



THE PERMANENT MISSION
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

May 6, 2019

Human Rights Treaties Branch
Committee on the Rights of the Child
United Nations Office at Geneva

Dear Secretariat:

Thank you for your letter dated February 19, 2019, seeking comment on 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.

In follow up to our response and communication on March 29, 2019, the United States provides the additional attached information.

Sincerely,

A handwritten signature in blue ink that reads "Jason Mack".

Jason R. Mack

Human Rights Counselor

SUBJECT: U.S. Supplemental Submission on the OPSC Draft Guidelines 2019

The United States thanks the Committee on the Rights of the Child (“Committee”) for the opportunity to comment on 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 (OPSC) (“Draft Guidelines”). The United States is committed to the protection and promotion of human rights of children and takes seriously its obligations under the OPSC.

The United States appreciates the Draft Guidelines’ identification of several important issues concerning implementation of the OPSC.¹ Much of the discussion in the Draft Guidelines reflects sound practices that can promote effective implementation of obligations contained in the OPSC. In addition, we appreciate the Committee’s important role in assisting States parties in their efforts to implement obligations under the OPSC and making nonbinding recommendations on making such implementation more effective. In an effort to support these useful efforts, the United States offers numerous recommendations and suggested language for inclusion in the Draft Guidelines. These recommendations and suggested language do not represent acceptance of the Draft Guidelines in whole or in part or that the United States is indicating its approval of future work on the Draft Guidelines.

In a number of instances the Draft Guidelines contain observations on matters beyond the Committee’s mandate. Although the OPSC does not address the Committee’s mandate in detail, Article 43(1) of the Convention on the Rights of the Child (CRC) indicates generally that the Committee is established “for the purpose of examining the progress made by States parties in achieving the realization of the obligations undertaken” in the CRC. Assuming this mandate also applies to the OPSC, its focus on “the obligations undertaken” in the OPSC would mean that the Committee’s mandate is limited to matters in which the OPSC creates obligations for States parties, and does not extend to other matters involving the protection of children as to which the OPSC does not establish obligations. In addition, it is important to bear in mind that the Committee does not have the mandate or authority to issue authoritative interpretations of the CRC and its Optional Protocols. This authority rests with the States parties to these treaties, and the Committee’s views, while meriting due consideration, are not binding on States parties.

In a number of places the Draft Guidelines express views—often in extraordinarily prescriptive terms—on topics beyond the bounds of State parties’ obligations under the OPSC. Examples of such overreach range from statements that indicate general measures of implementation that are both prescriptive and overreach by requiring training on gender identity by caregivers (paragraph 15); to double criminality “should not be applied” to crimes covered by the OPSC (paragraph 88); to the assertion that specialized training for police, lawyers, prosecution, and judiciary professionals “must” include online issues (paragraph 41). More broadly, sections of the Draft Guidelines relating to comprehensive policy and strategy; coordination, monitoring, and evaluation; allocation of resources; and training (sections III-C, D, E, and G, respectively) go far beyond the scope of OPSC obligations, recommending broad policy reforms for States parties in addressing child sexual exploitation. There is no question that broad policy recommendations such as these may have merit in the broader context of addressing child sexual exploitation; indeed, many of the Committee’s recommendations reflect existing U.S. practice or U.S. views on what constitutes best practices. However, such recommendations, particularly when couched in prescriptive and mandatory terms, overstep the bounds of the Committee’s role in relation to the OPSC. To be clear, the Committee is not a legislative body. Its focus should be limited and not prescriptive.

¹ The United States reiterates that it is not a party to the Convention on the Rights of the Child.

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The Committee also exceeds its mandate in suggesting that specific terms adopted by the States parties for use in the OPSC are inappropriate for use in domestic legislation implementing the OPSC. In this regard, the Committee's role is to address itself to the obligations contained in the text of the OPSC adopted by the States parties, and not to attempt to rewrite what the States parties have written. The United States is supportive of States reconsidering the dated terminology used to describe child sexual exploitation, such as "child prostitution" and "child sex tourism," in domestic legislation and elsewhere. However, including such recommendations in these nonbinding Draft Guidelines related to implementation of the OPSC's obligations could give the misimpression that they relate to, or are required in connection with, States parties' obligations under the OPSC. The Committee is not empowered to change these legal terms of art, which have specific definitions laid out in the OPSC itself; rather, it is for States parties to amend the OPSC if they believe that doing so is appropriate to modernize its terminology or for other reasons.

In other instances, the Draft Guidelines misstate or advance flawed interpretations of obligations established in the OPSC. For example, in paragraph 103, the Committee purports to "remind" States parties of their obligation to ensure that criminal justice proceedings "are carried out in the best interest of the child." Article 8 of the OPSC, in contrast, requires only that States parties "ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the [OPSC], the best interest of the child shall be a *primary consideration*." Moreover, the Draft Guidelines go on to state "this [obligation] includes" a variety of measures, including providing free legal aid. Many of these measures may be commendable, but none of them are required as a matter of law under the OPSC. Such misstatements, whether deliberate or inadvertent, undermine the Committee's credibility on this important topic.

More generally, the United States disagrees with the Committee's characterization of the OPSC as a "living instrument" to which a "dynamic interpretation" is to be applied. The OPSC is a treaty which, in accordance with international law, is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. While there may be occasion to apply the OPSC in a variety of factual settings as situations implicating its provisions arise over time, absent amendment, the text and appropriate interpretation of the treaty's provisions are not subject to change. The United States will continue to view the text of the OPSC—rather than these Draft Guidelines—as setting forth the United States' obligations, in conjunction with the reservations, understandings, and declarations that accompanied U.S. ratification of the OPSC. The United States reiterates that the foundation of international law is State consent, and that international law has binding force only to the extent that it is based on that consent.

The United States further notes the complexities raised by the assumption underlying the Draft Guidelines that States parties to the OPSC are also all parties to the CRC. For example, Paragraph 14 of the Draft Guidelines states that "measures of implementation of the provisions in the OPSC should fully comply" with the CRC. The United States is not party to the CRC and emphasizes that such references to implementation of the OPSC complying with the CRC, or the obligations therein, do not apply to the United States.

Beyond concerns regarding the scope and mandate, the United States notes that in several places the Draft Guidelines raise serious federalism concerns. The United States does not have centralized law enforcement, or centralized law-making in the way the Draft Guidelines contemplate, and would have difficulty implementing several suggestions, including those related to legislation, prosecution,

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sentencing, data collection, and analysis. In addition, aspects of the Draft Guidelines could conflict with U.S. obligations under international human rights law and the U.S. Constitution. This is a particular concern with regard to restrictions on speech and other expression, which is generally protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the First Amendment of the U.S. Constitution.

The United States prefers use of the terms “women and men” and “girls and boys” to “gender” in appropriate situations where they provide greater clarity and focus in the Draft Guidelines

Finally, the United States notes that the Draft Guidelines could benefit from additional discussion of the OPSC in the context of new threats to which its obligations may apply. For example, other than in passing (paragraphs 2–3), the Draft Guidelines do not address the Dark Net (or Darknet); nor do the Draft Guidelines discuss newer forms of child sexual exploitation such as live streaming of abuse.

Some additional examples of the concerns raised above, together with comments on some more specific matters, relate to the following paragraphs:

- Paragraph 15 provides guidance on the drafting process for legislative and policy measures and gender training for caregivers. We suggest omitting the last sentence of paragraph 15 and replacing it with the following:

States parties should make best efforts to consider the unique needs of the child during the drafting process of legislative and policy measures, and should make efforts to include the representative views of all vulnerable children, taking into consideration their age and maturity to gauge the level of participation by the child.

- Paragraph 18 and Paragraph 54 both emphasize that children should not be prosecuted for any conduct related to their exploitation, but in both instances, the phrasing is awkward. In addition, Paragraph 18 uses the phrase “trafficked across borders,” which implies that trafficking in persons is strictly a movement-based crime that only occurs across international borders. To more clearly express the point and avoid any inaccurate implications regarding trafficking, we suggest the following edits:

Paragraph 18: “The Committee urges States parties to ensure that **the child victims of the offenses set forth in the OPSC are not inappropriately arrested or prosecuted for unlawful acts committed as a direct result of their exploitation.**”

Paragraph 54 (final sentence): “The Committee underscores that all children who are sexually exploited in prostitution shall be considered victims, **and should not be inappropriately arrested or prosecuted for unlawful acts committed as a direct result of their exploitation.**”

- Paragraphs 29, 30, 31, 42, 95, 97, 102, 103, and 110 add the awkward and unclear phrase “child and gender-sensitive” before other descriptive terms. However, we urge a clarification that is more sensitive to all children: “**age appropriate information, being sensitive to the age and sex of the child**”.

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- Paragraph 29(c) suggests that States parties should “ensure that all persons, especially those caring for children, have adequate knowledge of the different forms of sexual exploitation and abuse of children ...” The United States questions how it is possible to “ensure” all persons caring for children have access to relevant information and comply. Some type of a licensing system might address this point, but there are unlicensed caregivers.
- In connection with the Committee’s suggestions in paragraph 29(d), we recommend broadening the last sentence as follows: “Information should be provided in collaboration with **instructors (with parental consent), parents, and caregivers.**” We also suggest adding a new subparagraph to paragraph 29 following (a) on dissemination and awareness-raising on the perpetrators of the crimes (the demand) and the impact of trauma inflicted on the victims and survivors. The new subparagraph (b) would read:

(b) Raise awareness about the perpetrators of the crimes to reduce the demand for the sexual exploitation of minors. Anti-demand efforts should address online exploitation, street-based exploitation, and exploitation by family members, community members, or other persons of trust.

- In paragraph 30, we recommend adding a subparagraph (e): “**Encourage training and effective responses for victims of offenses proscribed by the OPSC include services that are both victim-centered² and survivor-led.**”³
- In paragraph 31(c), we recommend changing “deal with” to “**identify and respond to.**” As edited, the subparagraph would read: “Train all police units investigating child sexual exploitation and abuse offences, including cases associated with the use of ICTs, as well as prosecutors and the judiciary, to **identify and respond to** child victims in a child- and gender-sensitive manner and to handle digital evidence and assess its weight and value, as well as to better understand child sexual exploitation and abuse cases associated with new technologies.”
- In paragraph 33, we suggest changing the phrase “particularly with regard to complex notions related to masculinity and gender, which” to “**that serve to foster, normalize, or.**”
- In paragraph 34, we recommend removing the unclear phrase “with due attention to the gender dimension” and editing paragraph 34(b) as follows: “Provide social protection and financial support, including income generating activities, to enable the economic empowerment of vulnerable **children, youth, and their families.**”

² The term “victim-centered” refers to an approach to practice that focuses on the safety, security, stability, and tailored needs of the victim rather than the roles, expectations, or desires of the service provider(s). In a victim-centered approach, the victim’s wishes, safety, and holistic well-being take priority in all matters and procedures. U.S. Department of Justice Office of Justice Programs, *Human Trafficking Task Force e-Guide: Strengthening Collaborative Responses*, available at <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/>.

³ The term “survivor-led” refers to an approach that equips and empowers survivors to take a leadership role in their own life and in the larger movement against the form of abuse and/or exploitation they have endured and overcome. See Karen Countryman-Roswurm & Bailey Patton Brackin, *The Journey to Oz: How Practice, Research, and Law Have Been Used to Combat Domestic Minor Sex Trafficking in Kansas*, 5(2) JOURNAL OF APPLIED RESEARCH ON CHILDREN: INFORMING POLICY FOR CHILDREN AT RISK (2018).

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- In paragraph 43, the Draft Guidelines urge “States parties to ensure that internet service providers control, block and ultimately remove” illegal content. In the United States, the government is generally prohibited from requiring private parties to monitor speech. Moreover, it is very difficult to remove this type of content from the internet once it is posted, not to mention the other means by which a subject could send or share the material. If possible, this statement should be qualified so that States parties should “ensure, **consistent with their national legal systems**, that internet service providers ...”
- Paragraph 51 is not consistent with the OPSC and the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and should be clarified. Through both of these Conventions, it should not be possible for an adoption that followed “applicable rules of international law” to have involved sale of a child.
- Paragraph 52 should omit “and to ensure that the best interests of the child is upheld at all times.” The term is highly subjective and open to interpretation. In addition, the stated purpose of the Draft Guidelines is to help States prevent the sale of a child; they are not aimed at addressing broader child welfare issues, child custody determinations, or parental responsibility proceedings, or societal determinations of children’s rights, and do not have the aim of emancipating minors or undermining parents’ rights. The “best interests of the child” standard is not directly related to preventing the sale of a child and is, in particular, not appropriate for use in all phases of the regulation of surrogacy.
- In paragraph 54, we believe that the Draft Guidelines intend to say that “survival sex” is a form of child prostitution within the meaning of the OPSC, but the language could be clearer in that regard. We propose the following edits to avoid confusion: “Moreover, such remuneration or consideration can be paid or given to any third person, and the child does not receive anything **directly**. Or the ‘consideration’ **can be provided directly to the child in the form of** basic survival needs such as food or shelter.”
- Paragraphs 61 to 63 should be qualified to indicate that States parties should define their laws or prohibit those activities “consistent with their national legal systems.” In the United States, we can only criminalize activity related to drawings, cartoons, etc., if they are obscene as defined under our law. Anything that does not meet the obscenity standard is protected speech under our Constitution, and therefore cannot be the basis of criminal prosecution.
- Paragraph 62: “... urges States parties to prohibit, by law, child sexual abuse material in any form.... including when such material represents realistic representations of non-existing children.” In the United States, federal law provides that it is illegal to create, possess, or distribute a visual depiction of any kind, including a drawing, cartoon, sculpture or painting, that depicts a minor engaging in sexually explicit conduct and is obscene. However, visual depictions (CGI, anime, etc.) where there is not a “real” child are typically protected by the First Amendment (unless the visual depictions are obscene) and the United States’ obligations under the ICCPR. We suggest editing the paragraph as follows: “... urges States parties to prohibit, by law, **consistent with their national legal systems**, child sexual abuse material in any form.... including when such material represents realistic representations of non-existing children.”
- Paragraph 63 states that “‘simulated explicit sexual activities’ should be interpreted as including any material, online or offline, that depicts or otherwise *represents* any person appearing to be a child

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engaged in real or simulated sexually explicit conduct and realistic and/or virtual depictions of a child engaged in sexually explicit conduct.” As noted above, such visual depictions are typically protected by the First Amendment (unless the visual depictions are obscene) and the United States’ obligations under the ICCPR. As a result, this language could complicate bilateral law enforcement engagement where other States expect the United States to investigate or prosecute leads based on activity that is not criminal and in fact protected expression in the United States. We suggest editing the paragraph as follows: “‘simulated explicit sexual activities’ should be interpreted, **consistent with their national legal systems**, 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.”

- Paragraph 70 refers to self-generated sexual content, such as sexting. The United States notes for purposes of this paragraph and elsewhere, that in States parties such as the United States, the production by a child of self-generated sexual content/material representing herself or himself can be a criminal offense.
- Paragraph 92 states that “... the Committee encourages States parties to establish universal jurisdiction for all offences covered by the OPSC ...” We note that the term “universal jurisdiction” is an imprecise term that can mean different things in different countries. The United States Criminal Code does contain some provisions that allow the U.S. government to exercise jurisdiction over those present in the United States for certain crimes committed in other territories; however, enacting this kind of statute is not always appropriate. Paragraph 92 should be discretionary under the Draft Guidelines. Therefore, we recommend editing the language to read: “... the Committee encourages States parties to **consider** establishing universal jurisdiction for all offences covered by the OPSC ...”
- Paragraph 93(a) should be edited to recognize that domestic law in some countries requires a bilateral treaty: “As a consequence, as far as these offences are concerned, and in accordance with article 5.2 OPSC, States parties do not need to have an extradition treaty with other States parties to be able to grant an extradition request, **except for those countries in which domestic law requires a bilateral treaty.**”
- In paragraph 98, the Draft Guidelines urge States parties “institute a formal ‘best interests of the child’ determination process, in accordance with article 12 CRC and General Comment No. 14, to ensure that the criminal prosecution of an alleged offender does not adversely affect the health and recovery of the victim.” We recommend editing the sentence to urge States parties to “**incorporate** a ‘best interests of the child’ **consideration into the** process, in accordance with article 12 CRC and General Comment No. 14, **in an effort to protect against** adversely affecting the health and recovery of the victim.”
- In paragraph 103(d), the Draft Guidelines urge States parties to avoid calling children to testify in court. The Confrontation Clause in the U.S. Constitution—which provides that a criminal defendant generally has the right to have witnesses against him or her testify in his or her presence—prevents or limits our ability to take many of the Committee’s recommended approaches. We again suggest that the Draft Guidelines clarify that States parties should take actions to the extent they are consistent with their domestic laws.

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- Paragraph 119 mentions supporting alliances such as the Virtual Global Taskforce (VGT). We note that VGT rules limit participation by allowing only one law enforcement representative per country. The same paragraph encourages States parties to establish a global task force to combat child sexual exploitation. We note that since 2014, the U.S. Federal Bureau of Investigation has overseen a task force that appears to meet this description. The Violent Crimes Against Children International Task Force currently includes 56 active members from 46 countries.
- Finally, the United States appreciates the Draft Guidelines’ discussion of “child sex tourism,” but notes that the Draft Guidelines place far too much emphasis on travel, without any acknowledgement of an increasingly serious concern: expatriates, or offenders who move abroad and never return (sometimes moving from country to country without returning to their home country). Some minor edits could incorporate this idea into the Draft Guidelines. The United States suggests the following changes:
 - Paragraph 37: “The **extraterritorial** sexual exploitation of children, **whether** in the context of travel and tourism (SECTT) **or by offenders residing outside their home country**, is an issue of increasing concern. Research has shown that children are at risk of sexual exploitation and sexual abuse from travelling offenders **who** cross borders to carry out premeditated abuse. **But** they are equally at risk of falling victim to offenders travelling for business **or** tourism **in** their own countries **or offenders who are residing outside their home countries**, as well as to ‘opportunistic’ offenders, **who** may not have planned to carry out a sexual offence **prior to** their travels. Illegal adoption may also be carried out using the context of travel and tourism as a cover or pretext.”
 - Paragraph 38: “To prevent these **extraterritorial** offences, which **can** take place in the context of travel and tourism **or offenders residing abroad**, States parties should ...”
 - Paragraph 59 (final sentence): “The offence can be committed by foreign or domestic tourists, travelers, **long-term visitors, and offenders who are residing outside their home countries.**”
 - Paragraph 89 (final sentence): “As the exploitation may not **have been** detected until the offender has **departed the country where the offence took place**, it is essential that States parties have the capability to prosecute her/him.”
 - To close out the discussion of extraterritorial sex offenders, the last sentence in paragraph 86 should refer to the authority to investigate and prosecute an offender. As written, the sentence is too narrow, focusing only on the ability to start an investigation.

The Permanent Mission of the United States avails itself of the opportunity to thank the Committee for the opportunity to comment on the Draft Guidelines and expresses once again the commitment of the United States to the protection and promotion of human rights of children.