# Committee on the Rights of the Child

# Concept Note for a General Comment on Children’s Rights in Relation to the Digital Environment

# Submission: Department of Child Law, Leiden Law School, Leiden University (The Netherlands)[[1]](#footnote-1)

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University Leiden, Department of Child Law, welcomes the initiative of the CRC Committee to draft a General Comment pertaining to Children’s Rights in Relation to the Digital Environment (hereafter: General Comment).

This submission focuses on the area ‘Protection from violence, sexual exploitation and other harm’. Cognisant of the fact that children face a variety of risks pertaining to violence, sexual exploitation and other harm in the online sphere, this submission will only focus on producing, possessing, disseminating and accessing online child sexual abuse material.

## General Remarks

***Children in a Digital World***

UNICEF’s State of the World’s Children Report 2017 ‘Children in a Digital World’ has shed light on the worldwide emerging issue of online child sexual abuse and exploitation. Children and adolescents below the age of 18 years constitute one third of internet users worldwide[[2]](#footnote-2), and hence the internet created an increasingly important realm for child sex offenders.[[3]](#footnote-3) 2018 data published by the Internet Watch Foundation (IWF) shows that since 2014, the percentage of children being aged 10 or younger depicted in child sexual abuse material gradually drops. However, where IWF does analyse child sexual abuse imagery of younger children, it is more likely to show the most severe forms of abuse, including rape and sexual torture. Further, IWF increasingly sees more imagery of 11 – 15-year-old children in what is termed ‘self-produced’ content, created using webcams and then shared online.[[4]](#footnote-4)

It is important to note that the internet did not ‘invent’ crimes of child sexual abuse and exploitation but facilitates new ‘common’ forms and creates wholly new forms.[[5]](#footnote-5) As technology outpaces legislative reform and law-making in the field of cybercrime, both international and national legislation do often times not sufficiently address the new emerging forms of online child sexual abuse and exploitation, and states are in many cases left without guidance on the appropriate criminalisation of these complex offences. It is therefore crucial that the General Comment provides in-depth guidance on the regulation of offences pertaining to online child sexual abuse material and stresses the complexity of such regulations in the context of constitutional concerns around freedom of speech and artistic freedom.

***‘Child pornography’?***

With regards to the terminology used in the General Comment, and in line with the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Maud de Boer-Buquicchio, (A/HRC/28/56 (2014), para. 29), we recommend that the Committee follows the global trend to move away from the term ‘child pornography’ when describing material that depicts the sexual abuse and exploitation of children. Using the term ‘child pornography’ may create the impression that adult ‘pornography’ and ‘child pornography’ are closely related, and hence implies that the child could give consent to ‘child pornography’. We welcome that these views have already been endorsed by the Committee in the DRAFT Guidelines on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereafter: DRAFT guidelines to the OPSC).

***Special nature of online offences***

Regulating criminal behaviour in the online space has proven difficult for national legislators all over the world, as technology tends to outpace the law. Due to the slow legislative process in many countries, cybercrime legislation is often outdated once it is enacted – criminals have already found other ways to pursue victims and cause damage to communities, circumventing the newly enacted legislation. Therefore, both national legislators and the international community are required to react quickly to these new ‘trends’ and ensure that the criminal law in particular covers new emerging forms of online child sexual abuse. Whilst national legislators already struggle to keep up with the pace with which the cybercrime scene develops, the erratic nature of cybercrime is an even stronger stumbling block for international law, as international conventions take years to negotiate. This means that any international convention addressing cybercrime is most likely already outdated by the time of adoption.

The ‘child pornography’ provision in the Optional Protocol to the Convention on the Rights of the Child (CRC) on the Sale of Children, Child Prostitution and Child Pornography (hereafter: OPSC) is a good example for this dilemma. The process of developing the OPSC started in 1990 and it was only adopted by the UN General Assembly in 2000.[[6]](#footnote-6) The OPSC falls short of comprehensively criminalising possessing ‘child pornography’ without the intent to further offer, distribute or sell the content. While in the 1980’s and 1990’s there was still a vivid discussion whether the mere possession of child pornography should constitute an offence[[7]](#footnote-7), there seems to be a broad consensus as to the criminalisation nowadays, in particular as many cases dealing with downloading child sexual abuse material could otherwise not be captured. However, as the OPSC was developed mainly in the 1990’s, the mere possession of child pornography is not criminalised under the OPSC. Other new developments not covered by the OPSC are the accessing of child sexual abuse material, e.g. using streaming services, (so-called child webcam sexual abuse[[8]](#footnote-8)) without downloading and hence ‘possessing’ the material.

The General Comment should hence serve as a corrective to the outdatedness of the OPSC in the area of child sexual abuse material. Therefore, we recommend for the Committee to stress this special character of criminal offences in the online space, and to encourage member states to interpret the OPSC as guiding international instrument in light of recent technological developments, that is: as a living instrument, rather than adhering only to the standard prescribed in the current wording of the OPSC.

## Role of criminal law pertaining to child sexual abuse material

Criminal law plays a key role in preventing and responding to offences pertaining to online child sexual abuse material. While a comprehensive criminalisation of such material is crucial to protect children, we would like to submit that criminal law is not suitable to respond to concerns of consensual ‘sexting’ between minors.

***Definition of child sexual abuse material and catalogue of offences***

In order to protect children from online child sexual abuse and exploitation, the General Comment needs to clearly provide guidance on the definition of child sexual abuse material and the catalogue of offences that should be covered. As established above, the OPSC is the key international instrument guiding the criminalisation of child sexual abuse material.

It is submitted that against the legal opinion expressed in the DRAFT Guidelines to the OPSC, the OPSC does not criminalise ‘any form’ of child sexual abuse material but excludes virtual child pornography and persons made to appear as minors (e.g. an 18-year-old engaging in pornographic performances, who is dressed like a 14-year-old school girl). The Committee states in the DRAFT Guidelines to the OPSC that the terms ‘real or simulated’ ‘should be interpreted as including ‘any material, online or offline, that depicts or otherwise represents any person appearing to be a child engaged in real or simulated sexually explicit conduct and realistic and/or virtual depictions of a child engaged in sexually explicit conduct’.

However, we would like to point out that the terms ‘real or simulated’ describe the sexual activity, not the child (‘real or simulated explicit sexual activity’ rather than ‘real or simulated child’). Whether certain conduct is ‘real’ or ‘simulated’, does therefore not substantiate the subject of the conduct, but rather the nature of the conduct at hand. In conclusion, only the term ‘child’ can expand the scope of the definition of ‘child pornography’ to include virtual child pornography and persons who are made to appear as minors. Therefore, Art. 2 (c) OPSC does currently not cover virtual child pornography or persons who are made to appear as minors.

We strongly support the criminalisation of such material as it nurtures the market of online child sexual abuse material and normalises the sexual abuse and exploitation of children.[[9]](#footnote-9) We therefore recommend that the Committee stresses the importance of exceeding the current protection standard of the OPSC by criminalising ‘any form’ of child sexual abuse material, not only the depiction of actual persons below the age of 18 years. Further, as mentioned earlier, we recommend that the General Comment should explicitly encourage the criminalisation of mere possession and accessing child sexual abuse material and urge member states to leverage criminal law to combat new emerging forms of such material, even if not explicitly mentioned in the OPSC.

***Sexting between minors***

 In line with the DRAFT Guidelines to the OPSC, we would like to emphasise the importance of addressing the issue of sexting between minors.

Topics such as sexuality, identity, intimacy, and interpersonal connection are of interest for teenagers in their journey of identity exploration and construction. While these areas have been traditionally explored and constructed in offline interactions with the self and others, an increasingly important realm for such activities is the internet.[[10]](#footnote-10) In so-called ‘developed’ countries, 94% of young people aged 15-24 use the internet compared with 67% in ‘developing’ countries and only 30% in ‘Least Developed’ Countries.[[11]](#footnote-11) Given these numbers, it is not surprising that child sexual exploration has expanded to the internet.[[12]](#footnote-12) A common form of such online sexual exploration is ‘sexting’. The term is a portmanteau of the words ‘sex’ and ‘texting’ and describes self-produced sexually suggestive or explicit images and texts and distribution thereof by cell phone messaging, internet messenger, social networks *et al.*[[13]](#footnote-13) With teenage sexting material and ‘child pornography’ objectively depicting the same behaviour, i.e. sexual activity involving a minor, the law in many countries does not differentiate under which circumstances the material was produced, but criminalises the production, dissemination and possession of both groups of materials as child pornography offences. As ‘primary’ sexting material is produced and shared with the consent of the depicted person(s), without use of force or abuse of authority, it does not depict the sexual abuse and exploitation of a child. However, there is an inherent risk for sexting material to become more widely available than initially intended. As the depicted person naturally loses control of the material once shared, they rely on the confidentiality and integrity of the receiver. Such trust is often times broken when the relationship ends, and the material is widely circulated to embarrass the former partner.[[14]](#footnote-14)

In line with the DRAFT Guidelines to the OPSC, we agree that this conduct in and of itself is not necessarily illegal or wrongful, but that there are risks that such content is circulated online or offline beyond or against the will of the child. We would like to stress that under no circumstances, should the sharing of such material with the consent of the depicted person for private use only, whereby the depicted sexual activity is considered legal under the relevant legal framework, be subsumed under ‘child pornography’ offences. Further, no other, ‘milder’ criminal offence should be created to address consensual ‘sexting’ between minors.

It is crucial to stress that regulation of teenage sexting infringes upon such teenager’s most private sphere (sexuality) and hence the criminalisation of such behaviour necessarily needs to be discussed within the realm of child rights, such as freedom of expression, right to privacy or other rights dealing with a person’s sexuality or sexual expression. The key question is hence whether this extends to a right for minors to record and document their own lawful sexual activities, in particular, sexual conduct and nudity, and consensually share and possess this content. It is submitted, that any form of regulation, whether criminal or other, that infringes upon a child’s private sphere has to be discussed in the context of a rights-based approach.

Taking a rights-based approach in the context of children’s rights, however, also means to take the rightsholder’s limitations and hence need for protection into account. This means to pay close attention that sexual autonomy does not always equal consent.[[15]](#footnote-15) This is in particular relevant where power relationships, relationships of trust or dynamics of authority come into play, as children tend to be specifically vulnerable to such influences due to their developing capacity. This is the reason why laws in many countries do not only criminalise sexual activity with children under a certain age, but often times limit the validity of given consent in situations where there is a risk that consent is not given entirely voluntarily (e.g. relationship of dependence between child and the other person, or difference in age). Therefore, the child protection lens with regards to potential vulnerability needs to be applied within the context of child’s rights, not *vice versa*. When looking for a rights-based approach to teenage sexuality, the South African Constitutional Court case *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35 (hereafter: *Teddy Bear Clinic)* comes to mind. In this case, the Court had to decide whether provisions in the Sexual Offences Act, which criminalised consensual sexual acts with children between 12 and 16 years, were unconstitutional. In short, the Court held that there was no rational link between the provisions and the stated purpose.[[16]](#footnote-16) Additionally elaborating on less restrictive means, the Court stressed that there is a variety of less restrictive means available to encourage adolescents to engage in a healthy and responsible sexual relationships, such as improving parent-child sexual communication as well as comprehensive sex education instead of abstinence-only or no sex education.[[17]](#footnote-17) In conclusion, the Court held that the provisions in the Sexual Offences Act criminalising the adolescents for engaging in consensual sexual conduct are unconstitutional.[[18]](#footnote-18)

In order to strike the balance between children’s right and child protection concerns, we submit that the Committee could recommend the inclusion of an exemption clause in the national legal framework, as proposed in Art 20 (3) Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (‘Lanzarote Convention’). Criminalising consensual sexual contact between minors, including ‘sexting’, will not assist in preventing risk turning into harm. It might only have negative effects, as sexuality might be driven underground, parental guidance to safe sexting is hampered, and teenagers will not seek support if material is disseminated against their will. Therefore, it is crucial to tackle this issue through a holistic and comprehensive multi-stakeholder stakeholder approach. One of the key interventions to ensure that risk does not turn into harm is the capacitation of children to detect risks and give them tools how to respond to them. This can be achieved through comprehensive sexuality education, focusing on gender stereotypes, sexual autonomy, and building healthy sexual relationships with oneself and others, both online and offline. At the same time, creating a safe and confidential environment for questions around sexuality and sexual exploration, in schools, homes and the community, could assist in promoting safer sex(ting).[[19]](#footnote-19)

## (transnational) law enforcement collaboration

Online child sexual abuse is a global problem, and hence requires global solutions. It is the rule, rather than the exception, that perpetrator and offender in cases of production and dissemination of child sexual abuse material are not based in the same country. Therefore, a strong transnational law enforcement collaboration mechanism is a key element for identifying and rescuing victims, and prosecuting offenders.

We concur with the Committee’s recommendation in the DRAFT Guidelines to the OPSC, which urges State Parties to leverage the extradition and mutual legal assistance mechanisms provided for in Art 5 and 6 OPSC. Apart from these formal mechanisms, we propose that the Committee recommends increased police-to-police collaboration, as the formal mutual legal assistance process can lead to significant delays in the investigation process.

 However, even if two states manage to exchange relevant information through police-to-police or mutual legal assistance collaboration, the digital divide between states can significantly hamper the success of an investigation. Many states have no or only limited capability and capacity in dealing with child sexual abuse material investigations, including the seizure and analysis of digital evidence. Digital literacy is in many countries the first stumbling block for a successful online investigation in potential child sex offender cases. We would further like to highlight the complexity of the analysis of child sexual abuse imagery. If such material is shared between countries for investigative purposes, it needs to be ensured that the receiving state has the technical capacity to safely store and analyse the data. Further, it needs to be acknowledged that the analysis of such material requires the vetting and in-depth training of police officers, while ensuring their access to de-briefing and psycho-social support services. Therefore, transnational capacity building programmes are a key intervention to ensure police forces have the capability and capacity to respond to child sexual abuse material. Acknowledging the limitations law enforcement in many countries might face when it comes to the investigation of child sexual abuse material, it is important to stress that the solutions for these problems might lie outside the traditional criminal justice sector. ICT industry plays a crucial role in combatting the dissemination of child sexual abuse material, and corporate social responsibility is a potential entry point for increased industry collaboration.

 We therefore recommend that the Committee stresses the importance of leveraging and strengthening extradition and mutual legal assistance mechanisms, while urging states to make use of transnational capacity building programmes. Combatting child sexual abuse material further requires a holistic multi-stakeholder approach, with the ICT industry playing a crucial role in complementing the work of law enforcement.

## Concluding Remarks

 Online child sexual abuse is for many countries worldwide not a focus area yet. The high numbers of contact child sexual abuse are an overwhelming task that countries already struggle with. Online child sexual abuse, as opposed to contact offences, is often times perceived as a completely new area, which requires a highly specialised intervention. As countries face budgetary and capacity limitations in combatting contact child sexual abuse, they might be deterred from touching on the topic of online child sexual abuse in the first place.

 Therefore, we recommend that the Committee stresses that when developing national strategies to combat online child sexual abuse, it is decisive to understand that there is ‘no online without offline’. Online and offline child sexual abuse are closely connected, as the abuse follows similar patterns. Instead of coming up with a separate strategy to specifically tackle online child sexual abuse, countries are urged to integrate online child sexual abuse in their overall violence against children prevention and response strategies. For example, when capacitating law enforcement officials on investigating child sexual abuse offences, a component on the dynamics of online child sexual abuse could be included. Prevention strategies on violence in schools could include a chapter on online sexual abuse and the risks of ‘sexting’, and social welfare professionals could be sensitised on detecting sign of online and offline child sexual abuse.

 We would like to thank the Committee for giving Leiden University the opportunity for submission, and would like to inform the Committee that we are willing to further assist in the drafting of the General Comment where needed.

1. This document has been prepared by: Prof. Dr. Ton Liefaard, UNICEF Chair in Children’s Rights, Leiden Law School; Prof. Dr. Julia Sloth-Nielsen, Leiden Chair of Children’s Rights in the Developing World; Ms. Sabine K. Witting (corresponding author: sabine.witting@gmx.de), PhD Researcher. [↑](#footnote-ref-1)
2. UNICEF, *The State of the World’s Children 2017,* New York 2017, p. 1. [↑](#footnote-ref-2)
3. UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children,* New York 2015, p. 1. [↑](#footnote-ref-3)
4. Internet Watch Foundation, *Once Upon a Year: The Internet Watch Foundation Annual Report 2018*, Cambridge 2018, p. 28. [↑](#footnote-ref-4)
5. UNICEF, *The State of the World’s Children 2017*, New York 2017, p. 76; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, p. 8. [↑](#footnote-ref-5)
6. UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, Florence 2009, p. 3. [↑](#footnote-ref-6)
7. Economic and Social Council, *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 the basic measures needed for their eradication*, E/CN.4/1998/103 (24 March 1998), para. 49; Alisdair A. Gillespie, *Child Pornography. Law and Policy,* London2011, p. 98. [↑](#footnote-ref-7)
8. UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children* (2015), pp. 22 – 23. [↑](#footnote-ref-8)
9. For a comparative analysis of virtual child pornography and persons made to appear as minors from a constitutional perspective, see Sabine K. Witting, *The "Greyscale" of "Child Pornography": Of Mangas, Avatars and School Girls: Part 1,* Computer and Telecommunications Law Review, Issue 3 (2018); Sabine K. Witting, *The “Greyscale” of “Child Pornography”: Of Mangas, Avatars and School Girls: Part 2*, Computer and Telecommunications Law Review, Issue 4 (2018). [↑](#footnote-ref-9)
10. David Smahel/Kaveri Subrahmanyam, *Adolescent Sexuality on the Internet: A Developmental Perspective* in: Fabian M. Saleh/Albert J. Grudzinskas/Abigail M. Judge, *Adolescent sexual behavior in the digital era,* Oxford 2014, p. 62. [↑](#footnote-ref-10)
11. *Ibid.* [↑](#footnote-ref-11)
12. Jane Bailey/ Hanna Mouna, *The Gendered Dimensions of Sexting: Assessing the Applicability of Canada's Child Pornography Provision,* Canadian Journal of Women and the Law, Vol. 23 (2011), p. 413. [↑](#footnote-ref-12)
13. UNICEF, *Regulation of Child Online Sexual Abuse. Legal Analysis of International Law & Comparative Legal Analysis*, Windhoek 2016, p. 16. [↑](#footnote-ref-13)
14. Alisdair A. Gillespie, *Child Pornography. Law and Policy,* London2011, pp. 31 – 33; UNICEF, *The State of the World’s Children 2017* (2017), pp. 220 - 221. [↑](#footnote-ref-14)
15. For an in-depth discussion of the concepts of sexual autonomy and consent, see Joseph J. Fischel/Hillary O’Connell, *Disabling consent, or reconstructing sexual autonomy*, Columbia Journal of Gender and Law, Volume 30/2 (2015). [↑](#footnote-ref-15)
16. *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35, para. 94. [↑](#footnote-ref-16)
17. *Ibid.,* para. 98 – 99. [↑](#footnote-ref-17)
18. *Ibid.,* para. 101. [↑](#footnote-ref-18)
19. For a comprehensive comparative legal analysis of the issue of ‘sexting’ between minors, see Sabine K. Witting, *Regulating bodies: the moral panic of child sexuality in the digital era*, Critical Quarterly for Legislation and Law, Vol. 1 (2019), pp. 5-34. [↑](#footnote-ref-19)