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# Human Rights Implications of Global Surrogacy, Executive Summary

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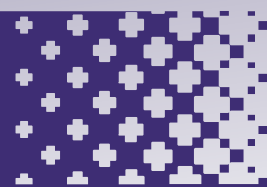
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# HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY

## Executive Summary



## OVERVIEW

The recent medical advancement of gestational surrogacy has opened new possibilities for many to found families. In this process, a woman (“surrogate”) becomes pregnant through *in vitro* fertilization (IVF) and gives birth to a child on behalf of a third-party unable to do so (“intended parent(s”).

As surrogacy becomes more accessible, however, questions have arisen about the impact on the human rights of the various parties involved. Vulnerable women working as surrogates have reportedly been exploited in countries without regulation of the surrogacy industry. Intended parents have been deceived and defrauded by surrogacy agencies. These reports, along with concerns about the welfare of the children born of surrogacy, have led several countries to prohibit domestic and/or transnational surrogacy.

Yet, documented reports of human rights violations in the context of surrogacy remain sparse. In fact, likely due to the fact that surrogacy is a relatively recent medical advancement, there is minimal research and evidence of the actual human rights implications of surrogacy.

This report aims to advance an understanding of the human rights implications of surrogacy in order to assist policymakers in crafting a proper regulatory approach to the practice. It analyzes surrogacy from an international human rights perspective, assessing how responsive laws, policies and regulations might enhance and protect the fundamental rights of all parties. Review and analysis of surrogacy practices reveals both the ways that surrogacy can protect and promote the rights of those involved in the practice and also the ways that unregulated surrogacy practices can undermine the rights of these same parties.

While various stakeholders in the surrogacy process, including states and intermediaries (surrogacy agencies), may have distinct and often competing interests, the human rights of the primary parties guaranteed by international treaties must be prioritized. Women’s rights to reproductive freedom, bodily autonomy, and the right to just and favorable working conditions; children’s rights, including the right to an identity and the right to have their best interests promoted; and the rights of individuals and couples to found families are all present in the practice of surrogacy and require protection. International law prohibitions, such as the prohibition on forced labor and human trafficking, must be guarded against as well.

Currently, the majority of countries lack laws or regulations on surrogacy. Ten countries have made surrogacy legal and have regulated the practice. In approximately ten other countries, the practice is prohibited. The market for surrogacy has expanded in recent years, but most countries restrict surrogacy to its altruistic form in which surrogates provide the service without compensation. Some countries and states in the United States allow for commercial surrogacy, permitting compensation to the surrogate, in addition to reimbursement of medical and other expenses incurred during the process.

Transnational commercial surrogacy, where the surrogate receives compensation and is located in a different country from the intended parents, has also expanded and gained popularity in certain regions in the early 2000s due to the lower costs for intended parents. India was one of the first countries to legalize it and became, for a period of time, the world’s largest provider of the service. However, following reports of exploitation of women serving as surrogates, India began to regulate the industry in 2012, before banning it in 2016. Following India’s ban, surrogacy practices continued in Thailand, Laos, Malaysia and Cambodia, where they were largely unregulated. Thailand then banned international surrogacy in 2015, and Cambodia followed in 2016. This report features the Cambodian ban as a case study for transnational commercial surrogacy.

The surrogacy process, which can vary, generally includes the following stages: surrogates are identified, usually through an agency, and then undergo medical testing; intended parent(s) seeking a surrogate procure sperm and egg through either a donor, bank, or extraction process; the surrogate and intended parent(s) are matched, negotiate and sign (or agree orally to) a contract, whose terms depend in part on the regulations of the particular state or country where the surrogacy process occurs; the surrogate is then impregnated via IVF, carries the child to birth, and then gives the child to the intended parent(s). Following birth, the surrogate is usually provided follow-up care, depending on the requirements of the surrogacy agreement or governing law.

There are limited empirical studies of surrogacy practices and none that identify any medical or psychological risks inherently associated with the practice. The majority of studies to date show no major medical risks in surrogacy as compared to traditional pregnancies and no studies have determined that surrogacy, inherently, has a detrimental psychological impact on surrogates or the children born through surrogacy. Some studies conducted in India did find a detrimental psychological impact on the surrogate within India's social context, where the stigma associated with the practice added emotional and physical stress experienced by surrogate women during pregnancy.

However, in the absence of regulation, the potential does exist for human rights violations of the parties at various stages of the process. Reports indicate that intermediary agencies do not always fully inform surrogate mothers of the medical risks involved, women are not always provided with adequate healthcare, and contracts between surrogates and intended parent(s) are sometimes unduly harsh or restrictive towards the surrogate or may be unenforceable due to an absence of effective legal mechanisms. States, including in Cambodia as described in more detail below, have criminalized surrogates and compelled them to raise the children born of surrogacy. Children of surrogacy can be left orphaned or stateless in cases where the surrogate and intended parent(s) are citizens of countries that have conflicting laws on surrogacy.

These contextual factors, not unique to surrogacy, appear to be the most influential in whether surrogacy can be conducted in a human rights compliant manner. For example, where the lack of an adequate standard of health care makes the process of surrogacy dangerous or unreliable for surrogates, regulations and other measures must ensure that such care is provided and that informed consent is given in all surrogacy arrangements. Similarly, where the lack of state institutions capable of effectively enforcing contracts and agreements leave surrogate women vulnerable to exploitation or at risk of medical complications without protection or recourse, a mechanism must be in place to ensure the parties comply with their obligations within the process. These and other safeguards should aim to promote and protect the human rights invoked in surrogacy and address underlying vulnerabilities caused by non-compliant state laws, policies and practices. The rights invoked in surrogacy as summarized below and the recommendations made in this report aim to provide such a framework.

# INTERNATIONAL HUMAN RIGHTS

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## RIGHTS OF WOMEN

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**Rights to reproductive freedom, bodily autonomy, and health.** Universal Declaration of Human Rights (UDHR) Article 12, International Covenant on Civil and Political Rights (ICCPR) Article 17, European Convention on Human Rights (ECHR) Article 8, American Convention on Human Rights (ACHR) Article 11, and ASEAN Human Rights Declaration Principle 21 protect women against arbitrary and unlawful interferences with their privacy. UDHR Article 25 and International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 12 guarantee women the highest attainable standard of health. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 16 affirms the right of women to decide freely the number and spacing of children and reproduction.

**Right to non-discrimination.** CEDAW, ECHR, ACHR, African Charter on Human and People’s Rights (ACHPR), and ICCPR all require countries to address gender discrimination in the context of reproductive choices and freedoms. As surrogacy is uniquely available to women, any restrictions that are not justified by a legitimate need to protect other parties’ rights aggravate gender inequality.

**Right to work under just and favorable conditions.** CEDAW Article 11, UDHR Article 23, and ICESCR Article 7 guarantee just and favorable working conditions for women.

**Prohibition on forced labor.** The Forced Labor Convention and other instruments prohibit “all work or service which is exacted from any person under menace of penalty and for which the said person has not offered himself voluntarily.”

**Prohibition on human trafficking.** CEDAW and the 2002 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children prohibit human trafficking, defined in Article 3 of the Protocol as the “recruitment, transportation, transfer...by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception...for the purposes of exploitation”. Human trafficking is only relevant to surrogacy where some form of coercion or deception is used to compel the surrogate to participate and/or the purpose of surrogacy is exploitative in nature as to the surrogate or child (e.g. sexual exploitation or forced labor).

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## RIGHTS OF CHILDREN

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**Prohibition on the sale of children and human trafficking.** The Convention on the Rights of the Child (CRC) also forbids “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” Surrogacy is a compensated or uncompensated service of gestating and birthing a child on behalf of a pre-designated party. The CRC prohibition on sale of children is only relevant to surrogacy where it is performed for the purposes of then transferring the child to a third-party for remuneration. See note above on human trafficking where surrogacy is performed for an improper and exploitative purpose.

**Best interests of the child.** CRC mandates that states act in the best interest of the child. States must assess how laws and policies actually impact children and their interests and put in place the necessary protections.

**Right to non-discrimination.** CRC Article 2 protects children from discrimination based on birth or other status.

**Right to identity.** CRC Articles 7 and 8 include a right to identity, including a nationality. States must ensure that children are not rendered stateless or orphaned and have access to information about their identity and origins.

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## **RIGHTS OF INTENDED PARENT(S)**

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**Right to found a family without discrimination.** UDHR, ICCPR, CESCR, ECHR, ACHR, ACHPR, and ASEAN Declaration all protect the right to found a family without discrimination. CRPD also ensures the right of persons with disabilities to found families and retain fertility on an equal basis with others. This right can include access to sexual and reproductive health services and technologies.

## CAMBODIA: A CASE STUDY

In 2015, following the restrictions of surrogacy in India and Thailand, the commercial surrogacy industry increased its presence in Cambodia. Surrogacy agencies found Cambodia attractive because, at the time, it lacked regulations on surrogacy or any other form of reproductive technology. Approximately fourteen agencies and clinics opened in Phnom Penh after Thailand imposed restrictions on surrogacy. However, the lack of regulations led Australia and other states to issue warnings to couples seeking Cambodian surrogacy services.

*As a condition of their bail, each woman has to care for the child they were carrying, or face arrest.*

In September and October of 2016, Cambodia’s Ministry of Women’s Affairs and Ministry of Justice adopted public positions that surrogacy was exploitation of women and a form of child trafficking. Eventually, the Ministry of Health banned all forms of surrogacy and commercial sperm donations and mandated all IVF services to acquire government permission before operating. Fifty agencies in Phnom Penh were notified of the change. Shortly after the ban, an Australian nurse and two Cambodian citizens were charged and eventually sentenced for human trafficking for brokering surrogacy arrangements. In 2018 and 2019, several women serving as surrogates were arrested and detained. Ultimately, many were released on bail. As a condition of bail, each woman has agreed to parent the child they

were carrying until the child reached 18 years of age. Reports continued in 2019 of further arrests of women serving as surrogates.

Accounts have varied on whether the intended parent(s) of the babies being raised by the Cambodian surrogate mothers have made efforts to claim the children. The Cambodian government has stated that only a few—three or four—intended parent(s) have filed applications claiming parentage, despite having a year to do so according to the Ministry of Interior policy.

Cambodia is currently considering surrogacy reform, with the Inter-Ministerial Working Group reviewing a draft law. Key provisions of the draft law require informed consent, medical screening, and a written agreement witnessed by the National Committee on the Management of Surrogacy. The draft law includes several other qualifications: women volunteering to be surrogates must be Cambodian, related to the intended parent(s), never have been a surrogate, be married, and have permission from their spouse. Using the egg of the surrogate is not permitted. The law criminalizes surrogates, intended parent(s), and any agencies aiding in the process without proper approvals. Any improper use of the embryos, such as scientific research or improper disposal of an embryo created for surrogacy, carries a sentence of five years imprisonment and a fine.

*The proposed law criminalizes surrogates, intended parent(s), and any agencies aiding in the process. Violators can face fines and criminal prosecution.*



## CAMBODIA: INTERVIEWS WITH SURROGATES

The International Human Rights Clinic interviewed three of the thirty-two women arrested in June 2018. All three women have been released on bail and are being monitored. None were aware that surrogacy was banned in Cambodia when they agreed to serve as surrogates. In order to protect their identities, they will be referred to as A, C, and K.

*None of the interviewed women were aware that surrogacy was banned in Cambodia.*

A and C both moved from smaller provinces to Phnom Penh. A worked in a garment factory, but now stays home to raise several young children. While working at the factory, she earned 130 USD per month on nine-hour shifts. A hoped that becoming a surrogate would help her pay off her family's debt of 18,000 USD, a debt she incurred when she borrowed money from her bank to start a fishing business in her old province. C also worked in a garment factory, where she earned 120-150 USD per month. When she became a surrogate, C owed her bank around 3,000-4,000 USD, a debt accrued from her mother's medical expenses. K also worked in a garment factory, but has since moved to construction. Her garment job provided 50-60 USD per month for eight-hour shifts, and her new construction job provides 6.25 USD per day for the same shifts. K also has debt, totaling around 2,000 USD. None of the three women have husbands who earn enough money to pay off the debts. The husbands all work in construction, bringing in 5-10 USD per day.

A, C, and K each experienced similar recruitment processes, and none claims to have been coerced. A co-worker introduced them to the idea of surrogacy and explained that they would receive an initial payment of 500 USD, in addition to 300 USD per month, plus another lump-sum payment at the end of the process. In total, the women were promised 10,000 USD, along with group housing during pregnancy. Each woman met with surrogates who had attested to being paid in full.

After agreeing to surrogacy, each woman went through a similar medical examination involving a blood test. A, C, and K were never warned of the medical risks, and the doctors never performed a psychological evaluation. At no point did they receive information about the intended parent(s), and not one of the three women recalled signing a contract. After this process, each woman had a slightly different procedure to prepare for pregnancy. A took medicine allegedly to thicken her uterus for fourteen days, was given an injection (for an unknown purpose), and then the doctor implanted the embryo. She proceeded to take pills and receive daily injections for three months and twelve days. C received injections for five days until the embryo was implanted, and then received continuous injections for three months. K took one pill a day for five days until implantation, and then received injections for three months. After this process, A, C, and K were all paid 500 USD and transported to a group home, where meals were prepared for them. The surrogates were directed to rest and to remain in the house.

*They were charged with human trafficking and held in a police hospital for five months without a conviction.*

The women were arrested in a raid on the group home on June 21, 2018. None of the interviewed women were aware that surrogacy was banned in Cambodia and so the raid came as a shock. At the time, A was one month pregnant, C was eight months pregnant, and K was four months pregnant. The police brought the surrogates to the police station. A and K were detained for 24 hours and C was detained for 48 hours. They were charged with human trafficking and held in a police hospital for five months without a conviction. C gave birth during this time. They were released on bail in December 2018 on the condition that they raise the children. On the day of the release, K gave birth. A gave birth in January 2019. The three surrogates are currently being monitored. Each month, they must report to the police and confirm that they still have the child, a requirement they assume will continue until the child is an adult. This requires K to travel to Phnom Penh each



month, a two-hour trip that costs 1.25 USD. Neither A, C, nor K earned full compensation, receiving 500 USD, 3,000 USD, and 1,100 USD respectively.

According to the surrogates, efforts were made by the surrogacy agency and intended parent(s) to request the child born of the process. A received a phone call while in detention about the baby, though she was unsure who called and assumed it

*Each month, the women must report to the police to confirm they have the child.*

was the agency. The broker contacted C, and C met with both the broker and the intended father upon release. C allowed the intended father to see the child but did not allow him to take the child for fear of being imprisoned. She also claims that the intended father filed a claim in court but was unclear on the outcome of his claim.

The three women described both criticism and pity from their communities as a result of serving as surrogates. A says some members of her community have expressed compassion for the difficult situation she now finds herself in, but others believe that she is lying and that she accidentally became pregnant due to promiscuous behavior. C also has faced criticism from her family. Her husband did not want her to be a surrogate and is now resentful of the additional burden of raising the child. C's brother-in-law has offered to adopt the child, but she refused because she was unsure how he would treat the child. K did not speak of her community but did express hope that the child will grow up to help her family.

## POLICY RECOMMENDATIONS

The continued demand for surrogacy will require protection of rights of those involved, including women’s reproductive freedom, bodily autonomy, and privacy; the rights of children to protection from exploitation and to be raised in circumstances that meet their needs and best interests; and the right of individuals who are unable for reasons of infertility, sexual orientation and otherwise to found a family in a manner that is free from discrimination. With the proper framework, surrogacy practices can take place in a manner that respects, or even promotes, the human rights and interests of all parties. These recommendations are merely guidelines for a human rights-protective approach, and consider several fundamental policy decision to be made: *whether to restrict or ban the practice; whether to allow for domestic or transnational arrangements; whether to permit surrogates to receive compensation or require them to provide the service altruistically; what role, if any, intermediary organizations should play in the process; and how the human rights of surrogates and children can be further protected with specific regulatory interventions.*

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### GENERAL POLICY APPROACHES

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- There is a significant lack of data and information available on existing surrogacy practices. In particular, further research is needed to determine how, whether and under what circumstances surrogacy arrangements are, in fact, serving as mechanisms for exploitation and abuse of surrogates and/or children.
- Policy approaches to surrogacy should be based on the best-available scientific evidence, placed within the larger context of an approach to infertility, reproduction and paths to parentage and should respect, advance and protect the rights of the parties to surrogacy – intended parents, surrogates and the children born through surrogacy.
- State interests and obligations must be balanced in policy approaches to surrogacy. Primary among these interests should be protecting individuals from abuse and exploitation, enabling women’s bodily autonomy and reproductive decision-making and supporting the ability of individuals and couples to found and expand their families.
- Regulations and policies on surrogacy should be developed in consultation with the various stakeholders impacted, including surrogate women, intended parent(s), and, where possible, individuals born through the surrogacy process.

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### LEGALIZATION OF SURROGACY: BANS AND/OR RESTRICTIONS

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- Available evidence indicates that permanent wholesale bans on surrogacy are not justified by concerns for human rights. Properly implemented regulatory mechanisms can address concerns while enabling important human rights at stake for parties involved.
- States have a duty under various treaty obligations to ensure access to basic health services, including reproductive and maternal services, and to provide legal mechanisms for basic due process and rule of law. Restrictions on surrogacy should not be justified by state failure to comply with these obligations.
- If a state chooses to institute a ban or restriction, the ban should be temporary with a goal towards developing mechanisms that will return this reproductive freedom to women and assisted reproductive option to individuals wishing to have children.
- Bans should categorically avoid criminalizing surrogates for simply engaging in surrogacy. Criminalization of surrogates excessively restricts their reproductive freedom and right to bodily autonomy.
- States that do institute bans must consider the best interests of the child, including the value to the child of the relationship with the intended parent(s), when faced with unauthorized surrogacy practices. Approaches to such cases

should avoid separating children from intended parent(s), rendering children stateless or requiring surrogates to raise children against their will.

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## **SCOPE OF SURROGACY: TRANSNATIONAL AND/OR DOMESTIC**

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- A transnational mechanism may be the most effective and realistic way to meet the demand for surrogacy services, address forum shopping concerns, establish international standards and protect vulnerable surrogate women from exploitation.
- Domestic arrangements, while clearly benefitting from increased state capacity for oversight, are unlikely to provide a long-term mechanism for surrogacy arrangements. A domestic limitation, however, could be appropriate while a transnational mechanism is under development.
- States that limit surrogacy to domestic arrangements must still contend with transnational arrangements and how to protect the best interests of the child born through surrogacy. States must develop policies and agreements to ensure children born through surrogacy are not rendered stateless or in unrecognized parentage relationships.

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## **COMPENSATION: COMMERCIAL AND/OR ALTRUISTIC SURROGACY**

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- Altruistic surrogacy limitations in high demand states may merely encourage expansion of commercial markets elsewhere, relieving certain states of regulatory burdens but increasing the burden on other states.
- Altruistic surrogacy limitations may encourage “creative” agreements between the surrogate and intended parent(s) to identify a mechanism for compensation, making enforcement of agreements more difficult and legal protections less effective.
- Altruistic surrogacy limitations may be based on gender discrimination and stereotyping of maternal labor or other paternalistic assumptions about monetization of women’s labor.
- Surrogacy services are demanding labor which potentially carry long term physical consequences to the surrogate. Fairness may dictate that compensation for such a service is appropriate.
- Altruistic surrogacy limitations may burden women and result in surrogates being pressured by family or social inequalities to provide this service with little benefit.

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## **RIGHTS OF INTERMEDIARIES**

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- Surrogacy intermediary organizations should be regulated at the state and international level, including strict licensing requirements, defined duties and responsibilities and accountability and reporting mechanisms
- It may be advisable to limit the role of private for-profit surrogacy intermediaries to matching and facilitating arrangements. Instances of intermediaries controlling all aspects of the process are concerning to the extent vulnerable surrogates are subject to uneven standards and practices in an unregulated industry.
- States should consider development of a government apparatus that either serves as a surrogacy intermediary and/or collects data on surrogacy services and monitors the activities of these private organizations.
- The global community should consider developing a transnational mechanism that replaces private agencies and fulfils a coordinating and monitoring function.

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## **RIGHTS OF SURROGATES**

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- Surrogates should be provided with quality reproductive and maternal health care throughout the process, including during implantation, pregnancy and for a reasonable period of time following conclusion of the pregnancy. If the state cannot provide quality care via a public health care system, an alternative private system may be employed, at no cost to the surrogate, as long as such a system is subject to regulation and monitoring.
- The informed consent of the surrogate at every stage of the surrogacy process, including all medical procedures and services, is critical to any surrogacy practice. Regulations should determine the format and content of information provided to the surrogate about the surrogacy process and implications. The surrogate should receive independent advice and counsel on the process and the terms of any agreements.
- The state should require written agreements with minimal terms that are enforceable through an accessible administrative and/or legal mechanism. The terms of written agreements may not unduly infringe on the surrogate's bodily autonomy, freedom of movement or privacy.
- In the commercial context, measures should be put in place to ensure surrogates receive the appropriate support and compensation. States could require, for example, that intended parent(s) put the cost of the surrogacy process in escrow in advance of the initiation of the process.

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## RIGHTS OF CHILDREN

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- Surrogacy policy and regulations must ensure children born of surrogacy arrangements are protected from abuse and exploitation as well as raised in conditions that serve their best interests. These rights attach at birth. However, to ensure they are respected, pre-conception fitness determinations of the surrogate and intended parent(s) should be made, as is practiced in other contexts such as adoption. Regulation of intermediary organizations should also aim to protect the children born of surrogacy in addition to surrogate women and intended parent(s).
- Policies should also consider the particular needs of children born through surrogacy. For example, policies may allow children to access information about their genetic and gestational origin at a certain age.
- State policies on surrogacy should not deprive children of an identity, parentage, citizenship or leave children stateless. In fact, states should avoid interference with the parent-child relationship, even where surrogacy practices were not sanctioned.

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## RIGHTS OF INTENDED PARENT(S)

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- States should approach regulation of surrogacy practices in the context of efforts to address infertility and facilitate access to the benefits of assisted reproductive technologies. These technologies facilitate the founding and expansion of families in its various forms.
- States should adopt policies that enable transfer of parentage and citizenship for children born of surrogacy. State should prioritize avoiding interference in the relationship between a fit parent and child, especially when such interference will result in the child being placed in state care or raised, under compulsion, by an unwilling surrogate.
- States should enact regulations and monitoring mechanisms that assist intended parent(s) to identify intermediary organizations that will engage in surrogacy practices in a lawful and human rights-compliant manner.
- Fitness determinations of intended parent(s) should not perpetuate stereotypes or discriminate against same-sex couples or single parents.
- States should not presume that the risk of exploitation of children arises from intended parent(s) without evidence to support this presumption. Concerns about human trafficking and organ selling in surrogacy appear to be largely speculative at this stage and can lead to harsh policies that negatively impact well-meaning intended parent(s).