

**In The  
Supreme Court of the United States**

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DOYLE RANDALL PAROLINE,

*Petitioner,*

vs.

AMY UNKNOWN and UNITED STATES,

*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit**

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**BRIEF *AMICUS CURIAE* OF THE DUTCH  
NATIONAL RAPPOREUR ON TRAFFICKING  
IN HUMAN BEINGS AND SEXUAL VIOLENCE  
AGAINST CHILDREN IN SUPPORT  
OF RESPONDENT AMY UNKNOWN**

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**BRIEF *AMICUS CURIAE* OF THE DUTCH  
NATIONAL RAPPORTEUR ON TRAFFICKING  
IN HUMAN BEINGS AND SEXUAL  
VIOLENCE AGAINST CHILDREN IN  
SUPPORT OF RESPONDENT AMY UNKNOWN  
INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

The Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (“National Rapporteur”) is an independent official organ of the Netherlands.<sup>2</sup> The National Rapporteur’s

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<sup>1</sup> On September 3, 2013, Counsel for Respondent Amy Unknown, filed a consent to the filing of *amicus curiae* briefs in support of either or neither party. On September 6, 2013, Counsel for Respondent Wright, Counsel for Respondent United States, and Counsel for Petitioner Paroline filed consents to the filing of *amicus curiae* briefs in support of either or neither party. No counsel for a party authored this brief wholly or partially, nor made a monetary contribution intended to fund this brief’s preparation or submission. No person other than *Amicus* and her counsel made a monetary contribution to this brief’s preparation or submission.

<sup>2</sup> The Dutch government created the National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children in response to the Hague Declaration of 1997, adopted at a European Union ministerial conference on combating human sex trafficking. The National Rapporteur conducts research on human trafficking and the sexual abuse of children to fulfill the Dutch government’s international treaty obligations. See Directive 2011/36/EU, of the European Parliament and the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2002/629/JHA, art. 19, 2011 O.J. (L 101) 1; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse art. 10(2)(b), *opened for signature* Oct. 25, 2007, C.E.T.S. No. 201 (Continued on following page)

primary purpose is to report on the nature and extent of human trafficking and sexual violence against children in the Netherlands. Both globalization and the advent of the Internet have significantly enhanced the transnational nature of these crimes; with the ease of exchanging abusive material over the Internet, this is particularly evident in the case of child pornography.<sup>3</sup> The rapid globalization of the child pornography market has compelled nations to collaborate in order to combat the challenges of twenty-first century child pornography. It is in the spirit of both the United States' and the Netherlands'

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("Lanzarote Convention"); Directive 2011/92/EU, of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L 335) 1. As of November 15, 2013, the National Rapporteur is organized under a recently enacted Dutch law that replaces a ministerial decree. The law maintains the National Rapporteur as an independent official organ of the Netherlands.

<sup>3</sup> The phrase "child pornography" is used in this brief interchangeably with "child sexual abuse images." Use of the latter phrase emerged to distinguish it from simulated child pornography where no actual child is used in the production of the images. Thus, "child sexual abuse images" refers specifically to child pornography in which an actual child is abused to produce the images. This is the child pornography that the National Rapporteur is referring to in this brief since a child is harmed in the production of the child sexual abuse images and then continues to be harmed when the images are distributed and consumed. The term "images" is expansive and may include digital imagery, photographs, sketches, cartoons, movies, sound recordings, paintings, or any other depiction of the sexual abuse of a child regardless of media.

history of international cooperation with regard to child pornography, its perpetrators, and, most importantly, its victims, that the National Rapporteur respectfully submits this brief in support of Respondent, Amy Unknown.<sup>4</sup>

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<sup>4</sup> The Special Representative of the United Nations Secretary-General on Violence against Children, Marta Santos Pais, asked the National Rapporteur to include the following statement from Ms. Santos Pais in this brief:

The Special Representative of the Secretary-General on Violence against Children (SRSG) has identified the opportunities and risks associated with children's access to and use of new information and communications technologies as a priority for her mandate. This work is guided by international human rights standards, including the Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography which recognize children's right to protection from sexual abuse through representation or images in pornographic performances or materials. Child pornography is a serious form of violence against children, including during its production and dissemination, and when it is subsequently viewed by potentially thousands of child sex abusers. At the dawn of the 1990s the exchange of information through cyberspace was just beginning. As widespread online access became commonplace, child pornography made its way into the global and connected world on the screens of personal computers, through mobile phones and social media. Information is available more easily and may be spread more quickly, potentially reaching out to millions in a fraction of a second and remaining accessible for a lifetime, with a serious impact on countless children. It is imperative that child victims of this form of sexual abuse are given the right to restitution

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## SUMMARY OF THE ARGUMENT

The United States' treaty obligations compel reading 18 U.S.C. §2259 without imposing a proximate cause requirement on (A) through (E). Specifically, the United States is a party to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol requires, *inter alia*, that state parties support the restoration of child pornography victims and provide them with "access to *adequate* procedures to seek . . . damages from those legally responsible."<sup>5</sup> Twice the United States has expressly identified 18 U.S.C. §2259 in reports to the United Nations as the law by which it complies with its treaty obligations to support victim recovery.

In its most recent report on treaty compliance, the United States cites specifically to Petitioner Paroline's offense (child pornography possession under 18 U.S.C. §2252) and states that the offense gives rise to "mandatory restitution" for the "full

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for this crime. This is important as a remedy for these children, and as a deterrent to prevent future situations of child sex abuse of this kind.

<sup>5</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art. 9(4), *opened for signature* May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002; United States ratified Dec. 23, 2002) ("Optional Protocol") (emphasis added).

amount of the victim's losses.”<sup>6</sup> Moreover, because the United States cites no other legal process satisfying its Article 9 obligations to provide a recovery mechanism for child pornography victims, this Court should not impose a level of causation that would render the statute functionally ineffective in the twenty-first century.

The Court is encouraged to interpret 18 U.S.C. §2259 with a respect for the evolving international legal norms that nations are collaboratively developing to protect children and combat a rapidly expanding global child pornography market. The Court should also be mindful of the United States' active role in helping to develop these legal norms, which include robust protections and support for victim care and restoration. Finally, the Court should interpret 18 U.S.C. §2259 with an accurate understanding of the challenges the international community faces both in eliminating the child pornography market and supporting the restoration of the children victimized by the production, distribution, and possession of the images of their abuse. That understanding should compel the Court to read the statute as simply as it is written: providing full, meaningful restoration to child pornography victims.

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<sup>6</sup> U.S. Dep't of State, *Periodic Report of the United States of America and U.S. Response to Recommendations in Committee Concluding Observations of June 25, 2008*, para. 421 (Jan. 22, 2010).

## ARGUMENT

### I. INTERNATIONAL LAW COMPELS NATIONS TO SUPPORT THE RESTORATION OF CHILD PORNOGRAPHY VICTIMS.

#### A. The United States' Treaty Obligations Compel Reading the Mandatory Restitution Statute without a Proximate Cause Requirement.

The United States' treaty obligations must guide the Court's interpretation of 18 U.S.C. §2259 ("Mandatory Restitution Statute"). The United States was an active participant in the drafting of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,<sup>7</sup> and was one of the first nations to sign

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<sup>7</sup> The Netherlands also actively participated in the drafting of the Optional Protocol alongside the United States. U.N. Commission on Human Rights, *Question of a Draft Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, as Well as Basic Measures Needed for Their Eradication: Report of the Working Group on Its Second Session*, 3, U.N. Doc. E/CN.4/1996/101 (Mar. 25, 1996). It is critical for the Court to appreciate the significant role that the United States has assumed in helping set the standards of the evolving normative legal framework for child pornography crimes internationally, including victim restoration. The fact that the United States required no new legislation after it ratified the Optional Protocol evidences this fact. U.S. Dep't of State, *Initial Report of the United States of America to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* para. 3 (Sept. 14, 2007) ("Initial Report"). The Optional Protocol and the federal statutory framework lined up precisely. *Id.* The  
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it. The United States subsequently ratified the Optional Protocol and became obligated as a state party to ensure that sexually exploited children, including child pornography victims, receive medical and psychological services for their full reintegration into society. Optional Protocol, *supra* note 5, at art. 9(3); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography Ratification Status*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_n=IV-II-c&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_n=IV-II-c&chapter=4&lang=en) (last visited Nov. 19,

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same was true for International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, 2133 U.N.T.S. 161 (“ILO Convention No. 182”); S. Exec. Rep. No. 106-12, at 4 (1999). The United States also participated in the drafting of the Council of Europe Convention on Cybercrime, and once again, treaty provisions resembled the United States’ legal framework with regard to child pornography crimes. Convention on Cybercrime, *opened for signature* Nov. 23, 2001, T.I.A.S. No. 13,174, C.E.T.S. No. 185; S. Exec. Rep. No. 109-6, at 2, 6 (2005). (Section I.B *infra* describes all of these treaties in more detail.) The United States was more active than any other government in the drafting of the Convention on the Rights of the Child. Human Rights Watch, *Q&A: The Convention on the Rights of the Child* (Nov. 18, 2009); Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 1, at iii, U.N. Doc. HR/PUB/07/1 (2007); Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating A New World For Children*, 4 Loy. Poverty L.J. 9 (1998). The United States proposed text or amendments for thirty-eight out of the Convention’s forty substantive articles, including several regarding exploitation, abuse, and the rehabilitation and reintegration of victims. Human Rights Watch, *supra*.

2013). The Optional Protocol additionally and expressly requires that parties “ensure that *all* child victims have access to adequate procedures to seek . . . damages from those *legally* responsible.” *Id.* at art. 9(4) (emphasis added). Those “legally responsible” include offenders found guilty of child pornography possession. *Id.* at art. 3(1)(c). Moreover, the Optional Protocol requires that the United States and other state parties ensure that victims of child pornography have access to procedures that are *adequate* and non-discriminatory. *Id.* at art. 9(4) (emphasis added).

From the beginning, the United States has relied expressly and specifically on 18 U.S.C. §2259 to fulfill its treaty obligations under Article 9 of the Optional Protocol. The United States first cited the Mandatory Restitution Statute in 2007 in its initial report to the United Nations Committee on the Rights of the Child (“U.N. Committee”) regarding the United States’ implementation of the Optional Protocol domestically. Initial Report, *supra* note 7, at 24. The United States’ Initial Report explained that 18 U.S.C. §2259 provides “mandatory restitution for any offense involving the sexual exploitation of children.” *Id.* at para. 89. Nowhere does the United States mention proximate cause in its report.

In 2010, the United States submitted a periodic report on its compliance with the Optional Protocol and again expressly cited 18 U.S.C. §2259 as providing “mandatory restitution for child sexual exploitation and other abuse offenses” including 18 U.S.C. §2252, which was the child pornography offense to which the offender in this case (Randall Paroline) pled guilty.

U.S. Dep't of State, *supra* note 6, at para. 421. The United States expressly explained in its 2010 report that restitution is mandatory and for the “full amount of the victim’s losses . . . .” *Id.* The United States cited no other statutory remedy supporting the restoration of child pornography victims. *Id.*

After receiving the United States’ Initial Report on its compliance with the Optional Protocol, the U.N. Committee requested additional information, including data for the years 2005, 2006, and 2007 regarding “The number of child victims provided with recovery assistance as indicated in Article 9, paragraphs 3 and 4 of the Protocol.” U.N. Committee on the Rights of the Child, *Lists of Issues to be Taken Up in Connection with the Consideration of the Initial Report of the United States of America*, para. 1(c), U.N. Doc. CRC/C/OPSC/USA/Q/1 (Feb. 26, 2008). The United States’ response did not indicate that a single victim had received compensation from an offender under the Mandatory Restitution Statute or any other statute despite the fact that 18 U.S.C. §2259 was the cornerstone of the United States’ statement of compliance with Article 9, paragraph 4. U.N. Committee on the Rights of the Child, *United States Response to Lists of Issues to be Taken Up in Connection with Consideration of the Initial Report of the United States of America*, U.N. Doc. CRC/C/OPOSC/USA/1/Add.1 (May 15, 2008). Instead, the United States indicated that some victims “may be eligible” for a variety of government programs such as Medicaid, Temporary Assistance for Needy Families (“TANF”), and Job Corp. *Id.* In its Concluding Observations regarding the United States’ Initial Report,

the U.N. Committee identified the United States as “one of the world’s largest producers, distributors and consumers of child pornography” and expressly encouraged the United States, *inter alia*, to “[i]mprove enforcement of the existing legislative framework on child pornography.” U.N. Committee on the Rights of the Child, *Concluding Observations: United States of America*, para. 27, U.N. Doc. CRC/C/OPSC/USA/CO/1 (June 25, 2008) (emphasis added).

In 2012, the U.N. Committee again identified victim restoration (including compensation to victims) as an issue in response to the United States 2010 periodic report, and requested additional information. U.N. Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Second Periodic Report of the United States of America*, para. 12, U.N. Doc. CRC/C/OPSC/USA/Q/2 (July 25, 2012). Specifically, the U.N. Committee asked for an indication of the measures taken by the United States to ensure that victims “are provided with appropriate assistance for their full social reintegration, physical, psychological and psychosocial recovery, as well as compensation.” *Id.* In its response, the United States again failed to identify even one specific measure that it is taking to ensure compensation to child pornography victims. U.N. Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Consideration of the Second Periodic Report of the United States of America: Written Replies of the United States of America*, U.N. Doc. CRC/C/OPSC/USA/Q/2/Add.1 (Dec. 12, 2012). Thus,

in its Concluding Observations, the U.N. Committee expressed concern “about the growing availability of child pornography online, the use of ever younger children and the increase in the violence of images recorded” as well as the fact that sexually exploited children in the United States “still lack adequate . . . compensation.” U.N. Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the United States of America*, paras. 27, 44, U.N. Doc. CRC/C/OPSC/USA/CO/2 (July 2, 2013). “Adequate remedy and reparation should be sought legally and through other means,” according to the U.N. Committee in addressing the United States’ treaty obligations under Articles 8 and 9 of the Optional Protocol. *Id.* at para. 45.

The Optional Protocol also requires that state parties’ criminal justice systems make “the best interest of the child” a “primary consideration” in the treatment of child victims. Optional Protocol, *supra* note 5, at art. 8(3). In interpreting 18 U.S.C. §2259, this Court should consider whether the United States’ treaty obligations under article 8(3) of the Optional Protocol compel the Court to consider the “best interest of the child” in deciding whether to impose a proximate cause requirement on the plain language of the Mandatory Restitution Statute.

The Court has held that a treaty is on “the same footing and made of like obligation, with an act of legislation.” *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Medellin v. Texas*, 552 U.S. 491, 504-07 (2008). When a statute and a treaty conflict, the Court will



give meaning to both, if it can, without violating the language of either. Otherwise, the latter in time controls. *Whitney*, 124 U.S. at 194 (noting that if the treaty is later in time, it must be self-executing). While the Optional Protocol is not self-executing, it is the latter in time and by interpreting 18 U.S.C. §2259 without imposing a proximate cause requirement on the statute, the Court can and should give effect to both the statute and the treaty without violating the language of either.

### **B. Evolving International Legal Norms Support Restoration of Child Pornography Victims.**

Both the United States and the Netherlands have been actively involved in developing an international normative legal framework that includes a significant and express focus on the protection of children from sexual exploitation and the restoration of child victims who are exploited. In interpreting the laws of the United States, the Court has turned to international law to assess the evolving standards of decency. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). As the Court interprets the Mandatory Restitution Statute, it should consider the international norms that have been evolving during the last century.

In 1924, the League of Nations adopted the first international instrument recognizing the inherent uniqueness of childhood and committing to provide

children with special care and protection. Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 (1924) (expressly stating that children should be protected from “every form of exploitation”). The United Nations 1959 Declaration of the Rights of the Child<sup>8</sup> followed twenty-five years later and expanded on the original principles of the 1924 Geneva Declaration and incorporated references to the United Nations Charter and the Universal Declaration of Human Rights,<sup>9</sup> making clear that children are entitled to all human rights previously recognized as well as additional rights due to their special status as children. Both the United States and the Netherlands actively participated in the drafting of the 1959 Declaration. Geraldine Van Bueren, *The International Law on the Rights of the Child* 10 (1998).

Principle 2 of the 1959 Declaration states that children “shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable [them] to develop physically, mentally, morally, spiritually and socially in a healthy and

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<sup>8</sup> Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), GAOR 14th Sess., Supp. No. 16, U.N. Doc. A/4249 (Nov. 20, 1959) (asserting that “mankind owes to the child the best it has to give” and “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . .”).

<sup>9</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) (recognizing childhood is entitled to “special care and assistance”).

normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.” Declaration of the Rights of the Child, *supra* note 8, at princ. 2. Principle 9 further provides that children “shall be protected against all forms of neglect, cruelty and exploitation. [They] shall not be the subject of traffic, in any form.” *Id.* at princ. 9. It is important to note that these were unanimous values shared by the international community on the historical eve of the significant growth of the child pornography market in the 1960s and 1970s. *See infra* Section II.A.

At the end of the first wave of growth in the twentieth century child pornography market, the international community celebrated the world’s children with the “International Year of the Child” in 1979, which commenced the drafting process of the world’s first binding children’s rights treaty, the United Nations Convention on the Rights of the Child. The drafting of the Convention on the Rights of the Child involved more than seventy countries (including the United States and the Netherlands) and spanned ten years. Office of the United Nations High Commissioner for Human Rights, *supra* note 7.

The Convention on the Rights of the Child was introduced to the United Nations General Assembly in 1989, just four years after the first child pornography network was identified on the Internet. Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* 5 (2008). The

Convention on the Rights of the Child was adopted unanimously by the General Assembly and broke records for the greatest number of signatories to a treaty on the day it opened for signature. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3; Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 Nev. L.J. 966, 970 (2006). Today the Convention on the Rights of the Child is the most widely ratified human rights treaty in the world and sets universal standards for the protection of children for countries to strive towards and by which they agree to be measured. *Convention on the Rights of the Child Ratification Status*, United Nations Treaty Collection Database, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last visited Nov. 12, 2013). While the United States has not yet ratified the Convention on the Rights of the Child, it signed the Convention on February 16, 1995, following active participation in the drafting process. *Id.* Further, this Court has relied on the near universal ratification of the Convention on the Rights of the Child in gauging the weight of international opinion affirming the Court's decision. *See Roper v. Simmons*, 543 U.S. 551, 575-79 (2005) (finding unconstitutional the imposition of the death penalty for juvenile offenders).

The Convention on the Rights of the Child requires that countries take all appropriate measures to promote physical and psychological restoration and social reintegration of a child victim of exploitation, abuse, or any other form of “cruel, inhuman or degrading treatment.” Convention on the Rights of the Child, *supra* at art. 39. While the United States has only signed the Convention, Article 18 of the Vienna Convention on the Law of Treaties requires a nation not to defeat the purpose of a treaty before ratification. Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.<sup>10</sup>

Other international treaties also evidence the rise of an international norm in the twentieth century recognizing that children have a right to special protections. International Covenant on Civil and Political Rights art. 24, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (United States ratified June 8, 1992) (noting a child’s right to “measures of protection” from state, society, and the child’s family). Nations have gone further in developing international instruments that require state parties to provide assistance for victims’ physical and psychological restoration. Declaration on

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<sup>10</sup> Similar to the Convention on the Rights of the Child, the United States has signed but not ratified the Vienna Convention on the Law of Treaties. However, the United States State Department has recognized many of its provisions as customary international law. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int’l L. 281, 298 (1988).

the Elimination of Violence against Women, G.A. Res. 48/104, art. 2, 3, 4(d), 4(g), U.N. Doc. A/RES/48/104 (Dec. 20, 1993); ILO Convention No. 182, *supra* note 7, at art. 7(2)(b). In ratifying ILO Convention No. 182, the Senate did not specifically reference 18 U.S.C. §2259 but recognized that the United States already criminalized child pornography and that “U.S. law is sufficient in order for the United States to comply with the Convention.” S. Exec. Rep. No. 106-12, *supra* note 7, at 4. Together, these instruments, along with others, convey an emerging international norm condemning child sexual abuse and child pornography, and compelling state parties to develop laws to protect and care for children and support their restoration when harmed.

In recognizing the need to provide restoration services to child pornography victims, the United States enacted the Mandatory Restitution Statute as part of the Violence Against Women Act, Pub. L. No. 103-322, §40113, 108 Stat. 1796, 1907 (1994). Following the enactment of the Mandatory Restitution Statute, the United States participated in three World Congresses against Commercial Sexual Exploitation of Children. The First World Congress called on governments to provide recovery services to sexually exploited children. First World Congress against Commercial Sexual Exploitation of Children, *The Stockholm Declaration and Agenda for Action against Commercial Sexual Exploitation of Children* 5 (1996). The Second World Congress recognized that the development of technology created more difficulties for

victims and called on countries to help victims recover and reintegrate into society. Viti Muntarbhorn, *General Rapporteur's Report from Second World Congress against CSEC* (2001). At the conclusion of the Second World Congress, the United States pointed to the Optional Protocol as providing a “clear starting point” for the international elimination of the sexual exploitation of children. United Nations Children’s Fund, *The Yokohama Global Commitment* (2001). Between the Second and Third World Congresses, the United States conducted a “mid-term review” on the commercial sexual exploitation of children in America in collaboration with three non-governmental agencies. Initial Report, *supra* note 7, at para. 84. A report from the mid-term review was submitted at the Third World Congress and found that the United States Congress and Executive Branch had “aggressively” confirmed their commitment to combat the sexual exploitation of children through legislative measures, including the recognition and protection of victims’ rights. Shared Hope International et al., *Report from the U.S. Mid-Term Review on the Commercial Sexual Exploitation of Children in America* pmb., add. III at 5 (2006).

The Council of Europe has also formed treaties to protect children from child sexual abuse. The United States actively participated in the drafting of the Council of Europe’s Convention on Cybercrime, which requires states to adopt legislative and other measures necessary to criminalize possession of child pornography on data storage media. S. Exec. Rep. No. 109-6, *supra* note 7, at 2; Convention on Cybercrime,

*supra* note 7, at art. 9(1). The United States ratified the treaty in 2006 with no need for implementing legislation because the United States had complied with the Convention on Cybercrime's provisions prior to the drafting of the convention. S. Exec. Rep. No. 109-6, *supra* note 7, at 6.

Four years later, the Lanzarote Convention expanded on the Convention on Cybercrime to require state parties to take all necessary measures to assist victims with their physical and psycho-social restoration and adopt a protective approach towards victims. Lanzarote Convention, *supra* note 2, at art. 30(2). Although the United States has not ratified the Lanzarote Convention, it participated in the drafting of the treaty and has been a permanent observer of the Council of Europe since 1995. Council of Europe, On Observer Status for the United States of America, Comm. of Ministers Res. (95) 37 (1995); Council of Europe, *Explanatory Report: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* para. 284 (2007). Moreover, the Lanzarote Convention is additional evidence of emerging international legal norms focused on criminalizing modern child pornography and providing for the restoration of victims.

The European Union requires member states to punish the "acquisition or possession of child pornography" and "knowingly obtaining access," including incitement or aiding and abetting. Framework Decision 2004/68/JHA, art. 3(1)(d), 2003 O.J. (L13) 44; Directive 2011/92/EU, *supra* note 2, at art. 5(2)-(3),



7(1). Significantly, in accordance with the Optional Protocol, the Convention on the Rights of the Child, and the Lanzarote Convention, the new legislation will oblige member states to provide assistance, support, and protection to victims, taking into account the best interests of the child. Directive 2011/92/EU, *supra* note 2, at art. 18(1). Among other things, this includes ensuring that victims have access to free legal representation for “the purpose of claiming compensation.” *Id.* at art. 20(2).

Furthermore, member states must ensure that victims receive assistance and support before, during, and after the criminal proceedings so that they may “exercise their rights set out in Framework Decision 2001/220/JHA.” *Id.* at art. 19(1). Framework Decision 2001/220/JHA directs member states to ensure that victims of crime receive adequate protection, acknowledgement of their rights, and special assistance. Framework Decision 2001/220/JHA, of 15 March 2001 on the Standing of Victims in Criminal Proceedings 2001 O.J. (L82) 1.

The European Union has recently expanded the rights, support, protection, and compensation for victims of crime, including an acknowledgement of Directive 2011/92/EU, by implementing Directive 2012/29/EU, which will replace Directive 2001/220/JHA in 2015. Directive 2012/29/EU, of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protections of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, 2012 O.J.

(L315) 57. It instructs member states to protect victims from continuing victimization and ensure that victims receive “appropriate support to facilitate their recovery.” *Id.* at pmb. para. 9. Victim support services must provide, at a minimum, emotional and psychological support services. *Id.* at art. 9. Member states must ensure that victims also have the right to receive compensation from offenders through a judgment in criminal proceedings. *Id.* at art. 16(1). Member states are obliged to promote measures to “encourage offenders to provide adequate compensation to victims.” *Id.* at art. 16(2). The new Directive 2012/29/EU demonstrates the European Union’s evolving standards on crime victim standing, and when read in conjunction with Article 19 of Directive 2011/92/EU, it furthers the aim to provide greater compensation and support for victims of child pornography.

In sum, the United States and European nations, including the Netherlands, have played an active role in developing an international legal framework that condemns child sexual abuse and the proliferation of child sexual abuse images. This framework also recognizes the harm done to victims and the need to provide for their restoration. Under the Optional Protocol, the United States has identified the Mandatory Restitution Statute as its means of ensuring that child pornography victims have access to recovery from offenders. By not imposing proximate cause on subsections (A)-(E) of 18 U.S.C. §2259, the United States gives effect to the statute, Article 9 of the Optional Protocol, and the normative international

legal framework that the United States has actively worked to create with other nations to combat child sexual abuse.

## **II. MODERN TECHNOLOGIES ADD CHALLENGING COMPLEXITIES TO THE ANCIENT CRIME OF CHILD SEXUAL ABUSE.**

### **A. The Child Pornography Market in the Digital Age Compels a Comprehensive Legal Response by the United States.**

In many countries, including the United States, the sexual abuse of children has been condemned for hundreds of years, yet the invention of photography in 1839 added an element of complexity to this ancient crime. National Rapporteur on Trafficking in Human Beings, *First Report of the Dutch National Rapporteur: Child Pornography* 33 (2011) (Neth.); see Christian Laes, *Children in Ancient Rome* 244 (2006); see John E.B. Myers, *A Short History of Child Protection in America*, 42 *Fam. L.Q.* 449 (2008); see John Lascaratos & Effie Poulakou-Rebelakou, *Child Sexual Abuse: Historical Cases in the Byzantine Empire (324-1453 A.D.)*, 24 *Child Abuse & Neglect* 1085 (2000). For the first time, a person could memorialize the sexual abuse of a child and use those images to continue to abuse the child. DNR, *supra*, at 34. The child sexual abuse images themselves became the currency in a market commonly referred to as “child pornography,” in which the creation, distribution, and possession of child sexual abuse images perpetuate the sexual abuse of children and normalizes conduct

that most civilizations have condemned. Suzanne Ost, *Child Pornography and Sexual Grooming* 109 (2009); Laes, *supra*, at 244; Lascaratos, *supra*.

The technological limitations of cameras and the physical limitations on delivery methods, such as postal services, restricted the growth of the child pornography market for more than one hundred years. U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses* 5, 41, 328 (Dec. 2012); DNR, *supra*, at 35-48. However, with the introduction in the mid-twentieth century of cameras that were affordable and easier to use, technological advances again contributed to a significant expansion of the child pornography market, especially when coupled with a loosening in the 1960s and 1970s of social mores with regard to human sexuality. DNR, *supra*, at 34. Because the significant expansion in the child pornography market during this period was evident in the United States and Europe, nations responded with tighter and more effective legal protections for children.<sup>11</sup>

In the United States, Congress criminalized child sexual abuse images in the late twentieth century,

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<sup>11</sup> In the 1970s, countries began to enact laws that tightened prohibitions on child pornography, which included banning the commercialization of child sexual abuse images. Prior to tightening regulations, child sexual abuse images were commercially available alongside adult pornography in many countries. Child pornography activities were made into criminal offenses in the Netherlands in 1986. DNR, *supra*, at 34-37.

and this Court upheld the rights of states to adopt legislation banning the production and distribution of child pornography. *New York v. Ferber*, 458 U.S. 747 (1982); Protection of Children against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978). In doing so, the Court recognized the continuing harm inherent in child pornography. *Ferber*, 485 U.S. at 759 n.10 (“Because the child’s actions are reduced to a recording, the pornography may haunt . . . [the child] in future years, long after the original misdeed took place.”). In *Osborne v. Ohio*, the Court later upheld the criminalization of possession of child sexual abuse images, reiterating that continuing victimization is inherent to child pornography crimes. 495 U.S. 103, 111 (1990) (“The pornography’s continued existence causes the child victim’s continuing harm by haunting the children in years to come.”).

Four years after *Osborne*, the United States Congress enacted 18 U.S.C. §2259, mandating that offenders at all points in the child pornography market (production, distribution, and possession) pay full restitution to victims. Mandatory restitution was part of a comprehensive federal statutory framework that also included clear definitions and criminalizing participation at any stage of the child pornography market. 18 U.S.C. §§2251-2260. Recently, the United States Congress responded to the increasingly global nature of child sexual crimes by enacting the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), which, *inter alia*, allows authorities in the United States to

prosecute citizens of the United States when they sexually abuse children abroad. 18 U.S.C. §2423 (2012). Similar to the PROTECT Act, a plain reading of the Mandatory Restitution Statute provides a more robust tool to protect children in light of rapidly changing technologies and the increasingly transnational nature of child sexual abuse.

The United States' domestic and international efforts are appropriate because unfortunately, the United States is the most common country of origin for child pornography victims. DNR, *supra*, at 166 n.315 (relying on images being compiled in Interpol's International Child Sexual Exploitation Database). The United States also is the leading source country for perpetrators. *Id.* at 82, 166 n.316 (citing to an ECPAT International report indicating that between 50,000 and 100,000 pedophiles participate in organized child pornography groups around the world and one-third of those operate from the United States). The significant number of child sexual abuse images produced in the United States allows perpetrators in other countries to continue the victimization of American children by distributing or possessing their child sexual abuse images. *See, e.g.*, Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 184-203 (2001) (noting the "global community" of child pornography collectors). Similarly, children of other countries, including Dutch children, continue to be victimized in the United States by perpetrators who distribute or possess images of the child's abuse. *Id.*; *see infra* Section II.D.

## **B. Child Pornographers Collectively Continue the Victimization of Children Globally and Indefinitely.**

The United States' statutory framework attempts to respond to the rise of digital technologies and the widespread use of the Internet in the late twentieth century, which together facilitated the explosive growth in the child pornography market that we continue to witness today. Millions of individual users consume more than fifteen million child sexual abuse images in a market currently valued between three and twenty billion United States dollars annually. Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, paras. 10, 44, Human Rights Council, U.N. Doc. A/HRC12/23 (July 13, 2009) (by Najat M'jid Maalla) ("United Nations Special Rapporteur Report"). Moreover, with the rapid proliferation of Internet usage, the child pornography market is projected to continue growing exponentially.<sup>12</sup>

The transformation from tangible to digital child sexual abuse images has had a debilitating effect on victims, as well as the governments committed to

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<sup>12</sup> Between 1996 and 2009, the number of people with Internet access has increased from 100 million to 1.25 billion and continues to rise. Robert J. Edelmann, *Exposure to Child Abuse Images as Part of One's Work: Possible Psychological Implications*, 21 J. Forensic Psychiatry & Psychol. 481 (2010).

battling this crime. Because images of the child's victimization are now digitalized, it is virtually impossible to destroy them permanently. U.S. Sentencing Comm'n, *supra*, at 112; U.S. Dept of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction* 9 (2010); DNR, *supra*, at 75. Thus, images of the child's sexual abuse exist indefinitely. Moreover, the Internet compounds this challenge because child sexual abuse images can be easily distributed and consumed countless times around the world by millions of unidentified perpetrators. DNR, *supra*, at 75. Today's child pornography victims experience continuing victimization by perpetrators who together perpetuate the distribution and possession of the victims' sexual abuse images indefinitely.<sup>13</sup> Jenkins, *supra*, at 187-95. Worse, as the child pornography market grows exponentially and transnationally, the majority of the perpetrators are never apprehended, which makes the prosecution of perpetrators and the restoration of victims especially challenging.

As child pornography victims grow older, many come to realize that the images of their sexual abuse will continue to exist and be consumed for the remainder of their lives, and they are largely powerless

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<sup>13</sup> Many child pornography market participants engage in all three market stages (creation, distribution, and possession), but even those who only enter the market at one point collectively participate in a market that at every stage victimizes some of the most vulnerable members of society and then perpetuates that victimization indefinitely. See United Nations Special Rapporteur Report, *supra*, at 10-11.



to end the abuse.<sup>14</sup> U.S. Sentencing Comm'n, *supra*, at 112; U.S. Dep't of Justice, *supra*, at 9; DNR, *supra*, at 36, 50, 75-77. This knowledge may haunt the victims for years because possessors and distributors will continue to consume, and possibly distribute, the images and recordings. DNR, *supra*, at 75. A recent survey revealed that almost ninety-five percent of victims suffer lifelong psychological damage and may never overcome the harm, even after lifelong therapy. U.S. Dep't of Justice, *supra*, at D-12. The continued victimization can take an extreme physical, psychological, and financial toll on the victim and the victim's family. See U.S. Sentencing Comm'n, *supra*, at 112; Julia von Weiler et al., *Care and Treatment of Child Victims of Child Pornographic Exploitation (CPE) in Germany*, 16 *J. of Sexual Aggression* 211, 218-19 (2010). Victims of child pornography may have difficulty maintaining jobs and relationships because of the fear that people they interact with have viewed the abuse images and will recognize them. See U.S. Sentencing Comm'n, *supra*, at 113. They also worry that perpetrators will use their abuse images for the purposes of grooming other children in order to facilitate subsequent sexual abuse; sexual grooming

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<sup>14</sup> Child sexual abuse images are becoming more violent and graphic as perpetrators demand younger victims, vaginal and anal penetration (sometimes with sex toys and foreign objects), rape, bestiality, defecation and urination, bondage, torture, and other sadistic behavior. U.S. Sentencing Comm'n, *supra*, at 85, 90-92; Internet Watch Foundation, *Annual and Charity Report* 8 (2008).

further expands the market and increases the number of victims. *Id.*

The psychological damage that child pornography victims suffer is experienced across cultures. For example, German victims report feelings of shame, hate, disgust, loathing, fear, repression, guilt, and speechlessness. Von Weiler, *supra*, at 214. Victims in the United States have also reported feelings of depression, anger, withdrawal, low self-esteem, and feelings of worthlessness. Terre des Hommes, *Full-screen on View: An Exploratory Study on the Background and Psychosocial Consequences of Webcam Child Sex Tourism in the Philippines* 12 (2013). The mere knowledge of the existence and circulation of the images of the victim's sexual abuse causes feelings of shame, humiliation, and powerlessness. *Id.* at 13. Unfortunately, these feelings do not dissipate over time, but rather intensify to feelings of deep despair, worthlessness, and helplessness. *Id.* A recent study of Filipino children who were engaged by Westerners to participate in live digital sexual abuse via the Internet ("webcam sex") similarly demonstrated significantly higher rates of post-traumatic stress and feelings of low self-esteem, worthlessness, shame, guilt, and being contaminated, particularly after learning that the images of their sexual abuse may be available on the Internet indefinitely. *Id.* at 41, 43.

Compounding the problems faced by victims of child pornography, a recent survey among German

victim assistance professionals found that professionals are ill equipped to deal with the type of psychological damage suffered by child pornography victims; thus, it is difficult for victims to find effective therapeutic support. Von Weiler, *supra*, at 218. The professionals in the von Weiler study indicated that “working with victims of [child pornographic exploitation] is more complex than working with child sexual abuse victims.” *Id.* at 217. The difference in the psychological harm suffered by child pornography victims compared to victims of other crimes is the permanent presence of the material on the Internet. When the victim fully understands this reality, feelings of helplessness, powerlessness, shame, and fear contribute to additional psychological stress. These victims, thus, have a higher susceptibility to post-traumatic stress disorder, depression, and psychoses. *Id.* at 214-19. Two-thirds of professionals working with child pornography victims reported that they *themselves* felt “deep feelings of helplessness” because the victim’s sexual abuse images on the Internet were permanent. *Id.* at 217 (emphasis added). Indeed, one-third of the professionals treating child pornography victims experienced thoughts such as “in this situation healing becomes impossible.” *Id.*

**C. Due to the International Nature of Child Pornography in the Twenty-First Century, Imposing a Proximate Cause Requirement on the Plain Text of 18 U.S.C. §2259 Would Impede the Full Restoration of Child Pornography Victims.**

As discussed in more detail in Section I, *supra*, the international community recognizes the rights of victims of child pornography to rehabilitation, social reintegration, and restoration (whether through restitution, damages, or some other method). However, the increasingly transnational nature of child pornography means that many perpetrators harm victims across national borders through the distribution or possession of the victim's child sexual abuse images digitally. A recent study by United States' law enforcement agencies found that 11.8 million unique *international* IP addresses engaged in peer-to-peer file sharing of child pornography between October 2008 and October 2009. U.S. Dep't of Justice, *supra*, at 14 (emphasis added). During that same period, 9.7 million unique IP addresses in the United States engaged in peer-to-peer file sharing of child sexual abuse images. *Id.* A 2012 report by the Internet Watch Foundation in the United Kingdom found that out of the 9,477 reports of websites hosting child sexual abuse content outside of the United Kingdom, fifty-four percent were hosted in North America, thirty-seven percent were hosted in Europe, and eight percent were hosted in Asia. Internet Watch Foundation, *supra* note 14, at 14. In 2011, a transnational investigation resulted in the shutdown of a

child pornography network, boylover.net, which hosted 70,000 members worldwide. The investigation was coordinated among thirteen different countries, including the United States and the Netherlands, and resulted in the identification of 670 suspects, 184 arrests, and the safeguarding of 230 children. *More than 200 Children Identified and Rescued in Worldwide Police Operation*, Europol (Mar. 16, 2011), <https://www.europol.europa.eu/content/more-200-children-identified-and-rescued-worldwide-police-operation>.

The transnational and digital nature of the child pornography market severely restricts the ability of victims to pursue restitution from most perpetrators. Most countries do not have adequate child pornography laws, including the criminalization of child pornography. *See* DNR, *supra*, at 54-55. Further, the patchwork nature of child pornography laws across jurisdictions hampers both law enforcement and the ability of victims to pursue restoration. Many perpetrators live thousands of miles away and are never apprehended, let alone prosecuted. If a perpetrator were convicted, the cost to the victim in pursuing restitution in a foreign jurisdiction would be considerable, making recovery both impractical and unlikely. Even when a perpetrator is convicted in the victim's own jurisdiction (assuming there are legal protections), a court cannot determine the specific restitution proximately caused by a single offender among an unknown number of offenders at a certain place and point in time when the harm continues indefinitely. Imposing a proximate cause requirement on 18 U.S.C. §2259 makes the Mandatory Restitution

Statute unworkable, and thus, ineffective for victim restoration. That is the fundamental problem that is solved by the Fifth Circuit's plain reading of 18 U.S.C. §2259.

#### **D. Dutch Lawmakers Are Also Formulating Legal Solutions to Ensure Compensation to Child Pornography Victims.**

Like the United States, the Netherlands is also trying to implement an effective legal scheme to ensure compensation to victims of child pornography. The central provision in the Dutch Criminal Code on child pornography criminalizes “an individual who distributes, offers, openly exhibits, produces, imports, conveys, exports, acquires, has possession of or knowingly gains access to” child sexual abuse images. Wetboek van Strafrecht [Sr] [Criminal Code] art. 240b (Neth.). The Netherlands added “knowingly gaining access” to this list, in response to the Lanzarote Convention, which further defines the criminalized possession of pornography to include viewing of child sexual abuse images using recently developed technologies such as “cloud storage” that do not require the downloading of images. *Id.*

While Dutch law does not provide the same kind of victim restoration as in 18 U.S.C. §2259, Sr art. 36f does mandate victim compensation for all criminal acts. Sr art. 36f (Neth.). Under this section, offenders may be obliged to pay compensation to the State, which transfers the sum without delay to the victim. Sr art. 36f (Neth.). In addition, this section connects

compensation in criminal proceedings to the notion of liability in accordance with tort law. Like Dutch criminal law in general, Sr art. 36f incorporates a causality theory of “reasonable attribution,” which is a comprehensive amalgamation of all older theories of causality that have proven inadequate under certain circumstances. Jaap de Hullu, *Materieel Strafrecht: Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* 173-84 (4th ed. 2009) (Neth.) (explaining why condition *sine qua non* and proximate cause do not suffice and how Dutch criminal law has adopted the doctrine of reasonable attribution consistent with tort law principles). The fundamental question underlying causality examines when a court can “reasonably attribute” damage to the perpetrator’s conduct. This allows judges to weigh all the important circumstances in the case.

The National Rapporteur reads the Mandatory Restitution Statute’s general causation requirement as similar to the Dutch theory of reasonable attribution, both of which are less strict standards of causation than proximate cause. In the case of possession of child pornography, the victim’s harm can reasonably be attributed to the perpetrator’s consumption of child pornography, as this continues the victimization indefinitely.

Dutch child pornography case law has been continuously evolving to affirm this causal connection where offenders are charged solely with possession. Similar to this Court’s finding in *Osborne v. Ohio*, Dutch courts have held that offenders who collect

child pornography participate in the sexual abuse of children. *Osborne*, 495 U.S. at 111; Rb. Zutphen 18 november 2009, NJFS 2010, 42, ECLI:NL:RBZUT:2009:BK3742 (Neth.). More recently, a Dutch court of appeals held that a perpetrator contributed to the perpetuation of “this very grave violation of the interests of minors.” Hof’s-Gravenhage 2 juni 2011, ECLI:NL:GHSGR:2011:BR5919 (Neth.). The judgment continued, “It is common knowledge that thereby [minors] can incur heavy psychological (and physical) damage, which can be detrimental to their further development. The accused should have realized that by his actions, he made a considerable contribution to the conservation of this extremely harmful worldwide industry.”<sup>15</sup>  
*Id.*

Dutch courts have begun to impose joint and several liability principles on child pornography offenders. In 2010, the United States authorities arrested an individual charged with possession of child sexual abuse images that originated from the Netherlands.

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<sup>15</sup> See also Rb. Zeeland-West Brabant 11 juli 2013, ECLI:NL:RBZWB:2013:5231 (Neth.). The perpetrator was found guilty of child pornography and the court stated, “Child pornography is highly undesirable, in particular because its production involves sexual abuse and exploitation of children. The accused should be held partially responsible for that, because by collecting child pornography he contributed to the conservation of the demand for this material. As long as there are consumers of child pornography, people who produce and distribute it will continue to abuse children. To effectively combat child pornography, it is therefore not only necessary to address the producers, but definitely also to tackle the collectors.”



Dutch law enforcement found the producer of the content and arrested him. The producer, Robert M., had worked in daycare centers for years, where he had sexually abused children and recorded the abuses for distribution. Robert M.'s husband, Richard van O., was charged with possession. The court held both offenders jointly and severally liable for damage caused to the victims through the possession of the images, and ordered Richard van O. to pay compensation to dozens of children depicted in the abuse materials.<sup>16</sup> Hof Amsterdam 26 april 2013, ECLI:NL:GHAMS:2013:BZ8895 (Neth./Richard van O.) (Neth.). Robert M. was solely liable to pay for the victims' damages caused by the original physical sexual abuse that was recorded in the images. *Id.* Although the offenders had a close personal relationship, the fact remains that Richard van O. was found jointly and severally liable for post-production damages to child pornography victims based solely on possession of the images. *Id.* The Netherlands' theory of causation and use of joint and several liability principles to multiple offenders makes for an efficient system where victims have reduced burdens to facilitate recovery of the costs for their restoration.

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<sup>16</sup> Robert M. and Richard van. O.'s liability derived from a violation of Article 8 of the European Convention on Human Rights, the right to private life. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005.

## CONCLUSION

The United States' treaty obligations and evolving international legal norms support providing meaningful recovery to child pornography victims through the Mandatory Restitution Statute to support their restoration. Imposing proximate cause on the plain language of subsections (A)-(E) would eviscerate the ability of child pornography victims to obtain adequate restitution for their losses from perpetrators who collectively perpetuate their victimization indefinitely through the production, distribution, and possession of child sexual abuse images all around the globe. This Court should interpret the Mandatory Restitution Statute so that the statute provides full, meaningful restoration to child pornography victims.

For these reasons, the Dutch National Rapporteur supports affirming the decision of the Fifth Circuit in all respects.

Respectfully submitted,

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**RELEVANT EXCERPTS FROM INTERNATIONAL  
TREATIES RATIFIED BY THE UNITED STATES**

**The Optional Protocol to the United  
Nations Convention on the Rights of the  
Child on the Sale of Children, Child  
Prostitution and Child Pornography**

<b>Provision</b>	<b>Excerpts from the Optional Protocol</b>
Preamble, para. 6	“Concerned about the growing availability of child pornography on the Internet and other evolving technologies . . . .”
Article 1	“State Parties shall prohibit . . . child pornography . . . .”
Article 2(c)	“Child pornography means 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.”
Article 3(1)	<p>“Each state Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis:</p> <p style="padding-left: 40px;">(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2.”</p>

Article 3(3)	“Each State Party shall make these offences punishable by appropriate penalties that take into account their grave nature.”
Article 3(4)	“Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present Article. Subject to the legal principles of the State Party, this liability of legal persons may be criminal, civil or administrative.”
Article 8(1)	<p>“States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:</p> <ul style="list-style-type: none"> <li>(a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs . . . ;</li> <li>(d) Providing appropriate support services to child victims throughout the legal process;</li> <li>(e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could</li> </ul>

	<p>lead to the identification of child victims;</p> <p>(g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.”</p>
Article 8(3)	“States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.”
Article 9(3)	“States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery.”
Article 9(4)	“States Parties shall 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.”
Article 10(1)	“States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving . . . child pornography . . . .”

**The Council of Europe  
Convention on Cybercrime**

<b>Provision</b>	<b>Excerpts from the Convention on Cybercrime</b>
Article 9(1)	<p>“Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:</p> <ul style="list-style-type: none"><li>(a) producing child pornography for the purpose of its distribution through a computer system;</li><li>(b) offering or making available child pornography through a computer system;</li><li>(c) distributing or transmitting child pornography through a computer system;</li><li>(d) procuring child pornography through a computer system for oneself or for another person;</li><li>(e) possessing child pornography in a computer system or on a computer data storage medium.”</li></ul>



**The International Labour Organization  
Convention No. 182 on the Prohibition  
and Immediate Action for the Elimination  
of the Worst Forms of Child Labour**

<b>Provision</b>	<b>Excerpts from ILO Convention No. 182</b>
Article 3	<p>“[T]he term ‘the worst forms of child labour’ comprises:</p> <p style="padding-left: 40px;">(b) the use, procuring or offering of a child for . . . the production of pornography . . . ;”</p>
Article 7(2)	<p>“Each Member shall . . . take effective and time-bound measures to:</p> <p style="padding-left: 40px;">(c) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;”</p>
Article 8	<p>“Members shall take appropriate steps to assist one another . . . through enhanced international cooperation and/or assistance . . . .”</p>

**The United Nations International  
Covenant on Civil and Political Rights**

<b>Provision</b>	<b>Excerpts from the International Covenant on Civil and Political Rights</b>
Article 24(1)	“Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

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**RELEVANT EXCERPTS FROM  
INTERNATIONAL TREATIES SIGNED (BUT  
NOT RATIFIED) BY THE UNITED STATES**

**The United Nations Convention  
on the Rights of the Child**

<b>Provision</b>	<b>Excerpts from the Convention on the Rights of the Child</b>
Preamble para. 7	“Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of . . . peace, dignity, tolerance, freedom, equality and solidarity . . . .”
Article 3(1)	“In all actions concerning children . . . [in] courts of law . . . the best interests of the child shall be a primary consideration.”
Article 3(2)	“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being . . . .”
Article 6(2)	“States Parties shall ensure to the maximum extent possible the survival and development of the child.”
Article 16(1)	“No child shall be subjected to . . . unlawful interference with his or her privacy . . . nor to unlawful attacks on his or her honour and reputation.”
Article 16(2)	“The child has the right to the protection of the law against such interference or attacks.”

Article 19(1)	“States Parties shall take all appropriate legislative, administrative, social and education measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse . . . .”
Article 19(2)	“Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”
Article 24(1)	“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”
Article 27(1)	“States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”

Article 34	<p>“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:</p> <ul style="list-style-type: none"><li>(a) The inducement or coercion of a child to engage in any unlawful sexual activity;</li><li>(b) The exploitative use of children in prostitution or other unlawful sexual practices;</li><li>(c) The exploitative use of children in pornographic performance and materials.”</li></ul>
Article 39	<p>“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; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”</p>

**The United Nations International Covenant  
on Economic, Social and Cultural Rights**

<b>Provision</b>	<b>Excerpts from the International Covenant on Economic, Social and Cultural Rights</b>
Article 10	<p>“The States Parties to the present Covenant recognize that:</p> <p>(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law . . . .”</p>
Article 12(2)	<p>“The steps to be taken by the States Parties to the present Covenant . . . shall include those necessary for:</p> <p>(a) [T]he healthy development of the child;</p> <p>(b) The creation of conditions which would assure to all medical service and medical attention . . . .”</p>

**RELEVANT EXCERPTS FROM  
OTHER INTERNATIONAL INSTRUMENTS**

**The Council of Europe Convention on  
the Protection of Children against  
Sexual Exploitation and Sexual Abuse  
(Lanzarote Convention)**

<b>Provision</b>	<b>Excerpts from the Lanzarote Convention</b>
Article 11(1)	“Each Party shall establish effective social programmes and set up multidisciplinary structures to provide the necessary support for victims, their close relatives and for any person who is responsible for their care.”
Article 14(1)	“Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psycho-social recovery. Measures taken pursuant to this paragraph shall take due account of the child’s views, needs and concerns.”
Article 14(2)	“Each Party shall take measures, under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.”

Article 20(1)	<p>“Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:</p> <ul style="list-style-type: none"> <li>(a) producing child pornography;</li> <li>(b) offering or making available child pornography;</li> <li>(c) distributing or transmitting child pornography;</li> <li>(d) procuring child pornography for oneself or for another person;</li> <li>(e) possessing child pornography;</li> <li>(f) knowingly obtaining access, through information and communication technologies, to child pornography.”</li> </ul>
Article 24(1)	<p>“Each Party shall take the necessary legislative or other measures to establish as criminal offences, when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with this Convention.”</p>
Article 24(2)	<p>“Each Party shall take the necessary legislative or other measures to establish as criminal offences, when committed intentionally, attempts to commit the offences established in accordance with this Convention.”</p>



Article 24(3)	“Each Party may reserve the right not to apply, in whole or in part, paragraph 2 to offences established in accordance with Article 20, paragraph 1.b, d, e and f, Article 21, paragraph 1.c, Article 22 and Article 23.”
Article 27(1)	“Each Party shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. These sanctions shall include penalties involving deprivation of liberty which can give rise to extradition.”
Article 28	<p>“Each Party shall take the necessary legislative or other measures to ensure that the following circumstances . . . may . . . be taken into consideration as aggravating circumstances in the determination of the sanctions in relation to the offences established in accordance with this Convention:</p> <ul style="list-style-type: none"> <li>(a) the offence seriously damaged the physical or mental health of the victim;</li> <li>(b) the offence was preceded or accompanied by acts of torture or serious violence;</li> <li>(c) the offence was committed against a particularly vulnerable victim;”</li> </ul>

Article 30(1)	“Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.”
Article 30(2)	“Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.”
Article 31(1)	<p>“Each Party shall take the necessary legislative or other measures to protect the rights and interests of victims . . . by:</p> <p style="padding-left: 40px;">(g) providing for their safety . . . from intimidation, retaliation and repeat victimization;”</p>
Article 38	<p>“The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through the application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:</p> <p style="padding-left: 40px;">(a) preventing and combating sexual exploitation and sexual abuse of children;</p>

	<p>(b) protecting and providing assistance to victims;</p> <p>(c) investigations or proceedings concerning the offences established in accordance with this Convention.”</p>
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**The United Nations Declaration on the Elimination of Violence against Women**

<b>Provision</b>	<b>Excerpts from the Declaration on the Elimination of Violence against Women</b>
Article 2	<p>“Violence against women shall be understood to encompass, but not be limited to, the following:</p> <p>(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;</p> <p>(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in</p>

	<p>educational institutions and elsewhere, trafficking in women and forced prostitution;</p> <p>(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”</p>
Article 4	<p>“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:</p> <p>(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered;</p> <p>(g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed,</p>

	<p>within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation.”</p>
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**The United Nations 1959  
Declaration on the Rights of the Child**

<b>Provision</b>	<b>Excerpts from the 1959 Declaration on the Rights of the Child</b>
Preamble	<p>“Whereas the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,</p> <p>Whereas the United Nations has, in the Universal Declaration of Human Rights, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as</p>

	<p>race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,</p> <p>Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,</p> <p>Whereas the need for such special safeguards has been stated in the Geneva Declaration of the Rights of the Child of 1924, and recognized in the Universal Declaration of Human Rights and in the statutes of specialized agencies and international organizations concerned with the welfare of children,</p> <p>Whereas mankind owes to the child the best it has to give . . . .”</p>
Principle 2	<p>“The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”</p>
Principle 9	<p>“The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate</p>

	minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.”
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**The United Nations Universal  
Declaration of Human Rights**

<b>Provision</b>	<b>Excerpts from the Universal Declaration of Human Rights</b>
Article 25(1)	“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”
Article 25(2)	“Motherhood and childhood are entitled to special care and assistance . . . .”

**The League of Nations 1924 Geneva  
Declaration of the Rights of the Child**

<b>Provision</b>	<b>Excerpts from the 1924 Geneva Declaration of the Rights of the Child</b>
	<p>“By the present Declaration of the Rights of the Child . . . men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:</p> <ul style="list-style-type: none"> <li>(a) The child must be given the means requisite for its normal development, both materially and spiritually;</li> <li>(b) The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;</li> <li>(c) The child must be the first to receive relief in times of distress;</li> <li>(d) The child must be put in a position to earn a livelihood,</li> </ul>



	and must be protected against every form of exploitation;”
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**RELEVANT EXCERPTS FROM FOREIGN LAWS**

**European Union Directive 2011/92/EU  
on Combating the Sexual Abuse and  
Sexual Exploitation of Children and  
Child Pornography, and Replacing  
Council Framework Decision 2004/68/JHA**

<b>Provision</b>	<b>Excerpts from Directive 2011/92/EU</b>
Preamble (23)	“The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims’ assistance and protection should be encouraged.”
Preamble (31)	“Member States should consider giving short and long term assistance to child victims. Any harm caused by the sexual abuse and sexual exploitation of a child is significant and should be addressed. Because of the nature of the harm caused by sexual abuse and sexual exploitation, such assistance should continue for as long as necessary for the child’s physical and psychological recovery and may last into adulthood if necessary.”
Preamble (32)	“Framework Decision 2001/220/JHA establishes a set of victims’ rights in criminal proceedings, including the right to protection and compensation. In addition child victims of sexual abuse, sexual exploitation and child pornography should be given access to

	legal counselling and, in accordance with the role of victims in the relevant justice systems, to legal representation, including for the purpose of claiming compensation.”
Article 18(1)	“Child victims of the offences referred to in Articles 3 to 7 shall be provided assistance, support and protection in accordance with Articles 19 and 20, taking into account the best interests of the child.”
Article 18(2)	“Member States shall take the necessary measures to ensure that a child is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that a child might have been subject to any of the offences referred to in Articles 3 to 7.”
Article 18(3)	“Member States shall ensure that, where the age of a person subject to any of the offences referred to in Articles 3 to 7 is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 19 and 20.”
Article 19(1)	“Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of

	criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive. Member States shall, in particular, take the necessary steps to ensure protection for children who report cases of abuse within their family.”
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**European Union Directive 2012/29/EU  
Establishing Minimum Standards on  
the Rights, Support and Protection of  
Victims of Crime, and Replacing Council  
Framework Decision 2001/220/JHA**

<b>Provision</b>	<b>Excerpts from Directive 2012/29/EU</b>
Preamble (5)	“The resolution of the European Parliament of 26 November 2009 on the elimination of violence against women called on the Member States to improve their national laws and policies to combat all forms of violence against women and to act in order to tackle the causes of violence against women, not least by employing preventative measures, and called on the Union to guarantee the right to assistance and support for all victims of violence.”
Preamble (51)	“The Member State of the victim’s residence should provide assistance, support and protection required for the victim’s need to recover.”

Article 8(1)	“Member States shall ensure that victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings.”
Article 9(1)	“Victim support services, as referred to in Article 8(1), shall, as a minimum, provide: <ul style="list-style-type: none"><li data-bbox="377 583 842 945">(a) information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including preparation for attendance at the trial;</li><li data-bbox="377 966 842 1113">(b) information about or direct referral to any relevant specialist support services in place;</li><li data-bbox="377 1134 889 1201">(c) emotional and, where available, psychological support;</li><li data-bbox="377 1222 847 1324">(d) advice relating to financial and practical issues arising from the crime;</li><li data-bbox="377 1345 836 1457">(e) unless otherwise provided by other public or private services, advice relating to</li></ul> ”

	the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation.”
Article 16(1)	“Member States shall 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.”
Article 16(2)	“Member States shall promote measures to encourage offenders to provide adequate compensation to victims.”

### **The Dutch Criminal Code**

<b>Provision</b>	<b>Excerpts from the Dutch Criminal Code</b>
Article 36f(1)	“By court ruling whereby a person is convicted for a criminal offence, that person may be obliged to pay the State a sum of money for the benefit of the victim. The State shall pay the amount received to the victim immediately.”
Article 36f(2)	“The court may impose an order if and insofar as under civil law the suspect is liable towards the victim for the damage caused by the criminal offence.”

Article 36f(3)	“The order may be imposed together with punishments and other orders.”
Article 36f(4)	“Sections 24a and 24b, subsection one to and including four, are applicable mutatis mutandis, on the understanding that the increase of the amount due by virtue of the order shall be paid into the public funds of the State.”
Article 36f(5)	“Payment by the convicted person to the State, shall in the first place go towards the payment of the order and subsequently for the increases pursuant to subsection four.”
Article 36f(6)	“Sections 24c and 77l, subsection two to and including six, are applicable mutatis mutandis, on the understanding that the application of default detention or default juvenile detention does not take away the obligation pursuant to the order to pay damages to the victim.”
3.1 Article 240b	“1. A term of imprisonment of not more than four years or a fine of the fifth category shall be imposed on any person who disseminates, offers, publicly displays, manufactures, imports, forwards, exports, acquires, or possesses an image – or a data carrier containing an image – of a sexual act in which a person who has apparently not yet attained the age of eighteen is involved or appears to be involved, or who gains access to such an image by means of a computerized

	<p>device or system or through a communication service.</p>
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	<p>2. A term of imprisonment of not more than eight years or a fine of the fifth category shall be imposed on any person who commits any of the offences described in Section 1 by profession or custom.”</p>
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