



THE PERMANENT MISSION  
OF THE  
UNITED STATES OF AMERICA  
TO THE  
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS  
IN GENEVA

June 21, 2019

Maud de Boer-Buquichhio  
Special Rapporteur on the Sale and  
Sexual Exploitation of Children, Including Child Prostitution,  
Child Pornography, and Other Child Sex Abuse Material  
United Nations Office at Geneva

Dear Ms. de Boer-Buquichhio:

The United States thanks the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography, and Other Child Sex Abuse Material for the opportunity to comment on her next thematic report, which intends to develop “Safeguards for the protection of the rights of children born from surrogacy arrangements.” The United States is committed to the protection and promotion of human rights of children, including children born from surrogacy arrangements.

Please find the United States’ response enclosed.

Sincerely,

A handwritten signature in blue ink that reads "Jason Mack".

Jason R. Mack  
Human Rights Counselor

**SUBJECT: U.S. Response to Questionnaire on Children Born from Surrogacy Arrangements**

The United States takes seriously our obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC).<sup>[1]</sup> As a threshold matter, the United States respectfully disagrees with the Special Rapporteur’s assertion that the OPSC creates obligations related to surrogacy. Because surrogacy, as a practice, does not involve any of the forms of exploitation included in Article 3 of the OPSC,<sup>[2]</sup> it is the view of the United States that surrogacy falls outside the scope of the OPSC.<sup>[3]</sup> Nonetheless, the United States has among the world’s strongest laws aimed at protecting and advancing the rights of children without distinction of any kind, and these apply equally to children born via surrogacy arrangements.

No federal legislation exists or is pending in the United States regarding payments to surrogate mothers, as such. Generally, family law matters—including the establishment, recognition, and contestation of legal parentage—are matters controlled by

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<sup>[1]</sup> The United States notes the complexities raised by the assumption underlying the questionnaire that all States are party to the Convention on the Rights of the Child (CRC). The United States is not party to the CRC and emphasizes that any obligations therein do not apply to the United States.

<sup>[2]</sup> Article 1 of the OPSC provides that parties shall prohibit the sale of children. Article 2 defines the sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” Article 3 further specifies that parties shall criminalize:

- (a)
  - (i) Offering, delivering or accepting, by whatever means, a child for the purpose of:
    - a. Sexual exploitation of the child;
    - b. Transfer of organs of the child for profit;
    - c. Engagement of the child in forced labour.
  - (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;
- (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;
- (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

<sup>[3]</sup> The United States stresses that forced pregnancies would not constitute surrogacy and could fall within the scope of OPSC crimes. In addition, the United States understands the reference to “applicable international legal instruments” in Article 3(1)(a)(ii) of the OPSC to mean the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the “Hague Convention” or the “Adoption Convention”). Whether the Hague Convention could be interpreted to apply to a surrogacy arrangement is a complex question that would turn on a variety of factors. However we note, in this regard, that the Hague Conference on Private Law’s Experts’ Group on the Parentage/Surrogacy Project has stated that the Adoption Convention is not the appropriate mechanism to address surrogacy-related issues, and the United States has taken the same position. In addition, in at least one case, the U.S. Department of State, acting as the U.S. Central Authority, determined that the Adoption Convention did not apply to a cross-border surrogacy arrangement after a U.S. state court granted legal parentage to the intended parents.

state law in the United States, and state laws regarding surrogacy vary widely. Surrogacy is illegal in some states and is expressly permitted and regulated in others. Thirty-one states have laws that in some fashion address surrogacy. Michigan and New York, as well as Washington, D.C., have criminalized surrogacy. Other states have laws that provide that surrogate contracts are invalid. Still other states set up elaborate mechanisms to approve contracts or to regulate the payment of fees to surrogates. In the states that permit surrogacy agreements, rules and regulations may address issues such as the marital status of the parties, the age of the parties, their medical conditions, the method of obtaining informed consent, the content of surrogacy agreements, the type of compensation that is permitted for surrogates, and the processes required to obtain a parentage order or a birth certificate.

The question of whether or how a “best interests of the child” standard is used varies by U.S. state and by the type of proceeding that is involved. In addition, as reiterated above, the United States is not party to the CRC, so it does not have an international law obligation to make the best interests of the child a primary consideration in all actions involving children.<sup>[4]</sup> However, as a general matter, States would use the “best interests of the child” standard in proceedings that involve custody, care, or guardianship of a child, not the establishment of parentage. Parentage is established by operation of state law, based on factors such as the person who gave birth to the child, whether the child was born in wedlock, and whether a father executes a valid affidavit of paternity, among other factors.

As discussed above, surrogacy and other family law matters are governed by state law in the United States and laws vary widely. Because of the lack of federal oversight, data on surrogacy-related matters is limited. Fertility clinics in the United States are required to report certain data on assisted reproductive technology (ART) cycles performed to the Center for Disease Control and Prevention (CDC) within the U.S. Department of Health and Human Services (HHS). Fertility clinics reported to HHS/CDC that in 2016, ART cycles resulted in 65,996 live births in the United States. However, these ART statistics do not isolate surrogacy births from other types of in vitro fertilization (IVF) procedures. A report published by the CDC found that between 1999 and 2013 about two percent of all ART cycles used a gestational carrier. State law would govern any licensing, certification, or registration of surrogacy “intermediaries.”

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<sup>[4]</sup> The United States acknowledges an obligation to employ a best interests standard with respect to treatment by the criminal justice system of children who are victims of crimes addressed by the OPSC. See OPSC Art. 8(3) (“States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.”).

On the question of children born from a surrogacy arrangement who enter the United States, generally a child born overseas is permitted to enter the United States if she or he has been documented as a U.S. citizen or has a valid visa. If the U.S. citizen parent or parents of a child meet the statutory requirements for transmission of citizenship to a child born overseas, or if they are eligible to apply for immigration benefits for their child, then the United States will issue the child the relevant documentation regardless of whether the parents used a surrogate or other forms of ART. In general, if parentage was established properly in the country where the child was born, U.S. officials do not question the legal parentage of the child. We are not aware of any cases where the legal parentage of a child born through a legal surrogacy arrangement was not recognized in the United States.<sup>[5]</sup>

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<sup>[5]</sup> The United States is aware of several cases where children born through surrogacy overseas could not be documented as U.S. citizens at birth because the child lacked a biological connection to his or her U.S. citizen parents; however, this issue is distinct from the legal parentage of the child.