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Addressing the Vulnerabilities of Children to Sale and Sexual Exploitation in the Framework of the Sustainable Development Goals

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This submission responds to the call for input issued by the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material inform the Special Rapporteur's annual thematic report on addressing the vulnerabilities of children to sale and sexual exploitation in the framework of the SDGs, to be presented to the 77th session of the UN General Assembly in October 2022.

This submission is firmly grounded in international children's rights, including the CRC Committee's *Guidelines regarding 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: the Guidelines)² and *General comment No. 25 (2021) on children's rights in relation to the digital environment* (hereafter: GC 25)³.

1. HOLISTIC GENDER LENS

The author would like to commend the Special Rapporteur for pointing out the diverse gender dimension of OPSC offences in her previous report.⁴ The sale and sexual exploitation of children were long wrongfully understood to be 'girls' issues. Considering the persistent vulnerability of girls and their overproportionate representation in victim statistics in the context of these offences⁵, a focus on this group of children is absolutely necessary yet should not be misunderstood to be interchangeable with a holistic gender perspective. Boys' vulnerability is often times masked as a strength and hence not considered as a weakness: being socialised in patriarchal societies where 'boys don't cry' and grappling with harmful expectations posed onto them under the guise of 'masculinity', boys often times suffer in silence when experiencing violence.⁶ As the Special Rapporteur points out in her 2020 report, '[t]here are complex, ingrained and interrelated gaps linked to deep personal identity issues for boys around their masculinity and sexuality that prevent disclosure'⁷. This paired with an 'unwitting professional blindness on the part of some workers to indicators of exploitation in boys owing to the gendered expectations about the context

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² CRC Committee, *Guidelines regarding 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*, CRC/C/156, adopted on 30 May 2019.

³ CRC Committee, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25, adopted on 24 March 2021.

⁴ Mama Fatima Singhatheh, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/75/210 (21 July 2021).

⁵ In 2019 and 2020, 92% and 93% of children depicted in child sexual abuse material analysed by the Internet Watch Foundation respectively were females, see Internet Watch Foundation, *The Annual Report 2020*, available here: <https://www.iwf.org.uk/report/iwf-2020-annual-report-face-facts>; CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 4.

⁶ Christine Ricardo/Gary Bake, *Men, Masculinities, Sexual Exploitation and Sexual Violence. A Literature Review and Call for Action*, Washington 2008, pp. 16-17; UNICEF, *Research on the Sexual Exploitation of Boys: Findings, ethical considerations and methodological challenges*, New York 2020, pp. 6 et seq.

⁷ Mama Fatima Singhatheh, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/75/210 (21 July 2021), para. 19.

of sexual exploitation'⁸, there is urgent need to rethink the true gender-responsiveness of strategies employed to combat the sale and sexual exploitation of children.

This further requires paying special attention to children 'who identify outside the gender binary'⁹, as well as 'lesbian, gay, bisexual, transgender and intersex children'¹⁰ and their experiences in the context of sale and sexual exploitation of children.¹¹ The specific recognition of sexuality diverse and gender diverse children resonates with evidence that suggests LGBTIQ+¹² children are both more likely to be sexually violated online and are more severely impacted by it. LGBTIQ+ children are more likely to look for sexual health information and explore their sexuality online.¹³ Online sexual exploration might feel safer for this group of children and in many parts of the world, be the only space where they can explore their sexuality altogether, with the least fear of persecution. This search for positive sexual identity online puts LGBTIQ+ children at higher risk of being taken advantage of.¹⁴ At the same time, evidence suggests that LGBTIQ+ children suffer from more severe impact of the online violence, as it adds to the already existing stress of belonging to a sexual minority and an increased feeling of being unsafe.¹⁵

It is therefore recommended to continue the application of a holistic gender lens on the OPSC offences, to identify the root causes of such harms and develop evidence-based strategies for prevention and response.

2. INTEGRATED APPROACH TO CHILD PROTECTION SYSTEM STRENGTHENING

While the Internet has created new forms of child sexual abuse, such as live-streaming of child sexual exploitation and abuse (hereafter: CSEA), it also facilitates a continuum between 'offline' – that is, contact – CSEA and 'online' CSEA.¹⁶ OCSEA is closely linked to 'offline' child sexual abuse and exploitation. Survivors share similar vulnerabilities and the impact on their physical and mental health can be equally devastating and long lasting.¹⁷ The promulgation of two separate, distinct 'online' and 'offline' 'worlds' are an artificial construct which does not reflect children's lived realities. This recognition is important when discussing prevention and response to online CSEA, as these offences tend to combine both online and offline components and hence require a holistic conceptualisation beyond online-offline binaries. Considering the importance of General Comment No. 25 in conceptualising children's rights in the digital

⁸ Singhateh, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/75/210, para. 19.

⁹ Singhateh, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/75/210, para. 39.

¹⁰ CRC Committee, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25, para. 11; CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 13.

¹¹ Identifying LGBTIQ++ children as specifically vulnerable in the context of online child sexual abuse and exploitation, WeProtect Global Alliance, *Global Threat Assessment 2019*, p. 29.

¹² The term 'LGBTIQ' stands for Lesbian, Gay, Bisexual, Transsexual, Intersexual, Queer'. The '+' is added to cover any other sexual orientations or gender identities which do not fall under the above identifications.

¹³ Corinne May-Chahal/Emma Palmer, *Rapid Evidence Assessment. Characteristics and vulnerabilities of victims of online-facilitated child sexual abuse and exploitation*, Lancaster 2018, p. 48; Tink Palmer, *Digital dangers. The impact of technology on the sexual abuse and exploitation of children and young people*, Ilford 2015, p. 33.

¹⁴ Mitchell Kimberly/Michelle Ybarra/Josephine Korchmaros, *Sexual harassment among adolescents of different sexual orientation and gender identities*, Child Abuse and Neglect, Vol. 38 (2014), p. 285; May-Chahal/ Palmer, *Rapid Evidence Assessment. Characteristics and vulnerabilities of victims of online-facilitated child sexual abuse and exploitation*, p. 48; according to a study, Flemish teens who identify as LGBTIQ+ were more often pressured into sharing sexually explicit material of themselves compared to their heterosexual peers, see WeProtect Global Alliance, *Global Threat Assessment 2021*, p. 56.

¹⁵ Kimberly/Ybarra/Korchmaros, *Sexual harassment among adolescents of different sexual orientation and gender identities*, p. 291.

¹⁶ Daniel Kardefelt-Winther/ Catherine Maternowska, *Addressing violence against children online and offline*, Nature Human Behaviour (2019); ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016, pp. 19–22; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 8.

¹⁷ UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015.

environment, it is unfortunate that it does not take a specific stance on this subject matter but only states that ‘*children’s online protection should be integrated within national child protection policies*’¹⁸. Considering that many countries still perceive children’s rights in relation to the digital environment to be a complete new set of rights compared to children’s rights ‘as we know them’, an explicit conceptualisation of the online-offline nexus is important to foster a holistic understanding of children’s rights in today’s digitalised and globalised world. This should not deny that OCSEA has its own dynamics and require additional, specific interventions. However, an overall holistic conceptualisation will assist Governments to increasingly focus on these specific online dimension of CSEA by integrating OCSEA into the wider child protection system, instead of creating a duplicative ‘online’ child protection system.¹⁹

3. USE OF TECHNOLOGY IN THE DETECTION OF OCSEA

Even though technology facilitates new forms of OCSEA, it is also an integral part of the solution. The CRC Committee in its Guidelines encourages ICT companies to develop technology-based solutions to combat OCSEA²⁰. Considering the importance tech solutions play in the identification and detection of OCSEA offences, it is crucial to point out that technology alone is not the solution to OCSEA. Technology-based solutions must always form part of a broader child protection system strategy and should not be deployed as an isolated ‘quick fix’.

This also means that when we as child protection experts speak of tech solutions, we need to acknowledge that OCSEA tech investigation tools are not a homogenous group of technology solutions. Technologies deployed in the fight against OCSEA range from file hashing to computer vision and artificial intelligence, and differ greatly in their overall ability, effectiveness, and maturity. This does not only impact their overall efficiency in protecting children from OCSEA, but also means that they impact other children’s (and human) rights such as right to privacy and data protection as encompassed in Art 16 CRC in varying degrees. When discussing legal frameworks such as the EU Digital Services Act or the temporary derogation to the EU ePrivacy directive, it is important to not lose sight of the principle of proportionality and seek solutions which do not deplete the essence of any of the rights affected through the legislation. However, the discourse around such new legislative developments aiming to strengthen OCSEA detection is often heavily polarised with child protection experts on one, and data protection experts on the other end of the spectrum. Such a ‘protection vs. privacy’ dichotomy neglects the fact that both protection from violence, abuse and neglect as well as right to privacy are core children’s rights as guaranteed in the CRC. Similar debates take place in the context of end-to-end encryption. The CRC Committee in General Comment No. 25 states that ‘where encryption is considered an appropriate means, States parties should consider appropriate measures enabling the detection and reporting of child sexual exploitation and abuse or child sexual abuse material. Such measures must be strictly limited according to the principles of legality, necessity and proportionality’.²¹ Even though it is clear that the devil lies in the detail²², it is important to note that the CRC Committee is calling for a proportionate solution to this question, which to the best

¹⁸ CRC Committee, *General comment No. 25 (2021) on children’s rights in relation to the digital environment*, CRC/C/GC/25, para. 25.

¹⁹ Best practices of such an integrated approach are increasingly emerging also from lower and middle income countries, see UNICEF, *Ending online child sexual exploitation and abuse. Lessons learned and promising practices in low- and middle-income countries*, New York 2021.

²⁰ CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 36.

²¹ CRC Committee, *General comment No. 25 (2021) on children’s rights in relation to the digital environment*, CRC/C/GC/25, para. 70.

²² For a more detailed analysis of this subject matter see Daniel Kardefelt-Winther/Emma Day/Gabrielle Berman/Sabine K. Witting/Anjan Bose, *Encryption, Privacy and Children’s Right to Protection from Harm*, Office of Research – Innocenti Working Paper, Florence 2020.

extent possible both protects the child's right to privacy and the child's right to be protected from all forms of violence, abuse and exploitation.²³

It is therefore crucial to overcome this tunnel vision and engage in critical, constructive dialogue with other disciplines which are pertinent to finding a proportionate balance to these sensitive and important questions, i.e. child protection, human rights, data protection, digital technologies and cybercrime²⁴. It is unfortunate that the regulation of technology usage in the context of OCSEA rarely offers any black and white answers. This is why it is more important than ever to accept that there are various shades of grey, and that experts on both end of the spectrum need to look beyond their 'comfort zone' to champion a true child rights based approach.

4. STRENGTHENING TRANSNATIONAL LAW ENFORCEMENT COLLABORATION²⁵

Combating child sexual abuse on the Internet requires a high level of harmonisation of both substantive and procedural laws, as such abuse is transnational by default: while the transnational nature of child sexual abuse material used to be the exception before the advent of the Internet, it is now the rule. In order to follow this shift in offending behaviour and avoid the creation of 'safe havens', countries require harmonised legal mechanisms to facilitate the investigation and prosecution of offences beyond their territorial borders.²⁶ Inasmuch as the harmonisation of substantive laws is hampered by varying constitutional, moral and ethical concerns at a national level, so procedural law in many cases also fails to provide for harmonised standards in adjudicating and investigating cybercrime.²⁷

The OPSC lays a basic foundation for such cross-border collaboration. Art 4 OPSC encompasses the jurisdiction to adjudicate, which means a state's power to submit certain persons or entities to its courts. It encompasses both mandatory territorial and optional extraterritorial jurisdiction (Art 4 (2) 'may'). The extra-territorial jurisdiction clause encompasses both the active and passive personality principle.

Once a state has established its jurisdiction to adjudicate, it starts the investigation of the online child sexual abuse case at hand. Due to the transnational nature of such offences, the state might be dependent on gathering evidence located outside its territory. It has to be noted that the jurisdiction to investigate is rooted in the principle of sovereignty of states.²⁸ Therefore, if state A intends to investigate a crime on the territory of state B, state B needs to generally give *consent* to such an investigation.²⁹ The volatile nature specifically of digital evidence requires a prompt and efficient transnational law enforcement mechanism to obtain such consent.³⁰ Such a mechanism is key to ensuring that online child sexual abuse offences are

²³ For an overview of current technological developments in this field, see WeProtect Global Alliance, *Global Threat Assessment 2021*, p. 34.

²⁴ A rare example of such a truly interdisciplinary approach is the Council of Europe's Independent Expert Report '*Respecting human rights and the rule of law when using automated technology to detect online child sexual abuse*' (June 2021) on the temporary derogation to the ePrivacy directive.

²⁵ This section is based on Sabine K. Witting, *Transnational by Default: Online Child Sexual Abuse Respects No Borders*, *International Journal of Children's Rights*, Vol. 29 (2021), pp. 731 – 764.

²⁶ UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, New York 2013, p. 60.

²⁷ Miriam F. Miquelon-Weismann, *The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process?*, *Journal for Computer & Information Law*, Vol. 32 (2005), p. 335.

²⁸ *Ibid.*, pp. 5–6; Susan W. Brenner, *Cybercrime and the Law: Challenges, Issues, and Outcomes*, Boston 2012, p. 171.

²⁹ Jan-Jaap Oerlemans, *Investigating cybercrime*, Amsterdam 2017, p. 57; for an in-depth analysis of trans-border access and breach of sovereignty, see Anna-Maria Osula, *Transborder access and territorial sovereignty*, *Computer Law and Security Review*, Vol. 31 (2015), pp. 725 *et seq.*

³⁰ Anna-Maria Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, *Masaryk University Journal of Law and Technology*, Vol. 9 (2015), p. 46.

investigated beyond, and despite, country borders. Traditionally, such transnational collaboration is facilitated by mutual legal assistance (hereafter MLA) and extradition requests.

When it comes to MLA requests, the provisions in the OPSC are generic. Article 6(1) prescribes that state parties shall ‘afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings, [...] including assistance in obtaining evidence’. The main question is how the term ‘greatest measure of assistance’ is to be understood. This should be generally interpreted as an obligation to undertake every possible effort to assist another state.³¹ However, this is much easier said than done. Considering that an investigation on another state’s territory usually requires the consent of the affected state, formal processes in the area of MLA take a long time and are cumbersome. It can take months and years to obtain crucial evidence needed for an ongoing investigation.³²

The deficiencies in the OPSC’s MLA provisions can be seen as an indication that at the time of the drafting of the protocol in the 1990s, the phenomenon of online child sexual abuse offences had only come to light in the past years.³³ As nowadays OPSC offences often have an online element to it, the collection of digital evidence becomes a key priority for cross-border investigation. Taking the volatile nature of digital crime scenes into account, it is questionable whether the generic provision of ‘greatest measure of assistance’ will *de facto* assist law enforcement agencies with obtaining cross-border evidence.

Given that in online child sexual abuse cases the depicted child might be under continuous threat of further abuse and exploitation, the situation places immense pressure on law enforcement. The Special Rapporteur should therefore consider developing comprehensive legal mechanisms tailored towards cross-border crime, including digital crime scenes, such as the specific provisional MLA regulations complemented by a 24/7 network for speedy mutual assistance among parties set out in the Council of Europe’s Budapest Convention. Otherwise, the MLA mechanism in the OPSC might lose its relevance.

³¹ John Tobin, *The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography* in: John Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford 2019, p. 1760.

³² Philip J. Pullen, *Nail in the MLAT Coffin: Examining Alternatives Solutions to the Current Mutual Legal Assistance Treaty Regime in International Cross-Border Data Sharing*, North Carolina Journal of International Law, Vol. 44 (2018), p. 4; Jean-Baptiste Maillart, *The limits of subjective territorial jurisdiction in the context of cybercrime*, ERA Forum 2019, p. 384; Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 51.

³³ UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, p. viii.