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OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

**Response to the Questionnaire of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material**

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**Submission by:**

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**Introduction**

1. ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people before national and international institutions. As well has having ECOSOC consultative status with the United Nations (registered name “Alliance Defending Freedom”), ADF International has accreditation with the Organization of American States, the European Commission and Parliament, and is a participant in the FRA Fundamental Rights Platform.
2. With reference to the recent questionnaire on the impact of the COVID-19 crisis on the nature and scope of various manifestations of sale and sexual exploitation of children, including surrogacy and sale of children, ADF International wishes to take the opportunity to provide input to the Special Rapporteur on the sale and exploitation of children, including child prostitution, child pornography and other child sexual abuse material, with the view of informing her report on the impact of the COVID-19 pandemic on children, to be presented to the Human Rights Council at its 46th session.
3. This submission highlights the ways in which the ongoing COVID-19 pandemic has exacerbated the vulnerability of children born through surrogacy, thereby shedding new light on the critical human rights implications underlying this practice. Furthermore, it provides a critical assessment of the effectiveness of relevant legal and policy frameworks through the lens of a case study on a recently adopted bill setting out regulations for the practice.
4. **The Impact of COVID-19 on Surrogacy Transactions**
5. The Special Rapporteur’s questionnaire queries *inter alia* the new forms and manifestations of sale of children in the context of the current pandemic, and the key factors that may increase children’s vulnerability to this gross human rights violation.
6. The extreme vulnerability of children to the harms caused by surrogacy has been further exacerbated as a result of the restrictions to freedom of movement imposed by the current COVID-19 pandemic, most notably in the case of transnational surrogacy arrangements.
7. While the peculiarity of the current circumstances has served to highlight complex human rights issues, these concerns are neither exceptional nor new. Regardless of the purposes and geographical location of the relevant parties, a child born following a surrogacy transaction is deliberately placed into a situation of planned abandonment from his or her gestational mother, as well as, potentially, both of his or her genetic parents. The consequence of the commissioning parties’ inability to retrieve their child exposes children to risks that are akin to those resulting mid-transaction from a dispute or dissolution of the surrogacy arrangement in “ordinary” circumstances.
8. In Ukraine, it is estimated that more than 100 babies born via cross-border surrogacy were recently stranded after the country closed its borders because of the pandemic, and that an additional 1,000 babies are expected to be born in Ukraine before the travel ban is lifted completely.[[1]](#footnote-2) BioTexCom, a third-party Ukrainian company responsible for the brokering cross-border surrogacy contracts, was forced to turn a hotel into a make-shift hospital for 46 babies awaiting “collection” by their intended parents.[[2]](#footnote-3)
9. Likewise, in the United States, surrogacy agencies and charitable organizations are “preparing” health care professionals, child care providers, agency workers and in some cases families and friends of commissioning parents, to take over the responsibility of post-natal care for newborns stranded due to travel restrictions.[[3]](#footnote-4) As a result, newborns that do not have birth certificates or passports to fly home are left medically uninsured in the hands of strangers, increasing the uncertainty of their legal status, their access to healthcare, and exposing them to increased risks of human rights violations.[[4]](#footnote-5)
10. Furthermore, surrogates around the nation are faced with either finding agencies that will care for the newborn or raising the child themselves for an indefinite period of time.[[5]](#footnote-6) While the responsibilities of post-natal care can vary from surrogates strictly providing breastmilk for third parties to providing full time care for these newborn babies, these children are highly vulnerable and left without any legal safeguards to protect their right to a standard of living adequate for their well-being, among other human rights[[6]](#footnote-7)
11. The media has shone a particular spotlight on parents unable to arrange passports to enable their surrogate-born babies to enter their country.[[7]](#footnote-8) However, the above-mentioned challenges are not unique to transnational arrangements. In India, where surrogacy is only permitted to Indian commissioning parents, domestic travel restrictions have seen babies stranded in the “surrogacy hubs” in which they were born. The Akanksha Infertility Centre, one of the biggest surrogacy facilities in the country, noted that of the twenty-eight babies born at the facility during the lockdown in April and May, at least ten were still awaiting collection fifty days later.[[8]](#footnote-9)
12. In conclusion, the COVID-19 crisis has further highlighted the reality of surrogacy as a modern form of sale of children. The fact that surrogacy deliberately places children into situations of planned abandonment from the gestational mother, and potentially, the genetic parents, as well as the additional danger of allowing children to be the center of commercial disputes and dissolutions is a price too high to pay.
13. **Regulatory Approaches to Surrogacy: A Critical Evaluation**

*Surrogacy as a New and Emerging Form of Sale of Children*

1. The Special Rapporteur’s call for input includes evaluating the relevance and functionality of existing legal frameworks dealing *inter alia* with “harmful practices in relation to children.” In this regard, and as explained below, ADF International submits that under no regulatory regime could surrogacy be compliant with international human rights law and standards.

1. At its core, within or outside the context of the current crisis, surrogacy amounts to the sale of children as defined in Article 2(a) of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC):

“Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”[[9]](#footnote-10)

1. Furthermore, it should be noted that the aforementioned human rights concerns underlying the practice are not exclusive to its commercial form, but also to so-called “altruistic” surrogacy. Studies show that even in the case of “altruistic” surrogacy, significant amounts of money still change hands in the name of “expenses”, and/or “payments in kind” are made either through the provision of housing or coverage of medical bills.[[10]](#footnote-11) If not a form of remuneration, such compensations may well be regarded as “considerations” within the meaning of OPSC Article 2(a).
2. The severe negative impact of surrogacy for the human rights and best interest of the child, coupled with the growing transnational dimension of this practice, warrants a collective response from the international community. We recommend that Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse include recommendations to this end in her next report to the Human Rights Council.

*Further Human Rights Violations as a Consequence of Surrogacy*

1. Besides its express prohibition in accordance with OPSC, it is worth recalling that the obligation to prevent the sale of children is also incumbent upon all States Parties pursuant to Article 35 of the Convention on the Rights of the Child (CRC):

“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”[[11]](#footnote-12)

1. Though a violation of international human rights law in and of itself, surrogacy exposes children to further, consequential human rights violations that can affect them long after the sale takes place.
2. The threat posed by this practice to the right of the child to preserve his or her identity, including *inter alia* nationality, has been well-documented in national court jurisprudence. In *X & Y*, in which twin babies commissioned by UK citizens and born to a Ukrainian surrogate were *de facto* left without citizenship in either country, Justice Hedley of the UK Supreme Court raised concerns that the surrogate arrangement had allowed the children to be left “marooned, stateless and parentless”, further noting his discomfort at being in a situation to authorize a commercial arrangement that is rightfully prohibited by UK law.[[12]](#footnote-13) Other domestic courts have addressed similar cases, alongside other situations in which a child born through surrogacy abroad has been willfully abandoned mid-transaction because of disability or a “change of desire”, such as in the case of *Baby Manji Yamada v. Union of India & Anor*.[[13]](#footnote-14)
3. Ukrainian orphanages and sympathetic staff nurses were caring for abandoned children born of surrogacy long before 2020. The story of Bridget Irmgard Pagan-Etnyre, a now three-year-old child with disabilities born to a surrogate mother and abandoned by her US commissioning parents, serves as a grim reminder that when a child is objectified and commodified as an item for purchase, their value and dignity is eroded as their worth is measured in accordance with “market demand”.[[14]](#footnote-15)

*Surrogacy and the Best Interest of the Child*

1. The principle of prioritizing the best interests of the child in all decisions concerning him or her has long been entrenched in international human rights law, having first been affirmed in the Declaration on the Rights of the Child in 1959 and later codified in Article 3 of the CRC.[[15]](#footnote-16) It is even regarded by certain legal scholars as a principle of customary law.[[16]](#footnote-17)
2. Although several other provisions of the CRC rely on this principle, the “best interest of the child” is not specifically defined. The Committee on the Rights of the Child (herein, “the Committee”), as well as national legislators and judicial bodies, has offered its own interpretation of the term. For example, in its General Comment No. 7 (2005) on implementing child rights in early childhood, the Committee outlined a dual-approach to honoring this principle: individualistic (in “all decision-making concerning a child”), and collective (putting “young children as a group or constituency” at the center of “all law and policy development”).[[17]](#footnote-18)
3. ADF International submits that, besides legalizing a practice that meets the definition of the sale of children under relevant international human rights instruments, permissive surrogacy laws, regulations and policies subordinate or even disregard the best interest of the child in favour of the “rights” of the commissioning parties and the gestational carrier arising from surrogacy arrangements, regardless of their eventual contractual nature.

*Case Study: Surrogacy in New York State*

1. One example of how regulatory frameworks are intrinsically unable to prioritize the child’s best interests is found in the recent adoption of New York State Senate Bill No. 7717.[[18]](#footnote-19)
2. Among other things, this bill creates the so-called “Surrogate’s Bill of Rights”, which protects the surrogate mother’s access to healthcare, independent legal counsel, medical costs before and after surrogacy, and the termination of surrogacy arrangements. Furthermore, Section 581 of its Part Three (Child of Assisted Reproduction) highlights the rights and interests of the “child of assisted reproduction” only insofar as they pertain to those of the commissioning parents and surrogate in the surrogacy agreements. In particular:
   * + §581, 302 clarifies that a donor is not a legal parent of a child conceived through assisted reproduction;
     + §581, 303 clarifies that a person who provides gametes for, or consents to, assisted reproduction with the intent of a being a parent of the resulting child with the consent of the gestating parent is a legal parent of the resulting child;
     + §581, 304 establishes when consent to assisted reproduction is presumed and how to prove consent when it is not presumed.
     + §581, 305 places limitations on a spouse’s ability to dispute the parentage of a child born through assisted reproduction.
     + §581, 306 discusses the effect of embryo disposition agreements between intended parents which transfer legal rights and dispositional control of the embryo(s) to one intended parent.
3. The immediate problem of travel restrictions disrupting surrogacy transactions have further brought to light the negative implications of the practice when the “buyers” are separated from the “product”, leaving the child in the hands of the woman who has prepared to emotionally detach herself from the child she carried. While these outstanding challenges have recently surfaced, they will continue after the pandemic subsides. Plights such as that of Bridget Irmgard Pagan-Etnyre, highlighted above, would not be evaded by these regulatory measures, which can only ever protect the “transactional rights” of the adults involved.
4. In centering on the experience of the transactional parties, and failing to accord foremost attention to the best interests of the child, the New York surrogacy bill demonstrates that failure of permissive frameworks to protect the human rights of children. Indeed, no safeguard can ever repair the deliberate fragmentation of parenthood to which children born via surrogacy are exposed, nor guarantee that they will not be abandoned as a ward of the State.
5. Moreover, no regulation can ever compensate for the fact that surrogacy, whether for remuneration or for other means, amounts to the sale of children.
6. **Conclusion**
7. In accordance with all the information provided above, it is the strong recommendation of ADF International that, considering how the global outbreak of COVID-19 has shed new light on the critical human rights implications of surrogacy, the Special Rapporteur use her upcoming report to unequivocally condemn this practice as a form of sale of children, and to call upon the international community to bring an end to this gross violation of human rights.
8. The current crisis has served as a warning that the fragmentation of parenthood and the objectification and commodification of children through surrogacy is never in the best interests of the child, and should therefore be prohibited in all its various forms. While the questionnaire sought examples of positive practices and regulations, it is ADF International’s clear analysis that neither legally limiting payment, nor safeguarding the treatment of the surrogate can serve as justification for a practice in which children’s human dignity, rights and wellbeing are compromised, their lives being bartered for as simple commodities.

1. Andrew Kramer, ‘100 Babies Stranded in Ukraine After Surrogate Births’ *New York Times* (16 May 2020) <<https://www.nytimes.com/2020/05/16/world/europe/ukraine-coronavirus-surrogate-babies.html>>. [↑](#footnote-ref-2)
2. Lauretta Brown, ‘Stranded babies, Hurting Moms: Covid-19 Crisis Highlights Problems with Surrogacy’ *National Catholic Register* (26 May 2020)

   <<https://www.ncregister.com/daily-news/stranded-babies-hurting-moms-covid-19-crisis-highlights-problems-with-surro>>. [↑](#footnote-ref-3)
3. David Dodge, ‘How Coronavirus Is Affecting Surrogacy, Foster Care, and Adoption’ *New York Times* (1 April 2020) <https://www.nytimes.com/2020/04/01/parenting/coronavirus-adoption-surrogacy-foster-care.html>. [↑](#footnote-ref-4)
4. Sirin Kale ‘Surrogates left holding the baby as coronavirus rules strand parents’ *The Guardian* (14 May 2020) <https://www.theguardian.com/lifeandstyle/2020/may/14/surrogates-baby-coronavirus-lockdown-parents-surrogacy>. [↑](#footnote-ref-5)
5. *Ibid.* [↑](#footnote-ref-6)
6. Sirin Kale, ‘Surrogacy: new parents stuck in US amid coronavirus shutdown’ *The Guardian* (26 March 2020) <https://www.theguardian.com/world/2020/mar/26/surrogacy-new-parents-stuck-in-us-amid-covid-19-shutdown>; Libby Dowsett, ‘The surrogate is in Oregon. The parents are in China. And the baby is in limbo’ *The Oregonian* (05 April 2020) <<https://www.oregonlive.com/living/2020/04/the-surrogates-in-oregon-the-parents-are-in-china-and-the-baby-is-in-limbo.html>>. [↑](#footnote-ref-7)
7. Kale, ‘Surrogates left holding the baby’ (n4); Kale, ‘Surrogacy: New Parents’ (n6) [↑](#footnote-ref-8)
8. Soutik Biswas, ‘India parents make pandemic road trip to get to stranded infant’ *BBC News* (25 May 2020) <<https://www.bbc.com/news/world-asia-india-52646024>>. [↑](#footnote-ref-9)
9. Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25th May 2000, entered into force 18th January 2002) U.N. Doc. A/RES/54/263 Art 2(c) (OPSC). [↑](#footnote-ref-10)
10. Studies from the University of Kent show that in the United Kingdom, where only “altruistic” forms of surrogacy are permitted, the majority of commissioning couples still pay between £20,000-30,000 throughout the process in so-called “pregnancy expenses.” See Kirsty Horsey, ‘Surrogacy in the UK: further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform’ (Surrogacy UK, December 2018). [↑](#footnote-ref-11)
11. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 35. [↑](#footnote-ref-12)
12. *Re X & Y (Foreign Surrogacy),* (2008) EWHC (Fam) 3030, 10. [↑](#footnote-ref-13)
13. *Baby Manji Yamada vs Union Of India & Another*(2008) AIR 2009 SC 84. [↑](#footnote-ref-14)
14. Samantha Hawley, ‘Damaged babies and broken hearts: Ukraine's commercial surrogacy industry leaves a trail of disasters’ *ABC News* (21 August 2019) <<https://www.abc.net.au/news/2019-08-20/ukraines-commercial-surrogacy-industry-leaves-disaster/11417388>>; Paola Belletti, ‘The Ukraine: A baby factory where “defective” products like Bridget are abandoned’ *Aleteia* (5 September 2019) <<https://aleteia.org/2019/09/05/the-ukraine-a-baby-factory-where-defective-products-like-bridget-are-abandoned/>>. [↑](#footnote-ref-15)
15. Declaration of the Rights of the Child (20 November 1959) UN Doc. A/RES/1386(XIV) Principle 2; CRC (n12) art 3. [↑](#footnote-ref-16)
16. Dina Imam Supaat, *‘Establishing the best interest of the child rule as an international custom’ (2014) International Journal of Business, Economics and Law, Vol. 5, Issue 4, 113-114.* [↑](#footnote-ref-17)
17. UN Committee on the Rights of the Child, ‘General comment No. 7 (2005): Implementing Child Rights in Early Childhood’ (20 September 2006) UN Doc. CRC/C/GC/7/Rev.1 ¶ 13. [↑](#footnote-ref-18)
18. New York State Senate, ‘An act to amend the family court act, in relation to judgments of parentage of children conceived through assisted reproduction or pursuant to surrogacy agreements; to amend the domestic relations law, in relation to restricting genetic surrogate parenting contracts; to amend the public health law, in relation to voluntary acknowledgments of parentage, gestational surrogacy and regulations concerning ova donation; to amend the general business law, in relation to the regulation of surrogacy programs; and to repeal section 73 of the domestic relations law, relating to legitimacy of children born by artificial insemination’ (11 February 2020) Bill No. 7717 <<https://www.nysenate.gov/legislation/bills/2019/s7717>>. [↑](#footnote-ref-19)