

**The Best Interest of the Child in the Philippines:  
Lessons from Supreme Court Decisions and Their Potential Application in Online  
Sexual Exploitation of Children Cases**

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**Abstract.** *In the Philippines, upholding the best interest of the child is a legal obligation which follows from national and international laws. Examining Supreme Court decisions on the best interest of the child shows that it is primarily applied in custody-related cases, while there is a lack of rulings specifically on cases of online sexual exploitation of children (OSEC). This paper examines the potential application of the best interest of the child principle in OSEC proceedings and identifies lessons which can be drawn from existing jurisprudence. Findings include the need to honour the voices of children-survivors and to consider expert opinions. The paper also finds that an OSEC-specific interpretation of the principle should be developed in jurisprudence, particularly considering the risk of retraumatizing survivors during the legal process, with the aim of truly upholding the best interest of the child in the digital age.*

**1. Background to Online Sexual Exploitation of Children in the Philippines**

One day, Marj was invited by her classmate's relative to come to their house. While she was there, a husband and wife took sexually explicit photos of her that they sent to foreigners online in exchange for money. Stunned and confused, 13-year-old Marj did not know how to react.<sup>1</sup> The exploitation was repeated multiple times. Aside from the couple, three other traffickers offered and provided Marj and other children to foreigners who directed and paid for sexually explicit materials and livestreaming abuse. In 2015, Marj and eleven others were rescued by Philippine law enforcement and brought to an aftercare home. The couple and three other perpetrators related to some of the survivors were arrested while committing various crimes.<sup>2</sup> Marj's exploiters were convicted in 2017 and sentenced to 20 years and life in prison respectively.<sup>3</sup>

This is one of the many cases of online sexual exploitation of children (OSEC) in the Philippines, which has been dubbed as its epicentre.<sup>4</sup> In 2013 the non-governmental organization Terre des Hommes noted the increase of 'webcam child sex tourism' in the

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<sup>1</sup> 'Marj's Story' (*International Justice Mission*) <<https://osec.ijm.org/survivors/marjs-story/>> accessed 13 March 2022.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid* 2, para 21.

<sup>4</sup> Jim Gomez, 'Study: Philippines a Global Hot Spot for Online Child Abuse' *ABC News* (21 May 2020) <<https://abcnews.go.com/International/wireStory/study-philippines-global-hot-spot-online-child-abuse-70804205>> accessed 13 March 2022.

Philippines.<sup>5</sup> In a study conducted by Sandra Concepcion and others, they noted that the Philippines has become a top global source of abuse materials involving children.<sup>6</sup>

According to numerous accounts, the situation for children has significantly worsened during the COVID-19 pandemic. The Philippine Government<sup>7</sup> and international organizations have reported an increase in violence against women and children including online crimes.<sup>8</sup> From a global perspective, Interpol noted that 2021 had been ‘the worst year on record’ with regards to online child sexual abuse, which included an increase in the livestreaming of child sexual exploitation for payment.<sup>9</sup> Online Sexual Exploitation of Children is defined for the purpose of this paper as ‘the production, for the purpose of online publication or transmission, of visual depictions (e.g., photos, videos, and livestreaming) of the sexual abuse or exploitation of a minor for a third party who is not in the physical presence of the victim, in exchange for compensation.’<sup>10</sup>

## 2. Introduction

Survivors like Marj interact multiple times and for various reasons with government officials, including law enforcement officers, prosecutors, public defenders, social workers and judges. Under international and Philippine law, including Supreme Court decisions, those state agents have the duty to uphold the best interest of the child at all times. However, what this looks like in OSEC cases may be difficult to discern.<sup>11</sup>

<sup>5</sup> ‘Webcam Child Sex Tourism - Becoming Sweetie: A Novel Approach to Stopping the Global Rise of Webcam Child Sex Tourism’ (Terre des Hommes Netherlands 2013) <<https://www.terredeshommes.org/webcam-child-sex-tourism-2/webcam-child-sex-tourism-terre-des-hommes-nl-nov-2013-2/>> accessed 5 August 2022.

<sup>6</sup> Sandra Concepcion and others, ‘Sexual Exploitation and Abuse of Children Online in the Philippines: A Review of Online News and Articles,’ (2018) 52 (4) Acta Medica Philippina.

<sup>7</sup> Benjamin Pulta, ‘Online child exploitation reports in PH surge amid COVID-19:DOJ’ PNA (25 May 2022) <<https://www.pna.gov.ph/articles/1103852>> accessed 10 July 2022. See also International Justice Mission ‘COVID-19 Brief on Online Sexual Exploitation of Children’ (2021) <<https://osec.ijm.org/news-and-insights/news-updates/covid-19-brief-online-sexual-exploitation-children/>> accessed March 12, 2022.

<sup>8</sup> Save the Children, for example, noted the increase of online sexual exploitation and abuse cases during the enhanced community quarantine in the Philippines. See ‘Online sexual abuse of children rising amid COVID-19 pandemic’ (*Save the Children*) <<https://www.savethechildren.org.ph/our-work/our-stories/story/online-sexual-abuse-of-children-rising-amid-covid-19-pandemic/>> accessed 10 July 2022. World Vision also noted that the COVID-19 pandemic has exacerbated the problem of OSEC. See ‘Word Vision continues advocacy against online sexual exploitation and abuse of Filipino children’ (*World Vision*). <<https://www.worldvision.org.ph/campaigns/world-vision-continues-advocacy-against-online-sexual-exploitation/>> accessed 10 July 2022.

<sup>9</sup> ‘INTERPOL Secretary General: Online Child Sexual Abuse at Record Levels’ (*INTERPOL*) <<https://www.interpol.int/en/News-and-Events/News/2022/INTERPOL-Secretary-General-Online-child-sexual-abuse-at-record-levels>> accessed 28 June 2022.

<sup>10</sup> International Justice Mission, ‘Online Sexual Exploitation of Children in the Philippines: Analysis and Recommendations for Governments, Industry, and Civil Society’ (2020). <[https://ijmstorage.blob.core.windows.net/ijmna/documents/studies/Final-Public-Full-Report-5\\_20\\_2020\\_2021-02-05-055439.pdf](https://ijmstorage.blob.core.windows.net/ijmna/documents/studies/Final-Public-Full-Report-5_20_2020_2021-02-05-055439.pdf)>, 6 accessed 13 March 2022. While this paper adopts IJM’s definition, the findings on the best interest of the child as discussed in this paper also apply to other types of online sexual exploitation, including grooming a child. Concepcion (n 6) illustrates how livestreaming abuse occurs and noted that it is a new form of information and communications technology-enabled crime that is on the rise. See Concepcion (n 6), 306.

<sup>11</sup> Lawrence Benjamin Patrick Aritao and Paulene Labay, ‘Child Protective Prosecutions: A Strength-Based, Child-Centered Approach to Assess Prosecution Results’ [2021] International Justice Mission <<https://osec.ijm.org/resources-list/child-protective-prosecutions/>> accessed 9 July 2022.

Supreme Court rulings in the Philippines form part of the country's legal system and operate as legal precedent.<sup>12</sup> Furthermore these rulings clarify and interpret the provisions of laws and rules, articulate the rights and responsibilities of the parties involved, and provide the parameters within which these rights can be enjoyed and enforced. Supreme Court decisions are needed in OSEC cases considering its urgency, novelty and complexity.

In this paper, Supreme Court decisions were identified by running the following key terms in the CD Asia Online database from 12 March 2020 until 17 February 2022: 'the best interest of the child,' 'child's best interest,' and 'minor's best interest.'<sup>13</sup> 31 cases containing these search terms were identified and those pertinent to this paper are discussed in Section 6. The survey of the Supreme Court rulings shows that the best interest of the child is primarily used in custody and custody-related cases, such as adoption, child support, and name changes.<sup>14</sup> OSEC-specific jurisprudence applying the best interest of the child has yet to develop.<sup>15</sup>

This paper outlines the basis of the best interest of the child principle in international law and its current articulation in the relevant provisions in the national laws of the Philippines. The paper argues that the current definition of the best interest of the child creates a standard of conduct and a duty of care which must be adhered to in any decision relating to a child, thus also included in OSEC cases. There is a dearth of publications on OSEC crimes in the Philippines.<sup>16</sup> The paper accordingly contributes to the existing literature on OSEC in the Philippines and identifies current questions for practitioners which require further guidance from jurisprudence. While the existing rulings primarily involve custody-related cases, decisions on the practical interpretation of this concept in this area may help to understand the potential application of the best interest of the child provisions in new scenarios, including the rights of children in the digital age. After considering the jurisprudence of the Supreme Court on the best interest of the child, the paper explores not only their application, but also their adequacy in upholding the best interest of the child in the growing number of cases of online sexual exploitation of children.

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<sup>12</sup> An Act to Ordain and Institute the Civil Code of the Philippines [Civil Code of the Philippines], Republic Act No 386, art. 8 (1949); also, *Fermin v. People*, G R No 157643, 28 March 2008, 550 SCRA 132.

<sup>13</sup> 'CD Asia Online' <<https://www.cdasia.com/about-us/>> accessed 13 March 2022. The earliest case found containing the said search terms is *Sebastian Lozano v. Carmen Martinez and Jose de Vega*, G R No 12834, 10 October 1917, 36 PHIL 976, a custody case decided by the Supreme Court in 1917.

<sup>14</sup> *Pablo-Gualberto v. Gualberto*, G R Nos. 154994 & 156254, [June 28, 2005], 500 PHIL 226.

<sup>15</sup> It can be noted that in the recent case of *Cadajas v. People*, G R No 247348, [November 16, 2021] that came out only on 15 June 2022, the Supreme Court decided a case involving an adult Filipino who induced a 14-year-old child to send him sexually explicit material after having made her believe that they were in a romantic relationship. While this involved an online crime against a child, it is not within this paper's definition of OSEC considering there was no exchange in compensation and there was no third party who was not in the physical presence of the victim.

<sup>16</sup> Concepcion (n 6) 306.

### 3. The best interest of the child in the United Nations Convention on the Rights of the Child

This section briefly traces the development of children's rights in international law and how these rights, including the best interest of the child, have been adopted in the various national laws and rules in the Philippines.

The evolution of children's rights has been informed in large part by societal developments such as the Industrial Revolution, World War I and World War 2.<sup>17</sup> As society confronted the realities of mass production and the costs and ravages of war especially on children, there were shifts in the way society treated and valued them. Over time children's rights emerged as inherent rights encompassing survival, protection, development and participation. In 1989, the UN General Assembly unanimously adopted the UN Convention on the Rights of the Child (UNCRC), which is the most comprehensive instrument outlining not only the provision-protection rights found in earlier instruments, but also their right to participate as members of society, in the decision-making process in areas that affect their lives and in upholding their best interest.<sup>18</sup> Article 3, paragraph 1 of the UNCRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>19</sup>

In 2021 the UN Child's Rights Committee formally recognized that children's rights also apply in the digital world.<sup>20</sup> This means that the duty to uphold the best interest of the child clearly covers OSEC cases, and is situated with other identified rights in the UNCRC; namely the rights to life, protection, participation and non-discrimination. Together, they form an umbrella of rights that should be enjoyed by children. It can be argued that the best interest of the child is an optimal situation in which all these other rights are realized: 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.'<sup>21</sup>

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<sup>17</sup> Hanita Kosher, Asher Ben-Arieh and Yael Hendelsman *Children's Rights and Social Work* (2016) Springer. The authors noted that during the industrial revolution, child labor was a common occurrence in society since children were made to work in factories. World War 1 ushered the League of Nations, which adopted the Declaration of Human Rights, which recognized for the first-time children's rights to development, assistance, relief, and protection. Meanwhile, after World War 2 came the United Nations, which eventually adopted the UN Convention on the Rights of the Child.

<sup>18</sup> *ibid* 15.

<sup>19</sup> Committee on the Rights of the Children, 'General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)' (2013) (Comment No 14).

<sup>20</sup> Committee on the Rights of the Child, 'General Comment No 25 (2021) on Children's Rights in Relation to the Digital Environment' (2021).

<sup>21</sup> Comment No 14 (n 19), para 4.

According to the UNCRC Comment No. 14 (2013) the best interest of the child is not simply an articulation of a general principle often found in the preamble of laws; it is self-executing.<sup>22</sup> As Candelaria and Rayco noted, it should be possible to go to court and seek redress based on this standard.<sup>23</sup> Moreover the best interest of the child is a substantive right, an interpretive principle and a procedural standard. As a substantive right, the best interest of the child is a primary consideration in every decision that affects them. As an interpretive principle, the scales should be tipped in favour of the best interest of the child in situations where there is ambiguity in an interpretation of a legal provision.<sup>24</sup> And finally as a procedural standard, the impact of every decision that affects children should be evaluated and articulated clearly.<sup>25</sup> These same principles, which have been applied by the Supreme Court primarily in custody and custody-related cases, can likewise apply in OSEC cases.

#### 4. The best interest of the child in the Philippines

This section introduces the legal provisions under the national laws of the Philippines on the best interest of the child, as well as the legal framework used to investigate and prosecute OSEC cases.

The Philippines ratified the UNCRC without reservation in 1990, the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography in 2002 and the Optional Protocol on the Involvement of Children in Armed Conflict in 2003.<sup>26</sup> Even before the ratification of the UNCRC and the optional protocols, the protection and value of children as members of society had been recognized and codified in Philippine law, including in the 1935 Constitution,<sup>27</sup> the 1973 Constitution,<sup>28</sup> the Child and Youth Welfare Code;<sup>29</sup> the current 1987 Constitution, which provides a stronger statement on the rights of children compared to previous constitutions,<sup>30</sup> and the Family Code.<sup>31</sup>

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<sup>22</sup> *ibid* para 6a.

<sup>23</sup> Sedfrey M. Candelaria and Rosalyn C. Rayco, 'The Philippines and the Convention on the Rights of the Child: Evaluating Compliance with Respect to the International Standards for Procedural Rules Involving Children' (2005) 49 *Ateneo LJ* 1016, 1041.

<sup>24</sup> Comment No 14 (n 17) para 6b.

<sup>25</sup> *ibid* para 6c.

<sup>26</sup> These Optional Protocols also recognize the best interest of the child as a primary consideration. See 'Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography' UN General Assembly, 25 May 2000, art 8, s 3 and 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' UN General Assembly, 25 May 2000, para 9.

<sup>27</sup> 1935 Phil Const art VIII, s 6 (superseded in 1973).

<sup>28</sup> 1973 Phil Const art II, s 5 (superseded in 1983).

<sup>29</sup> The Child and Youth Welfare Code, Presidential Decree No 603, art 3 (1974).

<sup>30</sup> Phil Const art 15, s 3(2).

<sup>31</sup> The Family Code of the Philippines, Executive Order No 209 (1987). The same provision also appears in art 129, s 9 on the power of the courts to decide what the best interest of the child is in certain cases and art 222 on the appointment of guardian *ad litem*.

After the ratification of the UNCRC, efforts were made to comply with the country's obligations under this instrument.<sup>32</sup> The laws and rules introduced are diverse in terms of their nature and focus, and include for instance the Family Courts Act of 1997 which created specialized courts throughout the country that have jurisdiction over cases involving children, including OSEC cases.<sup>33</sup> Concerning a definition of the best interest of the child, the Supreme Court issued the Rule on Examination of a Child Witness (RECW) that contains the current articulation of the best interest of the child:

The totality of the circumstances and conditions as are most congenial to the survival, protection, and feelings of security of the child and most encouraging to his physical, psychological, and emotional development. It also means the least detrimental available alternative for safeguarding the growth and development of the child.<sup>34</sup>

The RECW also embodies the interpretive principle under the UNCRC, since Section 3 provides that it 'shall be liberally construed to uphold the best interests of the child and to promote maximum accommodation of child witnesses without prejudice to the constitutional rights of the accused.' Additionally, the Juvenile and Justice Act of 2006 recognizes the rights of children in conflict with the law, providing for the objectives of preventing these cases and of rehabilitating and reintegrating these children into society. It defines the best interest of the child in the same way as the RECW.<sup>35</sup>

In the Philippines, perpetrators of OSEC violate a range of laws, including the Special Protection of Children Against Abuse, Exploitation, and Discrimination Act of 1992<sup>36</sup> and the Anti-Online Sexual Abuse or Exploitation and Anti-Child Sexual Abuse or Exploitation Materials Act which explicitly recognizes that paramount consideration be given to the interests of children in matters affecting them.<sup>37</sup> Furthermore, the Expanded Anti-Human Trafficking Act of 2022 is also applicable in OSEC cases. This law also provides that in all

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<sup>32</sup> Chief Justice Reynato Puno, 'The David G. Bradley Leadership Lecture on Philippine Judicial Initiatives in Addressing the Needs of Children' (2007) 52 *Ateneo Law Journal* 730.

<sup>33</sup> An Act Establishing Family Courts, Granting Them Exclusive Original Jurisdiction Over Child and Family Cases, Amending Batas Pambansa Bilang 129, as Amended, Otherwise Known as the Judiciary Reorganization Act of 1980, Appropriating Funds Therefore and for Other Purposes [The Family Courts Act of 1997], Republic Act No 8369 (1997), s 2.

<sup>34</sup> Rule on Examination of a Child Witness, A.M. No 004-07-SC (21 November 2000) (RECW), s 4(g).

<sup>35</sup> An Act Establishing a Comprehensive Juvenile Justice and Welfare System, Creating the Juvenile Justice and Welfare Council Under the Department of Justice, Appropriating Funds Therefore and for Other Purposes [Juvenile Justice and Welfare Act of 2006], Republic Act No 9344, s 4(b).

<sup>36</sup> An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes [Special Protection of Children Against Abuse, Exploitation, and Discrimination Act], Republic Act No 7610, s 2.

<sup>37</sup> An Act Punishing Online Sexual Abuse or Exploitation of Children, Penalizing the Production, Distribution, Possession and Access of Child Sexual Abuse or Exploitation Materials, Amending Republic Act No 9160, Otherwise Known as the 'Anti-Money Laundering Act of 2001', as Amended and Repealing Republic Act No 9775, Otherwise Known as the 'Anti-Child Pornography Act of 2009' [Anti-Online Sexual Abuse or Exploitation of Children (OSAEC) and Anti-Child Sexual Abuse or Exploitation Materials (CSAEM) Act of 2022], Republic Act No 11930, s 2e. This became law on 30 July 2022. Prior to this, the Anti-Child Pornography Act of 2009 was used in online sexual exploitation of children cases.

actions concerning children, their bests interest shall be the paramount consideration.<sup>38</sup> Lastly, in some cases the abuse includes rape or sexual assault punishable under the Revised Penal Code.<sup>39</sup> It can therefore be noted that the Philippines legal system not only recognizes the best interest of the child, but also includes a range of instruments used against perpetrators in OSEC cases. The following sections will discuss the application of the best interest of the child principle in such cases beyond a sole focus on achieving convictions.

### **5. The best interest of the child as a standard of conduct and a duty of care in OSEC cases**

The current definition of the best interest of the child in the Philippines envisions a scenario in which not only the survival and protection of a child (including the feeling of safety) are guaranteed, but also to ensure the physical, psychological and emotional development of the child. It speaks of the *totality of circumstances and conditions*, which presupposes that the determination of the best interest of the child should be made on a case-by-case basis. This is consistent with the UNCRC, which clarified that the best interest of the child is a ‘dynamic concept that requires an assessment appropriate to the specific context.’<sup>40</sup>

The second part of the definition, while building on the UNCRC, expands the concept further to accommodate the reality that there may be instances where these circumstances might still be less than ideal for the child. The State is then obliged to determine the least detrimental alternative from the available options - what would cause the least harm.

It can be argued that the definition creates a duty of care that requires confronting alternatives in cases where the best interest of the child is pitted against other interests and choosing one where the harm is mitigated. It is a standard of conduct because it should govern how law enforcement agencies, prosecutors, judges and social workers act toward children for whom they have the duty of care both under domestic and international law.<sup>41</sup>

The standard of conduct and duty of care is consistent with the UNCRC. As the UNCRC Comment No. 14 (2013) explains, ‘viewing the best interests of the child as “primary” requires a consciousness about the place that children’s interests must occupy in all actions and

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<sup>38</sup> An Act Strengthening the Policies on Anti-Trafficking in Persons, Providing Penalties for its Violations, and Appropriating Funds Therefore, Amending for the Purpose Republic Act No 9208, as Amended, Otherwise known as the ‘Anti-Trafficking in Persons Act of 2003’, and Other Special Laws’ [Expanded Anti-Trafficking in Persons Act of 2022], Republic Act No 11862, s 2.

<sup>39</sup> An Act Revising the Penal Code and Other Penal Laws [Revised Penal Code], Act No 3815 (1932) (as amended), art 266-A.

<sup>40</sup> Comment No 14 (n 19) 3, para 1.

<sup>41</sup> This twin requirements of the totality of circumstances and the least harm, creating both a standard of conduct and a duty of care, were adopted and made explicit in the RECW, Republic Act 9344 and the Rule on Custody of Minors and Writ of Habeas Corpus in Relation to Custody of Minors, A M No 03-04-04-SC (22 April 2003).

a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.<sup>42</sup> It is this same standard of conduct and duty of care that should also apply in cases of online sexual exploitation of children. According to Netkova and Mustafa, ‘Child sexual abuse including online sexual abuse and exploitation is a particularly serious crime that has wide-ranging and serious life-long consequences for victims.’<sup>43</sup> Government officials and other stakeholders should recognize that the circumstances of OSEC survivors, as well as the processes they go through once they are removed from exploitation, may be nuanced and therefore may not always look the same as in custody-related cases, where this principle has often been used and where jurisprudence is already quite developed.

A 2020 study published by International Justice Mission found that cases of OSEC often involve young children. The average age of children rescued was 11 years old.<sup>44</sup> Perpetrators are oftentimes parents, relatives or other members of the same community.<sup>45</sup> This is consistent with the observations of Concepcion and others. From the news articles and reports they examined, they found 30 percent of perpetrators were biologically related to the victims, and from among the family members involved, many were mothers in their 30’s.<sup>46</sup> Male victims account for 14 percent of those who were rescued.<sup>47</sup> The offenses usually occur on the surface web, as opposed to the dark web.<sup>48</sup> The perpetrators, both the local trafficker and the demand-side offender, negotiate the price of the abuse, while the latter often directs the manner of abuse against children. The offense is financially motivated.<sup>49</sup> For many of these children, they were exploited for an average of two years before they were rescued.<sup>50</sup>

The legal process that children go through in OSEC cases, while similar to other criminal cases, is nevertheless nuanced. For example, from the time a child is rescued from online sexual exploitation, survivors interact with government officials and social workers multiple times through formal and informal interviews for different, oftentimes overlapping purposes. Social workers interview survivors to establish their identities and ages, to determine

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<sup>42</sup> Comment No 14 (n 19) para 40.

<sup>43</sup> Bistra Netkova and Ariana Qosaj Mustafa ‘International Legal Standards in Combating Child Online Sexual Abuse and Exploitation,’ (2021) 6(3) *Journal of Liberty and International Affairs*, 111.

<sup>44</sup> International Justice Mission (n 10) 50.

<sup>45</sup> *ibid* 51.

<sup>46</sup> Concepcion (n 6) 308.

<sup>47</sup> International Justice Mission (n 10) 50.

<sup>48</sup> *ibid* 56. The surface web is ‘the portion of content on the World Wide Web that may be indexed by popular engines.’ The Dark Web is ‘a portion that is not indexed by conventional search engines and is accessed through network overlays such as the Tor network.’ See Dario Adriano Bermudez Villalva and others ‘Under and Over the Surface: A Comparison of the Use of Leaked Account Credentials in the Dark and Surface Web,’ (2018) 7 *Crime Science*.

<sup>49</sup> *ibid*.

<sup>50</sup> *ibid* 51.



non-offending family members who could take custody over them, and to assess immediate interventions and long-term care needs. The police interview them to corroborate evidence gathered or to identify other potential victims and perpetrators. It is also not uncommon for foreign law enforcement to interview survivors to support parallel cases against foreign offenders.<sup>51</sup> This does not often happen in non-transnational cases. As Robert Brian Smith noted, ‘Child pornography as an offence is not new. What is relatively new is the ability of offenders to use cyberspace to produce and distribute such materials almost instantaneously to their clients around the world. This provides a serious challenge to law enforcement agencies.’<sup>52</sup> Once the case is filed before the office of the prosecutor, he or she will determine if there is probable cause to file a formal charge against the perpetrator in court. During this phase the prosecutor can interview the survivors again.<sup>53</sup> After formal charges are filed in court, survivors may be called to testify during trial against a parent or relative over many hearing dates.<sup>54</sup> They may need to recount the abuse multiple times.

Indeed, these factors may not necessarily be present in other types of crimes against children or in custody or custody-related cases, but they should form part of the *totality of circumstances* and inform the duty of care in determining what the best interest of children looks like for OSEC cases. The scope of the best interest of the child principle ‘should be responsive to the situation of individual children and to evolve knowledge about child development,’<sup>55</sup> As such it should be flexible enough to apply also to cases of online sexual exploitation and the rights of children in the digital world.

It bears stressing that the most ideal scenario is for children to enjoy their inherent rights under the UNCRC, free from abuse and exploitation. The State therefore has an obligation to prevent online sexual exploitation from happening.<sup>56</sup> However in cases where it is already happening, it is in the best interest of the child that such cases are identified, that the abuse is ended and that the perpetrators are prosecuted. Therefore, there must be a framework of laws

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<sup>51</sup> ‘Child Sex Offender Convicted in Australia’ *Sunstar* (1 April 2020) <<https://www.sunstar.com.ph/article/1850914/manila/local-news/child-sex-offender-convicted-in-australia>> accessed 8 July 2022; see also ‘Filipino Survivor’s Testimony Leads to French Sex Offender’s Conviction’ International Justice Mission (2022) <<https://osec.ijm.org/news-and-insights/news-updates/filipino-survivors-testimony-leads-to-french-sex-offenders-conviction/>> accessed 8 July 2022.

<sup>52</sup> Robert Brian Smith, ‘Cybercrime in ASEAN: Anti-Child Pornography Legislation’ (2020) 5 *JILS* 277.

<sup>53</sup> Revised Rules of Criminal Procedure, rule 112, s 3e.

<sup>54</sup> In some cases, court trials can last as long as five years. See Maria Caridad Tarroja, Ma. Angeles Lapeña and others ‘National Study on Online Sexual Abuse and Exploitation of Children in the Philippines’ (2020). <<https://www.unicef.org/philippines/media/2711/file/UNIPH-2021-NationalStudyOSAEC-FullReport.pdf>> accessed 8 July 2022.

<sup>55</sup> Comment No 14 (n 19), para 34.

<sup>56</sup> In *Cadajas v. People*, the Supreme Court said that it is the obligation of the State as *parens patriae* to protect children from sexual predators.

that punish OSEC offenses and policies in place that allow for law enforcement agencies to investigate efficiently in order to identify and remove victims from exploitation. Additionally, social workers are needed who can provide the survivors with care, prosecutors who are able to bring solid evidence during trial while being attentive to the wellbeing of survivors and judges who can adjudicate fairly.<sup>57</sup>

The best interest of children in OSEC cases does not simply mean obtaining the conviction of the respective perpetrators. Survivors should be treated in a trauma-informed way from the time they are removed from exploitation and throughout the process, as they move through the stages of interviews, evidence gathering, court trial and placement decisions. It is important that there are trauma-informed measures in place, recognizing not only the trauma of survivors, but also understanding its potential impact on the individual reaction of the survivors during the processes. It is therefore in the best interest of the child that the State and its actors seek to prevent the re-traumatization of survivors.<sup>58</sup>

The Supreme Court plays an important role in shaping what the best interest of the child looks like specifically during the legal process. The following section will identify lessons from existing jurisprudence which can be applicable to OSEC cases, while also discussing how future jurisprudence in this area could provide important clarifications on the practical use of the best interest of the child in the OSEC context.

## **6. Lessons from Supreme Court decisions on the best interest of the child and their potential application in OSEC cases**

Having discussed the holistic nature of the best interest of the child above, this section will discuss specific points during the process through which the best interest of the child may be applied. Currently, the Supreme Court has discussed the best interest of the child primarily in custody and custody-related cases. The lessons developed in these decisions may provide a baseline for understanding the practical application of this principle and a starting point for discussing the ways in which it may play a role in OSEC cases. It should be noted that OSEC-specific jurisprudence on the best interest of the child has yet to develop, but law enforcement agencies, prosecutors, social workers and other stakeholder are already required to take decisions related to the child in OSEC cases today.

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<sup>57</sup> Netkova and Mustafa similarly argue that it is ‘paramount for governments to be in line with fast-developing structures and to criminalize all forms of online sexual abuse and exploitation of children.’ See (n 43), 112.

<sup>58</sup> Christopher Edward Branson and others, ‘Trauma-Informed Juvenile Justice Systems: A Systematic Review of Definitions and Core Components’ (2017) 9(6) *Psychological Trauma: Theory, Research, Practice, and Policy* 635.

### 6.1. Determining custody in OSEC cases

Both custody cases in family law as well as OSEC cases raise the question of where to place a child. The case of *Nerissa Perez v Court of Appeals and Ray Perez* was decided in 1996 under the Family Code and post-ratification of the UNCRC. In this case the mother was a nurse in New York, while the father was a doctor in Cebu City. The trial court and the Court of Appeals arrived at opposing results—the former granting custody to the mother, and the latter to the father. The Supreme Court agreed with the trial court. In its decision, it referred to the UNCRC and to the best interest of the child as a ‘long settled’ standard in custody cases.<sup>59</sup>

Particularly, the Supreme Court discussed the evolution of Article 213 of the Family Code that grants mandatory custody to the mother in cases when the child under seven years of age. The Supreme Court, quoting the records of the Civil Code Commission, further noted:

The general rule is recommended in order to avoid many a tragedy where a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be for ‘compelling reasons’ for the good of the child; those cases must indeed be rare, if the mother’s heart is not to be unduly hurt.

The legal assumption in the mandatory maternal custody cases is that it is in the best interest of the child who is under seven years of age to be with the mother. However, the Supreme Court has carved out the following exceptions: immorality, habitual drunkenness, neglect or abandonment, unemployment, drug addiction, maltreatment of the child, insanity and affliction with an infectious disease.<sup>60</sup> These exceptions can be considered as circumstances that are not in the best interest of the child.

In the case of *Pablo-Gualberto v. Gualberto* the Supreme Court further emphasized that courts should ‘take into account all circumstances that would have a bearing on the children’s well-being and development.’<sup>61</sup> The Supreme Court then enumerated the following factors that should be considered: previous care and devotion shown by each parent, their religious background, moral uprightness, home environment, time availability and the children’s emotional and educational needs.<sup>62</sup> In the case of *In Re: Chua v. Cabangbang*, the Supreme Court reiterated that custody may be given not only to parents but also to ‘benevolent persons’ if it is in the best interest of the child.<sup>63</sup>

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<sup>59</sup> G R No 118870 [29 March 1996] 325 PHIL 1014.

<sup>60</sup> G R No 250849 (Notice) [March 9, 2020].

<sup>61</sup> *Pablo-Gualberto* (n 14).

<sup>62</sup> *ibid.*

<sup>63</sup> G R No L-23253, [March 28, 1969], 137 PHIL 204-215

The factors mentioned above may be applicable in OSEC cases, especially as social workers and aftercare professionals make decisions regarding the child's placement, custody and long-term care after he or she is removed from exploitation. In cases where parents are the perpetrators, they must determine which family member can care for the child or whether the child is better placed in an aftercare home, foster care or a family adopting the child. As Candelaria and Rayco noted,

The State is obliged to provide special protection for a child temporarily or permanently deprived of the family environment and to ensure that the appropriate alternative family care or institutional placement is available in such cases. The reason behind such special protection is that "[t]he loss of family attachments and identity, together with the instabilities and disruption of a new placement, can impede their physical, intellectual and emotional development." It should be noted that this provision refers to family, and not parents. While it may be in the child's best interest to be removed from his or her parents, the State should first seek placement in the child's wider family, before looking for alternatives. A hierarchy of options is available: first, family relatives; second, substitute family through fostering or adoption; and third, an appropriate institution.<sup>64</sup>

It is interesting to compare the factors enumerated by the Supreme Court in custody and custody-related cases with the Parenting Capability Assessment Report (PCAR) of the Philippines' Department of Social Welfare and Development. Originally used as a tool to assess the capacity of parents in custody and adoption cases, the PCAR is now being used in OSEC cases to assess other family members who might be able to care for the survivor. It includes the need to assess the following factors, among others: the person's emotional and mental health, parenting skills and style, communication and interpersonal skills, social support system and community resource utilization.<sup>65</sup> The factors in the PCAR include those mentioned in Supreme Court decisions, but it also considers the social and community support for the child. Indeed online sexual exploitation happens in households within tight-knit communities.<sup>66</sup> It has been noted that 'family-run operations are common in very crowded and poor neighbourhoods where children are coerced by parents and other family members.'<sup>67</sup> Dens, on the other hand, 'are larger-scale operations involving whole neighbourhoods or organized criminal group operations where children are hired or trafficked.'<sup>68</sup> Because of these realities, a strong social support system and access to available resources within the

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<sup>64</sup> Candelaria (n 23) 1032.

<sup>65</sup> Department of Social Welfare and Development, 2020 Omnibus Guidelines on Domestic Adoption, Memorandum Circular No 13 (2020), 48-52.

<sup>66</sup> Buena Bernal, 'NBI: Online sex trade cottage industry in PH' *Rappler* (16 January 2014) <<https://www.rappler.com/nation/48123-nbi-online-prostitution-cottage-industry-ph/>> accessed 6 July 2022.

<sup>67</sup> Concepcion (n 6) 306.

<sup>68</sup> *ibid.*

community—including from the local government, NGOs and churches—such as counselling, skills training and educational support are necessary to ensure survivors of OSEC are not revictimized. In this process, the voice of the survivor should be heard. This point will be further elaborated below.

## 6.2. *Honouring survivors' voices*

In the case of *Horacio Luna and Liberty Luna-Hizon v Intermediate Appellate Court* the child's biological parents and grandparents were in conflict over the custody of the child.<sup>69</sup> The appellate court awarded custody to the biological parents, who then filed a motion before the trial court to execute this decision. However, the child, Shirley, did not want to be under their custody, and when questioned by the judge, she stated that she would kill herself or run away from home if she were placed under the custody of her biological parents. The Supreme Court gave weight to the testimony of Shirley who was nine-year-old:

Since, in this case, the very life and existence of the minor is at stake and the child is in an age when she can exercise an intelligent choice, the courts can do no less than respect, enforce and give meaning and substance to that choice and uphold her right to live in an atmosphere conducive to her physical, moral and intellectual development. The threat may be proven empty, but Shirley has a right to a wholesome family life that will provide her with love, care and understanding, guidance and counselling. And moral and material security. But what if the threat is for real?<sup>70</sup>

The case of *Espiritu v. Court of Appeals* concerned a custody case between the father and the mother.<sup>71</sup> The children were older than seven years by the time the case reached the Supreme Court, which noted that they were 'perfectly capable of making a fairly intelligent choice,' when they chose to be with their father. The ruling also noted that Rosalind, one of the children, had expressed that choice even when she was only five years old.<sup>72</sup> In another case, *Laxamana v. Laxamana*, the Supreme Court lamented that the trial court did not ascertain the choice of the children as regards the parent they wanted to live with, especially considering that they were already 14- and 15-years old when the trial court decided the case.<sup>73</sup> This is similar in the case of *Becket v. Sarmiento* where the Supreme Court said, "...He [the child] was very much capable of deciding, based on past experiences, with whom he wanted to stay."<sup>74</sup> The Supreme Court noted that the trial court judge did not take into consideration the choice of the children.

<sup>69</sup> G R No L-68374 [18 June 1985], 221 PHIL 400.

<sup>70</sup> *ibid.*

<sup>71</sup> G R No 115640, [March 15, 1995], 312 PHIL 431.

<sup>72</sup> *ibid.* The Court of Appeals in this case ruled in favor of the mother.

<sup>73</sup> G R No 144763, [September 3, 2002], 437 PHIL 104.

<sup>74</sup> A M No RTJ-12-2326, [January 30, 2013], 702 PHIL 433.

While the cases above show the value placed on a child's choice with respect to the parent that the child wants to live with in a custody dispute, they show a broader picture of the need to consult children, giving them a voice and valuing their choices in matters that affect them. This is also true in online sexual exploitation cases. Children should have a voice in matters that affect them, even as small as whether they want to take breaks during a police interview or whether they want to testify in court. When the Supreme Court values their voice and even quotes them in its ruling, it is an opportunity to validate their experience.

It is interesting to note that generally the choice of children in custody cases becomes an important consideration when they are over seven years old.<sup>75</sup> However in OSEC cases, the choices of children should be taken into consideration regardless of age. This does not mean that it is the sole decision point in matters that affect them, but at the very least, the police, prosecutors, social workers, courts and other stakeholders should exert efforts to seek the child's input. Not only is this consistent with the UNCRC, but it is also a trauma-informed approach.<sup>76</sup> It should be noted that there is an important distinction between giving a voice to survivors and exposing them to the potentially retraumatizing experience of testifying in court. Measures to minimize these risks will be discussed below under points 6.4. and 6.5.

### ***6.3. Exercising legal flexibility in favour of the best interest of the child in OSEC cases***

In the *Horacio Luna* case, already discussed above, the Supreme Court was confronted with a situation in which procedural rules clashed with the best interest of the child. The case concerned a custody battle between the child's biological parents and her grandparents. Custody of the child was awarded by the appellate court to the biological parents, who then filed before the trial court a motion to execute what had become a final and executory decision. However, the child did not want to be under the custody of her biological parents and stated that she would kill herself or run away from home if she were placed under their custody. The Supreme Court explained that it is already a settled doctrine that when a higher court remands a decision to the lower court, the latter must execute this decision. However, the Supreme Court noted that the threat of self-harm made by the child, regardless of whether it was hollow or

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<sup>75</sup> This is also consistent with The Family Code of the Philippines, Executive Order No 209 (1987), art 213, which states that 'in case of separation of the parents, parental authority shall be exercised by the parent designated by the Court. The Court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.' See also *Dacasin v. Dacasin*, G R No 168785, [February 5, 2010], 625 PHIL 494-513, where the Supreme Court said that because the child was already 15 years old, the case is 'outside the ambit of the mandatory maternal custody regime and bringing it within coverage of the default standard on child custody proceedings—the best interest of the child.'

<sup>76</sup> 'What is Trauma-Informed Care?' (University of Buffalo) < <https://socialwork.buffalo.edu/social-research/institutes-centers/institute-on-trauma-and-trauma-informed-care/what-is-trauma-informed-care.html> > accessed 10 July 2022. See also, Center for Mental Health Strategies, 'Key Ingredients for Successful Trauma-Informed Care Implementation' (White paper, 2016).

true, constituted a supervening event and ruled that the best interest of the child may override procedural rules, even the rights of parents to the custody of their children. It ultimately awarded the custody of the child in favour of the grandparents.<sup>77</sup>

This is also the case in *Spouses Joon Hyung Park and Kyung Ah Lee v. Hon. Rico Sebastian Liwanag, Presiding Judge of the Regional Trial Court of Makati City, Branch 136*.<sup>78</sup> The petitioners were spouses and American citizens who filed a petition for adoption concerning two children under the Domestic Adoption Act. One of the children was rescued from human trafficking at 22-days old by a non-government organization and was referred to the Department of Social Welfare and Development. The spouses were denied the adoption under the Domestic Adoption Act, as they were not Filipino citizens. However, the Supreme Court ruled in favour of the spouses and remanded the case to the trial court. According to the Supreme Court, ‘a relaxation of the rules of procedure is necessary in the instant case in order to promote the best interest of the adoptee child, Innah.’<sup>79</sup> It appears that not only is the best interest of the child used to relax or even override procedural rules in both cases, but it is also used in the latter case as an interpretive principle where the interests and welfare of the child are so important that rules of procedure cannot be applied without first examining their effects on the child.

This flexibility and wide discretion exercised by the court is critical in OSEC cases, especially because of the novelty of the issues and the current dearth of specific Supreme Court decisions that can guide the lower court’s rulings. This flexibility may also foster child protective innovations and create opportunities to test them in actual cases, thus leading to the development of jurisprudence when these cases reach the Supreme Court. Such innovations are discussed in the following section.

#### **6.4. Minimizing survivor exposure in court trials**

Custody battles are oftentimes contentious and difficult, especially in mandatory maternal custody cases where children are seven years old or younger. This was the case in *Espiritu v. Court of Appeals*, in which the court noted the children’s choice to live with their father based on available records.<sup>80</sup> It appears from the available information regarding this decision that the children did not testify in the trial court. A perusal of the Supreme Court cases, especially involving custody cases, shows that many of these decisions are silent on whether

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<sup>77</sup> *Horacio Luna* (n 69)

<sup>78</sup> G R No 248035 (Resolution), [27 November 2019].

<sup>79</sup> *ibid.*

<sup>80</sup> *Espiritu* (n 71).

the child testified. What is clear, however, is that in many of these cases, the Supreme Court has noted that children were interviewed by social workers and other professionals, and the children's input was included in assessment reports. The Supreme Court's rulings are not clear on whether the children involved in these custody cases participated in the respective trial court proceedings. It can be noted that the Supreme Court rulings do not contain any discussion on the negative impact on children when they have to testify in court in favour of or against a parent.

While custody cases can be difficult for children, this impact may be even more pronounced in cases of OSEC. A Supreme Court ruling recognizing the specific needs of OSEC survivors may provide them not only with *factual* safety, but also an overall feeling of safety and support, consistent with the best interest of the child definition.

In OSEC cases, eliminating, or at the very least, minimizing, the participation of affected children in the legal process is one way of upholding their best interest.<sup>81</sup> As noted above these children have the right to have their voices heard and to participate in the trial. According to Candelaria and Rayco, 'a child has a right to be heard either directly, or through a representative, and in either case, he or she has the right to transmit his views and feelings to the courts.'<sup>82</sup> However, it should be done in ways that safeguard their wellbeing and do not expose them to the risk of additional trauma.

As discussed previously, testifying in court is often a traumatizing event for sexually abused children, including survivors of OSEC. For example, a study conducted in the United States that examined the effects of court testimony in 218 children found that they experienced greater behavioural disturbance than those who did not testify, more so those who repeatedly had to take the witness stand. The study further noted that,

In courthouse interviews before and after testifying, the main fear expressed by children concerned having to face the defendant. Children who appeared more frightened of the defendant while testifying were less able to answer the prosecutors' questions; and later, after the cases were closed, they were more likely to say that testifying had affected them adversely. The two most pervasive predictors of children's experiences in the courtroom, however, were age and severity of abuse.<sup>83</sup>

Additional findings included in the work of Tiffany E. Lewis noted that 'older children (12- to 17-year-olds) appear to be most affected by the court process (...). However, 7- to 11- year-

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<sup>81</sup> Aritao (n 11)

<sup>82</sup> Candelaria (n 23) 1042.

<sup>83</sup> Gail Goodman and others, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (Wiley 1992).



olds are most likely to cry during testimony (50%).<sup>84</sup> Similarly Andrea Varrella's paper on livestreaming abuse in the Philippines found that online sexual abuse can have damaging psychological effects on the child and the family relationship that may exist between survivor and perpetrator can have a negative impact on the child's testimony.<sup>85</sup>

The ages of children, the familial relationship between them and the perpetrators and the nature of abuse they had experienced form part of the totality of circumstances in the determination of the best interest of children in OSEC cases. These factors should also inform the responses of the State and its actors toward survivors of OSEC and should continue to shape child-protective interventions in the Philippines. Alternatives to in-person testimony should be explored, and in cases where it is unavoidable, measures must be taken to ensure that children are not retraumatized. Some of these interventions which limit the exposure of OSEC survivors to a trial experience include the use of plea agreements, videotaped in-depth interviews, reliance on digital or electronic evidence and hearings in the form of video conferences.<sup>86</sup> Aside from these, the RECW also allows under certain conditions the use of a screen or other devices so that the child cannot see the accused while testifying.<sup>87</sup>

Evidence shows that plea bargaining cuts short the length of trial, while at the same time ensuring perpetrator accountability through reduced but reasonable sentences.<sup>88</sup> Children can meaningfully participate in this process by being consulted and giving their consent.<sup>89</sup> This has given a sense of justice to survivors and spared many of them from testifying in court against a parent or a relative.<sup>90</sup>

The use of videotaped in-depth interviews (VIDIs) is a child protective option specifically mentioned in the Rule on Examination of a Child Witness to preserve the testimony of a child under specific circumstances, such as when the child is unavailable to testify because he or she had died, when testifying would expose the child to severe psychological injury or

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<sup>84</sup> Tiffany E. Lewis, Bianca Klettke and Andrew Day, 'The Influence of Medical and Behavioral Evidence on Conviction Rates in Cases of Child Sexual Abuse' (2014) 23 J Child Sexual Abuse 431.

<sup>85</sup> Andrea Varrella, 'Livestreaming of Child Sexual Abuse: Background, Legislative Frameworks and the Experience of the Philippines' (2017) 12 ECPAT International Journal, 56.

<sup>86</sup> Aritao (n 11), 24-25.

<sup>87</sup> RECW (n 34) s 26.

<sup>88</sup> Benjamin Pulta, 'Convictions involving online child abuse up in 2020' PNA (11 April 2021) <<https://www.pna.gov.ph/articles/1136394>> accessed 9 July 2022, para 3. In many OSEC cases where the perpetrator agreed to plead guilty, they received a sentence of at least 15 years in prison. See, for example, the cases cited in 'Plea Bargaining Results in the Conviction of four suspects for Online Sexual Exploitation of Children Offenses in Visayas and Mindanao' (IJM) < <https://www.ijm.org/news/plea-bargaining-results-conviction-four-suspects-online-sexual-exploitation-children-offenses-visayas-mindanao>> accessed 9 July 2022.

<sup>89</sup> In *People v. Reofor*, G R No 247575 [16 November 2020], the Supreme Court ruled that plea bargaining is dependent on the consent of the offended party and the prosecutor. However, in some cases, OSEC survivors may not be able to give their consent due to their age or other circumstances. Their social worker, representative or the prosecutor may himself or herself communicate their circumstances to the court on their behalf.

<sup>90</sup> International Justice Mission (n 10).

when the child can no longer be located.<sup>91</sup> In cases of online sexual exploitation of children, videotaped in-depth interviews not only preserve the testimony of survivors, but they reduce multiple interviews and prevent retraumatizing survivors. Relying heavily on digital and electronic evidence instead of survivor testimony also protects children. These pieces of evidence are available through careful and thorough investigation by law enforcement, are admissible and carry weight under current rules of procedure.<sup>92</sup>

Furthermore, in response to the COVID-19 lockdowns in the Philippines, the Supreme Court issued guidelines that allowed court hearings in the form of video conferences.<sup>93</sup> Intended originally to keep legal proceedings continuing despite mobility restrictions during a pandemic, videoconferencing was found to benefit children and promote their best interest because they removed the possible traumatic interaction between survivors and their abusers, which can occur when court proceedings are in person. Survivors also benefit by not experiencing long delays, as proceedings are able to continue online.<sup>94</sup> Hence it is possible for them to expect their cases to be timely promulgated and their abusers sentenced.<sup>95</sup>

These child protective strategies are grounded not only on the peculiar circumstances in OSEC cases, but also consider the ‘least harm.’ In cases where survivors must be interviewed, VIDIs ensure they are not interviewed repeatedly. As legal proceedings are initiated, a plea agreement can reduce trial length and ensure accountability of perpetrators. In cases that proceed to the trial stage, convictions can be obtained by relying on electronic evidence and police testimony instead of relying on a child’s testimony. In cases where such a testimony is required, survivors may testify remotely through videoconferencing hearings.

Plea agreements, electronic evidence, and videoconferencing hearings already exist within the legal system, although they are not originally intended for child protection.<sup>96</sup> Supreme Court decisions that articulate how they connect with the best interest of the child would be valuable in streamlining their use and encouraging law enforcers, prosecutors, social workers and other stakeholders to continue finding ways, including re-examining and using existing measures, to uphold the best interest of children by minimizing their exposure to additional trauma during the legal proceedings. Related to this, the following section will

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<sup>91</sup> RECW (n 34) s 28c-29.

<sup>92</sup> Current rules of procedure provide requirements for the proper authentication and presentation of electronic evidence. See Rules on Electronic Evidence, A M No 01-7-01-SC (17 July 2001).

<sup>93</sup> Guidelines on the Conduct of Videoconferencing, A M No 20-12-01-SC 2020 (9 December 2020).

<sup>94</sup> Pulta (n 88), para 7-9.

<sup>95</sup> Lawrence Aritao and Paulene Labay, ‘Child Protection Efforts in the Time of COVID-19: Understanding Effective Casework Practices and Policies’ (2021) < <https://osec.ijm.org/documents/16/IJM-Philippines-Child-Protection-Efforts-in-the-Time-of-COVID-19.pdf> > accessed 15 March 2022.

<sup>96</sup> VIDIs, unlike the other measures mentioned, are originally intended as a child protective strategy, because they are a way to preserve a child’s testimony in case of death and incapacity to testify and allows for its use as evidence.

discuss the importance of relying on the opinion of experts and professionals in the field, which is another lesson that can be drawn from existent jurisprudence.

### **6.5. Relying on experts and professionals**

In the case of *Spouses Ernesto Nieto and Matilde Nieto v. Hon. Romeo Magat*,<sup>97</sup> the Supreme Court sought to determine whether the spouses in the case should be allowed to adopt their nephew, even though they were residents of Guam and no longer of the Philippines. The trial court denied their petition on the ground that they were non-residents, and hence the legal requirement of a trial custody could not be complied with. The Supreme Court however granted the adoption and dispensed with the trial custody requirement, stating that it had the authority to do so if it is in the best interest of the child. The Supreme Court found the assessment of the social worker to be impactful and made it one of the bases for its decision.

In *Bobanovic v. Montes*, Australian spouses filed a petition in the Philippines to adopt a child. The trial court directed the Ministry of Social Services Development (MSSD) to conduct a social case study on the child, his biological parents, and the Australian spouses and to submit the MSSD's recommendations to the court.<sup>98</sup> However the MSSD failed to comply with this order, and consequently the court ordered its own social worker to conduct the social case study instead. The social worker of the court recommended that the petition for adoption filed by the Australian spouses be granted. The trial court agreed with the assessment of the social worker and granted the petition for adoption. The Australian spouses then filed for a travel clearance with the MSSD to bring their adopted child to Australia, but their request was denied. When the spouses filed a case to compel the MSSD to issue the travel clearance, the MSSD argued that it was the sole government body competent to conduct the social case study but was denied the opportunity to do so in this case. While the main issue here is whether the MSSD should issue the travel clearance or not, it is interesting to see how the Supreme Court, just like the trial court, gave weight to the assessment of the social worker of the court and upheld the validity of the case study report.

Similarly, in the case of *Espiritu*, when the child was five years old, she was referred to a child psychologist who noted the negative responses of the child toward her mother. The Supreme Court likewise gave credence to her report and the social case study conducted by a social worker that corroborated the findings of the psychologist.<sup>99</sup>

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<sup>97</sup> G R No L-62465, [May 24, 1985], 221 PHIL 222.

<sup>98</sup> G R No 71370, [July 7, 1986], 226 PHIL 404.

<sup>99</sup> *Espiritu* (n 71).

While courts generally listen to testimonies of social workers, professionals and other experts, it is worth noting that courts also have a duty to ensure that their testimonies and the reports, assessments and evaluations they make are in compliance with rules of evidence and procedure. This is a valuable lesson from the *Laxamana* case mentioned earlier. In this case a father filed a case in court to recover the custody of his children who, together with their mother, left him because of his drug addiction. Both parties agreed to submit the case for resolution without a trial and agreed in advance to be bound by the psychiatric evaluation of a physician. The trial court granted the custody to the mother and gave the father visitation rights only, basing its decision on the final report of the physician. However, the Supreme Court ruled that the trial court should have conducted a trial so that it could evaluate exhaustively the capacity of each parent to care for their children.<sup>100</sup>

Giving weight to the assessments of social workers, professionals and other experts is important in OSEC cases to help the court appreciate the evidence and make decisions that are in the best interest of the child. While social workers regularly make assessments in custody and custody-related cases and physicians give evidence in sexual abuse cases against children, there may be other experts who can provide evidence in OSEC cases. For example, the use of digital evidence instead of victim testimony can take away the burden of relying solely on the testimony of the child for securing perpetrator accountability. Instead, digital forensic examiners may be presented to provide evidence. OSEC cases, unlike custody conflicts, may leave digital traces or recordings, which can provide valuable pieces of information for securing a conviction.

Furthermore, the court can listen to the testimony of a social worker, child psychologist or a related specialist to determine whether testifying in court will expose the child to ‘severe psychological injury,’ which will then be a legal basis for concluding the child to be ‘unavailable’ as a witness. This would consequently allow for videotaped in-depth interview to be used in lieu of the child’s in-court testimony.<sup>101</sup>

## 7. Conclusion

Upholding the best interest of the child is an obligation that is recognized, defined and applied in the Philippines through international and national laws. The best interest of the child is also applicable in the digital age and in cases of online sexual exploitation of children, although its current application is primarily in custody-related cases as shown in Supreme Court decisions.

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<sup>100</sup> *Laxamana* (n 73).

<sup>101</sup> RECW (n 34).

The best interest of the child provides a holistic duty of care on the part of the State. Protecting children from OSEC should be a principal objective of law enforcement agencies and policy makers. As discussed in this paper, various national laws prohibit the online sexual exploitation of children. The State must ensure the effective identification of victims, so that the exploitation can be stopped and perpetrators are prosecuted. This paper shows that obtaining such a conviction is not the sole objective during criminal proceedings in OSEC cases. The individual needs of the survivors involved in the proceedings must be recognized and accommodated in a trauma-informed manner.

As argued in this paper, the rulings of the Supreme Court in custody cases can have a potential application in the growing number of OSEC cases in the Philippines. For instance, the Supreme Court has given children opportunities for their participation in matters that affect them, by providing them with choices and honouring their voices. In dealing with children, the Court has emphasized the importance of listening to opinions of experts and other professionals, which is also necessary in OSEC cases, especially considering the goal of not relying solely on the testimonies of survivors. This helps to remove the burden of securing convictions from the shoulders of the child. Further, as the State and its actors contend with the options of where to place or to whom to grant custody of an OSEC survivor, these rulings provide helpful insights as to the circumstances and factors which should be taken into consideration. Finally, the Supreme Court has shown a certain flexibility as to procedural rules when the best interest of the child is concerned, an approach which should also be taken in OSEC cases.

While the decisions discussed are helpful, they are inadequate for capturing some of the nuances and complexities of OSEC cases. In particular, finding ways to minimize exposure of children-survivors during court proceedings may be more crucial in the OSEC context compared to custody cases. The paper highlighted various ways in which the risk for retraumatization can be mitigated, and the Supreme Court could provide guidance and criteria for the use of such measures. Therefore, and in view of the novelty and the particularities of OSEC crimes, jurisprudence on the best interest of the child in this area should be developed in order to take into account the individual experiences of survivors. This would provide clarity to the State and its actors as to the circumstances they need to consider and the duty of care they need to exercise when confronted with questions regarding the best interest of the child in OSEC cases. A comprehensive and trauma-informed response to this crime is part of the broader objective of truly upholding the best interest of the child in the digital age.