences to allow for child protection services to intervene, where appropriate. As set out by the RPA, situations whereby parents or guardians are offenders or facilitators of OCSEA require special attention and should trigger prompt safety measures to protect the child from immediate danger.

In order to set out the standards for support required by OCSEA victims, ASEAN is developing Guidelines for the provision of protective and support services for all child victims and children in contact with the law as a result of OCSEA (see Activity 4.1.6). These will also assist AMS in developing the legal framework to include OCSEA victims into the overall child protection system.

Best practice example: Considering child victims of OCSEA as children in need of protection and care

Section 17 of the **Malaysian Child Act No. 611, 2001**, provides for an explicit inclusion of child victims of OCSEA as children in need of protection and care, especially where the parents and guardians have been involved in the abuse:

17. (1) A child is in need of care and protection if-

(a) the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused by his parent or guardian or a member of his extended family; ...

(2) For the purposes of this Part, a child is-

(c) sexually abused if he has taken part, whether as a participant or an observer, in any activity which is sexual in nature for the purposes of-

(i) any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance ...

5. Obligations for private sector companies offering digital services, products and platforms

Standard: The RPA encourages AMS to establish a legal requirement for private sector companies to report and remove CSAM from their platforms and services when they become aware of it. AMS should endeavour to impose criminal and civil liability and penalties for non-compliance.¹¹⁵

Private sector companies, in particular Internet Service Providers and intermediaries such as social media and gaming companies, play an important role in providing products, services and platforms on which OCSEA can occur. The CRC Committee states in its General Comment No. 25 that ‘although businesses might not be directly involved in perpetrating harmful acts, they can cause or contribute to violations of children’s rights to freedom from violence’.¹¹⁶

Even though such companies are in most jurisdictions generally not liable for the content they are hosting and have no obligation to actively monitoring the content for possible illegality, such companies should at least be obliged to take action once they become aware that they are hosting illegal material on their platforms. There are various venues how companies can become aware of hosting illegal content, such as reports from customers,

¹¹⁵ ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Activity 1.2.4.

¹¹⁶ CRC Committee, *General comment No. 25 (2021) on children’s rights in relation to the digital environment*, CRC/C/GC/25.

victims or concerned partners, ‘trusted flaggers’ such as NGOs or law enforcement. Regardless of how the company became aware of the illegal content, there should be an obligation to report, block and remove child sexual abuse material.

Criminal and civil liability as well as penalties should be imposed by law for non-compliance. In order to set an incentive for companies to take the obligation to report seriously, legal consequences for non-compliance should be strictly enforced.¹¹⁷

Best practice example: Obligation for provide sector companies offering digital services and platforms

The EU has recently reached an agreement on a new Regulation on a Single Market for Digital Services (Digital Services Act) which includes new obligations for intermediary services (including mere conduit, caching, and hosting services) to report suspicions that criminal offences took place. This explicitly includes offences such as ‘child pornography’ offences (see Recital 12). The EU can impose fines not exceeding 6% of a very large platform’s turnover for non-compliance (see Art 52).

Art 18: Notification of suspicions of criminal offences

(1) Where a provider of hosting services becomes aware of any information giving rise to a suspicion that a criminal offence involving a threat to the life or safety of persons has taken place, is taking place or is likely to take place, it shall promptly inform the law enforcement or judicial authorities of the Member State or Member States concerned of its suspicion and provide all relevant information available.

Recital 56 further elaborates on the obligation:

A provider of hosting services may in some instances become aware, such as through a notice by a notifying party or through its own voluntary measures, of information relating to certain activity of a recipient of the service, such as the provision of certain types of illegal content, that reasonably justify, having regard to all relevant circumstances of which the online platform is aware, the suspicion that the recipient may have committed, may be committing or is likely to commit a serious criminal offence involving a threat to the life or safety of person, such as offences specified in Directive 2011/93/EU of the European Parliament and of the Council (Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography) [...].

IV. Tier 3: Private sector regulation

1. Obligations for financial institutions and related actors

Standard: The RPA encourages AMS to categorise commercial transactions involving a) CSAM and b) use or facilitation of live streaming for child sexual abuse as predicate offences under anti-money laundering or other applicable legislation.¹¹⁸

Predicate offences are criminal offences producing revenue which is subsequently laundered. For example, the predicate offence of online child sexual exploitation and abuse can generate revenue, and through one

¹¹⁷ ICMEC, *Child sexual abuse material: Model legislation & Global Review*, 2018.

¹¹⁸ ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Activity 1.2.1, Annex 3 ii).

of the basic steps of placement, layering and integration, conceal the illegal source of the funds, allowing the perpetrator to use the funds without generating suspicion of the underlying criminal activity. A 2020 report by the Anti-Money Laundering Council from the Philippines states that given the continuous emergence of OCSEA and the extent of threat coupled with illegal proceeds involved and the limited enforcement actions and coordination efforts, OCSEA poses a high risk to money laundering.¹¹⁹

The inclusion of CSAM offences as predicate offences in anti-money laundering legislation obliges financial institution to file so-called suspicious transaction reports ('STRs') which might trigger an investigation into the origins of the revenue. Considering that especially in the context of organised crime it is a well-established investigation technique to 'follow the money', the categorisation of OCSEA offences as predicate offences will be an important entry point for investigation of commercial OCSEA activities.

Standard: The RPA encourages AMS to establish a legal requirement for financial institutions to report suspicious transactions that may be related to CSAM or live streaming. AMS should endeavour to impose criminal and civil liability and penalties for non-compliance.¹²⁰

Financial institutions play a key role in detection of suspicious transactions which might be related to OCSEA offences. Such payments might occur in the context of money-laundering (see above), especially in the context of organised crime, but might also cover direct payments to children or to adults facilitating the online sexual abuse and exploitation of the child. Financial institutions which are able to identify and flag suspicious transactions related to OCSEA might provide important information for investigation of OCSEA cases, which law enforcement otherwise would not have been made aware of. Therefore, AMS are encouraged to include a legal requirement for financial institutions to report suspicious transactions which might be related to OCSEA, and impose criminal and civil liability for non-compliance.

Best practice recommendation:

In order to assist financial institutions in the detection and subsequent reporting of suspicious transactions, the Anti-Money Laundering Council from the Republic of the Philippines recommends '*updating and dissemination of red flag indicators, suspicious triggers, and case typologies to the regulators and private sector, particularly to the financial institutions*'.

2. Data protection and privacy rules for children

Standard: The RPA encourages AMS to develop adequate data protection and privacy rules for children.¹²¹

According to Art 16 (1) CRC, no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. The CRC Committee in its General Comment No. 25 notes that privacy is vital to children's agency, dignity and safety and for the exercise of their rights. Digital practices, such

119 Republic of the Philippines Anti-Money Laundering Council, *Online sexual exploitation of children: A crime with a global impact and an evolving transnational threat*, 2020, available here: <http://www.amlc.gov.ph/publications/16-news-and-announcements/238-amlc-study-on-online-sexual-exploitation-on-children>.

120 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Activity 1.2.4.

121 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3.

as automated data processing, may lead to arbitrary or unlawful interference with children's rights to privacy and may have adverse consequences for children.¹²²

The CRC Committee, like the RPA, recommends in its General Comment No. 25 that States parties should take legislative measures to ensure that children's privacy is respected and protected. Such legislation should include strong safeguards, transparency, oversight and access to remedy. To begin with, children's data should be collected and processed for specified, explicit, and legitimate purposes. The purposes and means of data processing need to be made clear and comprehensible to children, allowing them to gain effective and independent control of their personal information. Furthermore, data collected should be limited to those necessary for achieving such purposes in preventing excessive data collection and subsequent violations of children's right to privacy. Additionally, where consent is sought to process children's data, States parties should ensure that consent is informed and freely given by the child, or by the child's parent or guardian, depending on the child's age and evolving capacity.¹²³

The protection of children's data and privacy is typically not an alone standing piece of legislation but embedded in overall data protection legislation. When developing such legislation, it is important that the specific needs and vulnerabilities of children are taken into account, as well as data protection principles including purpose limitation, transparency, data minimisation, and effective consent.¹²⁴

3. Data retention and preservation laws

Standard: The RPA encourages AMS to create data retention and preservation laws and procedures to allow for retention and preservation of digital evidence that applies to ISPs, mobile phone companies, social media companies, cloud storage companies, and the technology industry as a whole.¹²⁵

Data retention and preservation rules are a key prerequisite for law enforcement to obtain relevant information as part of an OCSEA investigation from an ICT company. Access to preserved data is usually prescribed by national law and differs considerably from country to country. Some countries differentiate between the type of data which is being accessed by law enforcement and the legal requirements associated by such a request. As an example, if law enforcement requests access to non-content data (such as an IP address), they might not require a search warrant. A search warrant might however be required for accessing content data (e.g. the content of an email communication). Further, data retention and preservation rules considerably differ for the time period such data is preserved and which type of data is covered by such legislation.¹²⁶ Overall it is important to note that the data retention period needs to strike a balance between availing relevant support to law enforcement and adhering to the principle of data minimisation and storage limitation. Retention measures should be necessary and proportionate regarding the categories of data to be retained, the means of communication affected, the persons concerned and the chosen duration of retention. Furthermore, national authorities' access to the retained data should be conditional and meet certain data protection safeguards.

122 CRC Committee, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25.

123 CRC Committee, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25.

124 UNICEF, *The Case for Better Governance of Children's Data: A Manifesto*, New York 2021.

125 ASEAN, *Regional Plan of Action for Protection of Children from All Forms of Online Abuse and Exploitation in ASEAN*, 2021, Annex 3 ix) RPA.

126 UNODC, *University Module Series – Cybercrime*, available here: <https://www.unodc.org/e4j/en/cybercrime/module-7/key-issues/data-retention--preservation-and-access.html>.

G. Conclusion

Comprehensive legislation is a cornerstone of the effective protection of children from all forms of online exploitation and abuse. AMS are hence encouraged to ensure that their legislation meets the recommended standards in these Guidelines, considering that the prevention and response to online violence against children requires legislation spanning across various areas of law. Creating a regionally comparable standard is further key to create an enabling environment for transnational law enforcement collaboration and take a clear stance as ASEAN against OCSEA offences.

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