

Barriers to Compensation for Child Victims of Sexual Exploitation

A discussion paper based on a comparative legal study of selected countries





ECPAT International is a global network of civil society organisations working together to end sexual exploitation of children. We aim to ensure that children everywhere enjoy their fundamental rights free and secure from all forms of sexual exploitation.



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Access to Justice and Right to Remedies for Child Victims of Sexual Exploitation Research Project

is a multi-country initiative focusing on child survivors' experiences in accessing judicial remedies and other reparations for sexual exploitation. With its unique focus and prioritization of the voice of the child survivor, the Project empowers children to be active agents in their protection, strengthening access to judicial remedies; identifying the specific recovery and reintegration needs of child victims of sexual exploitation; and improving the opportunity of monetary relief for victims to rebuild their lives.

The Research findings and recommendations are pre-sented in thematic papers and reports focusing on Access to Criminal Justice; Access to Recovery and Reintegration; Access to Compensation.

TABLE OF CONTENTS

FOREWORD	4
ACKNOWLEDGEMENTS	5
1. INTRODUCTION	6
1.1 ECPAT International “Access to Justice and Right to Remedies for Child Victims of Sexual Exploitation” Research Project	7
1.1.1 <i>Research Methodology</i>	7
1.1.2 <i>Limitations</i>	9
1.1.3 <i>Report Structure and Findings</i>	9
2. LEGAL FRAMEWORK	10
2.1 Definitions of child sexual exploitation	10
2.2 A child victims’ rights to a remedy	10
2.2.1 <i>Foundations in international law</i>	11
2.2.2 <i>Terminology and scope</i>	12
2.2.3 <i>Compensation as the focus of this Study</i>	14
3. PROCEDURES TO SEEK COMPENSATION AND CROSS-CUTTING PRINCIPLES	15
3.1 Procedures to seek compensation	15
3.1.1 <i>Criminal courts</i>	15
3.1.2 <i>Civil courts</i>	16
3.1.3 <i>State-managed victim compensation funds</i>	16
3.1.4 <i>Main differences between State funds and other sources of compensation</i>	16
3.2 Cross-cutting principles	17
3.2.1 <i>The best interests of the child</i>	17
3.2.2 <i>The right to be treated with dignity and compassion and the training of professionals</i>	18
3.2.3 <i>The right to be heard</i>	19
3.2.4 <i>The right to be protected from discrimination</i>	20
4. BARRIERS TO SEEKING COMPENSATION	22
4.1 Lack of notice and information about child victims’ rights	22
4.2 Insufficient legal assistance to support child victims	25
4.3 Difficulties in securing compensation from State funds	27
4.3.1 <i>State funds are not adapted to SEC victims</i>	27
4.3.2 <i>Reliance on the criminal justice process and risk of re-traumatisation</i>	29
4.4 Hardship in the compensation process	30
4.4.1 <i>Multiplication of investigations</i>	30
4.4.2 <i>Having to prove damages</i>	32
4.4.3 <i>Length of the process and uncertain outcome</i>	34
4.5 Misperceptions of child victims	35

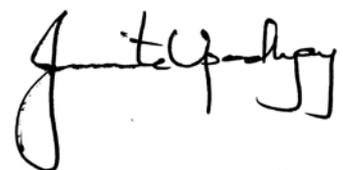
4.6 Barriers in transnational cases	36
4.6.1 <i>When offences are committed out of country</i>	36
4.6.2 <i>Requirements that claimants be lawful residents</i>	37
4.6.3 <i>When the crime is committed by a foreign offender</i>	38
4.7 Prescription periods/statutes of limitation and other time requirements	39
4.8 Difficulties in accessing payment of monetary awards	42
4.8.1 <i>Compensation amounts are too low</i>	42
4.8.2 <i>Court compensation orders too often not enforced</i>	43
4.8.3 <i>Lack of State-enforced protection mechanisms for disbursement of funds</i>	44
5. SUMMARY OF FINDINGS	48
6. RECOMMENDATIONS	50
6.1 Legislation	50
6.2 Recommendations on Access to Compensation	50
6.2.1 <i>State funded compensation programmes</i>	50
6.2.2 <i>Compensation through criminal/civil courts</i>	51
6.3 Recommendations on Capacity Building and Training of Professionals	51
BIBLIOGRAPHY	52

FOREWORD

Children who are victims of sexual exploitation have experienced harm and trauma which are often irreparable and bear deep, long-lasting sequels. Recovery and rehabilitation, whenever possible, can be a long and complicated process for these children. Prospects of a better life are uncertain at best, and often depend on resources too frequently lacking. Children who navigate the justice system as victims or witnesses face significant challenges when it comes to claiming their rights, ranging from systems designed for adults, to the lack of assistance available to a lack of understanding on the part of adults about their rights and needs as victims. It is unacceptable and unforgivable that children who have suffered such horrific crimes, would be left out and denied any form of reparation. It is for these reasons that ECPAT International continues to campaign and advocate with them and on their behalf, so that their voices are heard: because a victim left without redress is one too many.

The current paper addresses the topic of compensation— a monetary reward meant to redress the harm suffered. The term ‘compensation’ is somewhat of a misnomer when it comes to child victims of sexual exploitation: no amount of money could possibly serve as a recompense for children who have had their lives, hopes and dreams shattered as a result of criminal acts. Children who have survived sexual exploitation have complex injuries and needs, which can prove challenging or impossible to quantify. Nonetheless, a monetary award is one of multiple components which can support a recovery process. It can play an important role to the extent it may provide much needed financial resources in situations where victims have their very basic needs unmet - such as food, accommodation and shelter - in addition to helping cover expenses for health care, counseling and other desperately needed services.

In this third and last part of a tripartite research project on access to legal remedies and other reparations, ECPAT International sought to better understand whether compensation is achievable for child victims and under what conditions. This work compiles the results of desk research conducted in partnership with ECPAT member groups and the international law firm DLA Piper, across several jurisdictions worldwide. The results highlight the enormous difficulties standing in the way of child victims’ access to compensation, and call not only for reforms of legal frameworks, but also for renewed efforts to place victims at the center of a justice process that truly upholds children’s rights.



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*“Ubi jus ibi remedium: a right without
a remedy is no right at all”*

- Latin legal maxim



1. INTRODUCTION

Nearly all countries of the world¹ are parties to the United Nations (UN) Convention on the Rights of the Child (CRC),² and have hence committed themselves to protecting children from all forms of sexual exploitation, including exploitation of children in prostitution and child sexual abuse material (CSAM). It follows that when children fall victims to such crimes, they should be able to fulfil their right to protection and access remedies to redress the violations they have suffered.

The international community acknowledges that remedies are a fundamental component of the justice process, and that access to justice is critical to the promotion, protection and realisation of children's rights. As the United Nations (UN) Committee on the Rights of the Child noted in 2003, "[f]or rights to have meaning, effective remedies must be available to redress violations".³ Ten years later, in its 2013 report on "Access to Justice for Children", the United Nations High Commissioner for Human Rights (UNHCHR) defined the term as "the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including the Convention on the Rights of the Child", emphasising that access to justice applies to "civil, administrative and criminal spheres of national jurisdiction," and covers "all relevant judicial proceedings affecting children without limitation including[...]victims and witnesses."⁴

Despite this recognition, child victims of sexual exploitation continue to be denied compensation for their suffering, or worse still, are left completely unaware of their right to seek remedies. Receiving compensation – the desperately needed financial assistance to rebuild their lives - can mean the difference between a child successfully breaking out of the cycle of exploitation or returning to it.

This report examines some of the reasons why very few children seek and obtain compensation or monetary relief (i.e. money from a State-managed victim compensation fund, or from a perpetrator through a court of law) for injuries and trauma incurred from being sexually exploited. These obstacles include: the lack of information made available to child victims about their rights; the lack of support throughout the compensation-seeking process; conditions imposed by government-managed victim compensation funds; challenges facing victims in the court environment; and difficulties in enforcing court-ordered compensation against an offender. The report also highlights some of the cultural, behavioural and practical issues which influence or affect how legal processes function.

- 1 Except for the USA and Somalia (which is currently unable to proceed to ratification as it has no recognised government).
- 2 UN General Assembly (1989), "Convention on the Rights of the Child" 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.
- 3 Committee on the Rights of the Child (2003), "General measures of implementation of the Convention on the Rights of the Child" (CRC), General Comment No.5, 27 November 2003, UN Doc. CRC/GC/2003/5, para. 24. The Committee on the Rights of the Child is the body responsible for the monitoring of the implementation of the Convention on the Rights of the Child.
- 4 Human Rights Council (2013), "Access to justice for children, Report of the United Nations High Commissioner for Human Rights" (hereinafter Access to Justice), UN Doc. A/HRC/25/35, 16 December 2013, para 4.



1.1 ECPAT International “Access to Justice and Right to Remedies for Child Victims of Sexual Exploitation” Research Project

There is a paucity of research on the unique challenges and barriers that child victims of sexual exploitation face (i) when accessing justice, (ii) seeking compensation, and (iii) throughout their recovery and reintegration process. ECPAT International sought to fill this knowledge-gap by undertaking three studies investigating each of these three areas. Studies on the barriers to accessing justice (ATJ Study) and on the recovery and reintegration process (Recovery and Reintegration Study) were conducted in three countries – Thailand, Nepal and the Philippines. The ATJ Study and the Recovery and Reintegration Study involved interviews and group discussions with survivors, caregivers and State actors, including prosecutors and police. The current report explains the results of the third study – a comparative legal study on the barriers child victims face when seeking to obtain compensation for trauma and injuries related to their exploitation (the Compensation Study).

1.1.1 Research Methodology

With the purpose of understanding the challenges faced by child victims of sexual exploitation in pursuing their right to a remedy, the Compensation Study focuses on mapping the barriers and challenges facing child victims in this process. In short, the research study aims at answering the following question:

What are the barriers and challenges that a child victim may face when seeking compensation for sexual exploitation?

To provide an in-depth analysis of the legal aspects of compensation for child victims of sexual exploitation, ECPAT partnered with a pro bono international legal firm – DLA Piper – and its lawyers and offices across 14 jurisdictions. DLA Piper offices in each selected location⁵ provided ECPAT with legal research regarding their station country. All DLA Piper research teams are made up of trained lawyers who speak the local language and understand the laws and legal frameworks of their countries.

ECPAT International also partnered with its network member groups in the selected countries,⁶ to capture the experiences and perspectives of organisations working with child victims of sexual exploitation.⁷ In some cases, ECPAT relied on other NGOs who work directly with child victims.⁸

The main data collection tools for this Study were questionnaires as well as secondary sources, especially desk research. ECPAT International (Legal Programme) developed two open-ended questionnaires. The first questionnaire was targeted for participating lawyers at each DLA Piper country office. DLA Piper attorneys conducted research to respond to the questionnaire. The data from this first set of questions mapped the avenues for child victims to seek compensation in the analysed countries as well as the barriers. The questions revolved around the avenues for compensation, the existence of child-friendly legal information on compensation, problematic aspects and practical solutions. The second set of

5 Namely Australia, Austria, Belgium, Czech Republic, France, Germany, Hong Kong, Italy, Japan, Netherlands, Romania, Spain, Thailand, and the United Kingdom.

6 Namely Child Wise (Australia), ECPAT Austria, ECPAT Belgium, ECPAT France, ECPAT Germany, ECPAT Italia, ECPAT/STOP Japan, ECPAT Netherlands, Save the Children Romania (ECPAT Affiliate), FAPMI/ECPAT Spain, ECPAT UK.

7 Some of these organisations provide direct assistance to child victims of sexual exploitation, while others focus their work on other aspects of child protection and do not work directly with children. However, all groups are linked to local structures that assist child victims.

8 These other organisations include Weisser-Ring Germany and ChildLine Thailand.



questionnaires was directed to ECPAT member groups and other NGOs working directly with child victims. The questionnaire sought the organisations' experiences working with child victims to seek compensation as well as opinions regarding barriers and best practices. This section of the investigation revolved mainly around the challenges in assisting child victims in obtaining compensation or other financial assistance.

The Compensation Study intends to cover a wide range of jurisdictions. Through ECPAT's global network of ECPAT Members and the partnership with DLA Piper, ECPAT International accessed and examined information about 13 countries around the world.⁹ The sample included both common law and civil law jurisdictions; both developing as well as developed countries.

The selected countries are:

- 1) Austria
- 2) Australia
- 3) Belgium
- 4) Czech Republic
- 5) France
- 6) Germany
- 7) Hong Kong
- 8) Italy
- 9) Japan
- 10) Netherlands
- 11) Romania
- 12) Thailand
- 13) the United Kingdom

The above countries were selected based on the accessibility and quality of information and data that was obtained via DLA Piper's country offices and ECPAT Member groups. Staff at ECPAT International also conducted desk research beyond the above-mentioned countries to provide additional information from other countries as good practices and/or examples. Information from the above mentioned ATJ and Recovery and Reintegration Studies was also reviewed and incorporated where relevant.

1.1.2 Limitations

This study is not, and does not claim to be, representative. Its objective is to expose some of the challenges facing child victims in seeking compensation through either state funds or courts of law, drawing on the experiences from participating countries, desk research in additional countries, and the results of the ATJ and Recovery and Reintegration Studies. There is no balance in the regional distribution of the sample, nor is there any significant representation of the different legal systems. Most of the participating countries are European, following the continental legal system (civil law system) and economically developed.¹⁰ The primary research was carried out by DLA Piper's pro bono lawyers.

⁹ ECPAT International obtained information that was sufficient for the purposes of this Study for 13 out of the 14 countries initially selected.

¹⁰ The studied countries of the civil law tradition are: Belgium, Czech Republic, France, Germany, Italy, Japan, the Netherlands, and Romania. Australia, Hong Kong and the UK follow the common-law tradition. Thailand is considered hybrid, combining elements from different legal systems.



Despite being lawyers in the analysed territories, DLA Piper's partners are not experts or specialists in the legal protection of child victims of sexual exploitation. This report focuses on the implementation, at national level, of the right to a remedy as defined in relevant international norms and standards. As such, this report does not address the role of regional human rights treaties, courts or treaty bodies in enforcing the right to a remedy, nor does it include the complaint procedures established under international human rights treaties.¹¹

1.1.3 Report Structure and Findings

This report is divided into three main sections. Part 2 introduces the international legal framework obligating States to provide access to remedies to all victims of crime, including children. Part 3 discusses the procedures available to seek compensation, as well as four overarching child rights principles that should inform the entire compensation-seeking process: the best interests of the child; the right to be treated with dignity and compassion; the right to be heard and the right to be protected from discrimination. Part 4 presents the key barriers that children face in the process, using examples from the Compensation Study, the Recovery and Reintegration Study, the ATJ Study, and additional desk research. These barriers are: (1) the lack of notice and information; (2) the lack of legal assistance available to children; (3) conditions imposed by state compensation funds; (4) hardship facing children in the compensation-seeking process; (5) misperceptions of child victims; (6) the complexity of transnational cases; (7) prescription periods, statutes of limitations and other time restrictions and (8) difficulties to access payments. Part 5 is a summary of these findings and Part 6 offers some recommendations for improving access to compensation for child victims of sexual exploitation.

11 For more information on these mechanisms, see e.g. UNHCHR, «Human Rights Treaty Bodies – Individual Communications», accessed 6 October 2016, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#proceduregenerale>.



2. LEGAL FRAMEWORK

2.1 Definitions of child sexual exploitation

Under the CRC,¹² all children have the right to live free and secure from all forms of sexual exploitation: For the purposes of the current Study, the following definition of child sexual exploitation is employed: “a child is a victim of sexual exploitation when he or she takes part in a sexual activity in exchange for something (e.g. gain or benefit, or even the promise of such) received by a third party, the perpetrator, or the child him/herself”.¹³

The sexual exploitation of children takes different forms, including the exploitation of children in prostitution, the production or the distribution of child sexual abuse material, the trafficking of children for sexual purposes, and the sexual exploitation of children in travel and tourism (SECTT). The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) defines exploitation of children in prostitution as “the use of a child in sexual activities for remuneration or any other form of consideration”.¹⁴ Child sexual abuse material, otherwise known as ‘child pornography’ under international law, is “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”.¹⁵ Under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), trafficking of children for sexual purposes means “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of [. . .] the prostitution of others or other forms of sexual exploitation”.¹⁶ According to the 2016 Global Study on Sexual Exploitation of Children in Travel and Tourism, SECTT is defined as: “Acts of sexual exploitation of children embedded in the context of travel, tourism or both”.¹⁷

2.2 A child victims’ rights to a remedy

International law recognises that all human beings have a right to a legal remedy whenever their rights are violated. Accordingly, children who are victims of sexual exploitation should be entitled to such a remedy, which can take many different forms.

12 Art. 34-35.

13 Interagency Working Group on Sexual Exploitation of Children (2016), “Terminology Guidelines for the protection of children from sexual exploitation and sexual abuse”, Bangkok: ECPAT International.

14 UN General Assembly (2000), “Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography”, A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002, art. 2(b).

15 *Ibid.* art. 2 (c).

16 UN General Assembly (2000), “United Nations Convention against Transnational Organized Crime, Annex 2: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime”, Res. 55/25 of 15 November 2000, art. 3(a & c).

17 ECPAT International jointly with Defence for Children – ECPAT Netherlands (2016), “Offenders on the move, Global Study on Sexual Exploitation of Children in Travel and Tourism 2016”, May 2016, 20, Bangkok: ECPAT International.



2.2.1 Foundations in international law

The 1948 Universal Declaration of Human Rights (UDHR) affirms that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.¹⁸ While the UDHR is not binding upon States, it is considered as the foundation of modern international human rights law and has triggered the drafting and adoption of several legally binding conventions. For example, most countries¹⁹ have ratified the 1966 International Covenant on Civil and Political Rights (ICCPR), which requires States Parties to “ensure that any person whose rights or freedoms [...] are violated shall have an effective remedy”.²⁰ There are several other international human rights treaties that recognise the rights of victims to a legal remedy.²¹

When it comes to child rights, while the CRC requires States to promote the recovery and reintegration of child victims,²² it does not contain a specific provision establishing their right to a remedy. However, there are grounds in international law to support this right. First, it can be argued that since the UDHR, the ICCPR and other international human rights instruments have long established the right to an effective remedy, this right now forms part of international customary law. As a result, the right to a remedy is applicable to everyone including children who are victims of sexual exploitation (and other forms of violations of their human rights). Second, the CRC provides that where national or international law is more favourable to the child than the CRC, such law should prevail. Therefore, in a country that has ratified both the CRC and the ICCPR, it can be argued that the right to a remedy would be directly applicable to child victims.²³

Furthermore, providing child victims with legal remedies to alleviate the harm they have suffered is consistent with the obligations set forth in the CRC for several reasons: remedies are likely in the best interests of the child, which is a pillar principle of this treaty;²⁴ remedies may also help fulfil other rights, such as a child victim’s right to recovery and reintegration.²⁵ Hence states parties to the CRC should take necessary measures to implement the right of all children to a remedy. Elaborating on this obligation, the Committee on the Rights of the Child stated in its General Comments on the implementation of this Convention that “[w]here rights are found to have been breached, there should be appropriate reparation, including compensation”.²⁶

The right to a remedy can also be found in two Optional Protocols addressing child sexual exploitation, which explicitly recognise this right and impose specific obligations on States parties in this regard. The OPSC obligates States parties to “ensure that all child victims [...] have access to adequate procedures

18 UN General Assembly (1948), Res. 217 A (III) of 10 December 1948, art. 8.

19 All UN member states except China, Comoros, Cuba, Nauru, Palau and St. Lucia.

20 UN General Assembly, “International Covenant on Civil and Political Rights”, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, art. 2(3)(a).

21 For e.g. UN General Assembly (1965), “International Convention on the Elimination of All Forms of Racial Discrimination”, 21 December 1965, Treaty Series, vol. 660, No. 9464, art. 6; UN General Assembly (1984), “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, art. 14.

22 Art. 39.

23 Art. 41 CRC reads: “Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in (...) (b) International law in force for that State”. The abovementioned provision of the ICCPR on the right to a remedy is arguably more conducive to the realization of the rights of the child to be protected from all forms of abuse and exploitation.

24 See art. 3 CRC.

25 Art. 39 CRC reads: “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse (...)”.

26 CRC (2003), General Comment No. 5, para. 24.



to seek, without discrimination, compensation for damages from those legally responsible”.²⁷ In the context of human trafficking, the Palermo Protocol, which contains child-specific provisions, requires States Parties to “ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”.²⁸

There are two further UN instruments which spell out the right of victims and are hence particularly relevant to this Study. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²⁹ (Declaration of Basic Principles of Justice) adopted in 1985 demands that States put in place judicial and administrative mechanisms to enable victims to obtain redress.³⁰ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on the Right to a Remedy and Reparation)³¹ adopted in 2005 demand that States provide remedies to victims, including reparation.³²

Finally, the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Guidelines on Child Victims and Witnesses)³³ is an international instrument meant to guide States and professionals in their treatment of children who are victims of crime, and specifies that child victims have a right to reparation, and that “[c]hild victims should, wherever possible, receive reparation to achieve full redress, reintegration and recovery”.³⁴

2.2.2 Terminology and scope

As the above overview has shown, the right of the child to a remedy is supported by international law. However, what remedies specifically entail is not always clear, with terminology appearing somewhat confusing. Indeed, throughout international human rights instruments, one can find the following terms: remedy, redress, reparation, restitution and compensation.³⁵ These are not consistently used across instruments³⁶ and not always specifically defined.

27 OPSC, art. 9(4).

28 Palermo Protocol, art. 6.

29 UN General Assembly (1985), “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, A/RES/40/34, 29 November 1985.

30 *Ibid.* para. 5.

31 UN General Assembly (2005), “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, Res. 60/147 of 16 December 2005.

32 *Ibid.* para. 3d).

33 UN Economic and Social Council (2005), “Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime”, Res. 2005/20 of 22 July 2005, UN Doc. E/RES/2005/20.

34 See also UN General Assembly (2014), “Summary of the consultations held on the draft basic principles on the right to effective remedy for victims of trafficking in persons, Annex II: Basic principles on the right to an effective remedy for victims of trafficking in persons Special Rapporteur on Trafficking in Persons (Draft)”, UN Doc. A/HRC/26/18, 2 May 2014, principle 3; “Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators”.

35 For e.g. in the context of gross violations of international human rights law and serious violations of international humanitarian law, the Basic Principles on the Right to a Remedy and Reparation considers that victims have a right to a remedy and that the latter include *inter alia* “prompt reparation for harm suffered”, para. 11d). The Guidelines on Child Victims and Witnesses defines reparation as “measures taken to help a victim achieve full redress, reintegration and recovery” to include “restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings”, paras. 35 and 37. The terms redress and compensation can be found in the Convention Against Torture, art. 14.

36 For example, the term remedy can be found in the International Convention on the Elimination of all forms of Racial Discrimination (art. 6) but not in the International Covenant on Economic, Social and Cultural Rights (UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3), the Convention on the Elimination of all forms of Discrimination Against Women (UN General Assembly, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13) or the CRC.



Furthermore, the right to an effective remedy comprises several possibilities. A general distinction is often made between ‘restitution’ and ‘compensation’. Restitution is usually understood as measures taken to restore the victim to their situation prior to a wrongful act being committed against them. The term compensation usually means monetary compensation for pecuniary losses suffered by a victim. The term can be used to describe monetary damages paid by an offender pursuant to a court order.³⁷ It can also designate a financial compensation provided to a crime victim, their parents or guardians by the State, through a government programme or compensation fund.

Both the Declaration of Basic Principles of Justice and the Basic Principles on the Right to a Remedy and Reparation demand that States make restitution available to victims, to include “the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights”³⁸ and “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment”.³⁹ In the context of trafficking, the draft UN Basic Principles on the Right to an Effective Remedy for Victims of Trafficking in Persons⁴⁰ (Trafficking Guidelines) clarify that restitution should not place the victim at risk of re-victimisation and offer the alternative restitution procedure of granting “temporary or permanent residence status, refugee status or third-country resettlement on such grounds as the inability of States to guarantee that return is safe for victims of trafficking in persons and/or their families, respect for the principle of non-refoulement, the risk of re-trafficking and the risk of reprisals”.⁴¹

The Declaration of Basic Principles of Justice demand that States provide financial compensation to victims for injuries or impairment of physical or mental health, when such compensation is not available from other sources.⁴² Expanding on the scope of compensation, the Basic Principles on the Right to a Remedy and Reparation demand that it be made available for several types of harm, including not only physical or mental harm, but also lost opportunities, loss of earnings, costs of medicine and medical services, psychological and social services, etc.⁴³ Both instruments encourages States to establish and maintain funds for the compensation of victims.⁴⁴

The Basic Principles on the Right to a Remedy and Reparation elaborate on the meaning of reparation, which includes several non-pecuniary forms or reparation in addition to restitution and compensation, namely rehabilitation, satisfaction and guarantees of non-repetition”.⁴⁵ For instance, satisfaction includes measures for the cessation of violations, public apologies, commemorations and tributes to the victims as well as declarations or judicial decisions restoring the dignity, reputation and rights of victims.⁴⁶ Guarantees of non-repetition include a range of measures including reviewing and reforming laws and providing education and training to law enforcement.⁴⁷

37 For example, in the UK the term “compensation” can mean money paid by a convicted perpetrator pursuant to a criminal court order. See “Victim Support”, <https://www.victimsupport.org.uk/help-and-support/what-you-can-do/compensation>, accessed 9 October 2016.

38 Declaration of Basic Principles of Justice, para. 8.

39 Basic Principles on the Right to a Remedy and Reparation, para. 19.

40 UN General Assembly (2014), “Summary of the consultations held on the draft basic principles on the right to effective remedy for victims of trafficking in persons, Annex II: Basic principles on the right to an effective remedy for victims of trafficking in persons Special Rapporteur on Trafficking in Persons, UN Doc. A/HRC/26/18, 2 May 2014.

41 Trafficking Guidelines, para. 9 (d).

42 Declaration of Basic Principles of Justice, para. 12.

43 Basic Principles on the Right to a Remedy and Reparation, para. 20.

44 Declaration of Basic Principles of Justice, para 13, Basic Principles on the Right to a Remedy and Reparation (preamble).

45 Para. 18

46 *Ibid.* para. 22.

47 *Ibid.* para. 23.



A legal remedy, in whatever form it may take, can play an important role in a victim's healing process; for instance, reparation may "convey to child victims that some justice has been achieved, despite the fact that a crime has been committed and that they may never fully recover from the harm done to them".⁴⁸ There should not be any undue limitations when it comes to crafting solutions that can alleviate the harm suffered by children whose rights have been violated. In some instances, courts have come up with innovative solutions, and specific examples can be found in the jurisprudence of the Inter-American Court of Human Rights. This Court has ordered a wide range of measures to redress violations of children's rights, ranging from changes in legislation and policy to guaranteeing the non-repetition of violations, to naming schools and public places in memory of the victims.⁴⁹

2.2.3 Compensation as the focus of this Study

While acknowledging that remedies can take many forms, the present Study focuses on compensation. The reasons for this are largely of a practical nature, i.e. the limited time and capacity of the DLA Piper research teams and ECPAT member groups, which made too ambitious a broader study that would have looked at remedies more broadly. Because the definition of compensation may vary from one jurisdiction to another, for the purposes of this report, the term 'compensation' is used in reference to both: (1) a financial compensation awarded to the victim through a victim's assistance or State fund; and (2) monetary compensation for damages⁵⁰ awarded in the context of criminal proceedings and/or a civil action.

48 UNODC (2009), Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime, Criminal Justice Handbook Series, New York: United Nations, 95.

49 Feria-Tinta, Monica (2015), "The CRC as a Litigation Tool before the Inter-American System of Protection of Human Rights", 231-248, in T. Liefaard and J. E. Doek, eds., *Litigating the Rights of the Child* (Springer, 2015), 231-248.

50 This can include both actual losses such as lost wages, medical expenses, etc. so-called 'out of pocket' pecuniary losses and 'soft' damages like emotional, pain and suffering, etc.



3. PROCEDURES TO SEEK COMPENSATION AND CROSS-CUTTING PRINCIPLES

This Study examines three different channels through which compensation may be claimed: criminal courts, civil courts and state-managed compensation funds.

3.1 Procedures to seek compensation

3.1.1 Criminal courts

In a criminal case, the state prosecutes a defendant, with penalties ranging from fines to imprisonment or other non-custodial punishments. In most of the surveyed countries, victims are given the possibility to claim compensation as part of criminal proceedings. In fact, in 2012 the European Union issued a directive to its Member States asking them to “ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings”.⁵¹ One way to make this possible is through laws allowing victims to become a civil party to the criminal proceedings, as opposed to having to file a separate civil lawsuit to recover damages.⁵²

In common law countries such as Australia, the UK and the United States, while victims cannot typically become parties to criminal proceedings,⁵³ courts may nevertheless have powers to order a convicted offender to reimburse victims for some or all of their out-of-pocket losses. This can be achieved either at the prosecutor’s request or of the court’s own motion.⁵⁴ In many jurisdictions, victims have the right to be heard, but do not enjoy formal party status (although in some cases victims can achieve quasi-party status and can file documents, motions, and other legal memoranda). Also, victims often have a limited right to appeal adverse decisions concerning their rights—such as the right to compensation and to be heard—and in those proceedings, have rights similar to the government’s and defendant’s. In some

51 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

52 See e.g. Government of Belgium (1867), Code of Criminal Procedure, art. 3 and 4; Supreme Court of Czech Republic, Case number 5Tdo 160/2012, *Accused P.K., Accused M.K.*, victim awarded 45,000 CZK in criminal court, but referred to civil court to seek the remainder of immaterial damages claim; Government of France (1959), Code of Criminal Procedure, art. 2; Government of Italy (1940), Code of Criminal Procedure, Royal Decree 1443 of 28 October 1940, art. 74, which states that: «The civil action for restitution and compensation for damages may be brought in criminal proceedings against the defendant or the responsible party by the victim of the damage or by his sole heirs»; Government of Romania (2010, amended 2014), Code of Criminal Procedure, Law #135/2010, art. 19. See also: Romania case law, e.g. Criminal Section II of the Bucharest Tribunal, Decision No. 621/27 of April 2005; Criminal Section I of the Bucharest Tribunal, Decision No. 903 of July 2005.

53 The parties are the State (prosecutor) and the accused (the defendant). Victims may be called as witnesses.

54 See e.g.: Government of Australia NSW (2013), “Victims Rights and Support Act”, Part 5, Div. 2; Government of the Hong Kong Special Administrative Region (1997), “Criminal Procedures Ordinance”, Chapter 221 of 30 June 1997, §73; The Government of the Hong Kong Special Administrative (1997), “Magistrates Ordinance”, Chapter 227 of 30 June 1997, §98; the court has the power to make compensation orders against convicted defendants, however according to DLA Piper Hong Kong, no compensation order has ever been made in favour of a child victim of sexual exploitation. In the UK, in some instances awards can be made against the perpetrator in criminal actions and a child victim may also, in some circumstances, seek to recover damages from the accused through the civil courts. See ECPAT Questionnaire, Response provided by DLA Piper – UK, May 2015.



jurisdictions, judges have an actual obligation to order restitution to victims in some cases.⁵⁵ Note that restitution is aimed at covering a victim's pecuniary losses and not the full extent of damages (i.e. pain and suffering). A restitution order will not necessarily preclude a victim from claiming further damages in front of a civil court.

Ideally, a criminal court should be able to compensate a child victim when the defendant is convicted or sentenced at the request of the prosecutor, the victim, the parents or guardians of the victim, the lawyer of the victim, or at the request of a judge.

3.1.2 Civil courts

In a civil case, a victim brings a separate lawsuit against the offender as a private party separately from the criminal prosecution. In this situation, the victim-plaintiff sues the defendant for compensation for the personal injuries of the victim, both physical and psychological. The plaintiff must provide evidence proving that he/she was harmed by the perpetrator as well as evidence of specific harms suffered (the victim can use a criminal conviction as evidence against the defendant). In a civil lawsuit, the amount of compensation could be decided by a judge, jury or settled between the parties prior to trial.

3.1.3 State-managed victim compensation funds

Obtaining full and adequate compensation from an offender through the court process can be challenging. There is the prospect of a lengthy procedure, and much depends on the ability to pay of an offender. More importantly, the court environment is often intimidating for children who are at risk of re-traumatisation.⁵⁶ In this respect, victim compensation programmes managed by States may provide a more informal, efficient and less traumatic way to seek redress in comparison with the court system. However, as this report demonstrates, there are many obstacles to obtaining compensation through a state fund.

3.1.4 Main differences between State funds and other sources of compensation

There are several differences between compensation through a State-managed programme and through a court of law. In a State-managed programme, the State is the payer instead of the perpetrator.⁵⁷ In many States, the procedure is administrative rather than legal.⁵⁸ Law or regulation typically establishes the procedures and guidelines of a fund.⁵⁹ State-managed programmes are usually administered by a

55 In the US, federal law provides for mandatory restitution for several federal offences involving the sexual exploitation of children. See Marsh, James R. (2014), "Federal Criminal Restitution for Child Pornography Victims", American Bar Association, 28 October 2014, accessed 14 October 2016, <http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2014-1014-federal-criminal-restitution-child-pornography-victims.html>. Also, in approximately one third of the states in the US, courts are required to order restitution to the victim for certain types of crimes. See National Center for Victims of Crime (2012), <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution>, accessed 9 October 2016.

56 See section 4.4 of this report for further details.

57 See e.g. Victims Assistant Scheme in Australia NSW, Criminal Injuries Compensation Authority (CICA) in Scotland, England and Wales, Government of Japan, Compensation System set out in "Basic Act on Crime Victims-2004" and "Crime Victims Support Act-1980", Government of Hong Kong SAR, "Criminal and Law Enforcement Injuries Compensation Scheme (CLEIC)".

58 See e.g. Government of Thailand (2008), "Anti-Trafficking in Persons Fund" set out in "Anti-Trafficking in Persons Act B.E 2551 (2008) and its amendment (No. 2) B.E. 2558 (2015) («ATPA»); Australia WA: Criminal Injuries Compensation Act 2003: Victims Assistant Scheme in Australia NSW; CICA in the UK.

59 See e.g. Government of Japan, Compensation System set out in "Basic Act on Crime Victims-2004" and "Crime Victims Support Act-1980; Government of Thailand (2008), "Anti-Trafficking in Persons Fund" set out in "Anti-Trafficking in Persons Act B.E 2551 (2008) and its amendment (No. 2) B.E. 2558 (2015) («ATPA»).



board or division of a government agency⁶⁰ that examines applications, approves or denies requests for compensation, and determines the amount of the compensation award.

In some States, the law may grant victims a general right to seek compensation from the government, but without a dedicated fund.⁶¹ All the States surveyed for this research have a dedicated victim compensation fund.⁶² While many States have compensation funds for victims of crimes in general, others have also established special funds for specific categories of victims, such as victims of trafficking.⁶³

In a 2015 article entitled “A Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims”, which reviewed the reports of State Parties to the Committee on the Rights of the Child pertaining to their compliance with the OPSC and CRC, a growing trend was reported of States establishing state-funded compensation programmes.⁶⁴ This is a promising development from an international law perspective because while the establishment of victim compensation funds is recommended in binding international instruments, it is not mandatory. Nevertheless, the Committee on the Rights of the Child has long criticised reporting States for lacking compensation programmes for victims who cannot seek compensation from perpetrators.⁶⁵

3.2 Cross-cutting principles

While having access to a legal remedy is a right per se, the process for obtaining compensation starts long before a child receives funds through a court or state fund. All interactions between the child and the justice system should be guided by fundamental, crosscutting principles: the child’s best interests, their right to be treated with dignity and compassion, their right to be heard and their right to be protected from hardship.

3.2.1 *The best interests of the child*

The principle of the best interests of the child is one of the pillar principles of the CRC. It requires States to make the best interests of the child a primary consideration, “[i]n all actions concerning [them], whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”.⁶⁶ While it is arguably in a child victim’s best interests to have access to legal remedies that may help alleviate their suffering, a child’s best interests may vary depending on unique circumstances and needs of a child, and its determination requires a thorough, careful analysis. Beyond justifying access to remedies, the principle of the best interests of the child can also help surmount each of the barriers listed in Chapter 4, below. For instance, it is in a child’s best interests to have the necessary information to pursue their rights. Upholding a child’s best interests also means

60 See e.g. the UK, where CICA is an executive agency of the Ministry of Justice.

61 In Romania, assistance is limited to the provision of legal and psychological assistance to eligible victims. Government of Romania (2004), “Law on measures to protect the victims of criminal offences”, Law No. 211/2004, (information provided by DLA Piper – Romania).

62 UK: Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 15; Australia NSW, *Ibid.* 15), Australia NSW (Trustlaw, 15).

63 See e.g. Thailand, Anti-Trafficking in Persons Fund; Italy, Government of Italy (2003), “Measures against trafficking”, Law No. 228 of 2003, Article 12.

64 Binford, Warren (2015), “A Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims”, 13 *Ohio St. J. Crim. L.* 37, 28 April 2015, 54-55, accessed 3 June 2016, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600339.

65 *Ibid.*, citing CRC concluding observations of Greece, Mexico, Slovakia, Sweden, Turkmenistan and Uruguay.

66 CRC, art. 3(1).



that compensation awards would be disbursed in a manner that is consistent therewith. The Guidelines on the Rights of Child Victims and Witnesses specify that in criminal justice matters, the best interests of the child should be balanced with the rights of the offender, and that includes a right to protection and harmonious development.⁶⁷

3.2.2 The right to be treated with dignity and compassion and the training of professionals

The right of child victims to be treated with dignity and compassion is an overarching principle of the Guidelines on Child Victims and Witnesses. These guidelines demand that child victims be treated with care and compassion during the justice process and that all interactions with child victims be conducted in a child-sensitive manner taking into account a child's unique circumstances, capacities and needs. In particular, all investigations should be conducted by professionals who have received adequate training to proceed in a manner that is sensitive and respectful of child victims.⁶⁸ To date, the training of professionals working with children remains insufficient, as noted in the UNHCHR's report on Access to Justice:

"[S]tates have also highlighted that specialized judges, prosecutors, lawyers and other personnel working with children, as well as sufficient resources to provide specialized training, are frequently lacking."⁶⁹

The importance of training professionals working alongside child victims cannot be overemphasised. It is underscored across international instruments, both binding and non-binding. For example, the OPSC requires State Parties to train those who interact with child victims of sexual exploitation on, inter alia, the substance of the relevant rights as well as on the special needs of child victims.⁷⁰ The Guidelines on Child Victims and Witnesses demand that States ensure that professionals are trained to "effectively protect and meet the needs of child victims and witnesses".⁷¹ As well as provide a list of training topics, including their rights under national and international law, the effect of crimes and appropriate methods for effectively interacting with child victims, that take into account their special needs.⁷²

The training of professionals can help surmount the barriers to compensation discussed in this Study. For example, trained professionals can be more inclined to inform children about their rights to claim compensation; legal assistance can be tailored to the rights of the child; prosecutors and judges can better understand the damages suffered by child victims and the impact that compensation measures can have on their lives, etc.

Of equal importance is the need to facilitate communication between professionals and child victims of sexual exploitation. On the one hand, state actors, such as the police, often perceive adolescent child victims as offenders; on the other hand, adolescent child victims can be distrustful of law enforcement or fear arrest.⁷³ Compounding these challenges is the fact that child victims can suffer from a range of psychological and emotional problems because of their exploitation. The Committee on the Rights of the Child has stressed the importance of "[t]raining and development of child-sensitive skills to

67 Guidelines on Child Victims and Witnesses, para. 8c).

68 *Ibid.*, paras. 10-14.

69 Human Rights Council, "Access to justice", para. 14.

70 OPSC, art. 8(4); *See also* Palermo Protocol, art. 10(2) and Trafficking Guidelines, para.18(e).

71 Guidelines on Child Victims and Witnesses, para. 40.

72 *Ibid.*, para 42.

73 ATJ Study, 2.1.1.1.b), 74.



communicate with children and creating a safe environment in the justice process”.⁷⁴ The Committee further recommended, “such training should be multi-disciplinary and include all persons working with and for children, such as lawyers, judges, public prosecutors, police, teachers, prison staff, social workers, health professionals, as well as persons working in the alternative care system, public administration, immigration control, civil society actors and traditional leaders”.⁷⁵

As the Committee on the Rights of the Child consistently observes, much remains to be done towards fulfilling the obligations of States to train all individuals interacting with child victims. For instance, in its Concluding Observations on the compliance of Germany with the OPSC, the CRC Committee expressed concern over insufficient training of relevant actors and resources in that country and recommended that the State improve the training of “judges, public prosecutors, police officers, social workers, health-care staff and other professionals working with and for children”.⁷⁶ The Committee expressed similar concerns regarding the lack of multidisciplinary training for professionals working with children in the UK and recommended increased training and related resources.⁷⁷ In this connection, ECPAT UK reported that one of the biggest barriers that child victims of sexual exploitation are experiencing in the UK is the lack of knowledge of child victims’ rights among the judiciary, police, social workers, and health and education staff, which results in child victims not receiving correct advice and guidance regarding their rights.⁷⁸ Additionally, the Committee expressed concern over the lack of multidisciplinary training of relevant professionals and authorities in Australia, and recommended the country increase its resources and systematically evaluate its training programs.⁷⁹ ECPAT Belgium reported that the training of professionals to help them understand the complexity of the process for seeking compensation is one means of improving the process in Belgium.⁸⁰

3.2.3 *The right to be heard*

The right to participation is another pillar principle of the CRC. This includes the right of the child to participate in procedures to access remedies.⁸¹ The right to participation involves not only the ‘right to be heard’, but also that the child’s views are actually considered and given appropriate weight.⁸² According to the Committee on the Rights of the Child, the right to participate applies to judicial or administrative proceedings affecting victims of “physical or psychological violence [and] sexual abuse or other crimes”.⁸³ The right to participation forms part of the obligation under international law to

74 UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/1, para. 49.

75 *Ibid.*

76 CRC (2014), Concluding observations on the report submitted by Germany under article 12, paragraph 1, of the OPSC”, 24 February 2014, UN Doc. CRC/C/OPSC/DEU/CO/1, paras. 18 and 36.

77 CRC (2014), Concluding observations on the report submitted by the United Kingdom of Great Britain and Northern Ireland under article 12, paragraph 1, of the OPSC”, paras. 21 and 22.

78 ECPAT Questionnaire, Response provided by ECPAT Member UK, October 2015.

79 CRC (2012), Consideration of reports submitted by States parties under article 12, paragraph 1, of the OPSC, Australia, CRC/C/OPSC/AUS/CO/1, 24 September 2012, paras. 16 and 17.

80 ECPAT Questionnaire, Response provided by ECPAT Member Belgium, October 2015.

81 Art. 12(2) CRC: “(...) the child shall (...) be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

82 Art. 12(1) CRC: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”. See also OPSC, art. 8(1).

83 CRC, General Comment No. 12, para. 32.



prioritise the best interests of the child in matters concerning the child.⁸⁴ In the context of compensation, in some countries victims may have an opportunity to express their views when an accused is found guilty by a criminal court. The victim can express their point of view and concerns in a written statement (sometimes called a ‘victim impact statement’), which can be read aloud in the courtroom to convey the harm suffered by the victim and its consequences on their life. The judge then gives weight to the statement in the sentencing decision.⁸⁵

3.2.4 *The right to be protected from discrimination*

States are unequivocally obligated to protect children’s rights irrespective of their (or their parent’s or legal guardian’s) race, colour, sex, religion, nationality, ethnicity, social origin, property, disability, birth or other status.⁸⁶ The OPSC requires States to “ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible”.⁸⁷

This study found several examples of how discrimination may limit access to remedies among certain vulnerable groups of children. One such example is that of children living in poverty are more likely to fall victim to sexual exploitation,⁸⁸ but also “...face significant barriers that seriously impede or discourage them from seeking justice”.⁸⁹ Child victims who live in poverty are even less likely to have access to information regarding their rights and remedies than other children.⁹⁰ For instance, it was reported that in Austria, children living in poverty are often less informed about their rights and the ways to get support and compensation.⁹¹ The length of legal proceedings is also found exacerbated in judicial matters involving poor child victims since their cases tend to be “[...]under-prioritised owing to biased preferential treatment of the wealthy or lack of sensitivity or understanding of the impact of the delay on the poorest claimants”.⁹²

Many children living in poverty lack birth registration⁹³ or other legal identification and this limits their access to the justice system or remedies.⁹⁴ Since many people living in poverty reside in rural and remote areas, their geographic location introduces a further obstacle to accessing remedies through justice systems and programmes administered in cities.⁹⁵ The legal research group in Australia reported that homelessness is one of the biggest barriers to seeking compensation: children without a fixed

84 CRC, General Comment No. 12, paras. 70-71.

85 This is the case in Quebec, Canada. See “Rights of Victims during Criminal Court Cases”, Éducaloi, accessed 15 April 2017, <https://www.educaloi.qc.ca/en/capsules/rights-victims-during-criminal-court-cases>.

86 CRC, art. 2(1).

87 OPSC, art. 9(4).

88 UN General Assembly (2012) “Extreme poverty and human rights, Report of the Special Rapporteur on Extreme Poverty and Human Rights”, UN Doc. A/67/278, 9 August 2012, para. 5.

89 *Ibid.*, para.19.

90 *Ibid.* para. 25-27.

91 ECPAT Questionnaire, Response provided by DLA Piper – Austria, October 2015

92 UNGA (2012) “Extreme poverty and human rights”, para. 69

93 UNICEF (2013), “Every Child’s Birth Right”, December 2013, New York: UNICEF, 23, accessed 13 June 2016, https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf.

94 UNGA (2012) “Extreme poverty and human rights”, para. 33.

95 *Ibid.* paras. 38 and 56.



address cannot access many support services.⁹⁶ In that country, children living in poverty, as well as many Aboriginal and Torres Straight Islanders' children, lack birth certification preventing them from accessing the criminal justice system and/or a number of support services.⁹⁷

Child victims from indigenous and ethnic minorities⁹⁸ are another population with specific barriers to compensation including “[...]discriminatory laws and practices, lack of funding necessary to seek justice, including legal aid, insufficient numbers of indigenous judges and lawyers, and biases against indigenous peoples and individuals involved in legal proceedings”.⁹⁹ The barriers also derive from ‘structural discrimination’ where indigenous people are more likely to live in poverty and have unequal access to education, among other State benefits.¹⁰⁰

Yet another example, boy victims of sexual exploitation are often denied access to justice because laws and cultural norms do not adequately protect them from sexual exploitation. Boys can also suffer from the lack of support systems that could enable them to seek justice. Boys are often perceived as offenders rather than victims. In Hong Kong and Nepal¹⁰¹ for example, there are no laws criminalising the rape of boys; thus, boys cannot be considered as victims of rape in these countries. According to Hong Kong’s Crimes Ordinance, procurement for unlawful sexual intercourse is criminalised only when the victim is a girl.¹⁰² In addition, boys under 16 in Hong Kong SAR can be found guilty of several sexual offences, namely homosexual buggery¹⁰³ and gross indecency with another man.¹⁰⁴ The ATJ Study found that boy victims are reportedly more likely to be arrested and tried as offenders than treated as victims.¹⁰⁵ In Nepal, recently established police service centres providing support such as counselling are only available to female victims.¹⁰⁶ Without equal protection under the law and in practice, the abilities of boy victims to access justice are severely limited.

96 ECPAT Questionnaire, Response provided by DLA Piper – Australia, October 2015.

97 Robinson Aivee, Broughan Tara *et al.* (2013), “Birth registration – Submission to the OHCHR”, November 2013, UNICEF Australia, accessed 14 June 2016, <http://www.childrights.org.au/wp-content/uploads/2014/06/Birth-Registration-Submission-to-OHCHR-November-2013-UNICEF-Australia.pdf>.

98 There is no specific definition of ‘minority’ and ‘indigenous’ people in international law. However, the UN system recognises the rights of these two categories of people in several international instruments. See e.g., UN General Assembly (1966), “International Covenant on Civil and Political Rights”, Res. 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, Article 27; UN General Assembly (1992), “Declaration on the Rights of Persons belonging to national or ethnic, religious and linguistic minorities”, Res. 47/135 of 18 December 1992; UN General Assembly (2007), “Declaration on the Rights of Indigenous Peoples”, Res. A/RES/61/295 adopted on 2 October 2007.

99 Human Rights Council (2013), “Access to justice in the promotion and protection of the rights of indigenous peoples. Study by the Expert Mechanism on the Rights of Indigenous Peoples”, UN Doc. A/HRC/EMRIP/2013/2, 29 April 2013, para. 26.

100 *Ibid.* para. 25.

101 Government of Nepal (1963), “General Code of Nepal”, Act No. 67 of 1963, Part 4, Chapter 14 “On Rape”.

102 The Government of the Hong Kong Special Administrative Region (1997), “Crimes Ordinance”, para.132.

103 *Ibid.*, para. 118C.

104 *Ibid.*, para. 118H.

105 ATJ Study, 2.1.3.3., 101.

106 Asian Development Bank (2014), “More Police Service Centers in Nepal Help Reduce Violence Against Women,” Asian Development Bank- Article, 12 November 2014, accessed 22 June 2016, <http://www.adb.org/news/features/more-police-service-centers-nepal-help-reduce-violence-against-women>.



4. BARRIERS TO SEEKING COMPENSATION

This Study highlights eight barriers to compensation, as identified by respondents and through desk research. These barriers are: (1) the lack of notice and information; (2) the lack of legal assistance available to children; (3) the fact that state funds are not adapted to child victims and their functioning is often intertwined with the criminal justice process; (4) hardship facing children in the compensation-seeking process; (5) misperceptions of child victims; (6) the complexity of transnational cases; (7) prescription periods, statutes of limitations and other time restrictions and (8) difficulties to access payments.

4.1 Lack of notice and information about child victims' rights

Under international law, crime victims are entitled to information pertaining to their rights, including the right to seek redress.¹⁰⁷ The OPSC extends these rights to child victims of sexual exploitation by requiring State Parties to keep them “informed of their rights” throughout the criminal justice process.¹⁰⁸

The Guidelines on Child Victims and Witnesses further elaborate on the right to information and demand that all child victims and witnesses be kept informed throughout the entire justice process including “about opportunities to obtain reparation from the offender, the State or other processes”.¹⁰⁹ All information should be provided in child-friendly manner in a language that the child is capable of understanding.¹¹⁰ The Model Law developed to implement the Guidelines further recommends that after the trial, courts inform children or their parents/guardians about procedures for claiming compensation whenever a victims fund exists.¹¹¹

Notwithstanding the well-articulated international law and standards on the child’s right to information, children continue to lack knowledge of their rights and available services, while also “lacking information about where to go and whom to call to benefit from advice and assistance”.¹¹² Consistent state practices in providing information to children about their rights to seek and obtain compensation are critically lacking. The UN Special Rapporteur on Trafficking in Persons, especially women and children, has expressed the concern that States fail to provide victims with information on their rights to a remedy in a method and manner that victims can understand.¹¹³ The Special Rapporteur also noted that despite laws in certain countries requiring States to inform victims of their rights to seek compensation, these are not consistently applied or the information is not conveyed by law enforcement in a way a victim can understand.¹¹⁴

107 See Basic Principles on the Right to a Remedy and Reparation, paras. 11 and 24; Basic Principles of Justice for Victims of Crime, para. 5.

108 OPSC, art. 8(1).

109 Guidelines on Child Victims and Witnesses, para. 20. See also Trafficking Guidelines, para. 18(b).

110 *Ibid.*, para. 14.

111 UNODC (2009), “Justice in Matters involving Child Victims and Witnesses of Crime, Model Law and Related Commentary”. New York: United Nations, p.22.

112 Human Rights Council, “Access to justice”, para. 14 citing OHCHR and Special Representative of the Secretary-General on Violence against Children (2012), “Safe and child-sensitive counselling, complaint and reporting mechanisms to address violence against children, Joint report of the Special Representative of the Secretary-General on Violence against Children and the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography”, September 2012 New York, 6.

113 Report of the Special Rapporteur, para. 43 (internal citations omitted);

114 *Ibid.* para. 44.



Research teams from Japan, the Netherlands and Romania could not readily locate child-friendly information available for child victims of sexual exploitation pertaining to procedures for seeking compensation or financial assistance.¹¹⁵ ECPAT Belgium reported that to its knowledge, no systematic method of providing child-friendly information to child victims of trafficking regarding their rights, including the right to compensation, exists in the country.¹¹⁶ Currently, the provision of information to child victims is left to the initiative of the individuals involved.¹¹⁷ The research team from France reported that a child would be unable to comprehend the information provided on government websites pertaining to claiming compensation due to the technical language of the information.¹¹⁸ The research team from the Czech Republic reported that the information provided by the Czech police - a pre-drafted form that includes complex legal citations, a general list of aid providers, and links to different websites - would be incomprehensible to adult victims, and even more so for child victims.¹¹⁹ ECPAT Netherlands stated that one of the greatest barriers to children accessing compensation is the lack of available information, despite the existence of well-structured procedures for accessing compensation.¹²⁰ Not surprisingly, ECPAT Netherlands further reported that the procedure applying to children who are seeking compensation would be improved by better informing the victims.¹²¹ Similarly, ECPAT Romania reported that one of the biggest barriers child victims face in seeking compensation is the lack of information.¹²² In its 2014 review of the UK's compliance with the OPSC, the Committee on the Rights of the Child recommended that the UK should better inform child victims of their right to seek compensation.¹²³ In Germany, “[m]ost of the entitled persons don’t know about their rights which are granted and subsequently don’t make use of them. Even legal advisors are widely not familiar with the support benefits victims can achieve”.¹²⁴ In its review of Germany’s compliance, the Committee on the Rights of the Child noted that “child victims and witnesses frequently do not receive sufficient information about their procedural rights”¹²⁵ and recommended that the country “[...]make every effort to allocate adequate and sufficient human, technical and financial resources to ensure the effective and exhaustive implementation of the right to be informed[...]”.¹²⁶

This gap in informing victims of their rights is also clearly exposed in the ATJ Study conducted in Thailand, Nepal and the Philippines: one in four survivors who participated in the ATJ Study had little understanding of their rights and the progress of their cases.¹²⁷ Regarding compensation specifically, one caregiver reported that children received such little information on their rights to compensation that some believed they would have to personally collect compensation from the perpetrators.¹²⁸ Research

115 ECPAT Questionnaires, Access to Justice Project: Child victims’ right to compensation 2014-2015, Responses provided by DLA Piper Japan LLP, DLA Piper Netherlands LLP, DLA Piper Romania LLP, October 2015.

116 ECPAT Questionnaire, Response provided by ECPAT Belgium Member, October 2015.

117 *Ibid.*

118 ECPAT Questionnaires, Responses provided by DLA Piper France, LLP, October, 2015, see <http://www.defenseurdesdroits.fr/fr/competences/missions-objectifs/defense-des-droits-de-lenfant>; <http://www.enfance-et-partage.org/spip.php?rubrique1>; <http://www.enfantbleu.org/etre-aide/enfant-ado>.

119 ECPAT Questionnaire, Response provided by DLA Czech Republic LLP, October 2015; form available to download at: <http://www.policie.cz/clanek/dokumenty-a-odkazy-pro-obeti-trestnych-cinu.aspx>.

120 ECPAT Questionnaire, Response provided by ECPAT Netherlands Member, October 2015.

121 *Ibid.*

122 ECPAT Questionnaire, Response provided by ECPAT Romania Member, October 2015.

123 CRC (2014), Concluding observations on the report submitted by the UK, para. 39(e).

124 Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 63. In Germany, only 10% of crimes are reported, *Ibid.*

125 CRC (2014), Concluding observations on the report submitted by Germany, para. 33.

126 *Ibid.* para 34.

127 ATJ Study, 2.2.8.2, 176.

128 *Ibid.* 2.2.7.1.c), 171; 2.2.10.1.c), 211.



conducted through the Recovery and Reintegration Study found that within the surveyed organisations, there was often no staff available to provide this information to children.¹²⁹

One closely related challenge is the language barrier. Children who do not speak the native language of the country in which they are seeking compensation have limited or no access to information in their native language about their rights. This was also noted by the Special Rapporteur on trafficking:

*“In terms of the language to be used, it is crucial that information about trafficked persons’ rights and the procedures for obtaining remedies is clearly explained in a language that the trafficked person understands. In this regard, interpreters have a crucial role to play, as many trafficked persons may not understand the language spoken in the country in which they wish to seek remedies [. . .] Furthermore, the language used to explain the rights and procedures to seek remedies must be easily understood by trafficked persons of all educational and socio-economic backgrounds”.*¹³⁰

ECPAT Belgium reports that the language barrier is one of the most significant challenges for child victims of sexual exploitation seeking compensation, and identified the need for child-friendly materials in the native language of the child to improve the compensation process.¹³¹ In Thailand, many trafficking victims do not speak Thai and are not provided with information in their native languages.¹³² There is an insufficient number of translators for communication with foreign child victims, particularly the significant number of victims from Burma and Laos.¹³³ In Australia NSW, victims from non-English speaking backgrounds face greater challenges in accessing legal assistance and information, which in turn means that they are less likely to recover compensation.¹³⁴ In the Czech Republic, only the basic information provided by the police in a pre-drafted form is required to be in a language that the victim can understand.¹³⁵

Child victims of online exploitation face problems that go beyond information and notices. Given the nature of these crimes—online distribution, trafficking, collecting, and even production—child victims might not even know the identity of the perpetrator. One of the main goals, and primary challenges, of law enforcement is identifying victims. This happens in a variety of ways using both traditional and computer forensic investigation. Once a child is positively identified, it is essential that the child be notified not only of their right to seek compensation, but especially and fundamentally that they are a victim. This does not happen systematically in the United States state court systems, where two thirds of the child exploitation cases are prosecuted - but has been happening in the federal system since 2008 when the federal Crime Victims’ Rights Act¹³⁶ mandated notice to victims.¹³⁷

In conclusion, States should generate child-friendly materials to inform victims about their rights including mechanisms to obtain compensation, in appropriate and various languages, and ensure these are widely disseminated, for example in police stations, schools, community centres, etc. In addition,

129 Dr. Katherine Hargitt, phone conversation with Catherine Beaulieu, 7 October 2016.

130 Report of the Special Rapporteur, 2011, para. 44

131 ECPAT Questionnaire, Response provided by ECPAT Member Belgium, October 2015.

132 ECPAT Questionnaire, Response provided by DLA Piper – Thailand, October 2015.

133 ATJ Study, pp.185, 194.

134 ECPAT Questionnaire, Response provided by DLA Piper – Australia, October 2015.

135 Government of the Czech Republic (2013), “Act on the aid to crime victims”, Act No. 45/2013 Coll., paras. 8,12.

136 18 U.S.C. § 3771.

137 James Marsh, e-mail communication to Catherine Beaulieu, 18 April 2017.



States should ensure that front-line professionals working in contact with child victims are equipped with the necessary knowledge and skills¹³⁸ to inform children, in a child-sensitive manner, on their right to compensation.

4.2 Insufficient legal assistance to support child victims

Legal systems are primarily designed for adults, and child victims often lack the financial means and knowledge to obtain advice and representation in the aftermath of being sexually exploited.¹³⁹ In most countries, children lack the legal capacity to represent themselves in judicial or administrative proceedings. Hence, they must rely on legal representatives who can be their parents, guardians or other representatives. Most respondents emphasised that this can be particularly difficult for unaccompanied and undocumented children.

The OPSC requires States parties to provide “appropriate support services to child victims throughout the legal process”¹⁴⁰ and the Guidelines on Child Victims and Witnesses specify that legal assistance is one type of support that should be offered to child victims, alongside child victims and witness specialists, support persons and/or guardians to protect the child victims’ interests.¹⁴¹ Ideally, free legal aid should be provided to child victims of sexual exploitation. There is some support for this idea, for example in the draft Trafficking Guidelines and from the Special Rapporteur on Trafficking,¹⁴² but this is not the norm.

Often, even where a legal assistance system is in place, child victims may not qualify for free legal assistance. The Special Rapporteur on Trafficking found that some states impose eligibility criteria for legal aid that can be particularly difficult to meet for trafficking victims, such as being nationals or long-term residents of the country.¹⁴³ In the Czech Republic, a child victims’ parents or legal guardian’s financial status and income are taken into account when determining whether a child qualifies for free legal assistance.¹⁴⁴ Similarly, when considering an application for legal aid in civil matters, the Scottish Legal Aid Board will consider the child’s resources, which include the financial resources of any person who owes an “obligation of aliment” to the child.¹⁴⁵ Under Scottish law, an obligation of aliment is owed to a child by his or her father, mother and any person who has accepted the child as part of their family, and this is considered part of the child’s own resources unless it would be unjust or inequitable

138 See section 3.2.2, above, on the importance of training.

139 Human Rights Council, “Access to justice”, para. 40.

140 OPSC, art. 8(d).

141 Guidelines on Child Victims and Witnesses, paras. 22 and 25.

142 Report of the Special Rapporteur on Trafficking, 2011, paras. 47 and 59; art. 7(e), Trafficking Guidelines. See also United Nations, “Basic Principles on the Role of Lawyers”, 7 September 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, art. 3: “Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources”.

143 Report of the Special Rapporteur, 2011, para. 47.

144 Government of the Czech Republic (1963), “Code of Civil Procedure”, Law No. 99/1963 Coll., §30, para. 2 and § 138 (information provided by DLA Piper- Czech Republic). See also European E-Justice Portal, accessed 27 September 2016, https://e-justice.europa.eu/content_costs_of_proceedings-37-cz-en.do?member=1.

145 Scottish Ministers (2010), “Legal Aid and Advice, The Civil Legal Aid (Scotland) Amendment Regulations 2010”, Law No.461 of 2010 (information provided by DLA Piper – UK).



to do so.¹⁴⁶ In Japan, the high costs of legal services render it impossible for children to hire a lawyer, especially in light of low compensation awards potentially available from civil courts.¹⁴⁷ In Hong Kong, even if a person meets the strict requirements to receive legal aid, he/she is required to reimburse the Legal Aid Department if damages are awarded in court proceedings.¹⁴⁸ Further, according to the above-mentioned Special Rapporteur report, when legal assistance is provided, the lawyers assigned to the case often lack training on the relevant laws.¹⁴⁹

The Compensation Study found that to the extent free, accessible and quality legal assistance exists, it is usually provided by non-governmental organisations, as opposed to the government. For example, in Thailand, the non-governmental organisation ChildLine Thailand assists child victims in the process of obtaining compensation, including obtaining the necessary documentation and monitoring the process through to its completion.¹⁵⁰ ECPAT UK provides services for child victims of trafficking, including support groups, connecting child victims with qualified pro bono attorneys and ensuring that decisions are made in the best interests of the child.¹⁵¹ In Germany, the non-governmental organisation Weisser-Ring provides support services to victims and funds necessary legal assistance and representation to access the State-managed compensation programme.¹⁵²

Some positive features of national legislation were mentioned by the respondents to this Study. In Germany, the government provides legal assistance under the Legal Advice Scheme Act covering legal representation and court costs.¹⁵³ For assistance with court fees, however, judges first review the evidence and documentation and rule whether the case is justifiable.¹⁵⁴ In Belgium, any minor is also entitled to free legal assistance.¹⁵⁵ The previously mentioned “Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims” found a trend towards providing free legal representation to child victims among those States reporting to the Committee.¹⁵⁶ In the Netherlands, as of 1 July 2015, attorneys wishing to represent victims of trafficking must first pass a course on victims’ rights, including the right to claim compensation.¹⁵⁷

In sum, because children who are victims of sexual exploitation are especially vulnerable, lack resources and depend on adults to support them in the exercise of their rights, it is essential that States continue to find ways to provide children with free legal assistance to enable them to claim compensation for the

146 ECPAT Questionnaires, Responses provided by DLA Piper UK, LLP, October 2015.

147 Japan Federation of Bar Associations (2008), «Investigative Report on legal needs of the citizens», June 2008, accessed 8 June 2016, http://www.nichibenren.or.jp/library/ja/jfba_info/publication/data/shimin_needs.pdf. (available in Japanese).

148 «Hong Kong Legal Aid Department (2014), «Contribution towards Costs of Legal Aid Case and Director of Legal Aid’s First Charge», January 2014, accessed 8 June 2016, <http://www.lad.gov.hk/eng/documents/ppr/publication/contribution.pdf>.

149 Report of the Special Rapporteur, 2011, para. 59.

150 ECPAT Questionnaire, Responses provided by ChildLine Thailand, October 2015.

151 *Ibid.* ECPAT Member UK, October 2015.

152 *Ibid.* ECPAT Member Germany, October 2015.

153 Government of the Federal Republic of Germany (1980), “Legal Advice Scheme Act”, 18 June 1980n (l.p.689), last amended by Article 140 of the Decree of August 31, 2015 (l.p. 1474)), accessed 8 June 2016, <https://www.gesetze-im-internet.de/berathig/BJNR006890980.html>. (available in German), (information provided by DLA Piper, Germany).

154 *Ibid.*

155 Federal Government of Belgium (2003), “ Arrêté royal déterminant les conditions de la gratuité totale ou partielle du bénéfice de l’aide juridique de deuxième ligne et de l’assistance judiciaire”, Royal Decree of 18 December 2003, Article 1, para. 1, al.1, 8°.

156 Binford, Warren (2015), “A Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims”, 15-16.

157 ECPAT Questionnaire, Responses provided by ECPAT Netherlands, October 2015.



damages they have suffered. Legal aid should also extend to children who are seeking compensation through both courts and State funds.

4.3 Difficulties in securing compensation from State funds

State-managed compensation funds are one potential source of compensation for child victims in the event monetary damages cannot be claimed directly from the perpetrator. In practice however, State funds are not always suited to the needs of child victims and their access can be restricted by limiting criteria.

4.3.1 State funds are not adapted to SEC victims

Nearly all States surveyed in this Study have established a fund to compensate crime victims. However, such funds are generally not specifically addressed to victims of sexual exploitation and even less so to children. In fact, most State-managed programmes provide one generic fund available to all victims of crime. Different schemes lay out amounts or categories of financial assistance that may be available to crime victims to compensate for physical or psychological injuries suffered because of a criminal act. This can include, for example, payments for personal injuries or economic loss. In addition, states sometimes provide for a lump sum ‘recognition payment’ in acknowledgement of the trauma suffered by a victim in certain cases.

Most state compensation funds are specific to victims of ‘violent crime’ – e.g. the CLEIC Scheme in the Hong Kong SAR, CICA (Criminal Injuries Compensation Authority) in England, Wales and Scotland and the Japanese state fund. In some countries, sexual assault or rape are included under the definition of violent crime,¹⁵⁸ but it is not clear whether all forms of sexual exploitation of children would qualify. This concern was highlighted in the recent “Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims” which found that because many states limit recovery to victims of violent crimes, certain categories of SEC victims, such as those exploited in child sexual abuse material, are excluded.¹⁵⁹ Furthermore, in some jurisdictions, compensation can only be claimed for offences that are enumerated in the law.¹⁶⁰ While some countries have extended the scope of state funds for victims of human trafficking,¹⁶¹ eligibility requirements can be difficult to meet for child victims.¹⁶²

158 Government of Australia NSW (2013), “Victims Rights and Support Act” sec.19; UK CICA: Annex E to Criminal Injuries Compensation Scheme 2012: “(1) Subject to paragraph 3, a “crime of violence” is a crime which involves (...) (d) a sexual assault to which a person did not in fact consent (...)”. In Belgium, child victims of sexual exploitation would be considered as victims of “deliberate acts of violence” and hence fall under the scope of the state victim compensation fund. See ECPAT Questionnaire, Response provided by DLA Piper Belgium. Hong Kong: Kwok Tung Ming, Eric SC. (2014), “Criminal and Law Enforcement Injuries Compensation Boards 41st Annual Report for the year ending 31 March 2014”. 5, accessed 22 June 2016, http://www.swd.gov.hk/doc/social-sec/41st%20CLEIC%20Boards%20Annual%20Report_Eng.pdf Northern Ireland: 2009 Scheme: “7.9 There is no legal definition of the term but crimes of violence usually involve a physical attack on the person, for example assaults, wounding and sexual offences”.

159 Binford, Warren (2015), “A Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims”, 5.

160 This is the case of Quebec, Canada. See Government of Quebec (1971), “Crime Victims Compensation Act”, CQLR, C. I-6.

161 This is the case in Belgium, as per ECPAT Questionnaire, Response provided by ECPAT Belgium. See also CICA, “Victims of Human Trafficking and the Criminal Injuries Compensation Scheme”, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351337/human-trafficking-leaflet.pdf, accessed 9 October 2016.

162 See section 3.4.2, below.



Examples of State funds with limited scope for child victims of sexual exploitation abound. In Germany, the State-managed programme is meant to compensate victims of intentional and illegal violent assaults. However, this requirement of a single, isolated violent assault does not always apply to sexual abuse and exploitation which can be ongoing over years or even decades.¹⁶³ In addition, the German State-managed programme does not compensate victims for psychological damages.¹⁶⁴ As a result, victims of sexual exploitation, who can suffer significant and lasting internal psychological damages¹⁶⁵ rather than obvious lasting physical injuries, often do not qualify. In Hong Kong, although exceptions can be made for special circumstances, to be eligible for compensation from the State-managed fund, the injury must have been severe enough to warrant sick leave for at least three days or three days of loss of earnings or working capacity.¹⁶⁶ Furthermore, the Hong Kong programme does not provide compensation to victims of certain forms of sexual exploitation, such as trafficking in persons to or from Hong Kong for sexual purposes and control over persons for the purpose of prostitution, because those crimes are not considered a 'crime of violence'.¹⁶⁷

Another issue is that State-managed compensation programmes offer limited monetary awards or place a limit on the amounts available to victims. ECPAT Romania found that based on information provided by national authorities, only 3,765 Euros had been awarded to child victims seeking compensation from 2009-2010.¹⁶⁸ While the maximum amount that can be granted under Australia NSW's State-managed programme is AUS \$45,000, such an award is highly unlikely to occur.¹⁶⁹ Although lump sum payments are one of three types of compensation payments under the programme, the amount available to a child victim of sexual assault is a mere AUS \$5,000.¹⁷⁰ The maximum award in Hong Kong under the State-managed programme is (excluding the amount for a death grant) HK \$160,920 (about US \$20,000).¹⁷¹ The ATJ Study found that the amounts potentially available to victims through State-managed funds were so small that they are one reason that child victims and their families consent to settlements with perpetrators.¹⁷² ChildLine Thailand also highlighted the problem that compensation awards are not equal to actual damages.¹⁷³ On a more positive front, in contrast to the almost nominal amounts awarded from the above mentioned compensation programmes, the maximum award is £500,000 in the UK.¹⁷⁴ However, it is reported that the awards are usually low and child victims of sexual exploitation may be able to recover higher amounts through a legal action against the perpetrator,¹⁷⁵ even though this would like involve protracted procedures and other hurdles.

163 ECPAT Questionnaire, Response provide by ECPAT Germany, October 2015.

164 *Ibid.*

165 When compared to those who did not suffer child sexual abuse, victims of child sexual abuse are more likely to receive lifetime diagnoses of major depression, conduct disorder, panic disorder and alcoholism, S. Dinwiddle *et al* (2000), "Early Sexual Abuse and Lifetime Psychopathology, a co-twin control-study", *Psychological Medicine*, Vol. 30 of 2000 41.

166 Trustlaw (2015), "Compensation Schemes, Comparative Report on National State Compensation Scheme", 66-67.

167 «Liberty Asia and Hogan Lovells (2014), «Civil Remedies: Justice for Victims of Trafficking in Hong Kong», September 2014, accessed 23 June 2016, <https://static1.squarespace.com/static/53038dd2e4b0f8636b5fa8c3/t/5436213de4b04Od26af83286/1412833597832/1153819v4-Liberty+Asia+-+civil+remedies-HKGLIB01-1.pdf>.

168 ECPAT Questionnaire, Response provided by ECPAT Romania, October 2015.

169 Trustlaw (2015), "Compensation Schemes, Comparative Report on National State Compensation Scheme", 13.

170 *Ibid.*

171 *Ibid.* 68-69.

172 ATJ Study, 2.2.3.1.d), 121 and 2.2.10.1.c), 216.

173 ECPAT Questionnaire, Responses provided by ChildLine Thailand, October 2015.

174 Trustlaw (2015), "Compensation Schemes, Comparative Report on National State Compensation Scheme", 34.

175 ECPAT Questionnaires, Responses provided by DLA Piper UK, May 2015.



This research did not identify any victim compensation fund for child victims of sexual exploitation, and found very limited use of child-specific provisions in the surveyed compensation schemes. When States limit the scope of compensation to exclude certain types of crime such as sexual exploitation, or when they offer only negligible amounts of compensation, a child's right to reparation can remain unfulfilled. In addition to these hurdles, compensation through a state fund is often contingent upon a child's participation to the criminal justice process, which puts them at risk of further harm as explained below.

4.3.2 Reliance on the criminal justice process and risk of re-traumatisation

As already mentioned, in most States compensation funds are subsidiary mechanisms and not primary sources of compensation. Most of the programmes surveyed as part of this Study provide financial assistance that is not meant to compensate the entire damage suffered by the victim, but rather to palliate instances where compensation cannot be recovered through legal proceedings against a perpetrator.¹⁷⁶ Therefore, in many respects, access to compensation through a state fund is contingent upon criminal proceedings against an offender. For example, victims can be expected to seek damages from the perpetrator as a first resort.¹⁷⁷ In Hong Kong, the prosecutor's decision to prosecute a perpetrator is considered while deciding whether to grant a victim compensation from the State-managed programme.¹⁷⁸ Thus, the State's decision not to prosecute could negatively affect the award of compensation.¹⁷⁹ In the UK, a claimant is expected to seek damages from a perpetrator first but "may still be eligible for an award under the Scheme even if [their] assailant is not known, or is not convicted".¹⁸⁰

A criminal conviction is not necessarily a requirement when applying for compensation through a state fund, nor is it required that a perpetrator be identified or arrested.¹⁸¹ In some cases however, access to the fund may even be contingent upon a perpetrator being charged or convicted,¹⁸² meaning that a child would have to wait until the end of the criminal proceeding before accessing the fund. While some countries have adopted legal provisions, allowing for limited, immediate financial assistance to victims in the form of an advance,¹⁸³ due to the length of court proceedings this can mean that children do not access much-needed funds until several years after the crime committed against them.

176 This is the case in Belgium. See ECPAT Questionnaire, Responses provided by DLA Piper Belgium.

177 Federal Government of Belgium (1985), "Victim of violent crime compensation act", Law of 1 August 1985; Government of Italy (2003), "Measures against trafficking", Law No. 228 of 11 August 2003, Article 12 as amended by Legislative Decree No. 24 of 4 March 2014, Article 6; Government of The Netherlands (1975), "Damages fund for violent crimes act", Law of 26 June 1975, (Information provided by DLA Piper Belgium, Italy and Netherlands, October 2015).

178 Trustlaw (2015), "Compensation Schemes, Comparative Report on National State Compensation Scheme", 67.

179 *Ibid.*

180 Government of the UK (2014), "Criminal injuries compensation: a guide", accessed 9 October 2016, <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#what-is-the-criminal-injuries-compensation-scheme>.

181 As per ECPAT Netherlands, the award of the State fund (Schadefonds) is not contingent upon a conviction or known perpetrator. See ECPAT Questionnaire, Responses provided by DLA Piper Netherlands.

182 See e.g. Government of Belgium (1985). "Loi sur l'aide fiscale" art.31bis. See also France. As per ECPAT Questionnaire, response provided by DLA Piper France, June 2015.

183 For example, Italy (pursuant to art. 539 and 540 of the Code of Criminal Procedure) and Romania (information provided by DLA Piper).



Compensation awards may often be reduced by the amount received from other sources, such as the perpetrator,¹⁸⁴ and conversely a victim may be required to reimburse the fund for any compensation received from other sources, such as the perpetrator.¹⁸⁵ In Australia, in assessing applications the Commissioner “must have regard to any amount that has been paid to the person or that the person is entitled to be paid by way of damages awarded in civil proceedings”. Such requirements may result in minimal awards for child victims of sexual exploitation.

The criminal justice aspect manifests in other forms as well. Some States require the victim to have reported the crime to the authorities within a reasonable amount of time¹⁸⁶ or require that a victim cooperate with the investigation and prosecution, as conditions to receive an award from the State-managed programme.¹⁸⁷ These requirements may be adverse to the best interests of the child, as child victims often do not disclose what happened to them for many years, and being forced to cooperate in a criminal case may expose child victims and their families to hardship. The Special Rapporteur on trafficking explained that requiring cooperation with police investigations could lead to re-traumatisation, which may result in the victim being less likely and able to provide useful information for the criminal investigation.¹⁸⁸

A child’s right to reparation through a State-managed fund should be upheld regardless of a victim’s report to the authorities in a reasonable time, of their cooperation with the authorities, and/or the apprehension, trial or conviction of a perpetrator. Repeated exposure to the criminal justice process places child victims at risk of re-traumatisation, which is contrary to international standards and norms. The next section elaborates on some of the harm that children may suffer through navigating a complex justice process.

4.4 Hardship in the compensation process

Child victims interfacing with the justice system can be subjected to hardship. In the compensation-seeking process this can take many forms, including the multiplication of procedures and the length of the process. This can happen irrespective of the child seeking compensation through the criminal justice process, a state fund or a civil trial.

4.4.1 Multiplication of investigations

The Committee on the Rights of the Child has recognised the traumatic effects that repeated interviews can have on a child.¹⁸⁹ More generally, the Guidelines on Child Victims and Witnesses emphasise that interference in a child’s life should be reduced to a minimum and demand that professionals working

184 See e.g. Government of Romania (2004), “Law on measures to protect the victims of criminal offences”, Law No. 211/2004; UK, Criminal Injuries Compensation Authority (CICA) and Northern Ireland Criminal Injuries Compensation Scheme 2009 (2009 NI Scheme).

185 Government of the Hong Kong SAR, Criminal and Law Enforcement Injuries Compensation Scheme (CLEIC), Government of Australia NSW (2013), “Victims Rights and Support Act”, Law No. 37 of 2013, § 44, para. 4.

186 Government of Australia NSW (2013), “Victims Rights and Support Act” §44, para. 1 (b); UK, CICA and 2009 NI Scheme, Federal Government of Germany (1985), “Crime victims Compensation Act” as promulgated on 7 January 1985, last amended by Article 3 of the Act of 20 June 2011, N.B. As regards German law, the requirement of prior crime reporting to the authorities within a reasonable amount of time is not mandatory, but delays could lead to compensation being denied.

187 UK, CICA and 2009 NI Scheme; Government of Australia NSW (2013), “Victims Rights and Support Act”; Federal Government of Germany (1985), “Crime victims Compensation Act”; Government of the Hong Kong SAR, Criminal and Law Enforcement Injuries Compensation Scheme (CLEIC).

188 Report of the Special Rapporteur, 2011, para. 52 (internal citations omitted).

189 CRC, General Comment No. 12, para. 24.



with child victims coordinate their efforts to minimise the number of their interventions.¹⁹⁰ Yet despite the breadth of international standards requiring States to take measures to avoid re-traumatisation, obtaining compensation can be a particularly difficult process when child victims have to tell their story several times to social workers, law enforcement, prosecutors, defence lawyers, judges, only to relive their pain all over again.

In criminal cases alone, victims may have to re-tell their stories repeatedly: during the initial reporting to authorities, during the investigation and pre-trial periods, and as witnesses at trial.¹⁹¹ According to the ATJ Study, child-dependent rather than child supportive investigations and prosecutions increase re-traumatisation.¹⁹² This can also be true in civil cases. In Japan, when a victim files a civil claim, he/she must give evidence of the sexual exploitation in an open court before many people.¹⁹³ The fear of telling their story in public, combined with the low amount that is typically awarded for compensation, deters many child victims and results in low rates of cases going to civil litigation, with cases being settled outside of court or not initiated at all.¹⁹⁴

One possible benefit of state funds is that a hearing is often not required to access compensation. For example, in Australia NSW the Commissioner of Victims' Rights need only be convinced that it is more likely than not that the act of violence occurred. Nearly all claims are decided based on a paper application and evidence provided, without a hearing. This means that the offender is not involved in the process and it is up to the victim to present their case to the assessor.¹⁹⁵ In some jurisdictions however, the process may involve a hearing.¹⁹⁶ In Belgium, the Commission on financial aid for crime victims may conduct its own investigations and/or request information to any state-body or authority with respect to the financial, professional, social or tax situation of the perpetrator (if not unknown) and/or of the victim. The Commission can also request from the victim to produce any useful document or information or can decide to hear witnesses.¹⁹⁷ ECPAT Belgium reported that the overall process for seeking compensation in Belgium could be improved by avoiding multiple interviews of the same child by different professionals and instead building trust with one interviewer.¹⁹⁸ In Hong Kong, the Criminal Injuries Compensation (CIC) Board may require a hearing in order to make a decision on an application.¹⁹⁹ An additional concern is the fact that of all surveyed information, none reported having child-friendly provisions in cases, such hearings are necessary. Moreover, none reported having dedicated staff to handle compensation applications for child victims.

190 Guidelines on Child Victims and Witnesses, paras 12, 23.

191 ATJ Study, 2.2.9.3, 187.

192 *Ibid.*, 2.2.9.6, 198.

193 Government of Japan (2004), «Basic Act for Crime Victims», Act No. 161 of 2004, accessed 7 June 2016, http://www8.cao.go.jp/hanzai/whitepaper/w-2013/html/zenbun/part2/s2_4_2c06.html; Government of Japan (1999), «White Paper on Crime (year 1999)», accessed 7 June 2016, http://hokusyo1.moj.go.jp/jp/40/nfm/n_40_2_5_3_2_4.html

194 ECPAT Questionnaire, Responses provided by DLA Piper Japan.

195 ECPAT Questionnaire, Response provided by DLA Piper Australia, 2015.

196 See e.g. Government of Belgium (1985), Loi portant des mesures fiscales et autres, art. 34ter.

197 Government of Belgium (1985), «Loi sur l'aide fiscale», art. 34bis.

198 ECPAT Questionnaire, Response provided by ECPAT Member Group Belgium, October 2015.

199 Social Welfare Department, Hong Kong SAR. Criminal and Law Enforcement Compensation Scheme Administrative Document. p. 7, accessed 12 October 2012, http://www.swd.gov.hk/doc/social-sec/2015_04_CLEIC_Admin%20Doc_Eng.pdf.



Respondents to this Study emphasised that it can be difficult for children to testify. The research team in Australia (NSW) found that, due to children's age and mental development, it is often difficult for them to recall details and provide thorough and consistent evidence.²⁰⁰ The ATJ Study yielded similar findings; that due to significant delays, children have trouble remembering details to testify in criminal court.²⁰¹ In Germany, the nation-wide victim support organisation Weisser-Ring emphasised that the age and psychological situation of child victims constitute significant challenges when presenting the requisite evidence to establish causation under the compensation laws.²⁰²

Another form of traumatisation can occur when children must testify in front of their perpetrators, as it sometimes seen in criminal courts.²⁰³ In fact, some survivors confirmed this was one of the most difficult parts of the justice process.²⁰⁴ States have tried to address this issue through a number of additional and ad-hoc measures such as in camera hearings, live link testimonies and the presence of child specialists (see the ATJ Study for further information on this issue).

4.4.2 Having to prove damages

When a compensation claim is made to a state fund or in court, documentary evidence is typically required to establish a causal link between the crime (of sexual exploitation) and the injuries for which reparation is sought. Damages must be proven either on a balance of probabilities, or beyond reasonable doubt in criminal cases. Having to provide a wide range of documentary evidence can be very challenging for child victims for several reasons.

Many State-managed programmes specifically require medical and other documentary proof of injury in support of an application, often in the form of police, medical and psychological/counselling reports. The procedures involved in obtaining documentary evidence can harm child victims and even deter them from pursuing their rights. For example, in Australia (NSW and WA), Belgium and Japan, victims are often required to be assessed by a health practitioner before their applications for compensation from the State-managed programme can be approved.²⁰⁵ ECPAT Germany reported that the requirement for medical and psychological exams might be a major reason why child victims avoid applying for compensation in the country.²⁰⁶ Weisser-Ring stressed the burden posed by psychological examinations and recommended that the process be reformed so that no such examinations are required.²⁰⁷

Another related issue is that it can be difficult to obtain expert assessments, as services may be lacking. For example, under the CICA scheme, while psychological or psychiatric evidence is needed to qualify for the higher awards available, such expert help is not consistently available through the public healthcare system.²⁰⁸

200 Australian Law Reform Commission (1997), "Seen and Heard: Priority for Children in the Legal Process", accessed 23 June 2016, <http://www.alrc.gov.au/publications/seen-and-heard-priority-children-legal-process-alrc-report-84/14-childrens-evidence>, (information provided by DLA Piper – Australia).

201 ATJ Study, 2.2.9.3, 188.

202 ECPAT Questionnaire, Response provided by Weisser Ring, through ECPAT member group in Germany, October 2015.

203 ATJ Study, 2.2.9.4, 189-190.

204 *Ibid*, 190.

205 Australia (WA): Government of Western Australia (2003), "Criminal Injuries Compensation Act" §20 (information provided by DLA Piper - Australia (WA); Australia; Trustlaw (2015), "Compensation Schemes, Comparative Report on National State Compensation Scheme", 14; Japan; *Ibid*.75; Belgium: Federal Government of Belgium (1985), "Victim of violent crime compensation act", art. 34bis.

206 ECPAT Questionnaire, Response provided by Weisser Ring through ECPAT Member Group Germany, October 2015.

207 *Ibid*.

208 ECPAT Questionnaire, Response provided by DLA Piper UK, May 2015, citing Association of Child Abuse Lawyers (2013), "Improve the CICA for Victims of Abuse" 17 June 2013, accessed 11 October 2016, <http://www.childabuselawyers.com/campaigns/improve-cica-victims-abuse>.



Child victims of sexual exploitation have unique needs and it is crucial that their claims for compensation be supported by qualified and trained professionals. States should implement child-sensitive policies and regulations designed to simplify the burden of proof that rests with the child both in court proceedings and State-managed programmes.

One related challenge is that the losses suffered by child victims may not be easily quantifiable. The sequels of a crime can extend through a victim's lifetime, requiring counselling and other forms of treatment. Cases of sexual exploitation online pose unique challenges when it comes to compensation and proving the harm suffered. This is because victims are harmed on more than one instance: initially when the images are produced, and long thereafter when those images are circulated online indefinitely and viewed by countless offenders. In addition to lost wages, victims are likely to incur a lifetime of treatment and counselling costs. Yet it is difficult to determine the amount that should be paid by each viewer, as compensation for their participation in the crime.

In the United States, the Supreme Court case of *Paroline v. United States*²⁰⁹ addressed this complex issue. In a landmark decision, the court found that a victim could achieve compensation in a prosecution for a crime that was committed on the internet (distributing and possessing CSAM) by a person they did not know. The Court interpreted a federal law requiring courts to order restitution in all cases related to CSAM and found that in such cases, a restitution award from a particular defendant would need to reflect "the defendant's relative role in the causal process that underlies the victim's general losses".²¹⁰ Unfortunately, the decision was criticised for its lack of clear guidance on the amounts of restitution that should be awarded by judges, and, as a result, victims have been denied compensation.²¹¹ Meanwhile, subsequent efforts to change the law have come to a stall in the United States.²¹²

In the words of "Amy" - the viewing of CSAM and its consequences for victims

"Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle...My life and my feelings are worse now because the crime has never really stopped and will never really stop...It's like I am being abused over and over and over again".²¹³

209 *Paroline v. United States*, 134 S.Ct. 1710 (2014)

210 Paul G. Cassell & James R. Marsh, "Full Restitution for Child Pornography Victims: The Supreme Court's *Paroline* Decision and the Need for a Congressional Response", 13 Ohio St. J. Crim. L. 5 (2015).

211 *Ibid.*

212 Marsh Law Firm PLLC, "Child Pornography Victims Ignored and Forgotten in the Halls of Congress", 11 February 2016, accessed 16 April 2017, http://childvictims.us/child-pornography-victims-ignored-and-forgotten-in-the-halls-of-congress/?utm_source=rss&utm_medium=rss&utm_campaign=child-pornography-victims-ignored-and-forgotten-in-the-halls-of-congress#.WPNXkogrLIU

213 *Paroline v. United States*, 134 S.Ct., 1717.



4.4.3 Length of the process and uncertain outcome

Procedures for seeking compensation, either from State-managed funds or through a court of law, can be lengthy. For this reason, victims often refuse to initiate procedures or give up at some point during the process. Under the Guidelines for Child Victims and Witnesses, professionals should:

*“[e]nsure that trials take place as soon as practical, unless delays are in the child’s best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited”.*²¹⁴

Nearly all respondents to this Study have stressed that the compensation seeking process is usually lengthy. In Australia NSW, decisions to award damages through the State-managed compensation programme can take as long as 12 months with additional time for actual disbursement.²¹⁵ In the UK, the process can last anywhere between two months and several years.²¹⁶ Out of all awards made in 2013 in the UK, 32.96% of the cases had been initiated more than 12 months prior to the award decision.²¹⁷ Although the process in Hong Kong usually takes two months, any decision will be delayed until the completion of the police investigation and, as the case may be, criminal proceedings.²¹⁸ In Germany, Weisser-Ring reports that compensation procedures “often take a very long time and that court cases can even take years which is too long and interferes with the coping of the victim”.²¹⁹ Similarly, ECPAT Germany observed that the length of compensation procedures is a significant barrier for children seeking to access remedies.²²⁰ Victims seeking compensation from the government in Japan typically wait between six and seven months.²²¹ Once the decision is made, the victim may have to wait up to another year for payment.²²² ECPAT Belgium reported that, “due to the length of the procedure, children are not willing to speak about their story anymore and end up minimising what happened to them – so they are not claiming compensation”.²²³

As noted by a prosecutor in the ATJ Study, in Thailand victims must often wait one to two years to receive funds from a State-managed programme.²²⁴ Child victims, especially those kept in restrictive shelters for the duration of the lengthy proceedings, often run away or simply give up.²²⁵ Additionally, unexplained delays in proceedings can be distressful for child victims who may assume they have been forgotten in the system.²²⁶ The ATJ Study also found that in sexual exploitation cases, children are under tremendous pressure to settle out of court with their exploiters rather than seek compensation through state systems because families have no incentive to engage in slow, time-consuming state processes

214 Guidelines on Child Victims and Witnesses, para. 30(c).

215 Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 14.

216 *Ibid.*, 37.

217 *Ibid.*

218 *Ibid.*, 69

219 ECPAT Questionnaire, Response provided by Weisser Ring, October 2015.

220 *Ibid.* ECPAT Member – Germany, October 2015.

221 Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 76.

222 *Ibid.*, 37.

223 ECPAT Questionnaire, Response provided by ECPAT Member – Belgium, October 2015.

224 ATJ Study, 2.2.10.1.b), 211.

225 *Ibid.*, 2,2,5,2,d), 152.

226 *Ibid.*, 2.2.8.4, 177-178.



that do not guarantee an award of compensation when they can accept substantial settlements from defendants up front.²²⁷ In its contribution to this Study, ChildLine Thailand recommended that the compensation-seeking procedures be fast-tracked for children.²²⁸

4.5 Misperceptions of child victims

What should be considered irrelevant beliefs and considerations on a child victim's character, involvement in the crime and criminal history often render remedies inaccessible for the victim. As noted in the Guidelines on Child Victims and Witnesses: "[...]children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses".²²⁹ The Committee on the Rights of the Child recognises that such perceptions contravene States' obligations under the OPSC, observing that Germany²³⁰ and the UK²³¹ sometimes treat child victims of exploitation as criminals. In the course of the ATJ, one Thai respondent mentioned that the police sometimes choose not to inform child victims of their rights to compensation because children have already received a payment from the perpetrator.²³² Some criminal justice professionals in Nepal and Thailand, including NGO workers, shared their belief that child victims who 'choose' to engage in sexual exploitation for commercial purposes should be arrested.²³³

It is not rare for child trafficking victims²³⁴ to be treated as offenders. The UNHCHR observed the fact that "female child victims of sex cases had often been handled as cases of juvenile delinquency rather than of victims of human rights violations".²³⁵ As reported by respondents in the ATJ Study, during criminal investigations and criminal trials in Thailand, the Philippines and Nepal, questioning involves 'victim-blaming' and often reflects prejudices towards child victims as willing participants or undeserving of justice.²³⁶

Character, criminal history and involvement in the crime may also disqualify a child victim from receiving compensation from State-managed programmes. For example, programmes in Australia NSW²³⁷ and the UK²³⁸ consider a victim's criminal history when determining whether to award compensation. Similarly, Australia NSW,²³⁹ Germany,²⁴⁰ Hong Kong²⁴¹ and Japan²⁴² consider whether the victim participated in the

227 ATJ Study, 2.2.3.1.d, 121.

228 ECPAT Questionnaire, Responses provided by ChildLine Thailand, October 2015.

229 Guidelines on Child Victims and Witnesses, para. 7(e).

230 CRC (2014), Concluding observations on the report submitted by Germany under article 12, paragraph 1, of the OPSC, paras. 31-32.

231 CRC (2014), Concluding observations on the report submitted by the UK, para. 38(a)-(b).

232 ATJ Study, 2.2.20.1.c, 213.

233 *Ibid.*, 2.1.3.2., 98-99.

234 The term "trafficking victims" is not to be interpreted narrowly. Children who are victims of trafficking, are often also victims of other forms of sexual exploitation including child pornography produced as part of the trafficking.

235 UN General Assembly (2014), "Summary of the consultations held on the draft basic principles on the right to effective remedy for victims of trafficking in persons, Report of the United Nations High Commissioner for Human Rights", UN Doc. A/HRC/26/18, 2 May 2014, para. 39.

236 ATJ Study, 2.2.9.4.b, 191.

237 ECPAT Questionnaire, Response provided by DLA Piper - Australia.

238 Trustlaw (2015), "Compensation Schemes, Comparative Report on National State Compensation Scheme", 36-37.

239 *Ibid.*, 12, "... whether the victim participated in the commission of the act of violence".

240 *Ibid.*, 60, "Compensation is not paid if the injury was caused by the claimant him-/herself...".

241 Kwok Tung Ming, Eric SC. (2014), "Criminal and Law Enforcement Injuries Compensation Boards 41st Annual Report for the year ending 31 March 2014". 5, accessed 22 June 2016, http://www.swd.gov.hk/doc/social-sec/41st%20CLEIC%20Boards%20Annual%20Report_Eng.pdf

242 *Ibid.*, 73, "...when the victim was in part the cause of his/her death, severe injury/disease or disability".



activity in evaluating whether to award compensation. In Hong Kong, a child victim could be denied support based on their character or way of life.²⁴³ In Thailand, a child victim is barred from the crime victim compensation programme if they were ‘involved’ in the offence and the ATJ found this could restrict many victims from accessing compensation.²⁴⁴

These misperceptions may lead to a lack of protection on the part of professionals working alongside child victims and prevent the latter from seeking and obtaining compensation. Laws that do not sufficiently protect child victims can further fuel such misperceptions amongst law enforcement. It should be further noted that the conditions and criteria imposed by States’ compensation schemes rarely consider the differences between child and adult claimants and thus, the specific vulnerabilities of children are not considered. Considering children’s vulnerability and States international obligation to protect all children from sexual exploitation, a child who is sexually exploited should not be barred from seeking or obtaining compensation for their passive or coerced involvement in a crime.

4.6 Barriers in transnational cases

The sexual exploitation of children is a crime that often involves multiple offenders, victims and jurisdictions: when offenders and victims are constantly on the move, offences can be committed in more than one State. For these reasons, the OPSC requires States parties “to promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation”.²⁴⁵ In practice however, access to justice can be limited when victims have suffered a crime in another country, or when they are not lawful residents of the country where they are seeking compensation. Children who are victims of SECTT can be left without remedies when foreign offenders escape prosecution.

4.6.1 When offences are committed out of country

State-managed compensation programmes in Australia NSW, Hong Kong and the UK,²⁴⁶ among others, specifically require that the criminal injuries for which compensation is sought occurred within their borders. This can be particularly challenging for children who have been moved around various locations, as often occurs in trafficking cases. It is worth mentioning that in Europe, Council Directive 2004/80/EC²⁴⁷ was adopted with the objective of making compensation for violent crime accessible regardless of where a crime took place in the European Union. When implemented, the directive allows victims to apply for compensation in their home country, and compensation is paid by the EU country where the crime was committed. However, based on the information available this does not seem to have

243 Hong Kong Social Welfare Department, «Criminal and Law Enforcement Compensation Scheme Administrative Document», para. 12.

244 ATJ Study, 2.2.10.1.c), 213, citing Thailand, Compensation and Expenses for Injured Persons and the Accused Act, § 3 (an “injured person” eligible for compensation is a person who has been injured by a criminal offense and was “not involved in committing such offense”).

245 OPSC, art. 10(2); see also Trafficking Principles, para. 6; UN Guidelines on Child Victims and Witnesses, para 44.

246 Australia, NSW: Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 10; Belgium: Federal Government of Belgium (1985), Victim of violent crime compensation act, art. 31bis, §1, 2°; Germany: Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 60 49; UK: ECPAT Questionnaire, response provided by DLA Piper UK, May 2015.

247 Council of the European Union, Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.



been applied to cases of child sexual exploitation. In the UK, the CICA's application to human trafficking is explicitly restricted to cases where injuries have been sustained in the UK.²⁴⁸ As a result, when an English child is sexually exploited outside of Scotland, England or Wales they cannot have direct redress through the CICA Scheme.

None of the respondents could identify mechanisms that would allow for the compensation of sexual exploitation crimes committed outside the country where it is sought. ECPAT UK emphasised the need for "[s]trengthened international assistance and co-operation calling for multilateral, bilateral and regional agreements on protection and safeguarding of children and their right to compensation".²⁴⁹

4.6.2 Requirements that claimants be lawful residents

The clear majority of respondents expressed concern at the lack of protection for undocumented children. Many children who are trafficked find themselves without any identification documents or proof of residence in the country where they live. Yet in many states, to apply for compensation, victims must be lawful residents of that country. According to the relevant German legislation, a victim without a regular residence title cannot access the State-managed compensation fund.²⁵⁰ In this regard, the Committee on the Rights of the Child expressed concern over victims' access to recovery, especially boys and unaccompanied children, in Germany.²⁵¹ ECPAT Romania reports that under the national laws and regulations of that country, only a victim who is legally in Romania may seek compensation.²⁵²

There are some exceptions to allow undocumented children to claim compensation, but this is usually subject to strict conditions. In Belgium for example, a child victim of trafficking must cooperate with the government's investigation to receive a (provisional) residence permit. During the procedures, the child is required to prove that they are a minor by showing official documents or by undergoing a medical expertise to determine the age of the child. The child also must prove that, inter alia, they are a victim of trafficking, and must cooperate with the judicial authority by submitting a complaint or making statements to support the investigation.²⁵³ In a similar way, in the Czech Republic, financial help can be provided to third country nationals who suffered a crime within the territory of Czech Republic and who have applied for international protection in the State. Hence, compensation could be awarded to undocumented children when they are victims of trafficking and are eligible to apply for humanitarian asylum, but this is an extraordinary and discretionary form of international protection in the Czech Republic. In the UK, there are similar measures applying to trafficking victims seeking compensation through the CICA.

248 CICA , "Victims of Human Trafficking and the Criminal Injuries Compensation Scheme", https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351337/human-trafficking-leaflet.pdf, accessed 9 October 2016

249 ECPAT Questionnaire, Response provided by ECPAT Member Group –UK, October 2015.

250 Federal Government of Germany (1985), "Crime Victim Compensation Act – OEG", promulgated on 7 January 1985 (Federal Law Gazette IS. 1), last amended by Article 1 of the Act of 25 June 2009 (Federal Law Gazette I p. 1580), §1 (4 and 5), (information provided by DLA Piper – Germany and ECPAT Member Germany).

251 CRC (2014), Concluding observations on the report submitted by Germany under article 12, paragraph 1, of the OPSC" paras. 35-36.

252 Government of Romania (2004), "Law on measures to protect the victims of criminal offences", (information provided by ECPAT Member Romania and DLA Piper – Romania)

253 ECPAT Questionnaire – Response provided by DLA Piper Belgium. See also European Union Agency for Fundamental Rights (2008), "Thematic Study on Child Trafficking in Belgium", September 2008, accessed 13 October 2016, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/child-trafficking-09-belgium_en_5.pdf.



In Japan, a victim must be a Japanese citizen or have Japan as their principal place of residence to receive compensation.²⁵⁴ In fact, the research team in Japan reported that when Japanese investigative authorities discover an undocumented person in Japan, they are required to inform Japanese immigration authorities who then begin the process of deportation without exception, even for child victims.²⁵⁵ Similarly, in Thailand, undocumented child victims are often arrested and placed in immigration proceedings and denied access to remedies.²⁵⁶ To seek compensation in Hong Kong, a child victim must have been in Hong Kong legally at the time of the incident and during the compensation-seeking process.²⁵⁷ Victims of trafficking in Hong Kong frequently do not report the crime out of fear of deportation.²⁵⁸

Although documented status is not required to seek compensation in the Netherlands, in practice there are few criminal convictions for trafficking of a foreign minor and the option to seek compensation is not typically shared with foreign child victims of trafficking.²⁵⁹ Similarly, ECPAT UK reports that there have been very few awards of compensation made to migrant children trafficked and abused in the UK.²⁶⁰

Nonetheless, some progress is taking place. For example, in 2013, pursuant to the law implementing the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, the French Code of Criminal Procedure was amended to abrogate part of article 706.3 that required citizenship of one of the Member States of the Economic European Community or legal residency in the French territory, to obtain full compensation for the damages deriving from criminal offences. Accordingly, since 2013, 'illegal' child immigrants have access to the national victim compensation fund.²⁶¹

4.6.3 When the crime is committed by a foreign offender

While the OPSC requires States to establish jurisdiction over crimes committed against child victims within their territory,²⁶² there is no equivalent requirement for crimes committed by or against a country's nationals outside a State's borders.²⁶³ This means that an offender could commit crimes abroad and escape prosecution simply by returning to their home country. The Committee on the Rights

254 Trustlaw (2015), "Compensation Schemes, Comparative Report on National State Compensation Scheme", 72, citing Government of Japan (1980), "Act Related to the Support of Crime Victims by Payment of Benefits for Crime Victims", Act No. 36 of 1980.

255 Government of Japan (2009), "Immigration Control and Refugee Recognition", Act No. 79 of 2009, as amended in 2015. Although the Minister of Justice may grant permission to the refugee to remain in Japan for 15 to 90 days, this is only to allow the refugee to prepare for departure. (information provided by DLA Piper – Japan).

256 US Department of State, "2014 Trafficking In Persons Report", June 2014, 372, accessed 13 October 2016, <http://www.state.gov/j/tip/rls/tiprpt/2014/>.

257 Hong Kong Social Welfare Department, «Criminal and Law Enforcement Compensation Scheme Administrative Document», para. 6 (G), accessed 13 June 2016, http://www.swd.gov.hk/doc/social-sec/2015_04_CLEIC_Admin%20Doc_Eng.pdf.

258 US Department of State, «2014 Trafficking In Persons Report», June 2014, 199-200, accessed 13 June 2016, <http://www.state.gov/j/tip/rls/tiprpt/2014/>.

259 ECPAT Questionnaire, Response provided by ECPAT Member Netherlands, October 2015.

260 *Ibid.* ECPAT Member UK, October 2015.

261 Fonds de Garantie des victimes des actes de Terrorisme et d'autres Infractions (FGTI).

262 OPSC, art. 4(1).

263 *Ibid.* art. 4(2).



of the Child has repeatedly expressed its concern over States' failures to enact legislation establishing jurisdiction over crimes covered by the OPSC that occur outside of their borders where a national is involved.²⁶⁴

Extraterritorial legislation can be used to prosecute an offender in their home country for crimes committed against a child abroad. In many SECTT cases, children are left without recourse when an offender flees back home or when local law enforcement is weak.²⁶⁵ When countries chose to prosecute their nationals for crimes committed abroad, victims can have a better chance at redress. There is only a limited number of cases where victims have received compensation from a court in their offender's country. For example, in a recent case, a French national, President of a non-profit organisation assisting children with disabilities in Indonesia, was found guilty by the Paris Criminal Court on counts of sexual assault and rape on two minors while in Indonesia. He was sentenced to eight years in prison and ordered to pay 15.000 euros in damages to one of the two minors.²⁶⁶

In theory, it might be possible for a victim to make a claim for compensation from a state fund in the offender's country of origin, however given the complexity and length of extraterritorial cases this is unlikely. Accordingly, victims of SECTT are unlikely to ever receive compensation unless reliable mechanisms are available to them in their home countries.

4.7 Prescription periods/statutes of limitation and other time requirements

Time limitations may be imposed for filing a claim for damages, either through a State fund or through a court of law. Statutes of limitation, also known as prescription periods in civil law systems, can effectively prohibit child victims from accessing remedies. A statute of limitation typically bars a victim from bringing legal proceedings against a perpetrator after a certain period has passed since the occurrence of the crime. The policy behind statutes of limitation includes fairness to the defendant by discouraging claims that are fraudulent or stale, and ensuring claims are brought while evidence still exists, as well as the practical effect of reducing the number of court cases.²⁶⁷ In a study conducted with 2,064 victims of child sexual abuse in 2006, the average time between the abuse and reporting was 14 years.²⁶⁸ In two-thirds of the cases in this Study, reporting occurred between five and twenty two years after the abuse, and "not infrequently the delay extended to three and four decades".²⁶⁹ Many factors influence delayed reporting, including "young age of the complainant, more intrusive abuse, reported presence of threats and alcohol, and a closer relationship with the accused".²⁷⁰ Thus, victims seeking compensation through criminal or civil means, as well as from the government, can be negatively affected by short statutes of limitation/prescription periods or State funds programme requirements to apply within a certain period.

264 See e.g. CRC (2012), "Consideration of reports submitted by States parties under article 12, paragraph 1, of the OPSC, Thailand", paras. 29-30; CRC (2014), Concluding observations on the report submitted by Germany under article 12, paragraph 1, of the OPSC", paras. 29-30.

265 For more information, see Hawke, Angela and Raphael, Alison (2016), "Offenders on the move. Global Study on Sexual Exploitation of Children in Travel and Tourism 2016", May 2016.

266 *Carayon case*, Paris Criminal Court, n° 10/0011C (information provided by DLA Piper France).

267 Malveaux, Suzette M. (2005), "Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation", 74 *Geo.Wash. L. Rev.* 68.

268 Connolly, Deborah A. and Read, J. Don, "Delayed Prosecutions of Historic CSA Analyses of 2064 Canadian Criminal Complaints", *Law and Human Behavior*, Vol. 30, No. 6, August 2006, p. 426.

269 *Ibid.*

270 *Ibid.* 427.



In the Czech Republic, the statute of limitations for claims brought by child victims in civil court starts running when the child turns 18 years old, as opposed to from the date of the abuse.²⁷¹ Upon reaching 18, the child victim must initiate proceedings at the earlier of (a) three years from the date the claimant became aware of the damages and the identity of the perpetrator or (b) by age 33.²⁷² Additionally, the statute of limitations in the Czech Republic does not begin to run for as long as the victim lives with a perpetrator or is under threat not to report by the perpetrator.²⁷³ Statutes of limitation for criminal proceedings range from three to 15 years from the date of abuse.²⁷⁴ To seek compensation funds from the government, a victim in the Czech Republic must initiate proceedings within two years of the date when the victim became aware of the damages but no more than five years from the date the crime is committed regardless of the age of the victim when the abuse occurred.²⁷⁵

In Hong Kong, the statute of limitations for civil actions starts running when a child victim reaches 18 years old,²⁷⁶ but depending on the crime, the statute of limitations expires between ages 21 and 24.²⁷⁷ A judge may extend the limitations period for reasons deemed “just and fair”.²⁷⁸ The three-year limitations period for seeking compensation from the State-managed programme is strictly enforced.²⁷⁹ For most criminal offenses related to child sexual exploitation, there is no statute of limitations because they are indictable offences.²⁸⁰

In Romania, the statute of limitations applicable to civil lawsuits seeking damages for child sexual exploitation is ten years, but may range between five to eighteen years for criminal proceedings depending on the maximum penalty provided for each specific crime.²⁸¹ To seek compensation from the State-managed programme, a child victim must apply within 60 days of the commission of the offense.²⁸² ECPAT Romania reported that the 60-day limitation presents a significant barrier to child victims.²⁸³

In Thailand, the statute of limitations for criminal proceedings ranges from ten to fifteen years and corresponds to the sentence applicable to the crime.²⁸⁴ However, the statute of limitations is only three

271 Government of Czech Republic (2012), “Civil Code”, Act No. 89/2012 Coll., 3 February 2012, § 622 (information provided by DLA Piper – Czech Republic).

272 *Ibid.*

273 ECPAT Questionnaire, Response provided by DLA Piper- Czech Republic, October 2015.

274 Government of Czech Republic (2009), “Penal Code”, Act No. 40/2009 Coll., § 39, 168, 193.

275 Government of Czech Republic (2013), “Act on the aid to crime victims”, Act No. 45/2013 Coll., § 30.

276 Community Legal Information Center, Law and Technology Center of the University of Hong Kong, “VI. Is there a time limit for filing a personal injury claim?”, accessed 3 October 2016, http://www.clic.org.hk/en/topics/personalInjuries/6_Is_there_time_limit_for_filing_a_personal_injury_claim/.

277 Government of Hong Kong SAR (2011), “Limitation Ordinance”, Chapter 347, § 4(1).

278 *Ibid.*, § 30.

279 Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”,⁶⁷ citing Hogan Lovells International Law Firm, telephone conversation with Hong Kong SAR’s Social Welfare Department, 18 and 19 June 2014.

280 Hong Kong Department of Justice, Law Drafting Division, «Drafting Legislation in Hong Kong- A Guide to Styles & Practices», January 2012, 72, accessed 27 June 2016, http://www.legislation.gov.hk/blis/eng/pdf/2012/Drafting_booke.PDF.

281 Government of Romania (2009), “Civil Code”, Law no. 287/2009 entered into force on 1 October 2011, article 2518; “Criminal Code” Law no. 286/2009 entered into force on 15 February 2014, Article 211, 213 (3), 374, 220.

282 ECPAT Questionnaire, Response provided by ECPAT Romania, October 2015.

283 *Ibid.*

284 Government of Thailand (1956), “Thailand Criminal Code”, B.E. 2499, §§ 95 and 98 (information provided by DLA Piper – Thailand).



months for compoundable offenses²⁸⁵ including rape, sexual assault²⁸⁶ and false imprisonment²⁸⁷ of victims age 16 or older when committed in private without injury. According to Thailand's Civil Code, in the case of compensation claimed on account of a criminal act, the longer statute of limitations provided by the criminal provision will apply;²⁸⁸ therefore, prescription periods in the case of SEC related-civil proceedings would be the same as those prescribed under the Criminal Code. In Thailand, a child victim of sexual exploitation who seeks compensation from the State-managed programme must bring a claim within one year of the date the offense was committed.²⁸⁹

In Belgium, generally, any action for compensation must be brought before the court within five years of the date when a victim became aware of the damage and the identity of the person responsible, but in no event may the claim be brought more than 20 years after the offence.²⁹⁰ As regards civil actions based on an event that qualifies as an offence under the Criminal Code, such as SEC-related crimes, their prescription periods are provided by the Civil Code and/or special laws; however, they cannot end before the ones established for public action (state prosecution).²⁹¹ The applicable statute of limitations for criminal proceedings in Belgium is 15 years.²⁹² To seek compensation from the Belgian government, a child victim must bring a claim within three years of (a) the decision of an investigating judge; (b) the day a final decision on the criminal action was taken, or (c) the day the decision on civil interests was taken following a decision on criminal action.²⁹³

In Italy, the statute of limitations in criminal court is the highest imprisonment sanction provided by law for each specific crime;²⁹⁴ for some offences, including the ones related to SEC, the statute of limitations is doubled, up to 24 years.²⁹⁵ The plaintiff could claim damages deriving from an illicit conduct in a civil proceeding within five years.²⁹⁶ However, when the illicit conduct is a criminal offence, the statute of limitations is equal to the one provided for criminal proceedings.²⁹⁷

On the other hand, some of the countries examined in this Study have abolished statutes of limitations with respect to sexual exploitation and/or sexual abuse. In England, there is no statute of limitations for criminal proceedings.²⁹⁸ In that country, the time limit for applying to the State managed programme is two years from when the abuse was reported if the abuse took place before the victim turned 18 years of age but was not reported to the police at the time. If the abuse was reported before the victim turned 18 years of age and no one made a claim on his/her behalf, the victim can make a claim up until the day of his/her 20th birthday.²⁹⁹ Similarly, Australia NSW has no statute of limitations for criminal proceedings relating to any child sexual abuse crimes or for seeking compensation from the State-

285 *Ibid.*, §96.

286 *Ibid.*, § 281

287 *Ibid.*, § 321

288 Government of Thailand (1925), "The Thai Civil and Commercial Act", B.E. 2468, §448.

289 Government of Thailand (2001), "Damages for the Injured Person and Compensation and Expense for the Accused in the Criminal Case Act", B.E.2544, § 22.

290 Federal Government of Belgium (1804), "Code Civil", art. 2262 (information provided by DLA Piper – Belgium)

291 Federal Government of Belgium (1878), "Titre préliminaire du code de procédure pénale", art. 26 (information provided by DLA Piper – Belgium).

292 *Ibid.*

293 Federal Government of Belgium (1985), "Victim of violent crime compensation act", art. 31bis.

294 Government of Italy (1930), "Criminal Code", Royal Decree 1398 of 1930, art. 157.

295 *Ibid.*

296 Government of Italy (1942), "Civil Code", Royal Decree 262 of 1942, art. 2947(1).

297 *Ibid.*, art. 2947(3).

298 Government of the UK (2003), "Sexual Offences Act", para. 132A as amended in 2009.

299 Government of the UK (2014), "Criminal Injuries Compensation: a Guide", accessed 1 April 2017, <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#time-limits-for-applying>.



managed programme for victims of sexual assault who were under 18 at the time of the incident.³⁰⁰ Although criminal or civil proceedings for child sexual exploitation must be filed before the victim turns 51 years old in Germany,³⁰¹ there is no deadline for filing a claim to seek compensation from the government.³⁰²

Given the frequency of delayed reporting, child victims seeking compensation are effectively barred from doing so in many States. States should ensure that as a minimum, statutes of limitations/prescription periods do not start running before a child has reached the age of 18.

4.8 Difficulties in accessing payment of monetary awards

This Study finds that children who are victims of sexual exploitation receive very low amounts to compensate them for the harm suffered, be it through courts or State funds. In addition, they face additional hurdles in securing the disbursement of the amounts awarded to them.

4.8.1 Compensation amounts are too low

Court cases of child sexual exploitation leading to compensation can be extremely difficult to locate. In many countries, jurisprudence is not publicly available and published cases do not typically state the amount of court-ordered damages. State-managed compensation authorities do not typically publish their decisions. Respondents have mentioned that in the rare cases where child victims of sexual exploitation are awarded damages, these are typically very low. A few examples are provided below, but are in no means intended to be representative (see table below).

Sample Cases

- 1. Belgium:** in 2009, a Court of Appeal convicted an offender for possession of CSAM. The Court awarded 500 euros in compensation to one of the minor girls appearing on some of the photos.³⁰³
- 2. Italy:** in 2015, the Italian Supreme Court upheld a decision of the Court of Appeal ordering three defendants convicted under article 600bis of the Italian Criminal Code to pay a total of 110,000 euros in damages to a child victim. The victim had been led into prostitution.³⁰⁴
- 3. Netherlands:** in 2015, a criminal court granted 3,000 euros for ‘immaterial damages’ and 1,790 in material damages to a victim, who was 15-year-old at the time of the crime. The perpetrator had convinced her to prostitute herself during 2.5 weeks. He had taken sexual abuse pictures of the victim and placed her profile on websites to find clients, in addition to telling her how to behave and escorting her to several clients.³⁰⁵

300 Government of Australia, NSW (1986), “Criminal Procedure Act” §179; *Ibid.* § 270; Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 11.

301 Federal Government of Germany (2002), “German Civil Code” (Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 16 of the Act of 29 June 2015 (Federal Law Gazette I page 1042)) (*Bürgerliches Gesetzbuch*, «BGB») apply. According to Section 197 para. 1 no. 1, a thirty-year limitation period applies to damage claims based on intentional injury to life, limb, health, liberty or sexual self-determination; according to Section 208 BGB, the limitation period of claims for infringement of the right to sexual self-determination is suspended until the obligee reaches the age of twenty-one.

302 Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 61.



4. **Netherlands:** in a 2015 criminal case, a court ordered a compensation of 2,000 euros for a CSAM victim who had initially requested 4,000 euros. The perpetrator had made pictures of the 14-year old girl and published these on a website for the purposes of attracting men to sexually exploit her. The victim was found by the police before the photos were placed online. The court considered the facts that the victim had been unable to go to school during 6 weeks, had had nightmares and was afraid of seeing the perpetrator again.³⁰⁶

Different explanations were provided for the low amounts of compensation granted to the child victim, including: the difficulty for courts to assess non-pecuniary losses and their potential repercussions in the future, especially when children are very young; young girls being 'in love' with their perpetrators or young adults being ashamed and therefore downplaying the effects of sexual exploitation on their lives. Where a criminal court can order compensation for the damages, these will not necessarily reflect the full extent of a victim's harm. It is very probable that the payment of medical bills, counselling or related expenses can never restore the victim back to where he or she was prior to being victimised. Research shows that children who were abused can experience, inter alia, physical and psychological developmental delays, difficulties in forming relationships, low self-worth, diminished ability to cope with and adapt to their environments. Later in life, victims can be more prone to alcoholism or substance abuse, depression, domestic violence, suicidal thoughts and attempts.³⁰⁷

In common law countries, restitution is not meant to cover a victim's pain and suffering, but is limited to monetary loss that is easily ascertainable.³⁰⁸ In fact, in the UK when damages are too complex to ascertain, cases will be referred to a civil court.³⁰⁹ This means that a victim must pursue a separate civil action to obtain further damages, ensuing further delays, costs and possible trauma.

4.8.2 Court compensation orders too often not enforced

The OPSC and other international legal instruments require States "to avoid unnecessary delay in the[...]execution of orders or decrees granting compensation to child victims".³¹⁰ Although States should enforce judgements for reparation against offenders,³¹¹ in reality this is a complex process because often offenders are insolvent. The Special Rapporteur on Trafficking noted that the difficulties in enforcing reparation orders against traffickers continue to be a barrier for trafficking victims:

303 Antwerp Court of Appeal, 24 September 2009 (case information provided by DLA Piper Belgium).

304 Italian Supreme Court, section III, 08/01/2015 no. 7757 (case information provided by DLA Piper Italy, 2015).

305 Court of Noord-Holland, ECLI:NL:RBNHO:2015:4900 (case information provided by DLA Piper Netherlands, 2015).

306 Court of Amsterdam, ECLI:NL:RBAMS:2015:1423 (case information provided by DLA Piper Netherlands, 2015).

307 American Psychological Association, «Understanding and Preventing Child Abuse and Neglect», accessed 14 October 2016, <http://www.apa.org/pi/families/resources/understanding-child-abuse.aspx>.

308 See e.g. Canada, Criminal Code, R.S.C. 1985, c. C-46, s. 738(1).

309 UK Crown Prosecution Service, "Sentencing – Ancillary Orders", accessed 15 October 2016, http://www.cps.gov.uk/legal/s_to_u/sentencing_and_ancillary_orders_applications/.

310 OPSC, art. 8(1). See also Declaration of Basic Principles of Justice, para. 4.

311 See e.g. Basic Principles on the Right to a Remedy and Reparation, para. 17.



*“One of the main contributing factors is that identified traffickers often do not have adequate assets to satisfy an award of compensation. In other cases, law enforcement authorities may lack the expertise, training and resources to conduct financial investigations to freeze and confiscate such assets. Traffickers may thus swiftly transfer their assets to another country or take other steps to conceal them before compensation orders are executed. Even where assets are successfully confiscated, such assets may be automatically transferred into State coffers or otherwise not used to compensate trafficked persons”.*³¹²

In the ATJ Study, respondents reported that no process existed for the identification, possession and sale of defendants’ property to satisfy compensation orders.³¹³ They further highlighted difficulties in locating offender assets, as the latter would hide them or transfer them to a third party.³¹⁴ When the perpetrator engages in money-laundering to hide ill-gained profits from the sexual exploitation, under money-laundering laws, those funds would go to the government in both Thailand and the Philippines.³¹⁵

The ATJ Study also mentioned that in Thailand, foreign offenders could easily pay their way out of police custody. When perpetrators escaped back to their home country, compensation to the victim was even more unlikely.³¹⁶ Although in Nepal, judges usually award restitution to victims in SEC cases when the perpetrator is convicted, respondents reported that these orders are rarely successfully enforced.³¹⁷ Weisser-Ring in Germany noted that the defendant is often insolvent and cannot fulfil a compensation order.³¹⁸

To offset such situations, the Basic Principles on the Right to Remedy and Reparation call on States to establish procedures for compensation to be paid by the State when offenders either refuse to or cannot satisfy the orders.³¹⁹ In anticipation of likely diversion of offenders’ funds to other recipients, the Guidelines on Child Victims and Witnesses recommend that: “[p]rocedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines”.³²⁰

4.8.3 Lack of State-enforced protection mechanisms for disbursement of funds

Too often, there is no way to ensure that a monetary award, whether from the State or perpetrator, will be used in the child victim’s best interests. Parents may not always be available or suitable guardians to manage and disburse the funds. In fact, the ATJ Study found that 25% of child survivors participating in the study had no family support whatsoever.³²¹ The Recovery and Reintegration Study found that in many instances, children who were sexually exploited cannot return to their families.³²² In some cases,

312 Report of the Special Rapporteur, 2011, para. 35 (internal citations omitted).

313 ATJ Study, 2,2,10.1.c), 214-215.

314 *Ibid.*

315 ATJ Study, 2.2.10.1.c), 216, citing Philippines, Anti-Child Pornography Act, § 17 (forfeited property to go to government); Thailand, Anti-Money Laundering Act (1999), as amended in 2009, §§ 49-51, accessed at https://www.unodc.org/tldb/pdf/Thailand/THA_AML_2009.pdf.

316 *Ibid.*, 214.

317 *Ibid.*, 215.

318 ECPAT Questionnaire, Response provided by Weisser Ring, through ECPAT Member Group -Germany, October 2015.

319 *Ibid.*, para. 16.

320 Guidelines on Child Victims and Witnesses, para. 37.

321 ATJ Study, Key Finding #5, 23.

322 Recovery and Reintegration Study, 2.7.4, 137.



child victims have no homes to return to because their parents are deceased or because a parent was the trafficker or abuser.³²³

According to the same Study, in Thailand some parents condone their children's exploitation in prostitution and children feel obligated to financially assist their families.³²⁴ Sometimes parents' pressure their children into sexual exploitation and other times child victims are the "bread winners" of the family.³²⁵ Respondents reported that parents have even filed habeas corpus petitions against shelters for release of the child so the child could return to sexual exploitation.³²⁶ Relatives and neighbours can also be involved in the exploitation,³²⁷ suggesting neglect on the part of the parents at the very least. Even where families are not involved or complicit in the exploitation, parents may be abusive in other ways.³²⁸ According to the Recovery and Reintegration Study, due to "stigma and judgments associated with involvement in sexual exploitation," some parents, otherwise uninvolved in the exploitation, still fail to provide care for recovery.³²⁹ Clearly, in many situations parents are not suited for managing the funds - even when not directly involved in the exploitation.

Often, these same child victims without parental support do not have a guardian or other person in their lives to whom the money can be entrusted. The shelters where child victims reside when they cannot return home may not be suitable institutions for managing the funds. In fact, one of the key recommendations of the ATJ Study is that shelters only be used as a last resort for child victims.³³⁰ Shelter housing is often a temporary arrangement with victims often moving from one facility to another; in addition, victims sometimes run away.³³¹ The Recovery and Reintegration Study found that government shelters programmes in Thailand lacked oversight and accountability.³³²

A frequently employed housing solution in South Asia is 'kinship care.' Kinship care is "family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature".³³³ In such situations, entrusting funds to those caring for the child victims may not be suitable, and in some cases, entire communities are involved in sexually exploiting children.³³⁴ Other child victims are placed in foster families through faith-based organisations; however, these are not permanent living situations and not a common practice in South Asia.³³⁵

Further complications arise when trying to determine appropriate uses for monetary awards, as these may considerably vary from one child to the next. Examples of such vastly different situations emerge from the Recovery and Reintegration Study. As the report points out through specific examples, when families have sufficient funds and a secure future, this can improve chances of recovery of the child victim.³³⁶ Such financial security may also eliminate the child victim's perceived obligation to support the family. As such, it could conceivably serve the best interests of the child for the family to spend

323 *Ibid.*

324 *Ibid.*, 2.1.1.1, 70-71.

325 *Ibid.* 2.7d), 155.

326 *Ibid.*, 2.2.4.1.b), 131, fn. 364

327 *Ibid.*, 2.2.3.1.c), 119 and 2.2.3.1.d), 122-123.

328 *Ibid.*, 2.2., 113.

329 *Ibid.* 2.2., 118.

330 ATJ Study, Key Recommendation #11, 28.

331 *Ibid.*, 2.2.6.4, 163-165.

332 Recovery and Reintegration Study, 2.7c), 155. See also ATJ Study, 2.2.6.3, 171.

333 UN General Assembly (2010), "Guidelines for the alternative care of children", UN Doc. A/RES/64/142, 24 February 2010, para. 29 (i).

334 See Recovery and Reintegration Study, sec. 2.7, 153.

335 Recovery and Reintegration Study, 2.7.1.1.a), 138.

336 See *Ibid.*, sec. 2.2, 47 for examples.



the money in a manner indirectly benefitting the child, such as capital for a small family business. In other situations, it could be in the best interests of the child to receive the funds directly. While every situation is unique, there might be situations where a child victim is deemed mature enough and has already experienced independent living (for e.g. having lived in transitional or independent housing, including half-way houses; having lived with other victims; at vocational training or employment sites; or in a rented room on his/her own).³³⁷

The complications in disbursement of compensation to child victims only increase when the sexual exploitation occurs on an international scale, as the case below demonstrates.

Compensation in Transnational Live Streaming of Child Sexual Abuse Case³³⁸

In a recent transnational case involving the live streaming of child sexual abuse, a Swedish national directed a woman in the Philippines to sexually abuse young girls in exchange for payment. The Swedish national could watch live the abuse taking place in the Philippines, while remaining on Swedish territory. The Swedish perpetrator was prosecuted in Sweden, sentenced to imprisonment and ordered to compensate the victims according to the compensation guidelines established by Swedish law. The Swedish Court convicted the Swedish perpetrator of instigation of rape against one child victim and ordered the perpetrator to pay 100,000 SEK for moral damages and 15,000 SEK for 'actual damages' to that victim. The court ordered the Swedish perpetrator to pay 40,000 SEK in 'moral damages' to each of the other three child victims because evidence demonstrated one act against each child. Today, the victims still live with the family members who perpetrated, permitted and/or benefited from the sexual exploitation. The child victims and female Filipino perpetrators provided evidence to local authorities, Swedish authorities and a Swedish prosecutor to enable the charges to be brought against the Swedish perpetrator in Sweden. The Filipino perpetrators were in some cases relatives of the child victims. Parents of the child victims received payment for the exploitation. Most of the child victims stated that they had not been penetrated and that the sexual acts were 'pretend'. The child victims refused to testify against the perpetrators because they did not want their relatives to go to jail and did not want to enter the social welfare system or live in shelters.³³⁹ The Filipino female perpetrators were reportedly promised immunity in exchange for providing evidence against the Swedish perpetrator.³⁴⁰ The compensation funds are currently being held in Sweden.³⁴¹ If the funds were distributed today, they would go to the parents of the victims. ECPAT Philippines is working with the government to establish a plan for management of the funds and removal of the children from their at-risk situations.³⁴²

337 See *Ibid.*, 2.7.1.1.b), 139.

338 Court of Appeals in Skåne och Blekinge (2013), Case nr. B212-13, 12 April 2013, (translation provided by ECPAT Sweden).

339 Sevilla, Cristina S. (independent consultant responsible for field research in the Philippines involving criminal justice professions for the ATJ Study), telephone conversation with Lindsey Schenck, Bangkok 24 November 2015.

340 *Ibid.*

341 Persson, Caroline (legal adviser at ECPAT Sweden), telephone conversation with Lindsey Schenck, Bangkok, 25 November 2015.

342 Sevilla, Cristina S., telephone conversation with Lindsey Schenck.



Child-sensitive procedures for the management and disbursement of compensation funds in favour of child victims of sexual exploitation should be established. The Office of the UNHCHR reported a suggestion from consultations on the Trafficking Guidelines that “any compensation awarded to child victims should remain partially under the control of the State so that it may be used by the victims once they reach the age of majority in order to give them an opportunity to build their future”.³⁴³ In Taiwan, because receipt of a large sum of money could place a child victim in danger, the Association for Victims Support holds compensation funds for minors and disburses the funds to the minors in instalments or in monthly allowances from the interest earned on the funds.³⁴⁴ These solutions should be carefully evaluated against the needs and circumstances of each child, in line with their best interests.

Funds should be managed and disbursed in the best interests of the child, but in some States, there is no one to oversee this process. The province of Ontario, Canada, has developed a nuanced system: a compensation award in favour of a minor from the State-managed programme is disbursed to one of several people, according to the best interests of the child as determined by the administering board of the programme. Potential recipients include “the parents or guardian, the minor’s adult spouse, the Accountant of the Superior Court of Justice, or any other person, if the Board considers payment to that person in the best interest of the minor”. The applicable law requires that the payee use the funds in the best interests of the minor.³⁴⁵ Missing from Ontario’s system is oversight of the disbursement of funds once delivered. Whether the parents, a government agency or other party manages the funds on behalf of the child, a system of accountability for disbursement of the funds should be part of the established procedures, possibly through court systems.

343 UN General Assembly (2014), “Summary of the consultations held on the draft basic principles on the right to effective remedy for victims of trafficking in persons, Report of the United Nations High Commissioner for Human Rights,” UN Doc. A/HRC/26/18, 2 May 2014, para. 37.

344 Trustlaw (2015), “Compensation Schemes, Comparative Report on National State Compensation Scheme”, 111.

345 *Ibid*, 21 (citing Government of Ontario (1990), “Compensation for Victims of Crime Act”, R.S.O. c. C.24 last amendment in April 2016, s. 21(3).



5. SUMMARY OF FINDINGS

As this Study has shown, while international law and common sense demand that child victims of sexual exploitation have access to legal remedies-including compensation for their suffering, this is rarely the case in practice.

This Study has looked at three avenues for obtaining compensation. First, in criminal cases victims are not typically parties to criminal proceedings. However, courts may have powers to order a convicted offender to reimburse a victim for their losses. In this context, such a restitution order is not meant to cover the full range of a victim's harm but will be limited to pecuniary losses. A victim would usually not be precluded from claiming further damages in front of a civil court. Second, in a civil case a victim would bring a separate lawsuit, separate from the criminal trial, and would be required to provide evidence of the harms suffered. Third, a victim could claim compensation through a state fund, under specific conditions. This Study finds that all three avenues for seeking compensation are marked by considerable obstacles.

First, child victims remain insufficiently informed about their rights. International law demands that child victims of sexual exploitation have access to information about their rights including their right to seek redress. Yet this information is not systematically provided and when it is, it is often not in a language, or terms that a child can understand. When children are not aware of their rights, they cannot exercise them. In many instances, such as child sexual exploitation online, children are not even aware that they are victims.

Second, child victims lack legal assistance and support services to navigate the justice system and assert their rights. They often lack the financial means and knowledge to obtain the necessary advice and representation. Free legal aid is not always available and when it is, often children do not qualify for it.

Third, access to state compensation funds is often limited. In most countries, there is no fund dedicated to child victims. In most surveyed countries, compensation funds are for victims of specific crimes only (i.e. 'violent crime') and it is unclear whether child sexual exploitation would fit that criteria. Another issue is that monetary awards are often very low. As compensation funds are subsidiary mechanisms and not primary sources of compensation, they are not meant to compensate the full range of damages suffered by a victim. As a result, to obtain compensation child victims must as a first resort go through a criminal justice process that is not adapted to them.

Fourth, child victims who interface with the justice system are often subject to hardship, whether through the multiplication of investigations that they must endure, or when they are required to prove damages. This can be particularly difficult, as sexual exploitation offences have sequels that often extend through the lifetime of a child victim. In addition, procedures are often very lengthy, which takes its toll on the child and compromises their recovery.

Fifth, child victims are often subject to harmful misperceptions, which further restricts their access to compensation. For example, child victims can be mistakenly viewed and treated as offenders. This sometimes stem from beliefs that, for example, children have chosen to engage in sexual exploitation and hence should be punished. In several countries, the 'participation' of children in a crime will be assessed in a decision to award compensation funds.



Sixth, there are important barriers in transnational cases, for instance where multiple offenders and countries are involved. State-managed compensation programs may require that a crime have been committed within their territory or that a claimant be a lawful resident of the country where compensation is sought. This can restrict the access to compensation of a child victim. In addition, when an offender commits a crime outside their home country and leaves, it may be particularly complicated for a victim to pursue remedies in the absence of the offender.

Seventh, time limitations may be imposed for the filing of a claim (through statutes of limitations, prescription periods or other limitations), either through a state fund or a court of law. These can effectively prohibit child victims from accessing compensation, as the reporting of sexual offences against children is frequently delayed.

Eighth, this Study identified considerable difficulties for victim in accessing payment of a monetary award. In addition to compensation amounts being very low overall, court compensation orders are often not enforced. Offenders are often insolvent, and even when they are solvent they can pay their way out of policy custody or find other ways to avoid fulfilling a compensation order. When compensation funds are disbursed, there can be issues in managing the funds and ensuring that they are used in a victim's best interests.

To overcome each of the above obstacles, the best interests of the child should always be given primary consideration. The right of every child victim to dignity and compassion should be consistently upheld, for example by ensuring that all professionals who are in contact with them receive adequate training. All children without discrimination should have the right to participate in all decisions affecting their lives, and to be heard in proceedings concerning them. Against this background, some recommendations are offered in the next section.



6. RECOMMENDATIONS

To fulfil international obligations, standards and norms on the right of child victims of sexual exploitation to a remedy, States should consider taking the following measures:

6.1 Legislation

- Include in national law the right of all children to a remedy in case of violations of their rights;
- Establish extraterritorial jurisdiction over child sexual exploitation offences, in conformity with article 4 of the OPSC, and abolish the requirement of double criminality;
- Review statutes of limitations/prescription periods so that they only start running when a victim of sexual exploitation or sexual abuse has reached the age of 18;
- Ensure that all children are protected from sexual exploitation until the age of 18, regardless of the age of sexual consent.
- Develop a rights-based mechanism to ensure that child victims are timely notified of the legal proceedings of perpetrators involved in the production, distribution, and collection of CSAM;

6.2 Recommendations on Access to Compensation

6.2.1 State funded compensation programmes

- Create a State fund for the compensation of crime victims;
- Ensure that all offences of child sexual exploitation fall under the scope of the fund, including exploitation of children in prostitution, online child sexual exploitation, child trafficking for sexual purposes and sexual exploitation of children in travel and tourism and;
- Review eligibility requirements; ensure that children who are not nationals or lawful residents have access to the fund, and enhance international cooperation in transnational cases;
- Adopt child-sensitive provisions. For example, eliminate any consideration of a child victim's character, purported participation or involvement in the exploitation and criminal history in decisions regarding compensation awards. Further, ensure that applications made by child victims are assessed by experts who have received adequate training on child sexual exploitation and its effects on victims; review requirements for medical and psychological examinations;
- Expand compensation coverage to include emotional and psychological damages regardless of whether a physical injury occurs;
- Increase compensation amounts awarded to victims of child sexual exploitation under State-managed programmes to adequately compensate for the full extent of damages suffered;
- Expedite the process for seeking compensation from State-managed programmes so that child victims receive compensation within a few months of filing their application;
- Develop synergies with other compensation channels, i.e. criminal and civil courts, for example by allowing the state to act by way of subrogation to get the compensation reimbursed by the offender;
- Establish a procedure providing for the disbursement and management of compensation funds awarded to child victims to ensure that the funds are disbursed in the child victims' best interests.



6.2.2 Compensation through criminal/civil courts

- Ensure that criminal courts can order an offender to pay full compensation for the damages suffered by a victim, so that the child does not have to go through a separate civil lawsuit to claim damages. Where this is not possible the court should, at a minimum inform the child of other recourses;
- Ensure that a child's right to compensation is not linked to any aspect of a criminal investigation or proceeding, such as the child's timeliness in reporting or cooperation with the investigation and prosecution;
- When in the best interests of the child victim, criminal and civil proceedings for seeking compensation should be expedited;
- Provide free legal assistance to all child victims;
- Appoint a support person (such as a guardian ad-litem) for every child victim of sexual exploitation as soon as the exploitation is reported. The support person's responsibilities would include:
 - Serve as a coordinator for all persons and organisations involved in the child's case;
 - At all times, ensure that any decisions related to the child are made in the child's best interests;
 - Ensure fulfilment of all rights to which the child victim is entitled;
 - Take measures to intervene when the child's best interests are not considered or when any of the child's rights are denied.
- Take measures to avoid the re-traumatisation of children. Avoid contact between child victims and offenders at any time during the proceedings, and minimise the number of interviews with the child;
- Ensure that compensation orders are enforced and satisfied, for example by amending legislation and regulations to ensure that funds and assets obtained from the perpetrator of sexual exploitation of children are directed first and foremost to satisfy compensation orders in favour of child victims before funds are distributed elsewhere.

6.3 Recommendations on Capacity Building and Training of Professionals

- Generate and disseminate child friendly materials about children's right to seek compensation; establish procedures for providing information to child victims, including child friendly materials, in a manner and language they can understand.
- Develop and deliver multidisciplinary trainings for all professionals working with child victims of sexual exploitation, to include at a minimum: the effect of crimes on child victims; appropriate methods for effectively interacting with child victims; misperceptions of child victims as offenders; and child victims' rights under national and international law, including the right to remedies and compensation.



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