



Prostasia Foundation
 18 Bartol Street, #995
 San Francisco, CA 94133

info@prostasia.org
 +1 415 650 2557
<https://prostasia.org>

**Comments on Draft Guidelines on the implementation of the OPSC
 15 March 2019**

Thank you for the opportunity to provide our comments 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 (the OPSC). In addition to this comments, we will be forwarding a petition under separate cover, which will be confined to the topic of paragraphs 60-63.

Prostasia Foundation is a child protection organization dedicated to taking an evidence-based, prevention-focused approach to protecting children, which upholds Internet freedom, sex-positivity, and human rights. Our mission is to ensure that the elimination of child sexual abuse is achieved consistently with the highest values of the society that we would like our children to grow up in.

Para	Comment
7	The Luxembourg Guidelines provide a useful terminological guide and reference document, and we agree with many of their recommendations. However, as far as we can ascertain, there has not been any resolution of OPSC member states endorsing these Guidelines; therefore, they do not carry the status of an official United Nations document. As a matter of procedure, therefore, it would be inappropriate for the Luxembourg Guidelines to be implicitly endorsed by the Committee in this paragraph, when there has been no opportunity for member states or for the general public to comment on the document. Were such an opportunity to be afforded, we would have several substantive concerns with the content of the document, some of which are referenced in subsequent paragraphs of this comment on the present Draft Guidelines.
34	We agree that part of a comprehensive program of prevention of the sexual exploitation and abuse of children involves the screening and supervision of those whose employment places them in direct contact with children. We question the emphasis placed on the establishment of registers of convicted sex offenders, which could create a false sense of security. Sex offender registries have been found to be ineffective, and to create significant collateral harms to those who have been convicted and completed their sentence, and to their families. Recidivism rates for those who have sexually offended against children are low: about 12-24%, and restrictions placed on their employment can make them <i>more</i> likely to reoffend, not less. ¹
42	Prostasia Foundation fully supports measures that major Internet companies voluntarily take to block child sexual exploitation materials (CSEM) using hash-based filtering technologies, which have been proven effective and proportionate. However this paragraph goes further in

¹ Hanson, R. K. & Morton-Bourgon, K. E. (2005). The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies. *Journal of Consulting and Clinical Psychology*, 73, 1154-1163.

	<p>suggesting that a generalized obligation to “control, block and, ultimately, remove” CSEM should be imposed by states on Internet service providers (ISPs) by law, which paragraph 82 further suggests might be enforced by criminal sanctions. We cannot support such a recommendation in this form, as it is far too vague and uncertain. For example, would the obligation apply to all ISPs, of any size, and regardless of their role (for example search engine, content host, or access provider)? What window of time would they have to comply? Does the requirement to “control” CSEM imply a proactive monitoring obligation? A much more in-depth consultation on those details will be required, which should include the input of the UN Special Rapporteur on Freedom of Expression and Opinion who has written a report on this very topic.²</p> <p>Additionally, this paragraph unscientifically assumes that exposure to CSEM “contributes to the promotion of a subculture in which children are perceived as sexual objects.” Experts believe that those who perceive children as sexually attractive generally become aware of that attraction naturally during adolescence, and that it may derive from an abnormality in their brains.³ The Draft Guidelines cite no evidence to support the assertion that non-pedophilic offenders can be socialized into becoming physically attracted to children through exposure to CSEM. To the extent that this paragraph suggests otherwise, it should be amended accordingly, or deleted.</p>
60	<p>This paragraph asserts that the definition of “child pornography” in the OPSC includes, aside from photographs and movies, also “drawings and cartoons; audio representations; any digital media representation; live performances; written materials in print or online; and physical objects such as sculptures, toys, or ornaments,” and in support of this interpretation, it cites the Luxembourg Guidelines; however those Guidelines provide no evidence in support of such a broad interpretation of the OPSC. We contest this expanded interpretation of the term, and contend that the OPSC’s reference to a representation of a child by whatever means refers to the representation of an <i>actual</i> child. This narrower interpretation accords with that of the Lanzarote Convention, which reserves to states the right not to criminalize the production or possession of “pornographic material consisting exclusively of simulated representations or realistic images of a non-existent child.”⁴</p> <p>This narrower interpretation also accords with state practice, which can be used as an aid to the interpretation of a treaty in case of doubt. Specifically, the United States Supreme Court has determined that the rationale for child pornography regulation is the protection of the physical and psychological well-being of actual children, by eliminating the record of their abuse, and suppressing the market for the exploitative use of those records.⁵ On this basis, it has further ruled against the extension of child pornography to artistic images such as drawings and cartoons, unless they are visually indistinguishable from real CSEM.⁶</p> <p>Implicitly, the Draft Guidelines seem to acknowledge the importance of this distinction; in paragraph 6 which correctly recites, “the term ‘child sexual abuse material’ [reflects] what it really is, namely the recorded material (images, videos, audio recordings etc.) of children being</p>

2 Kaye, D. (2016). UN Freedom of Opinion and Expression Report. Document No. A/HRC/32/38.

3 Cantor, J. et. al. (2008). Cerebral white matter deficiencies in pedophilic men. *Journal of Psychiatric Research*, 42(3), 167-83.

4 The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, Article 20(3).

5 *New York v. Ferber*, 458 U.S. 747 (1982)

6 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

	<p>sexually abused,” and in paragraph 64, which describes how the term “child pornography” “is considered to undermine the situation of the victim because it suggests a connection with pornography - an activity... to which the subject is capable of consenting, i.e. an adult. This is far from the reality of child victims of sexual exploitation and abuse.”</p> <p>We agree that the exploitation of real child victims is a cornerstone of the definition of CSEM, but this recognition undermines the Committee’s attempt to conflate images of real child exploitation with representations of non-existing children that involve no exploitation or abuse.</p>
61	<p>The only justification for the criminalization of the possession of “realistic representations of non-existing children” can be in the narrow case of images that are visually indistinguishable from real children, such as “deep fakes.” The justification is, in this case, a pragmatic one; since there is no way to reliably distinguish such images from real, any defendant accused of the possession of CSEM could simply allege that the images were simulated. The same justification underpins the inclusion of images of a “person appearing to be a minor/child” in the Budapest Convention and in EU Directive 2011/93, which in our view does not extend to cases in which the person can actually be identified as an adult. These pragmatic exceptions can be accommodated within the natural meaning of “any representation of a child” contained in article 2 of the OPSC, but the further expanded definition suggested in paragraph 60 of the Draft Guidelines is not justified.</p>
62	<p>A further justification is attempted in this paragraph: that the possession of representations of “simulated explicit sexual activities” of a non-existing child should be criminalized because such depictions “contribute to normalising the sexualisation of children and fuels the demand of child sexual abuse material” [sic]. These are in fact two separate claims, which we will examine in turn.</p> <p>Taking first the assertion of a link between sexual representations of non-existing minors and the consumption of actual CSEM, the Draft Guidelines provide no evidence to support this assertion. If we look to the Luxembourg Guidelines we see a similar but stronger claim repeated, attempting to link virtual images with sexual offending against actual children. Those Guidelines in turn reference an ECPAT document; however that document contains no empirical evidence to support its claim. Indeed, it acknowledges that “there remains an unfortunate dearth of research on this question,” and simply asserts “the strong intuitive plausibility of such a claim.”⁷</p> <p>What science tells us however is that what may seem intuitively plausible can nevertheless turn out to be completely wrong. We agree that there is insufficient research on this question, and we plan to raise funds for more such research. But what research we do have shows exactly the opposite of what ECPAT claims: that access to representations of non-existing children is <i>not</i> associated with greater social acceptability of sexual interaction with children,⁸ and that it may actually <i>decrease</i> rates of actual sexual offending against children.⁹ This may be because virtual representations such as cartoons and dolls can provide a safe, victimless outlet for some people who are sexually interested in children, but who abhor the idea of harming a real child.¹⁰</p> <p>The other claim made in this paragraph is broader: that even if no actual children are directly</p>

7 ECPAT International (2012). Protection and the OPSC: Justifying Good Practice Laws to Protect Children from Sexual Exploitation. *Journal Series No. 2*, 2012, 20.
http://www.ecpat.net/sites/default/files/ecpat_journal_apr2012_final.pdf.

8 Paul, B., & Linz, D. G. (2008). The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior. *Communication Research*, 35(1), 3-38.

9 Diamond, M., Jozifkova, E., & Weiss, P. (2011). Pornography and sex crimes in the Czech Republic. *Archives of sexual behavior*, 40(5), 1037-1043.

	<p>harmed by the availability of representations of non-existing minors, the availability of such representations creates a culture of tolerance for the sexualization of real children. Scholars have criticized this notion that the representation of childrens' sexuality in art and fiction is responsible for the premature cultural sexualization of children; pointing out that people create and consume such representations for many legitimate reasons, and that many of those who do so are sexually benign, non-pedophilic women.¹¹ Even if we accept it as true (since as framed, it can hardly be proved or disproved), this claim that representations of non-existing children contribute towards the sexualization of real children is insufficient to justify the blanket censorship of such representations, let alone the criminalization of their mere possession.</p> <p>As stated by the Special Rapporteur on Freedom of Expression and Opinion, because child pornography falls into the most tightly restricted category of expression that must be criminalized by states, such restrictions "must also comply with the three-part test of prescription by: unambiguous law; pursuance of a legitimate purpose; and respect for the principles of necessity and proportionality."¹² The proposal to include a broad and ill-defined range of artistic and literary expression within this category (drawings, comic books, written materials, toys, etc) is wildly disproportionate to its stated aim, and can in no way be justified as an exception to the right of freedom of expression guaranteed by Article 19 of the UDRP and the ICCPR.</p>
63	Our comments to paragraph 62 apply. See also our response to paragraph 87 below.
65	We support the revised terminology only for use to identify the subset of images that it accurately describes. Child pornography is not a satisfactory term for the reasons the Committee gives in paragraph 64. However, "child sexual exploitation material" is not a satisfactory term either. We have already noted that virtual child pornography cannot be so described, because no child is being abused or exploited in its production. But similarly, as paragraph 69 recognizes, sexual images that minors create of themselves are not the product of abuse or exploitation. In order to avoid wrongly stigmatizing minors as victims of abuse or exploitation simply for possessing sexual images of themselves, we find "unlawful sexual images of minors" to be a broader and more neutral term.
68	This paragraph is far too broadly framed. It appears to be intended to capture the case of a party advertising or promoting access to CSEM or to the sexual abuse of children, which we agree should be criminalized, and in most countries that recognize accessory crimes, already is criminal. But in the way it is framed, it goes much further. It suggests that "any insertion on an online or offline medium... promoting the sexual exploitation of children in any way" should be criminalized. There is a grave risk that such a broad ban could chill legitimate discussions around issues such the age of consent; for example the introduction of "Romeo and Juliet" exceptions to prevent teens from being criminalized for relationships with similar-age peers. Such a ban could also affect legitimate academic research on the effects of child sexual abuse. For example, one infamous meta-analysis provoked a motion of censure from the United States Congress over its

10 Morin, R. (2016). Can Child Dolls Keep Pedophiles from Offending? *The Atlantic*. January 11, <https://www.theatlantic.com/health/archive/2016/01/can-child-dolls-keep-pedophiles-from-offending/423324/>.

11 Madill, A. L. (2015). Boys' Love Manga for Girls: Paedophilic, Satirical, Queer Readings and English Law. In: Renold, E, Ringrose, J and Egan, RD, (eds.) *Children, Sexuality, and Sexualization*. Palgrave Macmillan , England , pp. 273-288.

12 La Rue, F. (2011). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. Document No. A/66/290, para 37.

	finding that the negative impacts of child sexual abuse had been overstated. ¹³ Such research should be open to robust discussion and criticism. Banning speech that can be characterized as “promoting the sexual exploitation of children” risks chilling such criticism.
69	We fully agree that a child must never be held criminally liable for the production of images of her-/himself. But equally, as explained in paragraph 65 above, this means that the use of terminology “child sexual exploitation material” is not appropriate in such cases.
70	The explanation given here for sexting—that it occurs as a result of peer pressure—is incomplete and inaccurate. Studies reveal that there are some teenagers who are self-motivated to engage in sexting with peers, as a part of their own natural exploration of pleasure and desire. ¹⁴
76	Paragraph 76 is poorly worded. By saying “a child under the age of 18 can never consent to any form of sale, sexual exploitation or sexual abuse,” the implication is that pornography and sex work are inherently exploitative and abusive at any age. The paragraph should be reframed to refer specifically to the acts that are covered by the OPSC in terms that do not suggest that persons over 18 engaging in pornography or sex work are necessarily being exploited or abused.
82	This paragraph suggests that Internet companies, financial intermediaries, and travel companies should be held complicit in offenses covered by the OPSC. Our comments are limited to the case of Internet companies, as that is where we have the most expertise. Internet companies are already obliged to remove child sexual abuse material that they host once they become aware of it. Many platforms go further than this, by adopting automated hash-based filtering systems as a voluntary industry best practice. As indicated in our response to question 42 above, if it is intended that Internet companies should do more than this, such as proactively monitoring the use of their platforms as a condition of avoiding liability, a much more detailed consultation on the implications of this would be required.
87	We oppose the proposed abolition of the “double criminality” requirement for offenses under the OPSC. Doing so would effectively allow a single state to unilaterally impose its own definition of child pornography upon all other states. The European Court of Human Rights explicitly rejected this approach in a case in which a Danish sex education textbook was considered to be obscene under United Kingdom law. The court ruled that a margin of appreciation should be allowed in such cases, reflecting different cultural conceptions of morality. ¹⁵
108	There is already a well functioning cooperative system for the blocking and removal of unlawful child sexual abuse images online, and we support the continuation of the collaborative approach that has made this system so effective. In particular, as indicated in our responses to paragraphs 42 and 82, we support the use of hash-based filtering systems such as PhotoDNA to identify known images of child sexual abuse so that they can be swiftly blocked or removed. The widespread adoption of such technologies as a voluntary industry best practice suggests that there is no need for states to go further by mandating technologically-specific rules that would apply across the Internet industry, irrespective of the size or character of the platform concerned.

13 Rind, B., & Tromovitch, P. (1997). A meta-analytic review of findings from national samples on psychological correlates of child sexual abuse. *Journal of Sex Research*, 34(3), 237-255

14 Lee, M. and Crofts, T. (2015). Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting Between Young People. *The British Journal of Criminology*, Volume 55, Issue 3, 1, 454-473.

15 *Handyside v United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976).