CHAPTER 8

# Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography – Criminalising Practices Including and Exceeding Exploitation and Abuse of Children

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**ABSTRACT**

The 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography is considered one of the most widely ratified international treaties, promulgating the incrimination of customers and intermediaries in cases of sexual and other forms of exploitation of children. This chapter highlights its strengths and limitations. Special emphasis is placed on provisions prohibiting and criminalising practices covered under the Protocol, particularly concerning topical and divisive issues such as commercial surrogacy, virtual pornography and the maximum age of protection under the Optional Protocol. Moreover, topics such as sanctions and other substantive issues, jurisdiction, freezing and confiscation of assets, extradition and further instruments of mutual legal assistance, rights of child victims and preventive measures are briefly addressed. Where applicable, the contrast between the Convention and the Optional Protocol is emphasised, as the drafters of the latter opted for a more welfarist approach. This implies that the Optional Protocol drastically limits children's agency to, for example, using explicit sexual materials in the context of sexting as a part of their sexual development. Recognising this issue, the authors argue against an unreasonably extensive interpretation of the Protocol's provisions which concern practices that far exceed the exploitation or abuse of children.

**KEYWORDS**

trafficking, illicit trade, cybercrime, exploitation, commercial adoption, commercial surrogacy, international law

**ABBREVIATIONS**

CoE – Council of Europe
CRC – Committee on the Rights of the Child
EC – European Commission
ECOSOC – United Nations Economic and Social Council
ECtHR – European Court of Human Rights
EU – European Union
GA – United Nations General Assembly

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HCCH – Hague Conference on Private International Law
ILO – International Labour Organization
UN – United Nations
UNCHR – United Nations Commission on Human Rights
UNHRC – United Nations Human Rights Council
UNICEF – United Nations International Children's Emergency Fund

## 1. Introduction

The 1989 Convention on the Rights of the Child (hereinafter Convention) contains measures protecting children from various forms of violence, including the trafficking and sale of children, sexual exploitation and abuse (see Articles 19, 34, and 35). However, despite its overwhelmingly positive reception in the international community,[1] newly established monitoring bodies highlighted those severe forms of exploitation of children, including prostitution, pornography, and trafficking, remained a serious problem.[2] Among these, the CRC was established under this Convention. For example, in 1994, the CRC adopted recommendations concerning the economic exploitation of children, calling for a strict prohibition of activities involving *inter alia* the sale of children or situations of servitude.[3]

Similar calls for action were raised by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography (hereinafter Special Rapporteur), appointed in 1990 by the UNHRC. For example, in his 1994 report, the Special Rapporteur emphasised that the root cause of the exploitation of children was criminality[4] and that national laws needed to be reformed to extend jurisdiction to cover the offences of nationals against children in other countries.[5] He further called upon the international community to promulgate laws and policies incriminating customers and intermediaries in cases of sexual and other forms of child exploitation.[6]

In this context, the GA in 1994 expressed substantial concern over the growing number of incidents worldwide related to the sale of children, child prostitution, and child pornography, and urged the international community to enhance international cooperation to eradicate such practices.[7] A year later, the GA authorised the UNCHR working group to draft the Optional Protocol to the Convention in cooperation with the CRC and the Special Rapporteur.[8] The working group came together in six sessions[9] held between 1994 and 2000, producing a final draft of the Optional Protocol to

1 See for example para. 21 of the 1993 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna.
2 Santos Pais, 2010, pp. 552-555.
3 UN Committee on the Rights of the Child, 1994, p. 42.
4 UN Commission on Human Rights, 1994, p. 55, para. 234.
5 Ibid., p. 57, para. 251.
6 Ibid, p. 58, para. 254.
7 UN General Assembly, 1994.
8 UN Commission on Human Rights, 1995.
9 For a detailed analysis of discussions during these sessions, see Tobin, 2019, pp. 1719-1726.

the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereinafter Optional Protocol).

The Optional Protocol was adopted by the GA in 2000[10] and came into force in 2002. Although its reach falls short of that of the Convention, it is considered one of the most widely ratified international treaties, with 178 States Parties and 7 additional signatories as of mid-2023. Concerning the Convention, the Optional Protocol extends the measures adopted by States Parties to guarantee the protection of child victims from the sale of children, child prostitution and child pornography. The Protocol achieves this, particularly by demanding the prohibition and criminalisation of such practices. The CRC oversees the implementation of the Optional Protocol and is tasked with drafting concluding observations upon receiving comprehensive reports on implementation measures by States Parties (Article 12). In practice, additional monitoring is provided by the Special Rapporteur and Special Representative of the Secretary-General on Violence Against Children, who was appointed by the Secretary-General in 2009 at the request of the GA.[11]

This chapter focuses on the Optional Protocol and highlights its strengths and limitations. The first part of this chapter addresses the prohibition and criminalisation of the sale of children, child pornography and child prostitution in detail. Additionally, the chapter briefly touches upon the provisions of the Protocol related to sanctions and other substantive issues, jurisdiction, freezing and confiscation of assets, extradition, other instruments of mutual legal assistance, provisions on the rights of child victims and preventive measures. Where applicable, this chapter also points in the direction of international treaties and EU law addressing (at least in part) similar practices, such as the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (Palermo Protocol) and the 2007 CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).

## 2. Sale of children

Article 2 of the Optional Protocol provides an overarching definition of the sale of children. According to this definition, the sale of children amounts to 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration'. As this definition is rather broad, Article 3 further clarifies which acts constituting the sale of children need to be criminalised by States Parties. This is only the case when a child is offered, delivered, or accepted for sexual exploitation, organ transfer for profit, engagement in child labour, or if an intermediary improperly induces consent for the adoption of a child.

10 UN General Assembly Resolution A/RES/54/263, 25. May 2000.
11 UN General Assembly, 2008, p. 14, para. 58. See also Santos Pais, 2010, p. 558-559.

However, before diving into the intricacies of the above definitions, attention must be drawn to the differences between the sale of children and trafficking of children. The CRC reminds us that a legal definition of trafficking can be found in Article 3 (a) of the Palermo Protocol:[12] 'recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.

Comparing both definitions clarifies that some forms of sale of children fall within the scope of the definition of trafficking of children. Trafficking encompasses several forms of child abuse and exploitation, including the sale of children for purposes such as sexual exploitation, prostitution, forced labour and child marriage, to name a few. Nonetheless, a careful reading of Article 2 of the Optional Protocol clarifies that the sale of children differs from this definition of trafficking under the Palermo Protocol.[13] For example, the criminalisation of child trafficking does not require the exchange of children for payment or profit and is, from this perspective, broader in scope. However, child trafficking offences always require seeking control over another person for exploitation. By comparison, the sale of children under the Optional Protocol does not require such circumstances.[14] For example, this is important under the prohibition of commercial adoption and child prostitution under the Protocol, which needs to be criminalised, even if no elements of achieving control over a child for his exploitation appear to be present.

Furthermore, the obligation to prohibit and criminalise the sale of children under Articles 1 and 3 is more specific and elaborate than the general obligation under Article 34 of the Convention to protect children from exploitative prostitution and pornography, and the obligation under Article 35 to prevent the sale of children. Instead, the Protocol formulates a necessary legal framework to protect child victims through criminal law and provides significant instructions regarding the measures to be adopted to fulfil this obligation. However, as aforementioned, the sale of children under the Protocol only ought to be criminalised when the perpetrator deals with the sale of children for a special purpose (for the purpose of sexual exploitation, transfer of organs for profit, or forced labour) or in cases of commercial adoption. Each of these modes of transfer criminalised under the Optional Protocol is discussed separately in the following sections.

Regarding the *sale of children for sexual exploitation*, the meaning of sexual exploitation should be read together with Article 34 of the Convention, which states that States Parties need to 'protect the child from all forms of sexual exploitation and sexual abuse', including the exploitative use of children in prostitution, pornographic

12 UN Committee on the Rights of the Child, 2019b, para 15. A similar definition can be found in Art. 2 of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

13 UN Committee on the Rights of the Child, 2019b.

14 Ibid, p. 5, para. 15.

performances and materials. However, under the Optional Protocol, a child is considered a victim of sale for sexual exploitation only if he is sold to participate in sexual activity in exchange for something (*for a profit or another type of benefit*, or even the promise of such). As argued by Tobin, it is clear that the remuneration condition requires a broad interpretation and includes non-monetary gains, such as the receipt of goods and expectations of future benefits.[15] Therefore, the CRC has recently drawn attention to the fact that the sale of children may also occur in the context of child marriage.[16] Indeed, where the marriage of a child to an adult is accompanied by the expectation of (pre-) adolescent sexual activity, States Parties are undoubtedly obligated to criminalise such practices (even more so in cases where child marriages include dowry payments, bride prices or even transfer of brides to settle family debts).[17]

No additional clarification was provided by the Protocol regarding the sale of children for *organ transfer*. However, it is indisputable that the removal must be performed to provide a benefit for a certain party (such as for the parents selling their child or for a third party, such as an intermediary facilitating the transaction), and thus must be distinguished from circumstances where a child's organ is transferred for altruistic reasons (e.g. a child's sibling). The explicit reference to profit in the context of illegal organ transfer, as opposed to a reward or any other form of compensation, as it appears in the general definition of the sale of children, suggests that the definition places a greater focus on finance.[18]

Moreover, the sale of children needs to be criminalised when it is performed with the purpose of involving a child in *forced labour.* The definition of the term forced labour is not provided in the Optional Protocol. However, the term could be interpreted in accordance with the 1930 ILO Forced Labour Convention (No. 29), which provides in Article 2 that forced or compulsory labour is to be understood as 'all work or service which is extracted from any person under the menace of any penalty and for which the said person had not offered himself voluntarily'.[19] In this context, children can be sold for domestic services or working in shops and agriculture for little or no money.[20] For example, a UK-led investigation found that approximately two-thirds to three-quarters of cannabis farms are run by Vietnamese criminal gangs, who traffic Vietnamese children into the UK to grow drugs under exploitative conditions.[21]

*Commercial adoption* is perhaps one of the most controversial topics covered under the Optional Protocol. Under Article 3 (1) States Parties need to criminalise the sale

15 Tobin, 2019, p. 1732.
16 UN Committee on the Rights of the Child, 2019b, p. 11, para. 51.
17 Greijer and Doek, 2019, p. 60; Witting, 2022, p. 39.
18 Tobin, 2019, p. 1742; Witting, 2022, p. 39.
19 Exceptions to this rule are provided in Art. 2 of the Forced Labour Convention. They include, *inter alia*, work or services exacted as a consequence of a conviction or in cases of emergency. See Tobin, 2019, p. 1743; Witting, 2022, p. 33.
20 UN General Assembly, 2016, pp. 9-13, paras. 29-49.
21 Daly, 2014, p. 17-18.

of children when it amounts to 'improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption'. Article 3 (5) further clarifies that States Parties should 'take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments'.

At least two issues arise from these provisions. First, does commercial adoption always amount to the improper inducement of an incentive for adoption and, therefore, be criminalised altogether? Alternatively, does the Optional Protocol allow exceptions? A major factor behind illegal adoption is the financial gain that can be obtained from procuring children for adoption, particularly intercountry adoption.[22] Therefore, it is unsurprising that the CRC assumed the position that improperly inducing consent for adoption always includes doing so through remuneration or any other form of consideration.[23]

However, this is not evident from the wording of the Protocol itself, which introduces a somewhat vague standard of inappropriateness rather than using the term 'through remuneration or any other consideration'. Nonetheless, improper induction of consent should be interpreted in accordance with Article 4 of the 1993 Hague Convention on Protection of Children and Cooperation in respect of the Intercountry Adoption (hereinafter Hague Convention), which does not allow for commercial intercountry adoption.[24] This is, at least, the case for States Parties to the Optional Protocol that ratified the Hague Convention and for which this instrument is applicable. It appears reasonable to demand that such countries criminalise all forms of inter-country commercial adoption. Contrarily, this approach does not appear convincing for countries which are not bound by the Hague Convention (such as Bosnia and Herzegovina, Russia and Japan).

As argued by representatives of the US and Japan during the negotiation sessions for the adoption of the Protocol, it is reasonable to believe that, in such cases, the Protocol does not demand a flat-out penalization of commercial adoption.[25] Instead, such States Parties to the Protocol may merely be obliged to criminalise the most reprehensible forms of inducing consent for adoption through remuneration.[26] Nonetheless, when contemplating the inappropriateness of induced consent, international legal instruments other than the Hague Convention should be considered. For example, the 2008 revised European Convention on the Adoption of Children stipulates in Article 5 (5) that a mother's consent for adoption cannot be provided until she recovers sufficiently from the effects of giving birth.

The second glaring issue, arising from the wording of the Optional Protocol, is related to the fact that it aims only at intermediaries which facilitate the illicit adoption process. Furthermore, only actions constituting the induction of consent should

22 UN Human Rights Council, 2017, p. 8.
23 UN Committee on the Rights of the Child, 2019b, p. 11, para. 50(a).
24 Ibid, para.50(b).
25 UN Commission on Human Rights, 2000, para. 46-47.
26 Dennis, 2000, pp. 93-94. Cf. Tobin, 2019, p. 1744; Witting, 2022, p. 57.

be criminalised. As pointed out by Witting, this is problematic because 'there are plenty of other criminal acts committed in the intercountry adoption process, such as the kidnapping of children for the purpose of adoption'.[27] Unfortunately, these actions are not covered by the Protocol. Nonetheless, as the Protocol merely sets forth a *de minimis* standard of conduct to be penalised, States Parties may decide to extend these crimes to acts and persons not covered under the Protocol.

Another controversial issue arising from the wording of the Protocol is the issue of *commercial surrogacy*, a practice involving a transaction where the surrogate provides gestational services and a child is then transferred from the surrogate mother to the intended parents in exchange for remuneration beyond the reimbursement of expenses.[28] Such transactions inevitably present a real threat to the exploitation and commodification of children and potentially of surrogates.[29] Hence, some argue that commercial surrogacy should be prohibited under the Optional Protocol because it constitutes the sale of children.[30] Others disagree, arguing that the Protocol clearly does not cover this topic[31] and that prohibition of surrogacy arrangements conducted abroad is problematic in practice because it inevitably leads to 'issues surrounding, *inter alia*, rights to identity, access to origins and the family environment for the child'.[32] In its Guidelines, the CRC also does not provide a definitive answer to this question, merely indicating that surrogacy *may* constitute a sale of children.[33] Moreover, the national legislation surrounding the issue varies significantly. In many countries, surrogacy is not regulated, with surrogacy arrangements deemed void and unenforceable (e.g. the Czech Republic or Slovenia). Additionally, although some States Parties banned all forms of surrogacy (Germany, France and Italy), others allowed for altruism (Portugal or the UK), and under some circumstances, commercial surrogacy (Russia or some states in the US).[34]

When interpreting the Optional Protocol regarding the prohibition of commercial surrogacy, the Report of the Special Rapporteur, which contains a thematic study on the surrogacy and sale of children, should be considered. In this report, the Special Rapporteur rightfully argued that 'commercial surrogacy could be conducted in a way that does not constitute a sale of children if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child.'[35]

27 Witting, 2022, p. 57.
28 See UN Human Rights Council, 2018, p. 11.
29 Greijer and Doek, 2019, p. 60.
30 See Tobin, 2014, pp. 335-338; Smolin, 2016, pp. 283-284.
31 See Johnson, 2019, pp. 716-718; Michaels, 2022, p. 5.; Gerber and O'Byrne, 2016, p. 97; Luckey, 2011, pp. 236-237.
32 Greijer and Doek, 2019, p. 60. These issues, in particular, potential harm to the right to identity, have also been brought up by the ECtHR in cases *Mennesson v. France*, App. no. 65192/11, and *D v. France*, App. no. 11288/18.
33 UN Committee on the Rights of the Child, 2019b, p. 11, para. 52.
34 Witting, 2022, p. 35; Greijer and Doek, 2019, p. 61; UN Human Rights Council, 2018, pp. 4-6, paras. 14-16.
35 UN Human Rights Council, 2018, p. 17.

This involves the discretion of States Parties to prohibit or criminalise altruistic surrogacy and certain types of commercial surrogacy. However, even when the State decides to legalise such practices, the CRC encourages States Parties to appropriately regulate surrogacy to avoid any form of sale of children.[36] The existence of such regulatory mechanisms is not to be understated as it is important for the prevention of the sale and exploitation of children in the context of (altruistic as well as commercial) surrogacy.[37]

## 3. Child pornography

The Optional Protocol prohibits child pornography in Article 1 and defines it in Article 2 as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes'. Further, Article 3 requires States Parties to criminalise 'producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography'.

Although the Protocol presented a significant leap forward in combating child pornography, it left unresolved certain issues regarding the scope of conduct which ought to be criminalised. This subsection examines such challenging areas by first addressing the issue of criminalisation of mere possession of child pornography, and then proceeding to the issue of where to draw boundaries of pornographic material with respect to artistic expressions, animated videos, and materials which are not captured with ill intent, such as family photographs of naked children. Finally, this subsection examines certain types of abusive conduct which are not directly addressed by the Protocol, such as engaging in pornographic performances and witnessing sexual acts by children, grooming, and sextortion.

The most glaring issue arising from the text of the Optional Protocol regarding child pornography is the criminalisation of the mere *possession of pornographic material*. According to Article 3, mere possession of child pornography should be criminalised in cases of possession "for the above purposes" – for purposes of producing, distributing, disseminating, importing, exporting, offering or selling.[38] As correctly pointed out in the UNICEF Handbook on the Optional Protocol, this implies that when interpreted strictly, the Optional Protocol does not demand that States Parties criminalise mere possession of child pornography.[39] As argued by Tobin, this implies that the focus of the Protocol appears to be 'on the criminalization of those activities that relate to the creation and dissemination of child pornography rather than its use for

36 UN Committee on the Rights of the Child, 2019b, p. 11, para. 52.
37 Greijer and Doek, 2019, p. 61.
38 In comparison, simple possession ought to be criminalised according to Art. 9 of the CoE Convention on Cybercrime (Budapest Convention) and Art. 20 of the Lanzarote Convention.
39 UNICEF Innocenti Research Centre, 2009, p. 12.

sexual gratification'.[40] However, this did not stop the CRC from encouraging countries to prohibit and criminalise simple possessions.[41] Nonetheless, although undoubtedly issued with the best intentions, such recommendations are not binding upon States Parties.

Optional Protocol distinguishes between two types of prohibited pornographic material. First, these materials include any representation of a child engaged in real or simulated *explicit sexual activities*. Although the Protocol does not define sexual activity, it is clear that sexual activity is an objective criterion. This implies that the sexual character of the material in question is derived from the material itself and does not depend on the intentions of the person who creates it or otherwise engages in it.

However, the Protocol also considers as prohibited pornographic material any representation of the sexual parts of a child *for primarily sexual purposes*. This definition relies on objective and subjective criteria. Hence, photographs, videos, or other materials which depict a naked child not engaged in sexual activities may be considered child pornography but only insofar as such materials are produced primarily for sexual purposes. Therefore, the Protocol does not extend to the criminalisation of paedophiles engaged in establishing collections and trading objectively innocuous materials which depict children without exposing their sexual parts. Moreover, even collections of photographs of naked children with exposed body parts are not considered child pornography if, for example, they are produced by the child's parent for sentimental reasons (e.g. a family photograph of a naked child in a swimming pool). Therefore, it could be argued that from this perspective, the Protocol was drafted in a rather conservative manner with respect to the nature of the prohibited material. However, some authors emphasise that it would be difficult to formulate viable legislation criminalising all materials that paedophiles and other sex offenders consider erotic.[42] Therefore, it was prudent for the working group to opt for a definition which did not encourage overcriminalisation in a field as delicate as child pornography.

Another problem arising from the wording of the Protocol is *fictional pornographic material* such as fictional drawings of non-existent children and virtual pornography. According to the Protocol, any representation of a child engaged in real or simulated sexual activities or the sexual organs of children should be considered prohibited child pornography. However, some authors have pointed out that by engaging in fictional drawings or animated materials (for example, *hentai*), perpetrators do not harm the sexual integrity of children.[43] Hence, it is controversial whether this Protocol also extends to the prohibition of purely fictional materials.[44] This is also reflected in the Committee Guidelines, wherein States Parties are merely *encouraged* to extend

40 Tobin, 2019, p. 1745.
41 See for example UN Committee on the Rights of the Child, 2012a, paras. 62-63; Cedrangolo, 2009, p. 9.
42 Gillespie, 2010, p. 30.
43 Ibid., p. 25.
44 Cf. Tobin, 2019, p. 1736, who emphasises that there can be no ambiguity as to whether child pornography under the Protocol also extends to situations involving fictional children.

the criminalisation to non-existing children or persons appearing to be children, 'in particular where such representations are used as a part of a process to sexually exploit children'.[45]

Nonetheless, the Protocol should at least be interpreted in a manner that does not cover cases where fictional material becomes so abstract, blurred, or cartoonish that it ceases to represent children or even human beings (for example, when fictional beings, such as succubi, demons, or androids, are depicted in a manner that loosely resembles children). As convincingly argued by Witting, 'the more the material can be qualified as merely "child-like" yet non-human depictions [...] the more likely that freedom of expression/artistic freedom aspects prevail'[46] over the interest to protect children from harm done by fictional child pornography. However, this does not mean that virtual pornography, including VR games that simulate sexual activities with children[47] and deepfake pornographic material,[48] never constitutes child pornography. Where such material depicts realistic-looking sexually explicit activity, it clearly falls within the scope of the Optional Protocol.

Additional controversies relate to cases involving *audio or written forms of pornographic material*. Although the Protocol seemingly includes the prohibition of any form of child pornography, States Parties need to consider that banning all books, audiobooks, and other similar materials which contain explicit sexual scenes with children could constitute a breach of freedom of expression. This becomes even clearer when considering that, in many cases, audio and written materials represent artistic expressions.

The boundaries between prohibited child pornography and permissible *artistic expression* are not easy to define. Therefore, it is unfortunate that the Protocol does not address the issue and merely states that any representation of a child engaged in real or simulated explicit sexual activities should be treated as prohibited child pornography. Simulating the sexual activities of (older) children is widely accepted in movies and other art media. For example, the character Rose is believed to be 17 years old in *Titanic*, Jane is 16 years old in *American Beauty* and Dolores is 14 years old in a movie depiction of Nabokov's *Lolita*. Despite these movies simulating sex scenes involving children, one would be hard pressed to argue that our society would be better off banning them or even prosecuting all those involved in their production and dissemination.

Considering the aforementioned, it becomes apparent that the term *explicit sexual activity* as provided in the Protocol, should be interpreted narrowly. In this respect,

45 Committee on the Rights of the Child, 2019b, p. 13, para. 63.

46 Witting, 2022, p. 48. Cf. Committee on the Rights of the Child, 2012a, p. 12, paras. 62-63, which condemned Austria for not adequately addressing pornographic cartoon representation of children.

47 For an analysis of how adult some VR games are becoming dangerously close to VR pornography, see Esposito, 2019, pp. 1936-1939.

48 For an analysis of synthetic child pornography which can be indistinguishable from traditionally generated images, see Spivak, 2022, pp. 874-879; Olson, 2022, p. 875.

Tobin argues, and rightfully so, that 'representations which merely imply or are suggestive that a child may be engaged in sexual activity will not fall within the meaning of explicit sexual activity'.[49] However, even in cases where explicit sexual activity is depicted, the prohibition and criminalisation of child pornography may give way to the protection of artistic expression. The recent book series *A Song of Ice and Fire* as well as the television series *Game of Thrones* spring to mind because they both include several very explicit scenes depicting the sex of underage characters (for example, Daenerys is only 13 years old when consummating her marriage).

Another problem arises when children produce sexual material of themselves. In recent years, the production and sharing of such materials with peers has increased.[50] The Protocol does not contain any exceptions to the criminalisation of *self-generated sexual content*. This is problematic because, in the majority of States Parties, children are capable of being criminally liable for committing criminal offences, including the production of child pornography.[51] This is problematic because children may be put in a position for being prosecuted instead of being protected for doing something which they (and perhaps even society at large) perceive as socially accepted behaviour, or even where they produce such material under duress or excessive social pressure.

It is perhaps exactly the issue of the criminalisation of self-generated sexual content, where the somewhat excessively paternalistic nature of the Protocol becomes evident. The Protocol eliminates the agency of children (even those with adequate mental capacity) in deciding whether they want to participate in the production and dissemination of such pornographic material. There is no requirement for the representation of a child as exploitative or abusive. This may lead to situations in which a child may be allowed to decide upon entering into a marriage or even opt for sex change therapy but not film himself during sexual intercourse and share his material. As noted by Tobin, such an approach is in stark contrast to Article 34 of the Convention, which is at least able to accommodate and recognise a child's potentially legitimate use of explicit sexual materials as part of his sexual development (for example, in the context of *sexting*).[52] Therefore, it should not be surprising that the CRC has been advocating strongly for States Parties to decriminalise the production of self-generated child pornography.[53] However, because of the overall welfarist approach and poor wording of the Protocol which does not provide any exceptions regarding such content, it appears that States Parties are, nonetheless, within their full right to extend criminalisation to child perpetrators who produce and disseminate such child pornography.

49 Tobin, 2019, pp. 1738-1739.
50 Witting, 2022, p. 52.
51 However, the exact age from which children acquire criminal responsibility varies widely from state to state and is often debatable in politics, psychology and criminal legal theory.
52 Tobin, 2019, pp. 1735, 1746-1747; Witting, 2022, pp. 52-54.
53 See for example UN Committee on the Rights of the Child, 2019b, p. 13, para. 67.

Nonetheless, in cases where children produce self-generated images because they find themselves under duress or in an abusive or exploitative scenario, criminal sanctioning of such children may be at odds with Article 39 of the Convention. It would be difficult to argue that sending child victims of abuse or exploitation to prison constitutes an appropriate measure 'to promote physical and psychological recovery and social reintegration'.

Although the Optional Protocol casts a wide net regarding criminalised conduct motivated by paedophilic urges, there are certain predatory activities which fall outside the scope of the Protocol. One example is *grooming* of children to facilitate online (or offline) sexual contact. Another example is *sextortion*, which involves extorting children under the threat of exposure to sexual material depicting the child.[54] Although this behaviour is not fully covered by the Protocol, it may constitute an attempt to produce child pornography. It is clear that, according to the Protocol, such attempts need to be criminalised by States Parties. Similarly, *revenge pornography* is covered by the Protocol when the disseminated material is classified as child-related pornography.[55]

Under child pornography provisions, the Protocol only addresses *representations* (depictions or portrayals) and not the direct involvement or abuse of children in sexual activities. This implies that despite the CRC encouraging States Parties to criminalise the intentional cause of children witnessing sexual activities for sexual purposes,[56] such conduct is clearly not covered by the Protocol. The involvement of children in live sexual performances which are not recorded, but rather enjoyed by the audience in a live session is more ambiguous. Although this is not readily evident from the wording of the Protocol, the narrative is being pushed that live performances also constitute child pornography, and are therefore, prohibited by the Protocol.[57]

Although pushing for criminalisation of such conduct certainly appears reasonable, it nonetheless falls outside the scope of the Protocol when it does not constitute the sale of children or child prostitution. It would be difficult to argue that attending a live performance in any way constitutes producing, distributing, disseminating, importing, exporting, offering, selling, or possessing such a live performance. In the context of digitalised child pornography, this limitation has become even more evident with a growing number of cases involving *live streams* of online child pornography. As pointed out by Witting, accessing child pornography material online cannot reasonably be interpreted as possessing such material.[58] Hence, in stark contrast to

54 See Greijer and Doek, 2019, pp. 71-72.

55 For more on revenge pornography, see Šepec and Lango, 2020.

56 UN Committee on the Rights of the Child, 2019b, p. 14, para. 70. However, in contrast to Art. 22 of the Lanzarote convention, Guidelines fail to make a distinction between children above or below the age of sexual consent. Greijer and Doek, 2019, p. 72.

57 UNICEF, 2009, p. 12; Tobin, 2019, p. 1736; Committee on the Rights of the Child, 2019b, p. 13, para. 64.

58 Witting, 2022, pp. 58-59.

Article 20 of the Lanzarote Convention, live streaming of child pornography falls outside the prohibition of child pornography.

Furthermore, the Protocol does not demand penalisation for the production and dissemination of material *advertising* involvement in child pornography.[59] Instead, Article 9 merely obliges States Parties to implement appropriate measures to effectively prohibit the production and dissemination of such materials. Nonetheless, the CRC regularly encourages States Parties to criminalise advertising of practices prohibited by the Protocol.[60] Moreover, in some States Parties, such advertising could already be criminalised, as it could constitute an attempt (for example, if advertising to children paid involvement in the production of pornographic material) or an instigation to commit a criminal offence (where such instigation is not limited to perpetrators already having a specific instigated person(s) in his mind).

Finally, it is noteworthy that the question of the *maximum age for the protection of children* from pornography emerged as one of the most pressing issues during the drafting of the Protocol.[61] During the drafting procedure for the Protocol, several Western delegations proposed to allow for a protection age lower than 18 years. However, the US, Canada, Italy, and several developing countries advocated precluding the possibility of a person under the age of 18 years consenting to involvement in child pornography.[62] As a compromise, the final version of the Protocol completely omitted any reference regarding the age of protection or the age of consent. Hence, for the majority of States Parties, the Protocol needs to be interpreted as offering protection to *children* as defined in Article 1 of the Convention. This implies that the Protocol extends to every human being below the age of 18 years, except in cases where, according to national law, the majority is attained earlier.

This approach has two problems with respect to harmonising child pornography offences. At first glance, it is clear that in States Parties where children attain the majority at a comparatively early age (for example, 15 years for boys and 9 years for girls in Iran[63] or 16 years for married girls in Indonesia[64]), the extent to which the Protocol protects them is limited in comparison to their peers in other countries who attain the majority at 18 years.

However, there is an additional problem. Following a heated discussion between delegations which almost threatened to derail the adoption of the Optional Protocol,[65] finally, it was stated in Article 13 that the Protocol is open to signature and ratification by any State that is either a party to the Convention or has signed it.[66] However, this compromise does now provide a clear answer regarding the question of how to treat

59 Tobin, 2019, p. 1741.
60 UN Committee on the Rights of the Child, 2019b, p. 13, para. 66.
61 Dennis, 2000, p. 794.
62 UN Commission on Human Rights, 1998, paras. 42-43.
63 UN Committee on the Rights of the Child, 2016a, p. 5, paras. 27-28.
64 UN Committee on the Rights of the Child, 2014, p. 3, paras. 9-10.
65 Tobin, 2019, p. 1783; UN Commission on Human Rights, 2000, paras. 32-34, 53, 60.
66 Dennis, 2000, pp. 795-796.

States Parties to the Protocol, such as the US which has merely signed but has not yet ratified the Convention. According to Article 14 of the 1969 Vienna Convention on the Law of Treaties, the consent of a State to be bound by a treaty is expressed by ratification when, for example, the representative of the State has signed a treaty subject to ratification. In such cases, a State merely expresses its intention to comply with a treaty by signing it. However, the expression of intent is not binding. This means that signing the Optional Protocol does not automatically entail States Parties assuming any obligations under the Convention. Hence, States Parties who have not yet expressed their consent to be bound by the Convention are also free to interpret the term *child* differently from the Convention. In theory, this would allow the US to limit the protections granted by the Protocol to persons below (or even over) the age of 18 years and decouple it from the age of the majority.

Although States Parties such as the US, Iran and Indonesia may be encouraged to extend protection to all children below the age of 18 years, they are not obliged to do so. This presents a liability for the harmonisation of child pornography legislation and the smooth functioning of cross-border cooperation which could have been avoided if the delegations had been able to find a solution regarding the maximum age for protection when drafting the Protocol.

## 4. Child prostitution

In comparison to the sale of children and child pornography, the obligation of States Parties to criminalise child prostitution is prescribed in the Optional Protocol more concisely. It prohibits child prostitution in Article 1 and defines it in Article 2 as 'the use of a child in sexual activities for remuneration or any other form of consideration'. Furthermore, Article 3 requires States Parties to criminalise 'offering, obtaining, procuring or providing a child for child prostitution'.

However, the Protocol does not define *sexual activities*. Nonetheless, sexual activities do not require penetration.[67] In the CRC Guidelines, sexual activities are defined as all forms of sexual intercourse and intentional sexual touching involving children, independent of the sex of all involved persons and any lascivious exhibition of the genitals or pubic area of children.[68] Although this definition is certainly helpful in the drafting of harmonised national legislation, it is not, in any way, binding upon States Parties.

Sexual activities with minors are not covered by the Optional Protocol's prohibition of child prostitution, unless sexual activities are obtained for remuneration or any other form of consideration. Although any form of payment to either the child or another person can be interpreted as remuneration, it is less clear which other forms of consideration should be taken into account. Hence, the Optional Protocol

67 Witting, 202, p. 40; Greijer and Doek, 2019, p. 61.
68 UN Committee on the Rights of the Child, 2019b, p. 11, para. 53.

extends to sexual activities which differ from the classical example of sex provided in exchange for monetary compensation.[69] Hence, the CRC Guidelines provide an example of a child being provided with food or shelter as compensation.[70]

However, it is less clear how to deal with cases in which the reward has no tangible monetary value, such as elevated social status or mere praise of the child. Although the CRC seemingly pushes for an interpretation which includes sexual activities for such rewards (including various types of *commodified relationships*) as criminalised under the Protocol,[71] caution is advised. In many States Parties, minors below the age of 18 years are allowed to legitimately pursue sexual activities and relationships, even with adult partners at similar mental developmental stages (e.g. a 19-year-old man may be allowed to pursue a relationship with a 17-year-old girl). Involvement in such relationships may naturally include benefits and rewards such as elevated social status and even certain reasonably modest monetary benefits for the involved child. However, it would be a stretch to push for the criminalisation of such relationships under the prohibition of child prostitution legislation by claiming that such relationships are *always* exploitative or abusive. Completely banning (older) children from pursuing sexual activities and relationships for social and even modest monetary benefits (such as small gifts between partners) may be at odds with Article 6 of the Convention which stipulates that States Parties should ensure the development of the child to the maximum extent possible.

As pointed out by Tobin, the fact that the Protocol demands that a child be *used* in sexual activities should not be interpreted as a requirement for such use to be exploitative or unlawful in nature.[72] Contrarily, although some delegations during the course of the drafting procedure argued for the alignment of the Protocol with Article 34 of the Convention which calls for the prevention of the *exploitative* use of children in prostitution,[73] the welfarist approach resting upon the assumption that even an older child can never consent to prostitution prevailed.[74] This is important for States Parties, where the age of consent is set below the age of the majority (for example, at 15 or 16 years, while the majority is mostly attained at 18 years). The CRC consistently reminded States Parties that the criminalisation of child prostitution should not depend on the age of consent.[75] Moreover, not limiting criminalisation to exploitative child prostitution leaves no doubt that various forms of online, commercialised child prostitution are prohibited under this Protocol. This also applies to subscriber-only websites which offer sex workers a fair amount of autonomy and protection, such as OnlyFans.[76]

69 Cedrangolo, 2009, p. 7.
70 UN Committee on the Rights of the Child, 2019b, p. 13, para. 5
71 Ibid., p. 12, para. 58.
72 Tobin, 2019, p. 1734.
73 See for example UN Commission on Human Rights, 1998, para 43.
74 Tobin, 2019, pp. 1732-1733.
75 Cedrangolo, 2009, p. 8.
76 Witting, 2022, p. 42.

Although it is clear that offering child prostitution should be criminalised for intermediaries, there is less clarity regarding the criminalisation of (older) children who offer sexual activities out of their own accord or without any intermediaries. Although the CRC condemns the criminalisation of children involved in prostitution,[77] the Protocol itself does not address this issue. As argued above, in the context of child pornography, this position is only defendable in the context of child victims forced into child prostitution of an exploitative or abusive nature. Punishing child victims is contrary to Article 39 of the Convention. However, in cases where, for example, a 17-year-old decides to offer live sexual content to paying customers via OnlyFans to afford a new iPhone or simply to boost her social standing with her peers,[78] the Protocol cannot be read in a manner that stands in the way of criminalisation. Simply put, although such offering of sexual content may count as child prostitution within the meaning of the Protocol, the 17-year-old does not necessarily count as a child victim of exploitation or abuse within the meaning of the Convention.

Finally, the issue of sexual exploitation of children in *travel and tourism* is typically mentioned within the context of child prostitution.[79] Although this phenomenon is not mentioned in Articles 1, 2, and 3 as a separate criminal offence, its importance for the development of the Protocol continues to be reflected in the preambulatory clauses and Article 10 on international cooperation. Nonetheless, the CRC encouraged multiple States Parties to criminalise such conduct as a separate criminal offence.[80] As argued by Witting, such an approach is not necessary, since the sexual exploitation of children in travel and tourism is already covered by the obligation to criminalise the sale of children, child pornography and child prostitution.[81]

## 5. Sanctions and other substantive issues

Regarding issues usually discussed within the framework of the General Part of substantive criminal law, the Protocol is, unsurprisingly,[82] rather sparse. Nonetheless, some attention has been paid to the issues of adequate sanctioning and liability of legal persons. The Protocol included attempts, complicity and participation. This subsection briefly discusses provisions addressing these issues.

According to Article 3 (2), *attempts* as well as complicity and participation need to be fully covered under the criminal law provisions of States Parties. The Protocol

77 See for example UN Committee on the Rights of the Child, 2012b, p. 7, paras. 27-28. See also UNICEF Innocenti Research Centre, 2009, pp. 11-12; Tobin, 2019, pp. 1733-1734.

78 Regarding the problem of glamour being associated with some forms of child prostitution, see Greijer and Doek, 2009, p. 18.

79 See for example UN Committee on the Rights of the Child, 2019b, p. 12, para. 59.

80 See for example UN Committee on the Rights of the Child, 2019a, p. 3, paras. 9-10.

81 Witting, 2022, pp. 43-44.

82 On the lack of consensus to harmonise general principles of substantive criminal law in the European context, see Stajnko, Šepec and Weingerl, 2023, pp. 225-227.

does not define these terms and leaves them to national law to allow the Protocol to be compatible with the widest possible number of legal systems. However, this does not mean that States Parties are completely free to interpret the said offences as they please. For example, the CRC Guidelines state that promising remuneration for sexual activity with a child should be criminalised under the Protocol.[83] In most States Parties, such offering of monetary compensation in exchange for sex would be criminalised as an attempt to engage in child prostitution if it did not lead to sexual activity.

In continental legal systems, the notion of *participation* in criminal law usually includes various forms of multiple principal offenders committing a crime, as well as principals by proxy, *aiding* (helping), and *abetting* (encouraging).[84] However, the Explanatory Report of Committee Guidelines offers a different explanation for Article 3 (2). Within the meaning of the Protocol, participation is supposed to be understood in terms of co-perpetrators who should be punished as perpetrators if the charges are proven. However, complicity must be understood in terms of aiding and abetting.[85]

The Protocol does not specify the type or severity of *sanctions* to be imposed. Instead, it merely stipulates in Article 3 (2) that States Parties ought to make the offences 'punishable by appropriate penalties that take into account their grave nature'. This provision allows States Parties to have a significant degree of discretion regarding the form and severity of imposed sanctions.[86] Nonetheless, imposed sanctions cannot be as mild as not to reflect the serious nature of offences which ought to be criminalised under the Protocol. For example, the commission, in its concluding observations, emphasised that mere financial penalties and short-term imprisonment are worrisome.[87] On the other side of the spectrum, a concern has been voiced that some States Parties interpret this provision as encouraging capital punishment for the sale of children, child prostitution, and child pornography.[88] Surprisingly, the CRC missed the opportunity to address this issue in its Committee Guidelines. This may even be interpreted by proponents of capital punishment as a tacit concession that this form of sanctioning may be deemed appropriate under the Protocol.

Regarding the *liability of legal persons* for offences established under the Optional Protocol, Article 3 (4) stipulates that subject to national provisions, States Parties need to take measures, where appropriate, to establish the liability of legal persons for such offences, whereby such liability may be criminal, civil or administrative in nature. Although this clause provides States Parties a good measure of discretion regarding its implementation, it does not mean that they can invoke national law to render this obligation meaningless.[89] In General Comment No. 16, the CRC encourages

83 Committee on the Rights of the Child, 2019b, p. 12, para. 56.
84 Bohlander, 2009, pp. 153-155.
85 Greijer and Doek, 2019, p. 55.
86 Tobin, 2019, p. 1748.
87 UN Committee on the Rights of the Child, 2012c, p. 6 para. 26.
88 Cedrangolo, 2009, p. 11.
89 Tobin, 2019, pp. 1749-1750.

States Parties to opt for criminal liability of legal entities in cases concerning serious violations of the rights of the child. Where the criminal liability of legal persons is not foreseen in the national legal order, the CRC recommends any other form of legal liability with comparable deterrent effects.[90]

In some States Parties, statutes of limitation are considered (at least partly) substantive in character, and are therefore addressed in this subsection. Although the Optional Protocol does not address temporal limitations, the CRC in its Guidelines recommends that States Parties not just extend but completely abolish them in relation to child pornography, child prostitution and the sale of children.[91] Although this recommendation was certainly provided with the best intentions, it fails to recognise that the reasons why statutes of limitation are provided in national legislation do not necessarily wither away, simply because the court is dealing with crimes such as the sale of children.[92] Moreover, it would be out of place if killing a child or intentionally causing him to become paraplegic was covered by the statute of limitation, while forcing him to work in a family-owned restaurant was not. Hence, it appears more reasonable to adjust the statutes of limitation to the nature of the crime, particularly by ensuring that they begin to run only when the victim reaches the majority.[93] This enables the victim to report the crime when he reaches the appropriate age and stage of mental development.

## 6. Jurisdiction

Rules on jurisdiction are widely perceived to have a dual procedural and substantive character,[94] and are therefore addressed in this subsection. The Optional Protocol does not address this duality of rules concerning the applicability of national substantive criminal law and the competence of national courts. Instead, Article 4 (1) tackles jurisdiction by first stressing that States Parties need to take measures that may be necessary to establish their jurisdiction following the traditional principle of territorial jurisdiction. Article 4 (2) further allows (but does not oblige) States Parties to prosecute offences covered by the Protocol regarding active (according to the nationality of the habitual residence of the offender) and passive (according to the nationality of the victim) personality principles of extraterritorial jurisdiction.[95]

Contrarily, Article 4 (3) obliges (and not merely allows) States Parties to establish their jurisdiction when the alleged offender is present in their territory, and they do not extradite him to another State Party on the grounds that the offence was committed by one of its nationals, regardless of where such a crime was committed.

90 UN Committee on the Rights of the Child, 2016b, p. 19, para. 70. See also Witting, 2022, p. 62.
91 Ibid., p. 17, para. 95.
92 Cf. Shinton, 2017, pp. 332-336, and Leibowitz, 2003, pp. 936-941.
93 UN Committee on the Rights of the Child, 2019b, p. 17, para. 95.
94 Satzger, 2017, p. 8, para. 3.
95 Tobin, 2019 p. 1754; Vandenhole, Türkelli and Lembrechts, 2019, p. 447.

This obligation should be read closely alongside Article 5 (5), which further establishes the *aut dedere aut iudicare* principle and forces the State Party to adopt suitable measures to prosecute if it does not want to extradite the offender. Although this solution could be considered as a savings clause prohibiting States Parties from acting as safe havens for nationals involved in sex tourism and other cross-border offences, it falls short of its obligation to assert universal jurisdiction regarding offences covered by the Protocol.[96]

As noted above, according to the Optional Protocol, States Parties are not strictly obliged to establish a legal framework for extraterritorial jurisdiction according to active and passive personality principles. However, the CRC in its Guidelines instead assumed the position that States Parties *should* establish their jurisdiction over such offences.[97] Furthermore, the Commission regularly opposes limiting the applicability of national legislation implementing offences with a double criminality constraint, which often serves as a barrier to extraterritorial jurisdictions.[98] Nonetheless, the only tangible obligation of States Parties to establish extraterritorial jurisdiction under the Optional Protocol remains Article 4 (3) under the *aut dedere aut iudicare* condition.

## 7. Seizure and confiscation

Under Article 7 (a), States Parties must provide for the seizure and confiscation of goods, assets and other instrumentalities used to commit or facilitate offences covered under the Protocol, as well as the proceeds of crime. Moreover, according to Article 7 (c), they need to adopt measures aimed at closing premises used to commit such offences on a temporary or definitive basis. It is up to States Parties to decide if such measures are of a substantive or procedural nature, whether they are considered a punishment or a protective (security) measure, and whether they are considered instruments of criminal, administrative or even civil law (for example, in Slovenia, the state prosecution may strive to confiscate assets of illicit origin in a special type of civil proceeding).

Surprisingly, the Optional Protocol does not extend to the freezing of assets. As freezing orders go hand-in-hand with efficient confiscation measures, this appears to be a missed opportunity. Simultaneously, it could be argued that providing adequate freezing measures is a key preventive measure in the sense of Article 9 of the Optional Protocol, and should therefore be implemented by States Parties.

96 Ibid, p. 1756.
97 Compare with UN Committee on the Rights of the Child 2019b, p. 15, para. 82, which assumed the position that States Parties *should* establish their jurisdiction over such offences.
98 See for example UN Committee on the Rights of the Child, 2019a, p. 6, para. 29; UN Committee on the Rights of the Child, 2017, p. 18, para. 69.

## 8. Extradition treaties and mutual legal assistance

In Article 5, the Protocol aims to address various issues that arise in the context of extradition proceedings. First, it stipulates in Article 5 (1) that offences covered by the Protocol need to be treated as extraditable offences in any existing extradition treaty between States Parties. It further imposes on states that parties include extraditable offences in every extradition treaty that is subsequently concluded. According to Article 5 (3), even when no treaty exists between States Parties, they need to recognise such offences as extraditable. However, this obligation does not extend to attempts, complicity and participation in such crimes.[99]

The extradition procedure is further simplified by the fiction of *locus delicti*, as Article 5 (4) obliges member states to treat offences covered by the Protocol as if they were committed in the territory of the requesting state, even if this is not the case. This fiction is important when one of the conditions for extradition is the requirement that the offence occurs in the requesting state.[100]

The Optional Protocol aims to not only simplify the extradition procedure but also facilitate the use of other instruments of mutual legal assistance between States Parties. Hence, Article 7 (b) stipulates that States Parties need to execute requests from other States Parties for the seizure or confiscation of assets or proceeds of crime. Furthermore, according to Articles 6 and 10 (1), they need to afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings and strengthen international cooperation by international arrangements for detection, investigation, prosecution and punishment of crimes covered under the Protocol.

## 9. Protecting the rights of child victims

The Optional Protocol devotes a large portion of its text to provisions aimed at making the criminal justice systems of States Parties more accessible and welcoming for children. In this regard, Article 8 (1) obliges them to design criminal procedures in a manner that protects the rights and interests of child victims of crimes covered under the Protocol, whereas Article 8 (3) calls for the best interest of the child to be a primary consideration in criminal procedures involving child victims. Adequate support needs to be provided throughout the legal process, and the special needs of such children should be recognised, including when they appear as witnesses. In general, unnecessary delays should be avoided, and the CRC recommends the fast-tracking of cases involving child victims.[101] In addition, where appropriate (e.g.

99 Witting, 2022, p. 67.
100 Tobin, 2019, p. 1758.
101 UN Committee on the Rights of the Child, 2019b, p. 18, para. 98.

where there is a risk of exposure to intimidation and retaliation), protective measures ought to be applied to safeguard children's privacy and identity and ensure the safety of such children and their families. Additionally, the right to be informed and heard must be granted to children involved in the criminal justice process, regardless of whether they have legal capacity.[102]

Another clause aimed at protecting the rights of child victims in criminal procedures relates to uncertainty regarding the victim's age. As pointed out by Witting, legal identity documents are an important precondition for many children to access the justice system; without those documents, they may not be considered children.[103] Hence, Article 8 (2) of the Optional Protocol obliges States Parties to ensure that uncertainty regarding the actual age of a victim does not prevent the initiation of criminal investigations. In practice, this means that persons such as migrants without documents should be given the benefit of doubt and treated as children (at least for criminal investigation of offences covered under the Protocol) when no conclusive results regarding their age can be reached using standard assessment methods.[104]

Other obligations of States Parties include the need to implement all feasible measures to ensure the social reintegration and full recovery of child victims, and provide adequate procedures to seek compensation for damages, as provided in Articles 9 (3) and (4). Finally, Article 8 (4) demands that States Parties provide special training for persons working with child victims. Such persons include not only police, state prosecutors, judges, and other practitioners involved with child victims in the course of the criminal procedure, but also those who work with children during reintegration and compensation procedures.

The scope of this chapter does not address the complexities of all provisions relating to the protection of the rights of child victims and their implementation in national legal systems in detail. Nonetheless, it is noteworthy that provisions of the Optional Protocol on the rights of child victims should be implemented and interpreted in accordance with the ECOSOC Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, which 'set forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles'.[105] Additionally, best practices were gathered and recommendations focusing on the reparation of child victims were drafted by the Special Rapporteur.[106]

102 Witting, 2022, p. 76.
103 Ibid., p. 80.
104 Ibid.
105 ECOSOC, 2005.
106 UN Human Rights Council, 2023, pp. 18-20.

## 10. Preventive measures

Although criminalising certain conduct and punishing offenders is linked to general prevention (deterrence), this is arguably not the only or even the most effective means of tackling criminal behaviour on a societal scale.[107] This has been acknowledged in the Optional Protocol, which stipulates in Article 9 (1) that States Parties shall strive to prevent the sale of children, child prostitution, and child pornography by using legislation, administrative measures, social policies, and programmes. The Protocol does not necessarily contain any new obligations aimed at preventive action which are not already expressly or implicitly imposed on States Parties by the Convention (primarily by Articles 34 and 35), for which it has been heavily criticised.[108] Indeed, as argued by Todres, the Convention itself already imposes a mandate on States Parties 'to address the causes of children's vulnerability and prevent all forms of child exploitation'.[109] However, the Protocol could continue to be considered as a means of affirming and codifying such obligations in a more detailed and unambiguous manner.[110]

According to the CRC, special attention is to be accorded by States Parties to underlying causes of problems addressed by the Protocol, 'which may serve to foster, normalize or perpetuate them'.[111] Such root causes may include poverty, underdevelopment and cultural stereotypes which contribute to the abuse and exploitation of children.[112] Additionally, the CRC drew attention to the need to implement measures which specifically target sex offenders and economic profiteers, who drive the demand for the abuse and exploitation of children.[113]

Furthermore, adequate attention should be paid to children who are at risk of falling victim to offences covered by the Protocol. The CRC stressed the need to identify, support and monitor such children; provide social protection and financial support to vulnerable families; and prevent harmful practices which expose children to situations where they are at risk, such as child marriages.[114]

Other measures include raising awareness and dissemination activities, as stipulated in Article 9(2). Such measures should primarily target the general public but may also include comprehensive sex and online safety education for schoolchildren,[115]

107 On the primary prevention which concerns pre-event strategies tackling online child sexual abuse and exploitation, see Quayle and Koukopoulos, 2019, p. 351-354.
108 Maxwell, 2023, pp. 70-71.
109 Todres, 2017, pp. 91-92.
110 Tobin, 2019, p. 1773.
111 UN Committee on the Rights of the Child, 2019b, p. 8, para. 32.
112 Cedrangolo, 2009, p. 12; Tobin, 2019, p. 1774.
113 UN Committee on the Rights of the Child, 2019b, p. 8, para. 32.
114 Ibid., para. 33.
115 Regarding the importance of empowering children to develop revenant self-protection skills see Maxwell, 2023, p. 76.

as well as the training and support of relevant professionals, families and caregivers.[116] Moreover, the CRC pointed out that specialised training for law enforcement officials, lawyers, and state prosecutors and judges would be beneficial, particularly in the context of preventing online sales and sexual exploitation of children.[117]

Finally, the Protocol also stresses in Article 10 (1) the importance of international cooperation in preventing prohibited practices, with special emphasis given in Article 10 (3) on cooperation to address root causes such as poverty and underdevelopment. More specifically, Article 10 (4) stipulates that States Parties in a position to do so should provide financial, technical, or other assistance to developing nations. Although all the obligations under Article 10 are rather vague and cannot constitute a legal obligation of States Parties to cooperate or provide support in specific cases, they remain important tools for invoking political pressure on States Parties not contributing to the global prevention of practices prohibited under the Protocol.[118]

## 11. Discussion

The Optional Protocol is one of the most important international treaties for protecting children against abuse and exploitation. Simultaneously, it is plagued by imprecise definitions and omissions which can lead to the uneven protection of child victims across various jurisdictions. However, it also pushes towards overcriminalisation beyond conduct constituting the exploitation or abuse of children.

One of the more glaring issues spanning across all crimes is the lack of the definition of a child, allowing States Parties to set the maximum age for protection below 18 years. Regarding the sale of children, criminalisation of commercial adoption appears surprisingly limited and, for example, does not cover the kidnapping of children for adoption. However, an open-ended definition of the sale of children sparked a fiery debate regarding the prohibition of commercial surrogacy under the Protocol. Regarding child pornography, a similar debate ignited concerning the treatment of virtual pornography and artistic expression – topics not addressed under the Protocol. Other peculiar omissions include the exclusion of freezing measures from provisions dealing with the confiscation of assets, whereas provisions for prevention measures appear particularly vague.

Although many of these issues can be resolved by providing guidelines, recommendations, and handbooks to States Parties, others cannot. Two more glaring examples are the aforementioned issues of commercial surrogacy and virtual pornography. Sometimes, subject matter which may potentially fall within the scope of the Optional Protocol was not necessarily initially intended to be covered by its

116 UN Committee on the Rights of the Child, 2019b, p. 7-8, para. 28-29; Greijer and Doek 2009, p. 20.
117 Ibid., p. 9, para. 39.
118 Tobin, 2019, p. 1782.

provisions. Simultaneously, the prohibition and criminalisation of certain practices may far exceed the fight against child exploitation and could instead be related to the protection of interests other than those of children. This is the case with respect to the criminalisation of dealings with fictional and overly cartoonish drawings of naked children (where merely public morality may be at stake) or adequately regulated commercial surrogacy (where the chief legally protected interest at risk is the dignity of the surrogate mother).

In such cases, it is unreasonable to overextend the scope of the Optional Protocol. Instead, this appears to be fertile ground for the international community to advocate for fresh international legal frameworks to address these issues. It has been argued that there is a desire and willingness to propose an international convention on intercountry surrogacy.[119] In 2022, the HCCH working group produced a report arguing for the desirability and general feasibility of such a binding legal instrument.[120] Furthermore, the EC included surrogate-born children within the scope of the latest proposal for regulations on the recognition of parenthood in the EU.[121] Such an approach would certainly benefit the international community more than interpretative *salti mortali* aimed at extending criminalisation and prohibition under the Protocol increasingly further away from practices constituting the exploitation or abuse of actual children.

119 Mohapatra, 2016, p. 32. Cf. 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/HRC/37/60, 15 January 2018, pp. 6-7, paras. 20-21.
120 HCCH Parentage / Surrogacy Experts' Group, 2022, p. 49, paras. 164 and 167.
121 Tryfonidou, 2023, pp. 95-97.

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Greijer and Doek, (2019), p. 60. These issues, in particular, potential harm to the right to identity, have also been brought up by the ECtHR in cases Mennesson v. France, App. no. 65192/11, and D v. France, App. no. 11288/18.

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