

# Online Sexual Exploitation of Children: Applicable Laws, Casework Perspectives, and Recommendations

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## I. INTRODUCTION

*The arc of the moral universe is long, but it bends toward justice.*

— Martin Luther King, Jr.<sup>1</sup>

Children find themselves at the nexus of a worldwide human trafficking crisis in the form of extensive online sexual exploitation of children (OSEC). While the OSEC issue may not be broadly known, the United Nations Children’s Fund has characterized the Philippines as “the global epicent[er] of the live stream sexual abuse trade.”<sup>2</sup> OSEC-related referrals to the Philippines have risen at alarming rates, now numbering in the thousands per month.<sup>3</sup> A growing number of law enforcement OSEC operations involve domestic production of child exploitation materials. In these cases, suspects intentionally provide children online for the purpose of sexual exploitation, in return for profit — the very definition of sex trafficking.<sup>4</sup> As a virulent form of human trafficking, OSEC production must be addressed for what it is — modern sex slavery perpetrated online.

The rise of the Internet and its related technologies has paved the way for perpetrators to commit crimes, such as human trafficking through OSEC production, with greater anonymity, and to target vulnerable victims, such as children, to satisfy an increasing demand for exploitative products worldwide. As the Child Exploitation and Obscenity Section of the United States (US) Department of Justice reports, “[t]he expansion of the Internet

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1. Mychal Denzel Smith, *The Truth About ‘The Arc Of The Moral Universe’*, available at [https://www.huffingtonpost.com/entry/opinion-smith-obama-king\\_us\\_5a5903e0e4b04f3c55a252a4](https://www.huffingtonpost.com/entry/opinion-smith-obama-king_us_5a5903e0e4b04f3c55a252a4) (last accessed Aug. 31, 2018).
  2. Andy Brown, *Safe from harm: Tackling online child sexual abuse in the Philippines*, available at <https://blogs.unicef.org/east-asia-pacific/safe-harm-tackling-online-child-sexual-abuse-philippines> (last accessed Aug. 31, 2018).
  3. See Lorna Patajo-Kapunan, *Online sexual exploitation of children*, BUS. MIRROR, Mar. 11, 2018, available at <https://businessmirror.com.ph/online-sexual-exploitation-of-children> (last accessed Aug. 31, 2018).
  4. International Justice Mission (IJM) Casework Data indicates at least 280 out of 327 rescued Online Sexual Exploitation of Children (OSEC) survivors were victims of trafficking through online exploitation.

and advanced digital technology lies parallel to the explosion of the child pornography market.”<sup>5</sup>

This Article discusses the growing problem of OSEC in the Philippines. Its main idea is that effective law enforcement, robust prosecution, and nuanced victim care are essential in the fight to end OSEC.

Part I — this introduction — provides for OSEC’s definition, scope, and known scale. Part II reviews pertinent laws and international instruments. Part III goes through the process of investigating and prosecuting OSEC cases, and discusses relevant jurisprudence. Finally, Part IV provides recommendations for system and case-level improvement, through the prism of International Justice Mission’s (IJM) collaborative casework experience,<sup>6</sup> ending in an examination of pathways for further study and research.

#### *A. The Internet and Mobile Applications*

The word “Internet” is a popular but seldom defined term in recent Philippine laws.<sup>7</sup> The Supreme Court provides a description of the Internet in *Disini, Jr. v. Secretary of Justice*<sup>8</sup> as a system that allows a user to link to other computers and access an array of activities, libraries, and services.<sup>9</sup> This is similar to the dictionary definition of the Internet as a global computer network.<sup>10</sup>

By design, the Internet facilitates communication and access to services and networks. Anyone online can communicate across borders with ease, often through a computer or a smartphone, with services accessible on a

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5. United States Department of Justice, Child Pornography, *available at* <https://www.justice.gov/criminal-ceos/child-pornography> (last accessed Aug. 31, 2018).
  6. IJM provides law enforcement, aftercare, and prosecution support to government agencies in OSEC casework.
  7. The term Internet is used but not defined in the text or implementing rules of the Cybercrime Prevention Act, Republic Act (R.A.) No. 10175, the Department of Information and Communications Technology Act, R.A. No. 10844, and the Free Internet Access in Public Places Act, R.A. No. 10929.
  8. *Disini, Jr. v. Secretary of Justice*, 716 SCRA 237 (2014).
  9. *Id.* at 297-98.
  10. The Internet is “an electronic communications network that connects computer networks and organizational computer facilities around the world[.]” Merriam Webster, “Internet”, *available at* <https://www.merriam-webster.com/dictionary/Internet> (last accessed Aug. 31, 2018).

browser or through native applications. Video-calling is a standard feature for many Internet-dependent apps.

These applications facilitate communications from one person to another, but unfortunately, they are also used for illicit activities. These include frauds,<sup>11</sup> illegal drug trade,<sup>12</sup> and human trafficking.<sup>13</sup> An increasingly prevalent crime involving the Internet and human trafficking is OSEC production, which benefits from access to video-calling or conferencing for livestreaming offenses.

*B. Online Sexual Exploitation of Children in the Philippines: Definition, Facts, and Figures*

As an umbrella term for many possible offenses, online sexual exploitation of children is not defined *per se* by Philippine law. The Luxembourg Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse<sup>14</sup> utilizes the general term of Online Child Sexual Exploitation, or OCSE, defining it thus — “The reference to ‘online child sexual exploitation’ includes all acts of a sexually exploitative nature carried out against a child that have, at some stage, a connection to the online environment.”<sup>15</sup>

For this Article, the term OCSE is used interchangeably with online sexual exploitation of children, or OSEC.<sup>16</sup> OSEC covers a spectrum of

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11. See Philippine National Police–Anti-Cybercrime Group, Common Types of Internet Fraud/Scams, available at <https://pnpacg.ph/main/resources/common-types-of-internet-fraud-scams> (last accessed Aug. 31, 2018).

12. See *Illegal drug sales on Internet booming*, PHIL. STAR, Feb. 28, 2002, available at <https://www.philstar.com/headlines/2002/02/28/152174/illegal-drug-sales-internet-booming> (last accessed Aug. 31, 2018).

13. See Judge Herbert B. Dixon, Jr., *Human Trafficking and the Internet\* (\*and Other Technologies, too)*, available at [https://www.americanbar.org/publications/judges\\_journal/2013/winter/human\\_trafficking\\_and\\_internet\\_and\\_other\\_technologies\\_too.html](https://www.americanbar.org/publications/judges_journal/2013/winter/human_trafficking_and_internet_and_other_technologies_too.html) (last accessed Aug. 31, 2018).

14. INTERAGENCY WORKING GROUP IN LUXEMBOURG, TERMINOLOGY GUIDELINES FOR THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION AND SEXUAL ABUSE (2016) [hereinafter LUXEMBOURG TERMINOLOGY GUIDELINES].

15. *Id.* at 27.

16. OSEC being the term recommended in A Systematic Literature Review of the Drivers of Violence Affecting Children: the Philippines by Child Protection Network, the University of Edinburgh, and the University of the Philippines, in partnership with UNICEF. See generally United Nations Children’s Fund, A

offenses, including creation, production, distribution, and sale, of child pornography online, punishable domestically under various laws.

The majority of IJM-supported cases in the Philippines involve the facilitation of OSEC production. Such cases involve domestic perpetrators transacting for money in exchange for livestreamed child abuse. Here, identifiable children, including toddlers and infants, find themselves exposed to clear danger. IJM thus focuses its resources on stopping such livestreamed abuse in partnership with Philippine authorities. An advantage of focusing on production cases is that resources go toward the most serious forms of OSEC with higher chances of victim rescue and perpetrator accountability.

On the possible scale of OSEC, the monthly cyber-tips sent by the National Center for Missing and Exploited Children to the Philippines have steadily increased from 1,000 in 2014 to 2,000 per month in early 2015.<sup>17</sup> Many of these cyber-tips involve OSEC offenses. As a hidden crime, the true prevalence and scale of OSEC is challenging to measure.

From 2011 to June 2018, Philippine law enforcement, in collaboration with IJM, facilitated 88 rescue operations involving cases of OSEC. The collaborative effort resulted in the rescue of 327 victims, where 85.6% of victims being children at the time of rescue.<sup>18</sup> 52% of all victims were age twelve or below. More than half of all cases involved sibling groups, and 73% of all cases involved relatives, neighbors, or close family friends as perpetrators.<sup>19</sup> Approximately 15% of all victims were boys, which is an increase in average victims per case vis-a-vis offline sex trafficking cases.<sup>20</sup>

The casework insights in this Article are the result of IJM's learnings across the above 88 rescue operations, and the work of pushing cases through the legal system alongside justice system partners.

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Systematic Literature Review of the Drivers of Violence Affecting Children: the Philippines, available at [https://www.unicef.org/philippines/PHL\\_NBSVAC\\_LitReview.pdf](https://www.unicef.org/philippines/PHL_NBSVAC_LitReview.pdf) (last accessed Aug. 31, 2018).

17. See Patajo-Kapunan, *supra* note 3.

18. IJM's Casework Tracking and Management System Records (on file with the Authors).

19. *Id.*

20. IJM data from 23 April 2001 to 30 June 2018 indicates less than five percent of offline child sex trafficking victims were boys. At the end of 2014, the percentage was even lower at approximately 3.55%.

## II. SURVEY OF LAWS AND JURISPRUDENCE RELATING TO OSEC

The Philippines is well-equipped with laws and jurisprudence needed to combat OSEC. This Part (1) surveys domestic laws and jurisprudence as well as international instruments and (2) synthesizes the application of these authorities as they relate to ground-level casework.

### *A. Domestic Laws and Jurisprudence*

As a collective term for various offenses, OSEC is not defined as a crime *per se*. Rather, it refers to all acts of abuse or exploitation committed against children in the online environment. It includes, among others, livestreaming, distribution, possession, transmission, pandering, and grooming offenses. The Philippines has four special laws, in addition to the those provided by the Revised Penal Code, that punish OSEC in its various iterations.

#### 1. Anti-Trafficking in Persons Act of 2003, as amended

The Expanded Anti-Trafficking in Persons Act of 2012<sup>21</sup> amended the Anti-Trafficking in Persons Act of 2003<sup>22</sup> to define trafficking in persons (TIP) or human trafficking as —

[T]he recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes[,] at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude[,] or the removal or sale of organs.

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21. An Act Expanding Republic Act No. 9208, Entitled “An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for Its Violations and for Other Purposes” [Expanded Anti-Trafficking in Persons Act of 2012], Republic Act No. 10364 (2012).

22. An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for Its Violations and for Other Purposes [Anti-Trafficking in Persons Act of 2003], Republic Act No. 9208 (2003).

The recruitment, transportation, transfer, harboring, adoption[,] or receipt of a child for the purpose of exploitation or when the adoption is induced by any form of consideration for exploitative purposes shall also be considered as ‘trafficking in persons’ even if it does not involve any of the means set forth in the preceding paragraph.<sup>23</sup>

Based on the definition, the elements of trafficking in persons are the following: (1) act, (2) means, and (3) purpose.<sup>24</sup>

An act of trafficking is either recruiting, obtaining, hiring, providing, offering, transporting, transferring, maintaining, harboring, or receiving persons.<sup>25</sup>

The element of means has two classes. The first class of means pertains to those that were employed directly to the victim, i.e., threat, use of force, coercion, abduction, fraud, deception, abuse of power or of position, or taking advantage of the victim’s vulnerability.<sup>26</sup> The second class of means pertains to those that were employed to achieve the consent of the person having control over the victim, i.e., through giving or receiving of payments or benefits.<sup>27</sup> When the victim is a child and the act involved is either recruitment, transportation, transfer, harboring, adoption, or receipt of the child for purposes mentioned, the element of means is dispensable when it does not exist in the facts.<sup>28</sup>

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23. Expanded Anti-Trafficking in Persons Act of 2012, § 3 (a).

24. *People v. Casio*, 744 SCRA 113, 128-29 (2014).

25. Expanded Anti-Trafficking in Persons Act of 2012, § 3 (a), para. 1.

26. *See* Expanded Anti-Trafficking in Persons Act of 2012, § 3 (a), para. 1 & *Casio*, 744 SCRA at 128-29.

27. *Id.*

28. *See* Expanded Anti-Trafficking in Persons Act of 2012, § 3 (a), para. 2. This definition of trafficking in persons is an adoption of Article 3, Paragraph (c) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. It must be noted, however, that the definition of a child in the Protocol is only one who is below 18 years old, but Philippine Law includes those who cannot take care of themselves in the definition of a child. *See* Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime *adopted* Nov. 15, 2000, U.N. Doc. A/RES/55/25, 2237 U.N.T.S. 319, art. 3 (c) & Anti-Trafficking in Persons Act of 2003, § 6 (a).

The victim's knowledge or consent is immaterial in cases of human trafficking.<sup>29</sup> The Court, in *People v. Casio*,<sup>30</sup> said that a "victim's consent is rendered meaningless due to the coercive, abusive, or deceptive means employed by perpetrators of human trafficking."<sup>31</sup> Furthermore, the Court said that "a minor's consent is not given out of his or her own free will" even in the absence of coercion, abuse, or deception.<sup>32</sup> *Casio* recognized the coercive, abusive, or deceptive nature of committing human trafficking.

Human trafficking may be committed in an attempted stage.<sup>33</sup> An attempt to traffic a person is committed when

[t]here are acts to initiate the commission of a trafficking offense but the offender failed to or did not execute all the elements of the crime, by accident[,] or by reason of some cause other than voluntary desistance, such overt acts shall be deemed as an attempt to commit an act of trafficking in persons.<sup>34</sup>

From the above definition, the elements of an attempted trafficking in persons are:

- (1) There is an act initiating the commission of a trafficking;<sup>35</sup>
- (2) The offender failed to or did not execute all the elements of the crime;<sup>36</sup> and
- (3) The reason of for the failure is by accident or other reasons and not by voluntary desistance.<sup>37</sup>

If the victim of trafficking in persons is a child,<sup>38</sup> the law further provides for other acts that would amount to an attempted trafficking in persons.<sup>39</sup>

29. *Casio*, 744 SCRA at 131-32.

30. *People v. Casio*, 744 SCRA 113 (2014).

31. *Id.* at 132 (citing United Nations Office on Drugs and Crime, Human Trafficking FAQs, available at <https://www.unodc.org/unodc/en/human-trafficking/faqs.html> (last accessed Aug. 31, 2018)).

32. *Casio*, 744 SCRA at 132.

33. Anti-Trafficking in Persons Act of 2003, § 4-A.

34. Expanded Anti-Trafficking in Persons Act of 2012, § 5, para, 1.

35. *Id.*

36. *Id.*

37. *Id.*

38. A child, under the law, is one who is under 18 years old or unable to protect oneself from abuse, neglect, cruelty, exploitation, or discrimination due to a physical or mental disability or condition. *Id.* § 3 (b).

As regards the persons liable, the law punishes the principal, accomplice,<sup>40</sup> and accessory<sup>41</sup> to the crime of trafficking. The law punishes a principal depending on whether the act of the perpetrator is an act of trafficking in persons<sup>42</sup> or an act that promotes trafficking in persons.<sup>43</sup>

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39. See Expanded Anti-Trafficking in Persons Act of 2012, § 5, para. 2.

40. *Id.* § 6. An accomplice to the crime of human trafficking is one who “knowingly aids, abets, cooperates in the execution of the offense by previous or simultaneous acts defined in this Act shall be punished in accordance with the provisions of Section 10 (c) of this Act.” *Id.*

41. See Expanded Anti-Trafficking in Persons Act of 2012, § 7. An accessory to the crime of human trafficking is one who

has the knowledge of the commission of the crime, and without having participated therein, either as principal or as accomplices, take part in its commission in any of the following manners:

- (a) By profiting themselves or assisting the offender to profit by the effects of the crime;
- (b) By concealing or destroying the body of the crime or effects or instruments thereof, in order to prevent its discovery; [and]
- (c) By harboring, concealing or assisting in the escape of the principal of the crime, provided the accessory acts with abuse of his or her public functions or is known to be habitually guilty of some other crime.

*Id.*

42. See Expanded Anti-Trafficking in Persons Act of 2012, § 4. The acts of trafficking in persons are as follows:

- (a) To recruit, obtain, hire, provide, offer, transport, transfer, maintain, harbor, or receive a person by any means, including those done under the pretext of domestic or overseas employment[,] or training[,] or apprenticeship, for the purpose of prostitution, pornography, or sexual exploitation;
- (b) To introduce or match for money, profit, or material, economic or other consideration, any person or, as provided for under Republic Act No. 6955, any Filipino woman to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude[,] or debt bondage;
- (c) To offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading them to engage in prostitution, pornography, sexual exploitation, forced labor or slavery, involuntary servitude[,] or debt bondage;

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- (d) To undertake or organize tours and travel plans consisting of tourism packages or activities for the purpose of utilizing and offering persons for prostitution, pornography[,] or sexual exploitation;
  - (e) To maintain or hire a person to engage in prostitution or pornography;
  - (f) To adopt persons by any form of consideration for exploitative purposes or to facilitate the same for purposes of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude[,] or debt bondage;
  - (g) To adopt or facilitate the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude[,] or debt bondage;
  - (h) To recruit, hire, adopt, transport, transfer, obtain, harbor, maintain, provide, offer, receive or abduct a person, by means of threat or use of force, fraud, deceit, violence, coercion, or intimidation for the purpose of removal or sale of organs of said person;
  - (i) To recruit, transport, obtain, transfer, harbor, maintain, offer, hire, provide, receive[,] or adopt a child to engage in armed activities in the Philippines or abroad;
  - (j) To recruit, transport, transfer, harbor, obtain, maintain, offer, hire, provide[,] or receive a person by means defined in Section 3 of this Act for purposes of forced labor, slavery, debt bondage[,] and involuntary servitude, including a scheme, plan, or pattern intended to cause the person either:
    - (1) To believe that if the person did not perform such labor or services, he or she or another person would suffer serious harm or physical restraint; or
    - (2) To abuse or threaten the use of law or the legal processes; and
  - (k) To recruit, transport, harbor, obtain, transfer, maintain, hire, offer, provide, adopt[,] or receive a child for purposes of exploitation or trading them, including but not limited to, the act of baring and/or selling a child for any consideration or for barter for purposes of exploitation. Trafficking for purposes of exploitation of children shall include:
    - (1) All forms of slavery or practices similar to slavery, involuntary servitude, debt bondage[,] and forced labor, including recruitment of children for use in armed conflict;
    - (2) The use, procuring or offering of a child for prostitution, for the production of pornography, or for pornographic performances;

The crime of human trafficking is qualified when, among others, the victim is a child.<sup>44</sup> The punishment for qualified trafficking is life imprisonment and a fine ranging from ₱2,000,000.00 to ₱5,000,000.00.<sup>45</sup>

The recruitment, transportation, transfer, harboring, adoption, providing, or receipt of a child for pornography is a qualified act that carries a penalty of life imprisonment.<sup>46</sup> The actual production of juvenile pornographic material is not an essential element of trafficking, and therefore, it is not necessary to convict a perpetrator.<sup>47</sup> It would necessarily follow, then, that even if no actual pornographic material was made or produced, a perpetrator in an OSEC case is liable under the Anti-Trafficking in Persons Act of 2003, as amended.

This distinction is vital in child-protective operations that utilize entrapment (i.e., a legitimate buy-bust) to secure rescue. It allows law enforcers transacting as poseur-customers to arrest the perpetrator immediately after agreeing on a price for a livestreaming show, greatly increasing the chance of rescuing victims before they experience further harm.

In such cases, the prosecution only needs to show that the perpetrator's act of recruiting, obtaining, hiring, providing, offering, transporting, transferring, maintaining, harboring, or receiving a child is for the purpose of child pornography, a form of sexual exploitation.

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(3) The use, procuring or offering of a child for the production and trafficking of drugs; and

(4) The use, procuring or offering of a child for illegal activities or work which, by its nature or the circumstances in which it is carried out, is likely to harm their health, safety[,] or morals; and

(l) To organize or direct other persons to commit the offenses defined as acts of trafficking under this Act.

*Id.*

43. See Expanded Anti-Trafficking in Persons Act of 2012, § 8.

44. Anti-Trafficking in Persons Act of 2003, § 6 (a). A child is defined as “a person below [ ] (18) years of age or one who is over [ ] (18) but is unable to fully take care of or protect [himself or herself] from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition.” *Id.* § 3 (b).

45. Expanded Anti-Trafficking in Persons Act of 2012, § 12 (e).

46. See Anti-Trafficking in Persons Act of 2003, §§ 3 (a), 4 (a), 6 (a), & 10 (c).

47. See *Casio*, 744 SCRA at 128-30.

## 2. Anti-Child Pornography Act of 2009

The Anti-Child Pornography Act of 2009<sup>48</sup> defines child pornography as “any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic[,] or any other means[ ] of [a] child engaged or involved in real or simulated explicit sexual activities.”<sup>49</sup> A child under the law is

a person below [18] years of age or over, but is unable to fully take care of himself [or] herself from abuse, neglect, cruelty, exploitation[,] or discrimination because of a physical or mental disability or condition.<sup>50</sup>

For the purpose of this Act, a child shall also refer to:

- (1) a person[,] regardless of age[,] who is presented, depicted[,] or portrayed as a child as defined [t]herein; and
- (2) [any] computer-generated, digitally[,] or manually crafted images[,] or graphics of a person who is represented or who is made to appear to be a child as defined [t]herein.<sup>51</sup>

Under the law, the elements of child pornography are as follows:

- (1) There is a written, visual, and/or audio material;
- (2) The content of the material involves a real or simulated explicit sexual activity; and
- (3) The one engaged in the sexual activity, whether a natural person, a graphical representation of a person, or a computer-generated image of a person, is a child or is presented, depicted, or portrayed as a child.<sup>52</sup>

The prohibited acts under the Anti-Child Pornography Act of 2009 are as follows:

- (a) To hire, employ, use, persuade, induce[,] or coerce a child to perform in the creation or production of any form of child pornography;

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48. An Act Defining the Crime of Child Pornography, Prescribing Penalties Therefor and for Other Purposes [Anti-Child Pornography Act of 2009], Republic Act No. 9775 (2009).

49. *Id.* § 3 (b).

50. *Id.* § 3 (a).

51. *Id.*

52. *Id.* § 3 (b).

- (b) To produce, direct, manufacture[,] or create any form of child pornography;
- (c) To publish, offer, transmit, sell, distribute, broadcast, advertise, promote, export[,] or import any form of child pornography;
- (d) To possess any form of child pornography with the intent to sell, distribute, publish, or broadcast: *Provided*. That possession of three (3) or more articles of child pornography of the same form shall be *prima facie* evidence of the intent to sell, distribute, publish[,] or broadcast;
- (e) To knowingly, willfully[,] and intentionally provide a venue for the commission of prohibited acts as, but not limited to, dens, private rooms, cubicles, cinemas, houses[,] or in establishments purporting to be a legitimate business;
- (f) For film distributors, theaters[,] and telecommunication companies, by themselves or in cooperation with other entities, to distribute any form of child pornography;
- (g) For a parent, legal guardian[,] or person having custody or control of a child to knowingly permit the child to engage, participate[,] or assist in any form of child pornography;
- (h) To engage in the luring or grooming of a child;
- (i) To engage in pandering of any form of child pornography;
- (j) To willfully access any form of child pornography;
- (k) To conspire to commit any of the prohibited acts stated in this section. Conspiracy to commit any form of child pornography shall be committed when two (2) or more persons come to an agreement concerning the commission of any of the said prohibited acts and decide to commit it; and
- (l) To possess any form of child pornography.<sup>53</sup>

In relation to other laws, a relevant question would be whether the act of hiring in Section 4 (a) of the Anti-Child Pornography Act of 2009 can be deemed included in Section 4 (a) of the Anti-Trafficking in Persons Act of 2003, as amended in 2012, if the only act involved is hiring a child, for the purpose of having the child engage in pornography.<sup>54</sup>

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53. *Id.* § 4.

54. Compare Anti-Child Pornography Act of 2009, § 4 (a) with Anti-Trafficking in Persons Act of 2003, § 4 (a) (as amended).

### 3. Cybercrime Prevention Act of 2012

Under the Cybercrime Prevention Act of 2012,<sup>55</sup> the acts punishable under the Anti-Child Pornography Act of 2009 when “committed through a computer system” will be punishable by a penalty that is one degree higher than what is provided for by the Anti-Child Pornography Act of 2009.<sup>56</sup> The Supreme Court, in *Disini, Jr. v. Secretary of Justice*, upheld the validity of the provision because it merely expands the scope of the Anti-Child Pornography Act of 2009.<sup>57</sup> This is a mere exercise of legislative prerogative to punish certain acts.<sup>58</sup> Thus, Section 4 (c) (2) of the Cybercrime Prevention Act of 2012 necessarily includes an act under the Anti-Child Pornography Act of 2009.

### 4. Special Protection of Children Against Abuse, Exploitation, and Discrimination Act

The Special Protection of Children Against Abuse, Exploitation, and Discrimination Act provides special protection to children as defined in its Section 3 (a), which includes not only those below 18 years old, but also individuals who are unable to protect themselves from harm due to a physical or mental disability or condition.<sup>59</sup> The law punishes the sexual abuse of a child in various forms, including child prostitution, child

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55. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175 (2012).

56. *Id.* § 4 (c) (2). The term computer system means

any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automated processing of data. It covers any type of device with data processing capabilities including, but not limited to, computers and mobile phones. The device consisting of hardware and software may include input, output[,] and storage components which may stand alone or be connected in a network or other similar devices. It also includes computer data storage devices or media.

*Id.* § 3 (g).

57. *Disini, Jr.*, 716 SCRA at 312.

58. *Id.*

59. An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes [Special Protection of Children Against Abuse, Exploitation, and Discrimination Act], Republic Act No. 7610, § 3 (a).

trafficking, other neglects of cruelty and abuse, obscene shows, and employment of children beyond safe parameters.<sup>60</sup>

Sexual abuse, aside from the engagement of a child to prostitution or sexual intercourse, includes “the employment, use, persuasion, inducement, enticement[,] or coercion of a child to engage in, or assist another person to engage in, sexual intercourse or lascivious conduct[,] or the molestation, prostitution, or incest with children.”<sup>61</sup> The acts of employing, using, persuading, inducing, enticing, or coercing a child to any sexual conduct is broad so as to include that psychological coercion or influence against the child.<sup>62</sup> The law does not require that there is a repetition of any of those acts to constitute an abuse.<sup>63</sup> In *Ricalde v. People*,<sup>64</sup> the Supreme Court said that the mere fact that the child is a victim and intimidation or coercion existed, child abuse exists.<sup>65</sup>

In *Ricalde*, the Court found that even if a violation of the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act was not originally charged in the Information, the facts alleged (the victim being a child) constituted an offense under Republic Act (R.A.) No. 7610.<sup>66</sup> Hence, even if the Information only charges Acts of Lasciviousness under the Revised Penal Code but alleges that the victim is a minor, the trial court may still convict the accused for violation of the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act.<sup>67</sup> It has to be noted, however, that when the accused is convicted of an offense under the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act for Acts of Lasciviousness or Rape, he or she can no

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60. *Id.* §§ 5-12.

61. Rules and Regulations on the Reporting and Investigation of Child Abuse Cases, § 2 (g) (1993).

62. See LEONOR D. BOADO, NOTES AND CASES ON SPECIAL PENAL LAWS 169 (2011) (citing *People v. Larin*, 297 SCRA 309 (1998) & *Malto v. People*, 533 SCRA 643 (2007)).

63. *Ricalde v. People*, 747 SCRA 542, 567 (2015).

64. *Ricalde v. People*, 747 SCRA 542 (2015).

65. See *Ricalde*, 747 SCRA at 566.

66. *Id.*

67. *Id.*

longer be convicted for violating the Revised Penal Code, and vice versa, because it would amount to double jeopardy.<sup>68</sup>

### 5. Revised Penal Code

An OSEC case may involve the commission of several offenses under the Revised Penal Code:<sup>69</sup> (1) rape, (2) acts of lasciviousness, and (3) obscene performances.

Under the Revised Penal Code, as amended, rape may be committed by:

- (1) “[A] man who had carnal knowledge with a woman under 12 years old with or without the latter’s consent”;<sup>70</sup> and
- (2) Any person who committed “an act of sexual assault by inserting his penis into another person’s mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person” and when the victim is under 12 years old.<sup>71</sup>

On top of the offense of Child Pornography, an accused in an OSEC case is liable for rape if the child is below 12 years old and the pornographic material involves a penetration of the mouth, anal orifice, or vagina of the victim. This, however, must be read along with the provisions of the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act.

An act of lasciviousness may also be charged if the sexual material does not involve a penetration to a child’s vagina, anal orifice, or mouth.<sup>72</sup> Distribution of indecent shows, or those that are contrary to public morals, is also punished.<sup>73</sup> The offense of distribution of indecent shows is absorbed by

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68. BOADO, *supra* note 61, at 173 (citing *People v. Abay*, 580 SCRA 235 (2009)). This is subject to the waiver of the accused against double jeopardy. This will be further discussed below.

69. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1932) (as amended).

70. *Id.* art. 266-A (1) (d).

71. *Id.* art. 266-A (2).

72. *Id.* art. 336. *See also* REVISED PENAL CODE, art. 335. This act of lasciviousness includes masturbation, taking off the child’s clothes, and fondling of child’s breast. *See Ricalde*, 747 SCRA at 564 (citing *Garingarao v. People*, 654 SCRA 243, 254 (2011) & *People v. Chingh*, 645 SCRA 573, 587 (2011)).

73. REVISED PENAL CODE, art. 201 (2) (b). *See also* *Gonzalez v. Kalaw-Katigbak*, 137 SCRA 717 (1985) (on the standard in determining whether a material is obscene).

the offense of distribution of child pornographic materials because pornography is necessarily indecent.<sup>74</sup>

### *B. International Instruments Useful in Combating OSEC*

#### *I. Budapest Convention*

On 19 February 2018, the Philippine Senate concurred in the ratification of the Budapest Convention on Cybercrime<sup>75</sup> (Budapest Convention).<sup>76</sup> The Budapest Convention enumerates the duties of Parties in assisting another State-Party on the prosecution of cybercrime offenses.<sup>77</sup> These provisions, except those pertaining to the general principles of mutual assistance,<sup>78</sup> only apply when there are no existing treaties between two States on mutual assistance on the prosecution of cybercrime offenses.<sup>79</sup>

Under the provisions on mutual assistance, each State Party must have a central authority or authorities that will be responsible for the sending, receiving, and acting on requests for assistance.<sup>80</sup> A Party being requested (Requested Party) for assistance may refuse to do so if the assistance would prejudice the pending criminal investigation or proceeding conducted by the Requested Party.<sup>81</sup> The Requesting Party may also request that the action of the Requested Party be kept in confidence.<sup>82</sup>

“In the event of urgency, requests for mutual assistance[,] or communications related thereto[,] may be sent directly by judicial authorities of the [R]equesting Party to [the judicial] authorities of the [R]equested

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74. See generally *Gonzalez*, 137 SCRA (on what constitutes an obscenity).

75. Convention on Cybercrime, *opened for signature* Nov. 23, 2001, ETS No. 185 [hereinafter Budapest Convention].

76. See Senate of the Philippines, Senate Concurs in Ratification of Cybercrime Convention, Agreement Establishing AMRO, and Double Taxation Avoidance Treaties, *available at* [http://www.senate.gov.ph/press\\_release/2018/0219\\_legarda1.asp](http://www.senate.gov.ph/press_release/2018/0219_legarda1.asp) (last accessed Aug. 31, 2018).

77. Budapest Convention, *supra* note 74, arts. 25-30. OSEC is included in the cybercrime offenses in the Budapest Convention.

78. *Id.* art. 25, ¶¶ 1-5.

79. *Id.* art. 27, ¶ 1.

80. *Id.* art. 27, ¶ 2 (a)-(b).

81. *Id.* art. 27, ¶ 5.

82. *Id.* art. 27, ¶ 8.

Party.”<sup>83</sup> A copy of the request shall be sent to the central authority or authorities of the Requested Party.<sup>84</sup>

A Party may also request another Party to conduct searches and seizures and/or preservation of data with respect to a cybercrime offense.<sup>85</sup> The Requested Party may refuse the request if it requires dual criminality.<sup>86</sup>

## 2. Luxembourg Terminology Guidelines

The Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse<sup>87</sup> provides the definition of Online Child Sexual Exploitation (OCSE). It provides that OCSE “includes all acts of a sexually exploitative nature carried out against a child that have, at some stage, a connection to the online environment”<sup>88</sup> and also “includes any use of [Information and Communication Technology] that results in sexual exploitation or causes a child to be sexually exploited or that results in or causes images or other material documenting such sexual exploitation to be produced, bought, sold, possessed, distributed, or transmitted.”<sup>89</sup> It covers the materials that were produced online, i.e., livestreaming of the sexual act performed by the victim, and those produced offline, i.e., those that were recorded offline and were subsequently uploaded to the Internet.<sup>90</sup>

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83. Budapest Convention, *supra* note 74, art. 27, ¶ 9 (a).

84. *Id.*

85. *Id.* art. 29, ¶ 4.

86. *Id.* Dual Criminality is a rule in International Law wherein

the laws of the requested State Party place the offen[s]e within the same category of offence or denominate the offen[s]e by the same terminology as the requesting State Party, if the conduct underlying the offen[s]e for which assistance is sought is a criminal offen[s]e under the laws of both States Parties.

United Nations Office on Drugs and Crime, United Nations Convention Against Corruption at 30, *available at* [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) (last accessed Aug. 31, 2018). In other words, the Dual Criminality rule is satisfied when both the Requesting and Requested States substantially punish the act. *Id.*

87. LUXEMBOURG TERMINOLOGY GUIDELINES, *supra* note 14.

88. *Id.* at 27.

89. *Id.*

90. *See* LUXEMBOURG TERMINOLOGY GUIDELINES, *supra* note 14, at 28.

The Philippines has not adopted the use of the Guidelines through any formal act of legislation or administrative circular. It is, however, submitted that the Guidelines can be seen as helpful in formulating child-protective language. That said, during criminal litigation, technical terms as used and defined in statutes or the Revised Penal Code must prevail over the Guidelines in the event of a conflict.

### 3. Mutual Legal Assistance Treaties

The Philippines entered into different bilateral treaties on mutual legal assistance on criminal matters.<sup>91</sup> These treaties recognize transnational crimes, among which is OSEC. As most customers of OSEC reside outside the Philippines, cooperation between the State where demand for child pornography is generated and the State where the supply for child pornography is produced is necessary to end OSEC.

For example, the Mutual Legal Assistance on criminal matters between the United Kingdom of Great Britain and Northern Ireland and the Republic of the Philippines<sup>92</sup> provides that “[d]ocuments, transcripts, records, statements, and other materials shall be exempted from any [legalization] requirements, including certification or authentication by consular or diplomatic officers.”<sup>93</sup> A Requesting State may request that those materials being requested be authenticated, and the certification of the Central Authority of the Requested State is sufficient for authentication.<sup>94</sup> The general rule therefore is that documents and other materials transmitted by a Requested State is deemed to be authenticated unless the Requesting State so requires. Applying the law to OSEC cases, when a customer of OSEC living in the United Kingdom (UK) is prosecuted there, all documents that were authenticated and admitted in a UK court are

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91. See, e.g., Mutual Legal Assistance on Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Republic of the Philippines, U.K.-Phil., Sep. 18, 2009, 33 U.K.T.S. 1; Treaty Between the Government of the United States of America and the Government of the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters, U.S.-Phil., Sep. 5, 1995, Treaty Doc. 104-18 [hereinafter Mutual Legal Assistance Treaty Between US and Philippines]; & Treaty Between Australia and the Republic of the Philippines on Mutual Assistance in Criminal Matters, Austl.-Phil., Apr. 28, 1988, 37 A.T.S.

92. Mutual Legal Assistance on Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Republic of the Philippines, U.K.-Phil., Sep. 18, 2009, 33 U.K.T.S. 1.

93. *Id.* art. 7, ¶ 1.

94. *Id.* art. 7, ¶ 2.

admissible in a Philippine court without need for a further authentication, unless Philippine authorities require the authentication *upon the request of transmittal of the documents*. The same is true with the documents, reports, and other materials made by UK Law Enforcers because the law in the Treaty does not distinguish whether UK Law Enforcers or other UK authorities produced the material.

A document or material produced by a US Government Authority need not be further authenticated if the official in charge has already authenticated the same in accordance to Form B of the Mutual Legal Assistance Treaty Between the US and Philippines.<sup>95</sup> This rule applies regardless of the availability of the official record to the public.<sup>96</sup> Hence, based on the language of the Treaty, if US Law Enforcers were able to locate the address of a child pornography producer in the Philippines, the Philippine law enforcers may apply immediately for a search warrant upon their receipt of US Law Enforcers' records, and the records are admissible as evidence without need for further authentication.

### C. Synthesis

A constellation of local laws punishing OSEC signifies the strong child-protective policies in Philippine law, utilizing the best interests of the child as a core guiding principle.<sup>97</sup> Together with the international instruments, these laws form a framework for domestic and cross-border collaboration for child-protective outcomes: victim rescue and recovery, as well as perpetrator accountability.

Human trafficking, child pornography, cybercrime, and special protection against abuse laws do not define OSEC as an offense *per se*, but the acts involved in OSEC are defined and punished as crimes by these laws. The Budapest Convention mainly provides for inter-country coordination in the prosecution of cybercrime offenses, which includes OSEC. The Luxembourg Terminology Guidelines serve as a helpful reference in the formulation of child-protective language, but in criminal cases, prosecutors must use the technical terms under local statutes.

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95. Mutual Legal Assistance Treaty Between US and Philippines, *supra* note 90, art. 9, ¶ 3.

96. *Id.* art. 9, ¶ 3. *See also* Mutual Legal Assistance Treaty Between US and Philippines, *supra* 90, art. 9, ¶¶ 1 & 2.

97. *See* Special Protection of Children Against Abuse, Exploitation, and Discrimination Act, § 2.

The assortment of offenses punishing OSEC is beneficial, but it also presents law enforcers and prosecutors with complicated strategic choices. These are discussed further in Parts III and IV of the Article.

### III. PROCESS OF PROSECUTING AND HANDLING OSEC CASES

This Part describes the process of OSEC casework, from investigation to promulgation of judgment and subsequent appeal.

OSEC cases commonly commence through investigations conducted by law enforcement agencies. These investigations may have roots in domestic referrals, foreign referrals, or self-generated investigations. Successful investigations lead to child-protective operations, resulting in victim rescue, perpetrator arrest, or both.

Child-protective operations, when successful, lead to inquest or preliminary investigation, which may trigger the filing of an Information in court, when probable cause exists to charge the offense. Once filed in court, OSEC cases proceed in accordance with the rules of criminal procedure: arraignment, pre-trial, trial, and promulgation of judgment. Post-trial remedies are available after promulgation of judgment.<sup>98</sup>

#### *A. Receipt of Reports and Law Enforcement Investigations*

##### 1. Domestic Referrals

At least 45 domestic referrals led to collaborative child-protective operations as of June 2018.<sup>99</sup> These were prioritized due to the identification of victims in clear danger of ongoing OSEC.

##### 2. International Referrals

Fifty-two international referrals have produced successful child-protective operations as of June 2018. At the current response rate, only a small percentage of referrals (which, on average, can reach thousands per month) can be acted upon at any given time, and priority is given to those with identified victims in present danger.

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98. See generally 2000 REVISED RULES OF CRIMINAL PROCEDURE.

99. The data under this portion and the subsequent one pertain to IJM-assisted casework.

### 3. Self-Generated Cases

To date, law enforcement agencies conducted 27 IJM-supported operations as a result of self-generated leads.

Once an investigation ripens into a possible operation, law enforcement takes action through one of three strategies detailed below.

#### *B. Rescue Operations, Search Warrants, Arrests, and Preliminary Investigations*

##### 1. Rescue Operations, Search Warrants, and Arrests

Child-protective-operations may utilize (1) entrapment, (2) search warrant, or (3) both, depending on the available evidence in each case and the engagement level of the perpetrator.

###### *a. Entrapment*

The leading case on entrapment for human trafficking cases, and by default, most OSEC cases involving entrapment of local facilitators, is *People v. Casio*. *Casio* emphasized entrapment as a necessary and valid tool to apprehend human traffickers.<sup>100</sup> The Court, in *Casio*, declared that flexibility is a trait of good police work.<sup>101</sup> In line with *Casio*, law enforcers have utilized entrapment for time-sensitive operations with the goal of immediately stopping ongoing online sexual exploitation of children.

A further development on entrapment operations was given by the case of *People v. Villanueva*.<sup>102</sup> In *Villanueva*, the Court stated that the arresting officer in an entrapment operation must only be satisfied in his or her mind that a crime is being committed to conduct an arrest.<sup>103</sup> This doctrine is helpful in conducting the arrest in livestream OSEC cases because the arresting officers need not wait for an actual sexual act to occur before conducting the arrest; what is important is that the circumstances are conclusive enough for the arresting officer that a crime is probably being committed or is about to be committed.<sup>104</sup>

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100. *Casio*, 744 SCRA at 138.

101. *Id.* (citing *People v. Padua*, 625 SCRA 220, 239 (2010)).

102. *People v. Villanueva*, 803 SCRA 228 (2016).

103. *See Villanueva*, 803 SCRA at 244.

104. *Id.* at 244-45.

*b. Search Warrants*

Search warrants, on the other hand, have proven useful when (1) entrapment is not possible or (2) further evidence is sought after the fact of arrest.

Further, search warrants, while conceptually unable to provide basis to arrest per se, may lead law enforcers to discover an ongoing crime. In such a situation, they may apprehend the suspect found to be in possession of child abuse materials in accordance with Rule 113, Section 5 of the Rules of Court on warrantless arrests.<sup>105</sup> In one case, the National Bureau of Investigation (NBI) served a search warrant on a suspect and found dozens of hard drives containing child pornography as well as ongoing distribution of child pornography through his home network.<sup>106</sup> They arrested him immediately.<sup>107</sup>

*c. Combination*

A combination of entrapment and search warrant entails the use of both tools in succession — entrapment and then service of search warrant, or the use of the warrant to obtain evidence in the event the entrapment is not successful.

## 2. Preservation and Search of Gathered Evidence

The Rules of Court provide that upon the conduct of the search, whether the search was made by virtue of a search warrant or an arrest, the law enforcers must issue a Receipt of Property Seized.<sup>108</sup> The Receipt of Property Seized provides the inventory of all the items gathered during the search.<sup>109</sup>

The accused or the person searched must sign all the receipts.<sup>110</sup> In an OSEC case, there is a probability that the accused may raise the defense that his or her right against self-incrimination is violated when the computer is found to store child pornographic material after he or she had signed the

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105. REVISED RULES OF CRIMINAL PROCEDURE, rule 113, § 5.

106. *See Police make more child cybersex arrests, rescues*, PHIL. DAILY INQ., May 13, 2017, available at <http://newsinfo.inquirer.net/896397/police-make-more-child-cybersex-arrests-rescues> (last accessed Aug. 31, 2018).

107. *Id.*

108. REVISED RULES OF CRIMINAL PROCEDURE, rule 126, § 11.

109. *Id.*

110. *Id.*

receipt.<sup>111</sup> It is recommended that the prosecution should avoid utilizing the Receipt of Property Seized to prove possession. The prosecution should look for the return on the warrant or the circumstances surrounding the entrapment, which may be used to substantiate the fact of possession during service and execution.

### 3. Inquests and Preliminary Investigations

As with all criminal cases, Informations for OSEC result from: (1) Inquest or (2) Preliminary Investigation. Of the two, inquests have proven most effective in pushing cases from the investigative stage to trial stage. Inquests following entrapment-based arrests have produced an over 90% charge rate,<sup>112</sup> while Preliminary Investigations have taken longer to resolve and are susceptible to additional dilatory activity from defense counsel.

Inquest is the determination of probable cause by a prosecutor when a warrantless arrest was conducted and such arrest initiated the criminal case whereas a preliminary investigation is conducted when the accused is not yet arrested and the criminal case was initiated by a complaint filed before the prosecutor's office.<sup>113</sup> The accused who was arrested without a warrant and was the respondent in the inquest proceeding may request for a preliminary investigation within five days from the time that the accused learned of the filing of the complaint or information against him or her.<sup>114</sup>

### 4. Aftercare of Victims

When an entrapment operation on OSEC cases is conducted, the rescue of the victims is necessarily included.<sup>115</sup> This rescue is conducted, whenever possible, "with the assistance of the [Department of Social Welfare and

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111. *See* *People v. Ang Chun Kit*, 251 SCRA 660, 671-72 (1995) (where the Court held that the signing of an accused of a Receipt of Property Seized that indicates that *shabu* was retrieved in the search amounts to an admission and was inadmissible if he was not assisted by counsel).

112. Data based from IJM assisted cases, as recorded through its IJM Casework Tracking and Management System.

113. *See* WILLARD B. RIANO, *CRIMINAL PROCEDURE (THE BAR LECTURE SERIES)* 202 (2016 ed.) (citing REVISED RULES OF CRIMINAL PROCEDURE, rule 112, § 6 & *Beltran v. People*, 523 SCRA 318, 332 (2007)).

114. REVISED RULES OF CRIMINAL PROCEDURE, rule 112, § 7, para. 3.

115. *See* Rules and Regulations Implementing Republic Act No. 9208, Otherwise Known as the "Anti-Trafficking in Persons Act of 2003", Republic Act No. 9208, art. VIII, § 32 (2003).

Development (DSWD)] or an accredited non-governmental organization that services trafficked victims.”<sup>116</sup> The rescued victims or potential victims must be immediately placed under the custody of the local social welfare and development office or any accredited or licensed shelter institution.<sup>117</sup> The law enforcers must also develop protocols in the gathering of victims’ testimonies considering both the time necessary for the victims to recover and to be debriefed of the operation, and the time necessary to conduct the inquest.<sup>118</sup>

### C. Proceedings Before the Court

#### 1. Information, Motion to Quash, and Bill of Particulars

Once the prosecutor determines that there is probable cause that a crime has been committed by the accused, he or she will issue a resolution and file an Information, along with the supporting documents and pieces of evidence, in the trial court having jurisdiction over the offense and the venue of the offense.<sup>119</sup>

116. Expanded Anti-Trafficking in Persons Act of 2012, § 18.

117. *Id.* The Anti-Trafficking in Persons Act of 2003, as amended, provides —

A law enforcement officer, on a reasonable suspicion that a person is a victim of ... trafficking [in persons] shall immediately place that person in the temporary custody of the local social welfare and development office, or any accredited or licensed shelter institution devoted to protecting trafficked persons after the rescue.

*Id.* (emphasis supplied). See also Special Protection of Children Against Abuse, Exploitation, and Discrimination Act, § 28 & Committee for the Special Protection of Children, Protocol for Case Management of Child Victims of Abuse, Neglect, and Exploitation at 22 (promulgated through a Committee Resolution), available at [https://www.doj.gov.ph/files/transparency\\_seal/2016-Jan/CPN-CSPC%20Protocol%2026Nov2014.pdf](https://www.doj.gov.ph/files/transparency_seal/2016-Jan/CPN-CSPC%20Protocol%2026Nov2014.pdf) (last accessed Aug. 31, 2018).

Furthermore —

The barangay or [Law Enforcement Agency] ... may immediately rescue a child if coordinating the rescue operations with the nearest available social worker would compromise the safety of the child ... As soon as the child is rescued, the child shall be immediately endorsed to [Local Social Welfare and Development Officer][.]”

Committee for the Special Protection of Children, *supra* note 117, at 22.

118. Nina Patricia Sison-Arroyo, *Responsive Law Enforcement Approach to Combating Child Trafficking*, 52 ATENEO L.J. 837, 859-60 (2008).

119. REVISED RULES OF CRIMINAL PROCEDURE, rule 110, §§ 4-5.

*a. Information*

An Information “is an accusation in writing charging a person with an offense subscribed by the prosecutor and filed with the court.”<sup>120</sup> It contains the name of all the accused, designation of the offense given by statute, acts or omissions complained of, name of the offended party, approximate date of the commission, and the place of the commission of the offense.<sup>121</sup>

An Information must charge a single offense, except when the law prescribes a single punishment for two or more offenses.<sup>122</sup> In OSEC cases, there are at least five applicable offenses that may be charged against the accused. These are the following:

- (1) Anti-Trafficking in Persons Act of 2003, as amended;
- (2) Anti-Child Pornography Act of 2009;
- (3) Cybercrime Protection Act of 2012;
- (4) the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act; and
- (5) Rape, Acts of Lasciviousness, or Distribution of Indecent Shows under the Revised Penal Code.

It must be noted, however, that the offense of child pornography under the Cybercrime Protection Act of 2012 necessarily includes the offense under the Anti-Child Pornography Act; therefore, there must only be one Information for a violation of both laws, i.e., Child Pornography under Cybercrime Protection Act of 2012 in relation to Anti-Child Pornography Act of 2009. In addition, the offense under the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act absorbs the felony of rape or acts of lasciviousness of the Revised Penal Code. Hence in most cases, there can be three Informations that can be filed per instance of OSEC.<sup>123</sup>

The place of the commission of the offense is necessary, because in criminal cases, venue is jurisdictional.<sup>124</sup> The names of the parties, if known,

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120. *Id.* rule 110, § 4.

121. *Id.* rule 110, § 6.

122. *Id.* rule 117, § 3.

123. *See generally* People v. Looney, 482 SCRA 194 (2006) (where the Court allowed the filing of several Informations under different penal laws for a single act of the accused).

124. REVISED RULES OF CRIMINAL PROCEDURE, rule 110, § 10.

must also be stated in the Information.<sup>125</sup> An alias or an “also known as” may also be used in OSEC cases if the accused used a username in his or her transactions.<sup>126</sup> The victim’s name may be concealed in the Information considering that it is a matter of public record.<sup>127</sup>

The purpose of an Information is to satisfy the right of the accused to be informed of the nature and the cause of the accusation against him or her.<sup>128</sup> It is not necessary that the Information contains all the details of the prosecution’s theory for it to be valid, but it must be of “such particularity as to apprise the accused, with reasonable certainty of the offense charged to enable the accused to suitably prepare for his [or her] defense.”<sup>129</sup> It must be noted that an Information must only contain ultimate facts and not evidentiary facts.<sup>130</sup>

Upon receipt of the Information(s) and supporting documents thereto, the Court must determine whether there is a probable cause that the accused named in the Information has committed the offense.<sup>131</sup> If the judge finds probable cause, he or she must issue a commitment order addressed to the jail warden if the accused is already under the custody of law enforcers or a warrant of arrest if the accused is at large or is not yet arrested.<sup>132</sup> If the judge finds no probable cause, he or she may either dismiss the case without prejudice or may require the public prosecutor to submit more evidence in support of the accusation against the accused.<sup>133</sup>

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125. See REVISED RULES OF CRIMINAL PROCEDURE, rule 110, § 7.

126. *Id.*

127. See *People v. Cabalquinto*, 502 SCRA 419 (2006) (where the Supreme Court changed the name of the child to AAA to conceal her identity).

128. *Neri v. Sandiganbayan*, 703 SCRA 350, 365.

129. *RIANO*, *supra* note 113, at 85 (citing *Lazarte Jr. v. Sandiganabayan*, 581 SCRA 431, 446 (2009)).

130. *Enrile v. People*, 766 SCRA 1, 36 (2015). Ultimate facts are those that “the evidence will prove at the trial” while evidentiary facts are those that support “the existence of some other alleged and unproven fact.” *Id.* (citing *Salita v. Magtolis*, 233 SCRA 100, 105 (1994) & *Philippine Bank of Communications v. Trazo*, 500 SCRA 242, 256-57 (2006)).

131. *Mendoza v. People*, 722 SCRA 647, 654-55 (2014).

132. *Id.*

133. *Id.*

*b. Motion to Quash v. Motion for Bill of Particulars*

An accused, before arraignment, has two options, i.e., either to file a Motion to Quash the Information or to file a Motion for Bill of Particulars.

A Motion to Quash is a relief sought by the accused to affect a dismissal of his or her case because, among other grounds, the facts alleged in the Information do not constitute an offense.<sup>134</sup> A Motion to Quash is filed before the accused enters his or her plea.<sup>135</sup> It is a proper remedy when the Information does not state the facts constituting the elements of the offense.<sup>136</sup> When the Motion to Quash is granted on the ground of failure allege facts constituting an offense, the dismissal is without prejudice to the filing of a proper Information.<sup>137</sup>

If the Information is vague, the remedy is not to file for a Motion to Quash, but for a Motion for Bill of Particulars.<sup>138</sup> A Motion for Bill of Particulars is a relief wherein the prosecution is ordered to give in detail the “items or specific conduct not recited in the Information but nonetheless pertain to or are included in the crime charged.”<sup>139</sup> In a Motion for Bill of Particulars, the accused admits the sufficiency and validity of the Information but it lacks particularity in a sense that the accused will not be able to arrive at a decision regarding his or her plea or to properly prepare for his or her defense.<sup>140</sup> In other words, the accused was duly informed of the nature and the cause of the accusation against him or her, but the Information is not sufficient for him or her to determine whether he or she will give a plea of guilt.<sup>141</sup>

If an accused fails to move for the specification of the details desired via a Motion for Bill of Particulars, he or she deprived “of the right to object to evidence that could be introduced and admitted under an Information of more or less general terms but which sufficiently charges the accused with a definite crime.”<sup>142</sup>

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134. REVISED RULES OF CRIMINAL PROCEDURE, rule 117, § 3 (a).

135. *Id.* rule 117, § 1.

136. *Id.* rule 117, § 3 (a).

137. *Id.* rule 117, § 5.

138. *Enrile*, 766 SCRA at 44.

139. *Id.* at 40.

140. *Id.* at 39 & 44.

141. *Id.*

142. *Id.* at 45 (citing *People v. Marquez*, 347 SCRA 510, 515 (2000)).

In OSEC cases, the prosecution is well served by stating in the Information the detailed basis of the offense, e.g., enumerating and describing the type and volume of child pornographic materials found in the possession of the accused, which may prevent the defense from filing a Motion for Bill of Particulars.

## 2. Application for Bail

Upon the arrest of an accused, he or she may post bail.<sup>143</sup> Bail is a guarantee that he or she will appear at the trial.<sup>144</sup> Bail, in general, is a matter of right.<sup>145</sup> It is a matter of discretion when the offense is punishable by *reclusion perpetua*, life imprisonment, or death.<sup>146</sup> When bail is a matter of discretion, it must not be granted if the evidence of guilt is strong.<sup>147</sup> If an accused in an OSEC case is charged with qualified trafficking in persons, bail is a matter of discretion because an offense included therein is punishable by life imprisonment.<sup>148</sup>

When bail is a matter of discretion, the accused must file a petition to fix bail, then the prosecution has to present its evidence, and the judge must determine whether the evidence of guilt is strong.<sup>149</sup> The evidence presented during the bail hearing will form part of the records of the trial; a witness in the bail hearing may be recalled for further examination.<sup>150</sup>

When a judge grants bail, he or she orders the accused to appear during the trial in exchange of the accused's temporary liberty.<sup>151</sup> A judge may also impose other conditions in the grant of bail.<sup>152</sup>

## 3. Arraignment, Plea Bargaining, and Pre-Trial

### *a. Arraignment*

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143. RIANO, *supra* note 113, at 317.

144. *Id.* at 316.

145. PHIL. CONST. art. III, § 13.

146. PHIL. CONST. art. III, § 13.

147. PHIL. CONST. art. III, § 13.

148. PHIL. CONST. art. III, § 13. *See also* Anti-Trafficking in Persons Act of 2003, § 10 (e) (as amended).

149. REVISED RULES OF CRIMINAL PROCEDURE, rule 114, §§ 5 & 8.

150. *Id.* rule 114, § 8.

151. *Id.* rule 114, § 2.

152. *See generally* Yap, Jr. v. CA, 358 SCRA 564 (2001).

Before the pre-trial stage, the Court must conduct an arraignment.

Arraignment is indispensable in bringing the accused to court and in notifying him [or her] of the nature and cause of the accusations against him [or her]. ... Procedural due process requires that the accused be arraigned so that he [or she] may be informed of the reason for his indictment, the specific charges he [or she] is bound to face, and the corresponding penalty that could be possibly meted against him [or her].<sup>153</sup>

In the arraignment, the accused will make his or her plea.<sup>154</sup> If the accused enters a guilty plea, the reception of evidence in an OSEC case is discretionary upon the court because the offenses involving OSEC, except qualified trafficking in persons and rape by sexual intercourse, are not capital offenses.<sup>155</sup> The arraignment also opens the opportunity for the accused to plead guilty to a lesser offense that is necessarily included in the offense charged.<sup>156</sup> The attendance of the offended party is also necessary in an arraignment; otherwise, he or she cannot object to the plea of guilty made during the arraignment.<sup>157</sup>

*b. Plea Bargaining*

Plea bargaining is “a process whereby the accused and the prosecution work out a mutually satisfactory disposition of the case subject to court approval.”<sup>158</sup> It is a concession between the prosecution and defense to avoid potential losses and to expedite the criminal proceeding.<sup>159</sup> It may be made either during the arraignment, pre-trial, or after the prosecution rested its case.<sup>160</sup> The plea is subject to the trial court’s discretion.<sup>161</sup>

153. *Kummer v. People*, 705 SCRA 490, 508-09 (2013).

154. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 1.

155. *Id.* rule 116, § 4.

156. *Id.* rule 116, § 2.

157. *Id.* rule 116, § 1 (f).

158. *People v. Villarama, Jr.*, 210 SCRA. 246, 251 (1992) (citing BLACK’S LAW DICTIONARY 1037 (5th ed., 1979)).

159. *Salvador A. Estipona, Jr. v. Hon. Frank E. Lobrigo, G.R. No. 226679*, Aug. 15, 2017, at 16-17, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/august2017/226679.pdf> (last accessed July 24, 2018) (citing *Hughey v. U.S.*, 495 U.S. 411 (1990); *Santobello v. New York*, 404 U.S. 257 (1971); & *Blackledge v. Allison*, 431 U.S. 63 (1977)).

160. *Estipona, G.R. No. 226679*, at 18 (citing *Daan v. Sandiganbayan*, 573 Phil. 368, 376 (2008); *People v. Mamarion*, 459 Phil. 74, 75 (2003); *Ladino v. Hon.*

A plea of guilty may be had on a lesser offense provided that (1) the offense is necessarily included in the offense charged, and (2) the plea is made with the consent of both the offended party and the prosecutor.<sup>162</sup>

*c. Pre-Trial Process*

During the pre-trial, the parties are obliged to stipulate the facts of the case, mark their respective evidence, waive, if any, the objections to admissibility of evidence, and other matters necessary that will promote a fair and expeditious trial of the criminal and civil aspects of the case, such as plea bargaining.<sup>163</sup> If there is any agreement made during the pre-trial, the agreement must be (1) made in writing and (2) signed by the accused and his or her counsel.<sup>164</sup> “All proceedings during the pre-trial shall be recorded, the transcripts prepared and the minutes signed by the parties and/or their counsel.”<sup>165</sup> Plea bargaining should be considered at pre-trial, in accordance with the Supreme Court Guidelines on Pre-trial.<sup>166</sup>

5. Trial

In the trial phase of any criminal case, the parties present their evidence. The sequence begins with the prosecution presenting its evidence, followed by defense evidence, and if needed, prosecution rebuttal evidence, and defense sur-rebuttal evidence.<sup>167</sup>

Since the criminal case of OSEC is usually initiated via entrapment operation, the case of *People v. Villanueva* is instructive. The case of *Villanueva* discussed the evidence necessary in proving the allegations in the

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Garcia, 333 Phil. 254, 258 (1996); & *People v. Villarama, Jr.*, 285 Phil. 723, 731 (1992)).

161. *Estipona*, G.R. No. 226679, at 18 & Daan, 550 SCRA at 240.

162. REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

163. *Id.* rule 118, § 1.

164. *Id.* rule 118, § 2.

165. RIANO, *supra* note 113, at 470.

166. See Supreme Court, Re: Guidelines to be Observed by the Trial Court Judges and Clerks of Court in the Conduct of Pre-Trial and Use of Deposition-Discovery Measures, Administrative Matter No. 03-01-09-SC [A.M. No. 03-01-09-SC] (July 13, 2004).

167. REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 11 (a)-(b).

Information involving TIP when the case is initiated by an entrapment operation.<sup>168</sup>

If the arrest was conducted during an entrapment operation, *Villanueva* dictates that the testimonies of the apprehending officers “are crucial for a conviction, *most especially in cases where the victim is unable to testify.*”<sup>169</sup> Furthermore, the testimonies should contain “the actual unfolding of circumstances which led [the apprehending officers] to believe that a crime was being committed *in flagrante delicto*[.]”<sup>170</sup>

The case is also instructive when the victim is unable to testify. As quoted above, the testimonies of the apprehending officers are necessary especially when the victim is unable to testify.<sup>171</sup> This is because there are instances where the victim of OSEC is less than a year old or too young to testify,<sup>172</sup> is too traumatized to be able to recall the situation, or is not recommended to testify for rehabilitation purposes. Because of those instances that may arise during the life of the case, the prosecution has to rely heavily on the facts and circumstance of the entrapment operation.

In *People v. Rodriguez*,<sup>173</sup> the Supreme Court noted that due to the weakness of the prosecution evidence, acquittal was unavoidable.<sup>174</sup> The Supreme Court noted the presence of only one witness testifying on the facts of the entrapment, and the absence of testimony on the explicit offer of the victims for sexual exploitation.<sup>175</sup> No victims testified in this case.<sup>176</sup>

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168. *See generally Villanueva*, 803 SCRA.

169. *Id.* at 244 (emphasis supplied).

170. *Id.*

171. *Id.*

172. *See, e.g.*, International Justice Mission, *The Youngest Survivor We’ve Ever Met is Now Safe from Cybersex Trafficking* (where the victim of OSEC is a ten-month old baby), available at <http://news.ijm.org/the-youngest-survivor-weve-ever-met-is-now-safe-from-cybersex-trafficking> (last accessed Aug. 31, 2018) & ABS-CBN News, *Nanay arestado dahil sa paggamit ng anak sa Cybersex*, available at <http://news.abs-cbn.com/news/04/27/18/nanay-arestado-dahil-sa-paggamit-ng-anak-sa-cybersex> (last accessed Aug. 31, 2018).

173. *People v. Rodriguez*, G.R. No. 211721 (2017) (unrep).

174. *Id.*

175. *Id.*

176. *Id.*

The Authors submit that *Rodriguez* does not explicitly require victim testimony for a prosecution to be successful, but instead highlights the evidentiary void that results from a lack elemental proof.

In the presentation of evidence in an OSEC case, the Rules on the Examination of a Child Witness and the Rules on Electronic Evidence apply.

*a. Rules on Examination of a Child Witness*

The Rule on Examination of a Child Witness<sup>177</sup> applies whenever a child is accused of an offense, a victim to an offense, or a witness to a crime and to criminal and non-criminal cases.<sup>178</sup> Under the rule, a child may testify inside a courtroom, through a live-link television testimony, or through a videotaped deposition.<sup>179</sup>

When a child is testifying in court, the judge “may, in [his or her] discretion, direct and supervise the location, movement[,] and deportment of all persons in the courtroom” to create a more comfortable environment to the child.<sup>180</sup> The child need not be in the witness stand when he or she gives his or her testimony, provided that the opposing party has a frontal or profile view of the child during his or her testimony.<sup>181</sup> The requirement of allowing the opposing party to have a frontal or profile view of the child does not mean that the child is also required to look at the accused directly, except when the child is asked to identify the accused.<sup>182</sup> The guardian *ad litem* or the prosecutor may also apply for the use of device so that the child cannot see the accused.<sup>183</sup>

In a live-link television testimony in criminal cases, a child is placed in a room outside the courtroom, and his or her testimony is displayed inside the courtroom via a television connected to a camera or other recording device in the other room.<sup>184</sup> The prosecutor, counsel, or guardian *ad litem* may

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177. RULE ON EXAMINATION OF A CHILD WITNESS, A.M. No. 004-07-SC (Nov. 21, 2000).

178. *Id.* § 1.

179. *See* RULE ON EXAMINATION OF A CHILD WITNESS, §§ 13, 25, & 27.

180. RULE ON EXAMINATION OF A CHILD WITNESS, § 13.

181. *Id.* § 13, para. 1.

182. *Id.* § 13, para. 2.

183. *Id.* § 26 (a).

184. *Id.* § 25 (a).

apply for the live-link television testimony taking of the child witness.<sup>185</sup> When the guardian *ad litem* applies for live-link television testimony taking, he or she “shall consult the prosecutor or counsel and shall defer to the judgment of the prosecutor or counsel regarding the necessity of applying for an order.”<sup>186</sup> If the guardian *ad litem* finds that the decision of the prosecutor or counsel could cause serious emotional trauma to a child, the guardian *ad litem* himself or herself may apply for the live-link television testimony taking.<sup>187</sup>

The Court, upon the application of the prosecutor, counsel, or guardian *ad litem* and upon finding that the child will not be able to testify in open court, may order the deposition of the child be taken and preserved by videotape.<sup>188</sup> In the deposition taking, the judge will preside over the deposition taking and any objections to the testimony or evidence in the deposition must be stated and ruled upon at the time of the deposition taking.<sup>189</sup> This rule is similar to the rule when a witness for the prosecution cannot attend the trial but with broader grounds, i.e., only when the judge is satisfied that the child witness will not be able to testify in open court for whatever reason, e.g., re-traumatization of the child.<sup>190</sup>

In the deposition taking, the accused may be excluded therefrom if the court finds that the accused’s physical presence would make the child unable to testify.<sup>191</sup> In such case, the Court may order (1) to have the testimony be made via a live-link television or (2) to exclude the accused only from the view of the child.<sup>192</sup>

A recorded interview of a child with an investigator may be admitted as evidence, thereby dispensing with the requirement of the child to testify in Court, if the following conditions are met:

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185. *Id.* § 25 (a), para. 1.

186. RULE ON EXAMINATION OF A CHILD WITNESS, § 25 (a), para. 2.

187. *Id.*

188. *Id.* § 27 (b). The manner of application by the guardian *ad litem* is the same as the process in Section 25 (a) of the rules. *Id.* § 27 (a).

189. *Id.* § 27 (c).

190. Compare RULE ON EXAMINATION OF A CHILD WITNESS, § 27 (c) with REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 15.

191. RULE ON EXAMINATION OF A CHILD WITNESS, § 27 (e).

192. *Id.* The second course of action may involve the use of a one-way mirror, a screen, or other device.

- (a) The child witness is unable to testify in court on grounds and under conditions established under section 28 (c).
- (b) The interview of the child was conducted by duly trained members of a multidisciplinary team or representatives of law enforcement or child-protective services in situations where child abuse is suspected so as to determine whether child abuse occurred.
- (c) The party offering the videotape or audiotape must prove that:
  - (1) the videotape or audiotape discloses the identity of all individuals present and at all times includes their images and voices;
  - (2) the statement was not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the statement of the child and not the product of improper suggestion;
  - (3) the videotape and audiotape machine or device was capable of recording testimony;
  - (4) the person operating the device was competent to operate it;
  - (5) the videotape or audiotape is authentic and correct; and
  - (6) it has been duly preserved.<sup>193</sup>

The person who conducted the interview shall be available at the trial for examination by any party, and all parties may examine the videotape or audiotape and its written transcript before the videotape or audiotape is offered in evidence.<sup>194</sup>

*b. Rule on Electronic Evidence*

The Supreme Court has clarified that the Rules on Electronic Evidence applies to criminal cases.<sup>195</sup> This Section discusses the core characteristics of electronic documents, their admissibility, and methods of authentication.

The core characteristics of an electronic document as defined under the rules is that (1) it is information or a representation of information, data, figures, symbols, or other modes of written expression; (2), it bears a

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193. *Id.* § 29.

194. *Id.*

195. *See generally* People v. Enojas, 718 SCRA 313, 10 (2014) (applying AM 01-7-01-SC September 24, 2002, modifying the Rules on Electronic Evidence to apply to criminal cases).

connection to rights, obligations, or facts; finally, (3) it is received, recorded, transmitted, stored, processed, retrieved or produced electronically.<sup>196</sup>

Electronic documents are admissible when (1) introduced in accordance with the Rules of Court and (2) authenticated in accordance with the Rules on Electronic Evidence.<sup>197</sup>

Private electronic documents introduced to prove the truth of their contents (and therefore, documentary evidence) must comply with the best evidence rule and prescribed authentication procedures. In practice, this means providing a printout or output readable by sight or other means, shown to reflect the data accurately<sup>198</sup> and proving the integrity and reliability of the document to the satisfaction of the judge.<sup>199</sup>

When video or audio in electronic document form is introduced to prove the truth of the events recorded, it should be authenticated through the above procedure, with the additional requirement that the sponsoring witness be the person who recorded it,<sup>200</sup> or a person competent to testify as to its accuracy (i.e., a person who was a part of the recorded events).<sup>201</sup> The same rule applies to photographs, which are similar to video.<sup>202</sup> No authentication is necessary for electronic documents introduced as demonstrative evidence or object evidence.<sup>203</sup>

## 6. Demurrer to Evidence

If the prosecution failed to prove the guilt of an accused after it presented its evidence, the accused may move for or the Court may *motu proprio*, after giving the prosecution the opportunity to be heard, decide on a demurrer to evidence.<sup>204</sup> A demurrer to evidence is a decision based on the merits wherein, if granted, the Court acquits an accused because the prosecution

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196. RULE ON ELECTRONIC EVIDENCE, A.M. NO. 01-7-01-SC, rule 2, § 1 (h) (July 17, 2001).

197. *Id.* rule 3, § 2.

198. *Id.* rule 4, § 1.

199. *Id.* rule 4, § 2. Digital signatures and Supreme-Court approved authentication are also explicitly allowed.

200. *Id.* rule 11, § 1.

201. *Id.*

202. RULES ON ELECTRONIC EVIDENCE, rule 11, § 1.

203. 1989 REVISED RULES ON EVIDENCE, rule 130, § 1.

204. REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 23, para. 1.

failed to prove guilt beyond reasonable doubt.<sup>205</sup> The Motion for Demurrer to Evidence is filed after the prosecution rests its case.<sup>206</sup> It may be filed with a leave of court if the accused desires to present evidence if the motion is denied or without a leave of court if the accused does not want to present evidence.<sup>207</sup>

If granted, the prosecution's remedy is to file a Motion for Reconsideration and, if the Motion for Reconsideration is denied, the remedy is to file a petition for *certiorari* under Rule 65.<sup>208</sup> If denied, the remedy of the accused is either to proceed with his or her presentation of evidence or to file a petition for *certiorari* under Rule 65 because the denial would amount to an interlocutory order.<sup>209</sup>

#### *D. Judgment and Appeal*

##### *I. Judgment*

The judgment is the Court's determination whether the accused is guilty of a criminal offense.<sup>210</sup> In cases where there is a variance between allegation and proof, the court may convict the accused of a necessarily included offense, if proven.<sup>211</sup> This type of conviction occurs when the prosecution failed to prove the offense charged in the Information but was able to prove an offense necessarily included in the offense charged.<sup>212</sup> In accordance with due process, the rules of court will not allow conviction of an offense — even if proven — if the information charges a different, but necessarily included offense. In such cases, conviction is limited to the offense that has been properly charged in the Information, and not the “larger” offense, even if proven.<sup>213</sup> This is known as the Variance Doctrine.<sup>214</sup>

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205. *Macapagal-Arroyo v. Sandiganbayan*, 797 SCRA 241, 458 (2016) (J. Leonen, dissenting opinion).

206. REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 23, para. 1.

207. *Id.* para. 2.

208. *Chiok v. People*, 776 SCRA 120, 144 (2015).

209. *See generally Macapagal-Arroyo*, 797 SCRA.

210. REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 1.

211. *Id.* rule 120, § 4.

212. *Id.*

213. *Id.*

214. *Id.*

The case of *People v. Chi Chan Liu*<sup>215</sup> can be used to convict an accused of illegal possession of child pornographic material if the prosecution fails to prove the distribution of such materials but was able to prove possession which is necessarily included in the offense of distribution. This will be discussed further in Part IV.

The logic of *Ricalde*, cited earlier, is also applicable to an OSEC case, when combined with the principle that the recital of facts in the Information determines the nature of an offense.<sup>216</sup> For instance, if the accused is charged with distribution of indecent shows or pornography under the Revised Penal Code in the caption, but the Information alleges that the material depicts a child involved in sexual activity, the accused may be convicted of distributing child pornography under the Anti-Child Pornography Act even if that offense is not specifically cited. In such a case, the facts constituting the violation of the Anti-Child Pornography Act are present in the Information, and these facts take precedence over the caption of the Information.

## 2. Appeal

An appeal throws the entire case open for review.<sup>217</sup> Even if the accused did not raise a particular issue, the appellate court can review any or all issues of the case.<sup>218</sup> If the accused was convicted in the trial court for a lower offense, he or she may be convicted of a higher offense because he or she is deemed to have waived the defense of double jeopardy.<sup>219</sup>

In OSEC cases, if the trial court erred in convicting the accused, for example, for simple TIP only, the appellate court may change the ruling and convict the accused for qualified TIP. If, however, the trial court erroneously acquitted the accused for an offense within the scope of OSEC, the appellate court cannot revise or review such acquittal via an appeal but only through a Petition for *Certiorari* under Rule 65.<sup>220</sup> In the petition, the

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215. *People v. Chi Chan Liu*, 746 SCRA 476 (2015).

216. *Canceran v. People*, 761 SCRA 293, 304-05 (2015) (citing *Domingo v. Rayala*, 546 SCRA 90, 119 (2008) (citing *People v. Dimaano*, 469 SCRA 647, 666-67 (2005)).

217. *RIANO*, *supra* note 113, at 514.

218. *Id.*

219. *Id.* at 515.

220. *Chiok*, 776 SCRA at 144 (2015).

prosecution, through the Solicitor General, must allege the acquittal by the trial court was tainted with grave abuse of discretion amounting to lack or excess of jurisdiction.<sup>221</sup>

#### IV. RECOMMENDATIONS

##### *A. Law Enforcement*

Collaborative anti-OSEC casework between law enforcement partners and IJM reveals a need to focus on three structural concerns: (1) headcount, (2) sustainable funding for OSEC law enforcement, and (3) operation-supportive training, where hours used for capacity-building concretely support child-protective operations and related skills. Further, data from collaborative casework supports continued use of two investigative strategies: use of valid entrapment operations and further evidence collection even after inquest, preliminary investigation, or victim turnover to aftercare authorities, as the process of forensic analysis yields better evidence when approached as a continuum.

The Philippine National Police (PNP) and the National Bureau of Investigation (NBI) have both actively addressed the issue of OSEC through collaborative casework, acting on both international and domestic OSEC referrals in the course of their work.

Within the PNP, the Women and Children's Protection Center (WCPC) handles trafficking cases through the Anti-Trafficking in Persons Division (ATIPD). To respond to the rise of OSEC, the WCPC also established the Internet Crimes Against Children (ICAC) office. Meanwhile, the NBI investigates human trafficking (including OSEC) cases through its Anti-Human Trafficking Division (AHTRAD).

IJM records indicate that both the WCPC, NBI, and NBI AHTRAD have faced challenges in fully staffing their teams. Despite these complications, the WCPC and AHTRAD conducted collaborative child-protective operations with great success, having rescued more than 72% of all OSEC victims identified through collaborative casework with IJM.

As of June 2018, the WCPC performed 39 child-protective operations, resulting in 56 arrests, 54 criminal cases, and the rescue of 133 OSEC victims. 17 convictions have resulted from PNP WCPC related operations. NBI AHTRAD — a smaller team with national jurisdiction — performed

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221. *Id.* at 144-45.

21 child-protection operations, resulting in 41 arrests, 48 criminal cases,<sup>222</sup> and the rescue of 101 OSEC victims.<sup>223</sup> Eight convictions have resulted from NBI AHTRAD related operations.

### 1. Manpower

Given the scale of the OSEC problem, the Authors' first recommendation is to ensure the WCPC, NBI AHTRAD, and other law enforcement agencies combatting OSEC — NBI Computer Crimes Division, PNP Anti-Cybercrime Group — are fully staffed. Sustainable OSEC law enforcement requires rescuers and investigators in sufficient numbers.

### 2. Budget

Sustainable OSEC law enforcement also requires sufficient resources, and for those resources to go to high-performing units. The WCPC and AHTRAD's compelling child-protective outcomes provide strong basis to increase their respective budgets. In 2017, the legislature provided additional resources for the WCPC to better combat OSEC.<sup>224</sup> NBI AHTRAD is likewise a strong candidate to receive resources as they have the track record of stopping OSEC abuse and rescuing children.

### 3. Time

In addition to increasing bodies and budget, law enforcement agencies must be given time to focus on their core deliverables — child-protective investigations and operations. Along with managing limited headcount and resources, law enforcement agencies must guard their time to perform child-protective operations. Time for investigation is often inversely proportional to time for non-essential training.

With the urgency and volume of OSEC cases, the Authors recommend finding a middle ground where successful trainings are defined as operation-supportive and application-based.

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222. IJM's Casework Tracking and Management System Records (on file with the Authors).

223. *Id.*

224. Loren B. Legarda, Senator of the Republic of the Philippines, *Ending Online Sexual Exploitation of Children*, Privilege speech at the Senate's Session Hall (Mar. 14, 2018) (transcript available at [http://www.senate.gov.ph/press\\_release/2018/0314\\_legarda1.asp](http://www.senate.gov.ph/press_release/2018/0314_legarda1.asp) (last accessed Aug. 31, 2018)).

Rather than focusing on the input of training programs (hours given to lectures, etc.), law enforcement and its training partners can focus on developing capacity-building programs that measure outcomes and support actual buildup of their cases. In 2018, the WCPC demonstrated that this was possible, working on several cases during an advanced investigation workshop that led to successful operations in Luzon, Visayas, and Mindanao.<sup>225</sup>

#### 4. Continued Use of Entrapment Operations

Law enforcement agencies may use any of four investigative strategies: (1) entrapment, (2) search warrant, and (3) a combination of entrapment and search warrant, and (4) victim rescue after further analysis of evidence.

IJM's casework data yielded the following insights:

- (1) The use of entrapment operations produced the best child-protective outcomes,<sup>226</sup> particularly, the highest victim rescue numbers (127 rescued) when compared with the use of other strategies.<sup>227</sup> When analyzed, cases connected to entrapment operations proved successful because they allowed law enforcers to ascertain the presence and location of victims and facilitators. Entrapment inherently allows for immediate suspect arrest and victim rescue, preventing further abuse.
- (2) Entrapment-only operations also led to the highest number of convictions across investigative strategies. Cases with a connection to entrapment as an investigative strategy — including those mixed with search warrants — yielded the

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225. See Maan Macapagal, 2 mothers peddling children for online porn arrested in Cebu, Davao, *available at* <http://news.abs-cbn.com/news/06/15/18/2-mothers-peddling-children-for-online-porn-arrested-in-cebu-davao> (last accessed Aug. 31, 2018).

226. 127 victims relieved, 66 suspects arrested, 68 charged in court, 20 convicted to date. IJM's Casework Tracking and Management System Records (on file with the Authors).

227. Search warrants alone led to 68 victims relieved, 26 arrested, 24 charged, and five convicted. Entrapment and search warrant as a strategy produced these outcomes: 54 victims relieved, 27 suspects arrested, 25 charged in court, three convicted to date. Victim relief after further analysis of evidence yielded 42 victims rescued, seven arrested, 13 charged in court, and no convictions to date. IJM's Casework Tracking and Management System Records (on file with the Authors).

highest total victim rescue and perpetrator arrest numbers, making entrapment the most effective victim relief and perpetrator accountability tool available to date.

- (3) Finally, across available data, cases connected to an entrapment had an impressive 95.9% conviction rate.<sup>228</sup>

It is the Authors' recommendation, therefore, that law enforcement agencies continue refining their ability to conduct entrapment operations, as it is the tool with a proven record of stopping abuse swiftly, and generating quality cases in court.

#### 5. Further Search of Gathered Evidence

In entrapment-only operations, or similar instances where devices are seized, law enforcers should apply for a warrant to search retrieved electronic devices, e.g., phones and computers, as they may lead to further victim identification and stronger evidence. In this case, the Court must inquire the existence of probable cause that the computer or the phone is used to perpetuate an offense in relation to OSEC in order to issue the warrant.<sup>229</sup> The Court must, in finding probable cause, "personally examine in the form of searching questions and answers, in writing and under oath, the complainant and the witnesses he [or she] may produce on facts personally known to them and attach to the record their sworn statements, together with the affidavits submitted."<sup>230</sup>

In an OSEC, the search warrant of a computer or phone should relate to the main violation for which the owner was arrested or under investigation. This offense would typically fall under the Anti-Trafficking in Persons Act of 2003, as amended, or the Anti-Child Pornography Act of 2009. This is in line with the requirement that the warrant be issued in connection with only one offense.

#### *B. Prosecutorial Concerns*

The Authors recommend the following structural enhancements: (1) institutional support for plea bargains, (2) investments to make digital evidence more accessible, and (3) self-care for prosecution teams. Further, the Authors recommend the following practices: (1) maximizing child-

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228. One acquittal across 24 cases connected to entrapment. IJM's Casework Tracking and Management System Records (on file with the Authors).

229. *Bache & Co. v. Ruiz*, 37 SCRA 823, 830 (1971). It must be noted that a search warrant can only be issued for a single offense. *Id.*

230. REVISED RULES OF CRIMINAL PROCEDURE, rule 126, § 5.

protective measures, (2) building cases independent of victim testimony, and (3) maximizing remedies under the Rules of Court and other related laws.

#### 1. Institutional Support for Prosecutorial Plea Bargain Framework and Child-protective Measures

IJM has assisted the Department of Justice in obtaining 35 OSEC convictions as of June 2018. Of these convictions, 29 were achieved by plea bargain. Utilizing plea bargains as a strategy provides the following advantages:

##### *a. Speed*

OSEC casework data confirms that plea bargains are faster than full trials. The average length of time to conclude an OSEC case by plea bargain is 19 months, while the average full OSEC trial takes more than twice as long at three years and 10 months. The fastest conviction by plea bargain as of June 2018 was achieved in 89 days, while the fastest conviction by full trial was more than seven times longer, concluding a little less than two years from date of filing.<sup>231</sup> Given the overloaded court dockets across the Philippines, plea bargaining is an efficient remedy in OSEC cases.

##### *b. Child Protection*

Under Philippine law, the best interests of the child are paramount. OSEC casework data shows that plea bargains protect children from unnecessary appearance in court and adversarial proceedings with their family members. Many of the recent IJM-supported OSEC cases concluded by plea bargain spared a majority of the victims from having to testify in court. The speed at which justice can be delivered by plea bargaining increases the chances of victim's closure and recovery. Therefore, the prosecution should maximize each opportunity to spare children from testifying in court and limit their participation to cases of absolute need.

##### *c. Support from Existing Rules, Guidelines, and Jurisprudence*

Rule 116, Section 1 (f) specifically requires a hearing for the purposes of plea bargaining.<sup>232</sup> The Guidelines on Pre-trial<sup>233</sup> again explicitly approved the

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231. IJM's Casework Tracking and Management System Records (on file with the Authors).

232. REVISED RULES OF CRIMINAL PROCEDURES, rule 116, § 1 (f).

233. Supreme Court, Re: Guidelines to be Observed by the Trial Court Judges and Clerks of Court in the Conduct of Pre-Trial and Use of Deposition-Discovery

use of plea bargains, mandating parties to consider plea bargaining at the pre-trial conference.<sup>234</sup> This approval is repeated in OCA Circular 101-2017, where plea bargaining forms part of the considerations during arraignment and pre-trial.<sup>235</sup>

It is therefore the Authors' recommendation that in OSEC cases, prosecutors maximize the availability of plea bargains as a child-protective measure that also ensures conviction with higher speed and certainty. In order to provide guidance and consistency in the use of plea bargains, the Department of Justice may provide a framework for the National Prosecution Service, ensuring that agreements to enter into plea bargains are done fairly and in accordance with law. The framework must match the existing rules and guidelines of the Supreme Court, which allow for flexibility and fairness.

*d. Self-care for prosecutors*

As with many front-liners handling OSEC evidence, prosecutors will need to apply principles of self-care to prevent burnout and mental fatigue. The Department of Justice may consider resourcing task forces to access self-care resources.

## 2. Investments to Make Digital Evidence More Accessible

As OSEC is a crime with elements committed online, thus, reliance on some form of digital evidence is unavoidable. Data confirming OSEC transactions, perpetrator conduct related to the offense, and other corroborative evidence have been presented in successful OSEC cases.

Digital evidence, once preserved, does not change, making it inherently reliable. In child pornography cases, the digital evidence is often sufficient to prove an offense if found in the possession of the accused. It is therefore a means of building highly viable cases that do not require toddlers to testify or put infants at further risk of harm. Historically, OSEC cases involve more than one offense. As long as the prosecution has digital evidence of one

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Measures, Administrative Matter No. 03-01-09-SC [A.M. No. 03-01-09-SC] (July 13, 2004).

234. *Id.* at 6.

235. Office of the Court Administrator, Approval of the Revised Guidelines for Continuous Trial of Criminal Cases, OCA Circular No. 101-2017 (May 16, 2017). *See also* Supreme Court, Revised Guidelines for Continuous Trial of Criminal Cases, Administrative Matter No. 15-06-10-SC [A.M. No. 15-06-10-SC], ¶ 8 (b) (Apr. 25, 2017).

offense — even if it is the simplest one, such as possession of child pornography — it can insure the proceedings against the risks of disappearing testimony (i.e., through witness tampering), and more importantly, free victims of the pressures of being star witnesses, an aspect of domestic practice worth changing through the use of technology.

In order to make digital evidence more accessible, law enforcement units may explore partnerships with international agencies willing to provide hardware, software licenses, and training to more personnel. The Department of Justice, through the Office of Cybercrime, may also work in collaboration with law enforcement agencies to scale capacity to provide digital forensics to prosecution teams nationwide.

### 3. Maximizing Remedies Under the Rules of Court and Other Related Laws in Protecting the Child's Interest

#### *a. The Use of Modes of Discovery*

Prosecutorial depositions, in criminal cases, must be used with extra caution, as resort to this remedy may violate the accused's right to confront the witness against him or her face to face.<sup>236</sup>

For the civil aspect of the case, the use of a deposition may prove helpful as OSEC is a transnational offense, i.e., it crosses the national borders of States.<sup>237</sup> For witnesses living abroad, e.g., foreign law enforcement, that will corroborate or will be material to the plaintiff's theory.<sup>238</sup> The offended party may ask the court in the Philippines to issue letters rogatory to a foreign court asking the latter to take the testimony of a material witness residing or sojourning in the latter's jurisdiction.<sup>239</sup> A foreign law enforcer, the offended party, or any other potential witness to an OSEC case that has not been instituted in court may avail of the remedy of perpetuation of his or her testimony.<sup>240</sup> Using this remedy will expedite the resolution of the civil aspect of the case, but it may not provide similar benefits for criminal prosecution.

236. PHIL. CONST. art. III, § 14 (2).

237. Jay S. Albanese, *Transnational Crime*, available at <http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0024.xml> (last accessed Aug. 31, 2018).

238. The term plaintiff is used to signify that the use of this remedy refers to the civil action relative to the case.

239. 1997 REVISED RULES OF CIVIL PROCEDURE, rule 23, §§ 11-12.

240. *Id.* rule 24, § 1.

*b. Preliminary Injunctions and Temporary Restraining Orders*

Unlike the Barangay, Temporary, and Permanent Protection Orders in Violence Against Women and their Children (VAWC) cases,<sup>241</sup> the laws concerning OSEC do not have similar protective mechanisms to that of VAWC.<sup>242</sup> To protect victims, it is submitted that the rules on preliminary injunctions may apply in OSEC cases as a consequence of the civil action included in the prosecution of OSEC cases.<sup>243</sup>

There are cases wherein an accused, either a principal or an accomplice, will be able to contact or be in a close proximity to a victim when bail is granted or when the accused is acquitted. The issuance of a Writ of Preliminary Injunction (WPI) will provide an extra protection to the victims. The range of the Temporary Restraining Order (TRO) and WPI may vary. For example, an accused may be enjoined from visiting or contacting a victim. When guilt beyond reasonable doubt was not proven but there is a preponderance of evidence of a tortious act and a WPI was issued, the court can make the injunction permanent.<sup>244</sup>

For an injunction to be issued, the following must concur:

- (1) There is a clear and unmistakable right;
- (2) There is an act or omission that threatens or violates such right;  
and
- (3) There will be an irreparable or grave injury that will occur because of such act or omission if the same was not enjoined.<sup>245</sup>

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241. An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for Other Purposes [Anti-Violence Against Women and Their Children Act of 2004], Republic Act No. 9262 (2004).

242. Compare Anti-Violence Against Women and Their Children Act of 2004, § 8 with Anti-Trafficking in Persons Act of 2003; Anti-Child Pornography Act of 2009; & Special Protection of Children Against Abuse, Exploitation, and Discrimination Act.

243. See REVISED PENAL CODE, art. 100 & REVISED RULES OF CRIMINAL PROCEDURE, rule 111, § 1 & rule 127, § 1.

244. 1997 RULES OF CIVIL PROCEDURE, rule 58, § 9.

245. See *Sy v. Autobus Transport Systems, Inc.*, 686 SCRA 707 (2012) (citing *Pacsports Phils., Inc. v. Niccolo Sports, Inc.*, 370 SCRA 338, 346-47 (2001)). Before the Injunctive Order becomes permanent, the applicant is required to deposit a bond, unless the court exempted him or her from depositing such bond. RULES OF CIVIL PROCEDURE, rule 58, § 4 (b).

The rights of an OSEC victim include the right to be free from any form of abuse under R.A. No. 7610 and free from psychological injury.<sup>246</sup> Freedom from abuse of an OSEC victim is a vast concept, which includes the prevention of any contact by the victim and the perpetrator to avoid psychological injury.<sup>247</sup> The act that may be subject of an injunction is the contacting of a child, and the grave injury would be the trauma that the contact or encounter would give to the child.

A Temporary Restraining Order (TRO) is basically a preliminary injunction before the issuance of the WPI.<sup>248</sup> The Executive Judge may issue it if there is an extreme urgency involved in a case upon the filing of the case and an *ex parte* motion of the offended party, and the TRO will have immediate efficacy upon issuance.<sup>249</sup> A presiding judge may also issue a TRO if the character of the urgency is not extreme (but great and irreparable injury is imminent) upon the filing of the case and an *ex parte* motion of the offended party; the TRO is effective upon the receipt of the accused.<sup>250</sup> An issuance made by the Executive Judge must be heard by the Presiding Judge within 72 hours upon the TRO's effectivity to determine whether the TRO should be extended to a maximum of 20 days, which already includes the 72-hour period.<sup>251</sup> Within the said 20 days, the Court must decide whether the issuance of a WPI is proper.<sup>252</sup>

It is suggested that a separate application for a TRO and a WPI to prevent the accused from contacting or being in close proximity to the victim as a response to the application for bail be made rather than having it become a condition for the grant of bail. This is so because bail is an assurance that the accused will attend the trial of the criminal proceeding and not a remedy for the offended party.<sup>253</sup>

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246. Special Protection of Children Against Abuse, Exploitation, and Discrimination Act, § 3 (b).

247. See Rules and Regulations on the Reporting and Investigation of Child Abuse Cases, § 2 (e).

248. RULES OF CIVIL PROCEDURE, rule 58, § 5.

249. *Id.* rule 58, § 5, para. 2.

250. *Id.* rule 58, § 5, para. 1.

251. *Id.* rule 58, § 5, para. 2.

252. *Id.* rule 58, § 5.

253. See RIANO, *supra* note 113, at 306.

*c. Preliminary Attachment and Freeze Orders*

A Preliminary Attachment is a remedy available to an offended party wherein the properties of the accused will be prohibited from any form of disposition or encumbrance to make these properties liable for the accused's civil liability.<sup>254</sup> The Writ of Preliminary Attachment under Rule 127 may only be used when the civil action is instituted along with the criminal action and when the ground relied upon is either

- (1) The accused is about to abscond from the Philippines;
- (2) The criminal action is based on a claim for money or property embezzled or fraudulently misapplied, or converted to the use of the accused who is a public officer, officer of a corporation, attorney, factor, broker, agent or clerk, in the course of his [or her] employment as such, or by any other person in a fiduciary capacity, or for a willful violation of duty;
- (3) When the accused has concealed, removed, or disposed of his [or her] property, or is about to do so; and
- (4) The accused resides outside the Philippines.<sup>255</sup>

An OSEC case may involve an offender who resides outside the Philippines or is a flight-risk.<sup>256</sup> The attachment of the accused's properties is proper to satisfy his or her civil liabilities.

The attachment of the accused's property is very different from a bail bond because the former is a security for the accused's civil liability whereas the latter is a security for the accused's attendance during trial.<sup>257</sup> A bail bond, when forfeited, will be allocated to the fine and costs whereas the preliminary attachment will answer purely to the accused's civil liability.<sup>258</sup> A bail bond presupposes that an accused was already under custody of law enforcers whereas a preliminary attachment presupposes that an accused is not in the Philippines, is about to escape therefrom, or has a fraudulent intent to avoid civil liability, such as the disposition of property.<sup>259</sup>

254. *Id.* at 528-29.

255. REVISED RULES OF CRIMINAL PROCEDURE, rule 127, § 2. *See also* RIANO, *supra* note 113, at 528-29.

256. REVISED RULES OF CRIMINAL PROCEDURE, rule 127, § 2.

257. *Id.* & rule 114, § 1. *See also* RIANO, *supra* note 113, at 306.

258. REVISED RULES OF CRIMINAL PROCEDURE, rule 114, § 21 & rule 127, § 2.

259. *Id.* rule 114, § 1 & rule 127, § 2.

Another remedy available is the use of freeze orders under the Anti-Money Laundering Act<sup>260</sup> to prevent the liquidation or withdrawal of the accused's money in a financial institution, which can be used to satisfy the civil liability of the accused and to prove the existence of transaction that relates to the exploitation of the child victim.<sup>261</sup> A freeze order is an injunction prohibiting a person from disposing his or her assets that is subject of the order. A freeze order is issued upon an *ex parte* petition filed by the Anti-Money Laundering Council to the Court of Appeals (CA) and upon the finding of probable cause by the CA that the money or property sought to be frozen is used for any of the unlawful activities mentioned by the law.<sup>262</sup> The freeze order has a life of six months and cannot be a subject of a TRO or a WPI, except when the Supreme Court ordered a TRO or a WPI against the freeze order.<sup>263</sup>

*C. Judicial Aspect of Prosecution — Pushing for “Impartial Child Protection”*

1. Proceedings in Court

Judges are required by the Constitution and the New Code of Judicial Conduct to behave impartially.<sup>264</sup> This requirement does not prevent judges from considering the best interests of the child. Instead, judges may use the articulated policies of our child protection laws as basis to allow child-protective measures in every case. These measures may be administered impartially, yet with due regard for the specific needs of each child.

2. Judgments to Consider Lesser Included Offenses, When Proven

At present, there is no case decided by the Supreme Court regarding a violation of the Anti-Child Pornography Act of 2009. There is, however, jurisprudence on the concept of possession of child pornography.

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260. An Act Defining the Crime of Money Laundering, Providing Penalties Therefor and Other Purposes [Anti-Money Laundering Act of 2001], Republic Act No. 9160 (2001).

261. JOSE R. SUNDIANG, SR. & TIMOTEO B. AQUINO, REVIEWER ON COMMERCIAL LAW 364-65 (2017 ed.).

262. Anti-Money Laundering Act of 2001, § 10 & SUNDIANG, SR. & AQUINO, *supra* note 264, at 366.

263. *Id.*

264. *See generally* NEW CODE OF JUDICIAL CONDUCT, A.M. No. 03-05-01-SC, canon 3 (June 1, 2004).

In the case of *People v. Chi Chan Liu*, the Supreme Court held that the illegal possession of illegal drugs is necessarily included in the crime of illegal importation or sale of illegal drugs.<sup>265</sup> Even if the accused was not charged with illegal possession of illegal drugs, he or she is still liable for illegal possession because it is necessary included in the offense of illegal sale.<sup>266</sup> Applying the logic of *Chi Chan Liu*, a person who distributes a child pornographic material may still be convicted for the illegal possession of juvenile pornographic material under Section 4 (l) if the prosecution failed to establish the elements constituting the distribution of child pornographic material, because possession is necessarily included in distribution.

Applying the doctrine of *Chi Chan Liu* further to OSEC cases concerning non-livestream materials, the accused may still be held liable for illegal possession because he or she has either constructive or actual possession of the materials.<sup>267</sup> Possession is present because even if an accused deletes the material in his or her computer system, he or she may still access the same in another computer system. In livestream cases, possession is also present because the accused has either an immediate physical possession or control over the thing.<sup>268</sup>

It is therefore an error for a court to acquit the accused in an OSEC case if a lesser included offense has been proven. For instance, if the prosecution fails to establish the elements of distribution or sale of child pornographic material, but possession has been duly proven, the law demands a conviction for the lesser offense.

#### *D. Further Studies*

Further studies identifying current gaps will allow development of evidence-based solutions. Researchers may consider the following avenues of inquiry:

- (1) Models of Care of OSEC survivors at different levels of development;

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265. *Chi Chan Liu*, 746 SCRA at 495-96.

266. *Id.*

267. *See Chi Chan Liu*, 746 SCRA at 493-94 (citing *People v. Elkanish*, 90 Phil. 53 (1951)).

268. *See People v. Tira*, 430 SCRA 134, 152 (2004).

- (2) Assessment approaches for OSEC survivors at different levels of development and crisis; and
- (3) Maximizing the use of plea bargains in the Philippine justice system (a) writ large or (b) for OSEC specifically.

## V. CONCLUSION

The fight to end OSEC can be won. While OSEC, livestreaming in particular, stands as a massive threat to child protection, the Philippines has proven that it can take on anti-trafficking challenges with documented success. The US Trafficking in Persons report rated the Philippines' anti-trafficking performance at Tier 1 for the past three years,<sup>269</sup> and there are documented prevalence reductions in sex trafficking within Metro Manila, Metro Cebu, and Angeles City, Pampanga.<sup>270</sup>

The Philippines' US TIP Report Tier 1 rating is an acknowledgment of the public justice system's improved annual performance in addressing trafficking concerns. Lead government agencies include the Interagency Council Against Trafficking, the Department of Justice, DSWD, Department of Labor, PNP, NBI, and the Bureau of Immigration. The judiciary also played a critical role in resolving cases at an increased pace. A community of international organizations, non-governmental organizations, civil society organizations, the diplomatic community, and other stakeholders contributed to enhance justice delivery alongside government partners.<sup>271</sup> The ecosystem that made the Tier 1 ranking possible continues to grow in breadth and depth of commitment.

Past IJM studies indicate that effective law enforcement and robust prosecution can deter criminal behavior, effectively preventing future

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269. US Department of State, Trafficking in Persons Report 2018 at 350, *available at* <https://www.state.gov/documents/organization/282798.pdf> (last accessed Aug. 31, 2018).

270. International Justice Mission, Evaluation of the Program to Combat Sex Trafficking of Children in the Philippines, *available at* <https://ijm-deutschland.de/files/studien/philippinen/evaluation-of-the-program-to-combat-sex-trefficking-of-children-in-the-philippines-2003-2015.pdf> (last accessed Aug. 31, 2018).

271. To name but a few: International Justice Mission, The Asia Foundation, Australia-Asia Partnership to Combat Trafficking in Persons, United Nations Children's Fund, Philippines Against Child Trafficking, Embassies of the United States, Australia, United Kingdom, and the Netherlands, and many more agencies, NGOs, and civil society organizations.

victimization.<sup>272</sup> It is with this principle in mind that the Authors recommend scaling investments to enhance justice delivery. Alongside these macro improvements, the Authors also recommend nuanced, victim-centered approaches that uphold the dignity of each survivor and celebrate their inherent worth.

Finally, the Authors acknowledge the limitations of the Article, which bases much of its analysis on data available from IJM's casework experience. Fortunately, IJM's data represents the largest aggregation of ground-level, child-protective, NGO and government-partnered, OSEC collaborative casework results to date. It is therefore with great confidence that the Authors recommend effective law enforcement, robust prosecution, and nuanced victim care is the way forward in the fight against OSEC.

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272. See Dave Shaw, Commercial Sexual Exploitation of Children in Cambodia (IJM Research), *available at* <https://www.ijm.org/documents/studies/CSEC-Prevalence-Cambodia-FINAL-12-Sept-2013-1.pdf> (last accessed Aug. 31, 2018); Dave Shaw, Child Sex Trafficking in Metro Manila: Using time-space sampling to measure prevalence of child sex trafficking in Metro Manila, the Philippines, *available at* <https://www.ijm.org/documents/studies/ijm-manila-final-web-v2.pdf> (last accessed August 31, 2018); & IJM Philippines, External Evaluation of IJM's Program to Combat Child Sex Trafficking in Philippines, 2003-2016, *available at* <https://ijm.org.au/wp-content/uploads/2017/09/2017-IJM-Results-Summary-External-Philippines-CSEC-Program-Evaluation.pdf> (last accessed Aug. 31, 2018).