*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*

**Comments by the Holy See**

The Holy See welcomes this 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*.

The Holy See notes with appreciation that the Draft Guidelines contain some valid recommendations regarding the practical implementation of the criminalization and mutual legal assistance provisions of the Optional protocol (OPSC) that may facilitate the protection of children as well as the prevention and contrast of criminal activities against minors (Sections V to X). Nonetheless, the Draft Guidelines contain a number of areas that raise concerns for the Holy See.

1. The OPSC is a legally binding instrument that sets forth, in carefully negotiated language, the obligations that State parties have voluntarily undertaken. It being a treaty, the State parties’ obligations are exclusively those set forth in its text, as modified by each State’s reservations.[[1]](#footnote-1) Notwithstanding such clear legal principles, the Draft Guidelines purport to provide a “*dynamic interpretation of the OPSC provisions, aimed to enable their effective implementation and to ensure that it remains an instrument that enhances the protection of children from sale and sexual exploitation, whether facilitated by ICTs or not*” (Para. 13, emphasis added). Such intention raises concern insofar as it is not within the mandate of the Committee to provide a new interpretation of the OPSC. Although there might be, within reason, some margin of appreciation when applying the provisions of the OPSC in light of new circumstances, such as the development of ICTs, from a legal point of view only a Conference of State parties may amend the terms of the Protocol and those amendments are binding only upon those States which expressly accept them (OPSC art. 16). Thus, any attempt at changing the extent or content of the State Parties’ obligations without their consent would deny the value of their ratification, thereby entitling those States to withdraw from the treaty (*cfr*. VCLT art. 61.1). Such an outcome should be avoided.
2. The effective implementation of the OPSC in the context of a changing world would be better served if the Committee were to gather updated and accurate information on the new forms of abuse against children, akin to those already under the scope of the OPSC, with a view to encouraging States to fight those crimes. Such an effort would not require a new interpretation of the provisions of the Protocol. A better understanding of the evolving threats to minors may also suggest new practical steps that can be taken to comply with the OPSC in light of current circumstances. The Holy See would therefore suggest the elimination of paragraph 13 of the Draft and the rewording of paragraph 11 as follows:

*“The main objective of these Guidelines is to foster a deeper understanding of the various forms of modern child exploitation and abuse, in light of developments in the digital environment as well as of the increased knowledge and experience developed with regard to the sale and sexual exploitation of children since the adoption of the OPSC in order to enable a more effective implementation of its provisions by States parties”.*

1. In the current draft, the Committee seems to draw from the recommendations of non-State “shareholders” to introduce concepts not found in the OPSC. By way of example one could mention: the request to adopt a “*gender perspective*” while recognizing the possibility of sexual identities other than male and female, the reference to “*children of other gender/sex identities”* (para. 15), and the mention of “*LGBTI children*” (para. 34). Neither the CRC nor the OPSC require State parties to adopt a “*gender perspective*” nor allow for the introduction of concepts based on subjective lifestyle choices and attractions. In addition, the suggestion to depart from the terminology used and clearly defined in the OPSC, such as the term “*child pornography*” (para. 15), would seem unwise.
2. According to the Draft guidelines, State parties would be required to “*pay attention to root causes underlying these problems, such as harmful social norms, particularly with regard to complex notions related to masculinity and gender*” (Para. 33, emphasis added). However, neither “*harmful social norms*” nor “*complex notions related to masculinity and gender”* are properly defined in the text. Such lack of precision could undermine the common understanding on which the OPSC is based. In this context, it is worth recalling that when the OPSC mentions “*root causes”*, it mainly refers to “*poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex-tourism*” (art. 10.3).
3. Regarding surrogacy (para. 52), the Holy See would like to recall that such a practice not only opens the door to the sale of children, but also to the exploitation of women, which raises important moral and legal questions as well as grave consequences for the status and filiation of the child. Surrogacy, in fact, undermines the human dignity of both the woman and the child.
4. The main body of the Draft guidelines (Sections V to X) contains valid suggestions on how to implement, in practice, the criminalization and mutual legal assistance provisions of the OPSC. Those suggestions would be useful as non-binding *best practices*, that Stats parties could examine voluntarily and put into place in light of their particular circumstances, needs and legal order. However, such best practices should not be presented as if they were an authoritative interpretation of the provisions of the treaty (*cfr*. para. 12), thus ascribing to them a legally binding character that, in fact, they do not possess.
1. Since the OPSC is a treaty, it must be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT), which codify the relevant customary international law. VCLT art. 31.1 requires, in particular, that treaties, including the OPSC, be interpreted “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.* According to VCLT art. 31.2, the relevant context includes any preamble and annexes, any agreement between all the parties, and any instrument made by one or more parties in connection with the conclusion or acceptance of the instrument, such as States parties’ reservations and interpretative declarations. The *travail préparatoire* may be used as supplementary means of interpretation only when a strict interpretation of “*ordinary meaning of the terms*” of a treaty would render its provisions ambiguous or obscure or it would lead to a manifestly unreasonable result (VCLT, art 32). [↑](#footnote-ref-1)