

### **CHAPTER III**

## **UNDERSTANDING THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION, AND CHILD PORNOGRAPHY (OPSC)**

Sexual abuse against children stays as a billion benefit industry in the world. According to recent study, every year, one million children has been used and benefitted billions of dollars through sex trade, suffering derivation, and risky threatening life. Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC) is the first legal standing which concerns about Child Sexual Abuse (CSA) globally. In this chapter, I will write about the Introduction to OPSC which consist of a descriptive elaboration of Optional Protocol, background of the OPSC, and the content of the OPSC. (UNICEF, 2005).

#### **A. Optional Protocol**

Optional protocol is a derivative text from a main convention which provides either further procedures relating to the main convention or propose substantive areas related to the main convention. In many UN convention, it is convention about human rights that often followed optional protocols. State parties who are bound to the main convention are open for signatory and ratification to the optional protocols (UN WOMEN, 2000-2009).

Optional Protocol is made under its main convention. It is usually created to specify and specialize certain issue that needing further procedures or substantive areas limitation. In many cases, optional protocol is created a long time later after the formation of the main convention. Because there is certain factors rushing to take a further step in responding certain issue. The increasing incidence of the issue may become the trigger to create optional protocol. States who have signed and/or ratify the main convention are the states who are allowed to sign and/or ratify the optional protocols. Optional protocol is

possible to be created more than a single optional protocol. It also could be created in a long period time one to the main convention or one to another optional protocol.

### **B. Background of the OPSC**

The OPSC was formulated in 25 May 2000 by the United Nations Commission on Human Rights (OHCHR) as a further commitment in protecting children as mentioned in the Convention on the Rights of the Child (CRC). It was established to respond the high incidence of sexual abuse against children. It acts to measure the protection of children from the sale of children, child prostitution, and child pornography provided by the State Parties as their proof to comply the Protocol. The CRC especially article 1, 11, 21, 32, 33, 34, 35, and 35 are the main measuring tool to the State Party in providing protection toward the children.

The CRC was adopted in 1989. Protection against children from all forms of exploitation became the concern of the Convention as reflected in articles 19, 32 and 34-36. However, after the 1996 World Congress against Commercial Sexual Exploitation of Children there was a consideration that a further and more detailed procedures are needed in protecting children from sexual exploitation. The rise of globalization and modern technology became the new challenges in facing child protection. Through the internet, child exploitation was spread widely. In early 1990s, a bunch of pedophiles websites and child pornography started to be a commonplace. The issue happened across the globe from one country to another country. Since then, it has become the most profitable business in the world together with the trafficking of arms, drugs, and human beings.

As the sale of children, child prostitution, child pornography, as well as child labor, child soldiering, illegal adoption and other forms of exploitation was increased, the international community committed to combat the issue immediately. Experts from international and national level

together with concerned individuals dedicated to begin a dialogue to talk about the issue. A common framework was created against child protection. It was believed that a formation of an optional protocol to the CRC would strengthen the protection against children through these child exploitation. The OPSC was premised that all children must be protected, that any kind of exploitation against children must be considered as a crime, and the perpetrators must be investigated and punished.

The consideration of the OPSC formulation was in preventing economic exploitation on children. Children would likely lose their effectiveness on education, physic and mental, health. Spiritual, social development and mental. The significant incidence that keeps increasing in the global level had triggered the formulation of the OPSC. The creation of the OPSC is a long way to finally be adopted by the OHCHR. The sale of children, child prostitution, and child pornography has been a concern to the OHCHR since a long time ago.

In 1974, there was an establishment of a Working Group on Slavery which was transformed into Working Group on Contemporary Forms of Slavery. It was established by Human Rights Council Resolution 6/14. It is no longer exist because it has finished its mandate as an enactor on contemporary forms of slavery, its causes, and its consequences. The session from 8 to 11 August 2006 in the *Palais des Nations* in Geneva was the last session of the Working Group on Contemporary Forms of Slavery held. It also concerned about the implementation of Human rights decision 2006/102 besides focusing on the review of contemporary forms of slavery around the world.

In 1990, a Special Rapporteur focusing on sale of children, child prostitution and child pornography was formed assigned to extend the mandate to all UN Member States in raising awareness of sale of children, child prostitution, and child pornography. The work of countering sexual exploitation was conducted through specific cases reports publishing, the

investigation on trends and situation as the fact-finding mission in certain country or region assigned to the Special Rapporteur, and the establishment of regional and national workshops.

In 1994, a report by the Special Rapporteur focused on the tightening of prevention strategies taken by the States Parties and other actors. The deep causes that trigger the rising issue on the sale of child, child prostitution, and child pornography was also the key finding of the report. Still in 1994, the 1993 Vienna Declaration and Programme of Action which declares effective measures against female infanticide, risky child labour, the sale of children and their organs, child prostitution and pornography and other forms of sexual abuse had triggered the formation of a resolution adopted by the Commission on Human Rights. The resolution was conducted on the need of effective international tools to prevent and combat the sale on children, child prostitution, and child pornography. During the year, many works about those issues are noticed by the Commission such as the work of UNICEF, the work of the Committee on the Rights of the Child, the Special Rapporteur, the ILO standards of child labour exploitative forms, and the report of the Second International Workshop on National Institutions for the Promotion and Protection of Human Rights. These works have triggered for a draft optional protocol to the CRC which specify on the combat of child sexual exploitation and trafficking. Eventually, a text on optional protocol was formulated by an open-ended working group of the Commission on Human Rights cooperating with the Special Rapporteur and the Committee on the Rights of the Child. Since then, the drafting of the OPSC was started. The First World Congress informed it against Commercial Sexual Exploitation of Children and by the struggles made by the NGO Community. The OPSC was then adopted by the United Nation General Assembly in 25 May 2000 and entered into force 18 January 2002.

### **C. Content of the OPSC**

The content of the OPSC is consisted of the required consideration of sale of children; the required consideration of child prostitution; the required consideration of child pornography; criminal, civil, and administrative responsibility; jurisdiction and extradition; mutual legal assistance; prevention; the rights of child victims; international assistance and cooperation.

#### **1. Sale of Children**

According to the OPSC article 2(a),

*“Sale of children is any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.*

It is important to understand that sale of children might sound similar with child trafficking, but it is not identical. States tend to recognized sale of children as child trafficking. Therefore, many of States’ legislation only criminalize child trafficking by consideration the overlapped understanding of child trafficking and sale of children. According to the CRC article 35, States Parties are demanded to criminalize either sale of child or child trafficking. However, the Committee still keeps reminding States Parties in order to satisfy both measurement without abandoning one to another. Even though there is no significant needs to distinguish the two crimes in the experience of a child’s exploitation, but it is important in regard to determine the procedure of the perpetrator’s prosecution, identification, and the rights of the victims. Below shows how sale of children and child trafficking is not identical each other.

**Table 4 The Differences of Sale on Child and Child Trafficking**

NO.	Differences	Sale of Children	Child Trafficking
1	Definition	<p>Sale of children according to the OPSC article 2(a) is any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration. (OPSC article 2(a)).</p>	<p>Child Trafficking according to Palermo Protocol includes of;</p> <p>Recruitment: A child can be sold to a trafficker by parents or other caregivers, or by an institution.</p> <p>Transport, transfer, harbouring:</p> <p>During the movement of the child, the child can be sold by one trafficker to another.</p> <p>Receipt: The child can be sold by the</p>

			trafficker to a final 'buyer'.  Exploitation: The child can at any time be sold to another trafficker or exploiter.
2	There are always <b>elements of sale</b> occurring throughout the process.	<b>There are always</b> elements of sale occurring throughout the process.	The elements of sale are <b>not always</b> occurred throughout the process.
3	There is a needs to <b>move</b> the child victim from one place to another place.	The child victim <b>doesn't always</b> have to be moved from one place to another place.	The key concept of child trafficking is <b>the movement of the child victim</b> from his/her social environment.

*Source: Handbook on the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC), UNICEF, 2009.*

It is important to make sure that the States Parties to the OPSC must distinguish the criminalization on the sale of child specifically which is not related to the child trafficking. As the minimum measurement of acts which are included as the sale of children according to the OPSC article 3 paragraph 1(a)

offering, delivering, or accepting a child for sexual exploitation purpose, transfer of organs for remuneration, forced labour, and other forms of legal instruments which applicable to the adoption of violation.

Sexual exploitations which are recognized by the OPSC is child prostitution, child pornography, child temporary marriage, sexual slavery, sexual relations between an adult and a child under his/her control. Sexual slavery and sexual relations between a child and an adult are not always identical with child prostitution. It is proven in some cases reported by the Committee that there are cases where children were forced to satisfy an adult's sexual needs such as a police officer or prison officer, a child domestic servant and his or her employer, civil services officer such as in orphanage, disable orphanage, or staff members in the home.

Besides prohibiting the act of sexual exploitation as the purpose of the sale of children, the OPSC article 3 also prohibits the offer, delivery, or acceptance of children for transfer of organs for profit purpose. The sale of children on purpose of child forced labour is also prohibited. The term of "Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour" includes the forced or compulsory recruitment of children for use in armed conflict according to Worst Forms of Child Labour Convention No. 182. The OPSC also prohibits the sale of children on purpose of camel racing under the prohibition of sale of children for the purpose of forced labour.

## **2. Child Prostitution**

According to the OPSC article 2,

*"Child Prostitution is the use of a child in sexual activities for remuneration or any other form of consideration".*



Child prostitution is prohibited according to the OPSC article 3 including the activities of offering, obtaining, procuring, or providing a child for child prostitution. Child prostitution according to the OPSC are relatable with the provision of sexual services in exchange for goods, services of favours, and money. The exchange of the sexual services can be covered with food, shelter, or for drugs.

The OPSC doesn't explicitly mention the definition of a child. Instead, the CRC defines a child as a person below the age of eighteen. The Committee has been asking the States Parties to set an age limit of 18 years for defining a child for all the offences covered by the OPSC. The committee has also demanded the States Parties to prevent the sale on child, child prostitution, and child pornography through travel and tourism. Under the article 3 of the OPSC, it is referred to in the Preamble as well as in the article 10 which deals with international cooperation. Since sex tourism is often related to the offences covered by the OPSC such as child prostitution and child pornography, it is covered by the OPSC. The efforts to combat these issue are made through promoting responsible tourism through awareness-raising campaigns towards the tourists, travel operators, NGOs, and civil society organizations.

### **3. Child Pornography**

According to the OPSC, article 2 (c),

*“Child pornography 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”.*

The OPSC article 3 (1)(c) demands the States Parties to criminalize the producing, distributing, disseminating,

importing, exporting, offering, selling, or possessing for the above purposes child pornography as defined in article 2. Pornography can be recognized through live performances, photographs, motion pictures, video recordings, and the recording or broadcasting of digital images. The widespread distribution and accessibility of child pornography using the internet has been a major concern to the Committee. It strongly recommends the States Parties to tackle the issue seriously through the adoption of legislation on the obligation of internet service providers relating to child pornography.

#### **4. Criminal, civil, and administrative responsibility**

Paragraph 2 article 3 of the OPSC demands States Parties to criminalize the action of sale of children, child prostitution, and child pornography. An attempts to conduct the listed acts in paragraph 1 of article 3, complicity, and participation in any of the acts are demanded to be criminalized too. Paragraph 3 of article 3 stated that the crimes recognized by the OPSC should be “punishable by appropriate penalties that take into account their grave nature” means that the offences should be identified. Paragraph 4 of article 3 concerns about the liability of legal persons for the offences identified in paragraph 1 which may be criminal, civil, or administrative. Article 7 of the OPSC concerns about the commitment of the State Parties in taking a measurement of instrumentalities and proceeds derived offences aimed to close premises used for such purposes including attempt and complicity.

#### **5. Jurisdiction and extradition**

Paragraph 2, article 2 states that States Parties “may” conduct jurisdiction over such offences according to the principles of active personality which means the alleged offender is a national of the State in question or has a habitual residence in its territory and another component is passive nationality where the victim is a national of the

state. It should be noted that the provisions of article 5 concerning extradition address the offences defined in paragraph 1 of article 3. They don't cover attempt or complicity which are already covered by paragraph 2 of article 3.

## **6. Mutual legal assistance**

According to article 6, States Parties are demanded to provide one another including assistance in obtaining evidence. Article 7 of the OPSC requires States Parties to execute requests from another States Parties to confiscation of good or proceeds which can be applied to any offence covered by the OPSC. According to the article 10 of the OPSC, "International cooperation by multilateral, regional, and bilateral arrangements for the prevention, detection, investigation, prosecution, and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography, and child tourism" are strongly recommended by the Committee as a further step to combat such actions.

## **7. Prevention**

States Parties are required to "adopt or strengthen, implement, and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol particular attention . . . to protect children who are especially vulnerable to such practices" as mentioned in article 9 of the OPSC. There are two kinds of preventive measures stated in this article. Paragraph 5 requires States Parties to "take appropriate measures purposed to effectively prohibiting the production and dissemination of material advertising the offences described in the present Protocol". Promoting awareness in the public at large, including children, through information by all appropriate means, education, training, about the preventive measures and harmful effects of the offences

referred to in the present protocol are also required as the preventive steps according to the paragraph 2 of article 9.

### **8. The rights of child victim**

The rights and interest of the child victim should also be the concern to the States Parties as it is mentioned in the article 8 of the OPSC. In article 9, paragraph 3 acknowledges the rights of the child victim to get an assistance in achieving social reintegration and full physical and psychological recovery. Paragraph 4 recognizes the child victim's rights to adequate procedures to look for compensation without being discriminated for damages from those legally responsible.

According to article 8, child victim has rights to; procedures of children's vulnerability and special needs, information of their rights, role, scope, timing, and progress of the processing of their cases, that their personal interests matter to the proceedings of their cases, proper support along their legal proceedings, privacy and the secrecy of information relating their identity, protection against intimidation and retaliation, and procedures which doesn't delay their cases unnecessarily. However, the article 8 also demanded States Parties to; investigate, even there is a needs to clarify the age of the victim; consider their best interest as a primary consideration, and train those who work with the child victim.

### **9. International assistance and cooperation**

International cooperation and coordination among authorities, national and international non-governmental organizations and international organizations are recommended to be promoted by the States Parties as mentioned in the article 10. The cooperation and coordination may be concerning about an assistance to the child victim regarding their physical and psychological recovery, social integration, and repatriation as mentioned

in paragraph 2. Poverty and underdevelopment as the root causes to such offences should be addressed at international level according to paragraph 3. Thorough presenting multilateral, regional, bilateral, or other programmes, financial provision, technical or other assistance should be provided as mentioned in paragraph 4.