Towards a universal legal framework: The necessity of international legal regulation for surrogacy

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Abstract

The global rise of surrogacy, both as a medical practice and a commercial arrangement, has outpaced the development of international legal frameworks, leading to significant ethical, legal, and human rights concerns. Currently, surrogacy laws vary drastically across jurisdictions, ranging from outright prohibition to permissive commercial practices, often leaving surrogate mothers, intended parents, and children in vulnerable and uncertain legal positions. This paper argues that the absence of a cohesive international legal regime to regulate surrogacy exacerbates these disparities, fostering exploitation, forum shopping, and legal fragmentation, especially in cross-border surrogacy arrangements. Drawing upon comparative legal analysis and international human rights law, the paper advocates for the establishment of a universal legal framework that would harmonise surrogacy regulations across borders. Such a framework would address fundamental issues, including the protection of surrogate mothers from exploitation, the

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recognition and enforcement of parental rights across jurisdictions, and the safeguarding of the rights and welfare of children born through surrogacy. Through an analysis of existing frameworks and the evolving discourse, this paper argues that comprehensive international regulation is essential to address the global nature of surrogacy, while also balancing national autonomy with universal human rights protections.

Keywords: cross border surrogacy, international law, regulation, surrogacy, surrogacy agreements

Introduction

The debate over the enforceability of surrogacy agreements in the world is fraught with legal, ethical, and social complexities, reflecting deeper issues about human dignity, reproductive rights, and the evolving nature of family structures.[1] Surrogacy is dynamic in nature. The constant evolution of its legal concerns makes it hard to consistently legislate against surrogacy agreements.[2] Surrogacy challenges traditional notions of parenthood, family structures, and reproductive autonomy.[3] It involves a contractual arrangement where a woman, the surrogate, agrees to carry a pregnancy to term for another individual or couple who will become the child's legal parent(s) after birth.[4]

There are two primary forms of surrogacy: traditional and gestational.[5] In traditional surrogacy, the surrogate's egg is used, making her the biological mother of the child.[6] In contrast, gestational surrogacy involves the implantation of an embryo created through in vitro fertilisation (IVF), ensuring that the surrogate has no genetic link to the child.[7] Both types raise significant legal and ethical challenges, particularly when practiced across borders, often in jurisdictions with varying degrees of legal regulation or none at all.

Against this backdrop, this paper is divided into four parts that critically examine the complex legal and ethical dimensions of surrogacy, particularly in cross-border contexts. It begins by dissecting the four common global positions of surrogacy. Thereafter, the paper addresses

1 Robai Ayieta Lumbasyo, 'Towards a Kenyan legal and ethical framework on surrogacy', Unpublished MSc thesis, University of Witwatersrand, 2015.

2 John Pascoe, 'Sleepwalking through the minefield: Legal and ethical issues in Surrogacy', 30 *Singapore Academy of International Law Journal* (2018) 455.

3 Pascoe, 'Sleepwalking through the minefield', 455.

4 Yehezkel Margalit, 'In defense of surrogacy agreements: A modern contract law perspective', 20(2) *William and Mary Journal of Race, Gender and Social Justice* (2014) 426.

5 Dominique Ladomato, 'Protecting traditional surrogacy contracting through fee payment regulation', 23 *Hastings Women's Law Journal* (2012) 247.

6 Ladomato, 'Protecting traditional surrogacy contracting through fee payment regulation', 247.

7 Yale Medicine, 'Overview on surrogacy'.

the contested nature of legal parentage, exploring how different legal systems grapple with the question of who is recognised as the legal parent in surrogacy arrangements. The analysis highlights the inconsistencies across jurisdictions and the legal uncertainties that arise, especially when surrogacy agreements cross national borders. The discussion then shifts to the Global South, focusing on Kenya as a case study to explore the unique challenges that cross-border surrogacy presents in economically disadvantaged regions. Here, the legal gaps and economic inequalities expose surrogate mothers to exploitation, raising significant ethical and human rights concerns.

The paper proceeds to argue that the current fragmented legal landscape is ill-equipped to manage these complexities, making a compelling case for the establishment of an international legal framework based on Third World Approaches to International Law (TWAIL). Such a framework would harmonise surrogacy laws across jurisdictions, ensuring protection for surrogate mothers, intended parents, and children alike. The conclusion synthesises these arguments, reaffirming the necessity for a comprehensive international approach that not only clarifies legal parentage but also safeguards the human rights and dignity of all parties involved.

The four global positions of surrogacy and international surrogacy agreements

This discourse can be distilled into three primary perspectives and arguments, each with its own implications for the legal system and society at large. The surrogacy contract debate encompasses four main positions. First being the total prohibition of surrogacy contracts. Second, commercial surrogacy is prohibited but altruistic surrogacy is permitted and regulated. Third, commercial surrogacy is permitted and regulated, and lastly surrogacy is totally unregulated.[8]

[8] Hague Conference on Private International Law, 'A study of legal parentage and the issues arising from international surrogacy agreements', Preliminary Document No 3C, March 2014, 15.

The first and most conservative position advocates for the total prohibition of surrogacy contracts. Proponents of this view argue that surrogacy, by its very nature, commodifies human life, reducing the profound and intimate act of childbearing to a commercial transaction.[9] They contend that allowing surrogacy contracts to exist, let alone be enforced, undermines the intrinsic value of human life and risks exploiting women, particularly those from economically disadvantaged backgrounds.[10] This perspective is often rooted in a moral framework that sees surrogacy as a violation of human dignity, arguing that the human body should not be used as a vessel for profit.[11]

Furthermore, critics of surrogacy highlight the potential psychological and emotional harm to surrogate mothers and the children born out of such arrangements stating that it involves the sale of children.[12] While it is undeniably true that human rights violations have occurred within the surrogacy context, such abuses are not unique to surrogacy but are prevalent across various sectors.[13] Addressing these violations requires broad, systemic solutions rather than imposing restrictive measures on the entire field of Assisted Reproductive Technologies (ART).[14] Many countries overlook the fact that increased regulation can, in fact, worsen the issue of surrogacy trafficking by driving citizens to seek alternatives

9 Margaret Jane Radin, 'Market inalienability', 100(8) *Harvard Law Review* (1987) 1850.

10 Yasmine Ergas, 'Thinking 'through' human rights: The need for a human rights perspective with respect to the regulation of cross-border reproductive surrogacy', in Katarina Trimmings and Paul Beaumont (eds) *International surrogacy arrangements*, Bloomsburry Publishing, 2013, 428.

11 Ergas, 'Thinking 'through' human rights', 428.

12 David M Smolin, 'Surrogacy as the sale of children: Applying lessons learned from adoption to the regulation of the surrogacy industry's global marketing of children', 43 *Pepperdine Law Review* (2016) 267 and 268.

13 American Bar Association (ABA) Section of Family Law, 'Report to the House of Delegates: American Bar Association position paper regarding a possible Hague Convention on Private International Concerning Children, Including International Surrogacy Arrangements', 2013.

14 ABA Section of Family Law, 'Report to the House of Delegates: American Bar Association Position Paper regarding a possible Hague Convention on Private International Concerning Children, Including International Surrogacy Arrangements'.

in other countries or through unregulated black markets, thereby exacerbating exploitation rather than curbing it.[15]

The second position in the surrogacy debate advocates for the legal enforceability of surrogacy agreements, framing it as an issue of reproductive autonomy and contractual freedom.[16] This is by prohibiting commercial surrogacy but permitting and regulating altruistic surrogacy. Proponents argue that in a modern liberal society, individuals should have the right to make personal reproductive choices and enter into agreements that reflect these desires, provided they are informed, consensual, and ethically sound decisions.[17] Legal enforcement would offer clarity and protection for all parties involved; ensuring that surrogates are fairly compensated, intended parents secure their parental rights, and that the welfare of the child is upheld.

Supporters of this view emphasise the state's role in establishing a robust legal framework that balances contractual freedom with safeguards against exploitation, coercion, and abuse.[18] Such a framework would respect individual autonomy while providing legal certainty and fairness.[19] However, this position also raises concerns about whether contract law alone can adequately address the power imbalances and ethical complexities inherent in surrogacy, particularly in cross-border contexts where socio-economic disparities often lead to the commodification of women's reproductive labour.

The third, a more nuanced position, suggests that while surrogacy contracts should be permitted, they should not be legally enforceable. This stance reflects a concern for the potential coercion and exploita-

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15 ABA Section of Family Law, 'Report to the House of Delegates: American Bar Association Position Paper regarding a possible Hague Convention on Private International Concerning Children, Including International Surrogacy Arrangements'.

16 Adeline Allen, 'Surrogacy and limitations to freedom of contract: Toward being more fully human', 41 *Harvard Journal of Law and Policy* (2018) 754.

17 Allen, 'Surrogacy and limitations to freedom of contract', 760.

18 Lois McLatchie and Jennifer Lea, 'Surrogacy, law and human rights', ADF International White Paper, 2022.

19 McLatchie and Lea, 'Surrogacy, law and human rights'.

tion that could arise in legally binding surrogacy arrangements.[20] Those who support this position argue that the complexities of pregnancy and childbirth, including the potential for a surrogate to change her mind about relinquishing the child, make it morally problematic to enforce such contracts through the legal system.[21] They contend that while surrogacy should not be outrightly banned due to the recognition of the legitimate desires of individuals to build families through these means, enforcing these contracts could lead to injustices, particularly for the surrogate.

These debates are what shape the policy for most countries in the world in regulating surrogacy. The surrogacy agreement itself is frequently the least complex aspect of the arrangement. International intended parents[22] often face far greater challenges in navigating the legal barriers of their home countries.[23] These challenges extend beyond merely executing the surrogacy agreement and encompass the difficult task of securing legal parentage and the desired citizenship status for the child once born.[24] In many instances, international intended parents are compelled to circumvent restrictive national laws, which complicate their ability to formally establish their parental rights and the child's legal standing in their country of origin.[25] This is what is termed as 'circumvention tourism', wherein they travel abroad to access services that are legal in their destination country but prohibited in their home jurisdiction.[26]

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20 Sarah Moratazvi, 'It takes a village to make a child: Creating guidelines for international surrogacy', 100 *The Georgetown Law Journal* (2012).

21 Jaden Blazier and Rien Janssens, 'Regulating the international surrogacy market: the ethics of commercial surrogacy in the Netherlands and India', 23 *Medicine, Health Care and Philosophy* (2020) 622.

22 Model Act Governing Assisted Reproductive Technology (American Bar Association Proposed Act 2008), Section 102(A) (19). The section defines an intended parent as, 'an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted or collaborative reproduction'.

23 Yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating international surrogacy agreements', 24 *Journal of Law and Policy* (2015), 54-55.

24 Margalit, 'From Baby M to Baby M(anji)', 54-55.

25 Margalit, 'From Baby M to Baby M(anji)', 54-55.

26 Glenn Cohen, 'Circumvention tourism', 97 *Cornell Law Review* (2012) 1312.

International surrogacy agreements underscore profound economic, social, racial, and gender disparities between the surrogate mothers and the intended parents.[27] These disparities often manifest in cross-border surrogacy arrangements, where wealthier, typically Global North intended parents, engage the services of surrogates from economically disadvantaged regions.[28] Such dynamics raise significant ethical concerns, as they expose underlying inequalities that influence the power relations and terms of these agreements.[29]

These disparities not only shape the surrogacy process but also deepen questions around exploitation, autonomy, and justice in the global surrogacy industry, therefore, demanding a comprehensive and cohesive legal framework.[30] A well-structured legal framework will facilitate the continuation of international surrogacy agreements while rigorously safeguarding the best interests and human rights of all contracting parties, particularly the child.[31] Comprehensive regulation is the only means to effectively address and mitigate the ethical and legal concerns that have arisen in connection with cross-border surrogacy arrangements.[32]

A *locus classicus* case of this dilemma was in *Re: X and Y (Parental order: Foreign surrogacy)* decided by Hon Mr Justice Hedley. In this case, a British couple had for many years explored myriad avenues of parenthood but were not successful.[33] The couple was introduced to several potential surrogate mothers and ultimately entered into an agreement

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27 Emily Stehr, 'International surrogacy contract regulation: National governments and international bodies' misguided quests to prevent exploitation', 35 *Hastings International and Comparative Law Review* (2012) 256.

28 Usha Rengachary Smerdon, 'Crossing bodies, crossing borders: International surrogacy between the United States and India', 39 *Cumberland Law Review* (2008) 51–56.

29 Maya Unnithan, 'Thinking through surrogacy legislation in India: Reflections on relational consent and the rights of infertile women', 1(3) *Journal of Legal Anthropology* (2013) 288.

30 Unnithan, 'Thinking through surrogacy legislation in India', 288.

31 Margalit, 'From Baby M to Baby M(anji)', 43.

32 Margalit, 'From Baby M to Baby M(anji)', 43.

33 *Re X and another (children) (Parental order: Foreign surrogacy)* [2008] EWHC 3030 (Fam) (09 December 2008), para 2.

with a married Ukrainian woman who had already given birth to her own children.[34] Initially, she had expressed interest in becoming a surrogate for her sister, who was struggling with infertility. However, after her sister naturally conceived, the Ukrainian woman decided to offer her services as a surrogate for another couple.[35] The Ukrainian surrogate was implanted with embryos conceived using donor eggs (from an anonymous donor) and fertilised with the male applicant's sperm.[36] Over time, the relationship between the surrogate and the intended parents evolved into a genuine friendship. Eventually, the surrogate successfully conceived and gave birth to twins.

This marked the beginning of significant legal and logistical challenges, none of which were due to the actions of the surrogate or the intended parents.[37] The discrepancy was in the United Kingdom (UK) Human Fertilisation and Embryology Act, 1990.[38] In this case, the judge stated that this conflict made children be marooned stateless and parentless since the children could neither remain in any of the two countries.[39] The court legally recognised the twins as legitimate children of the intended parents, thereby granting them British citizenship stating that this is the best approach that the court should take for the interest of the children.[40] This decision highlights the court's emphasis on protecting the rights and welfare of the children born through surrogacy, as well as its recognition of the financial agreements involved, despite the complexities and legal uncertainties surrounding cross-border surrogacy arrangements.

34 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
35 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
36 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
37 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 4.
38 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 8.
39 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 10.
40 *Re X and another (children) (Parental order: Foreign surrogacy)*, para 25.

The contestation of legal parentage in domestic laws

Cross-border reproductive care has increasingly become a favoured option for prospective intended parents pursuing fertility treatments, driven by a wide range of factors.[41] For example, a foreign country may offer access to more advanced and innovative fertility treatments, whereas the intended parents' home country may impose legal, ethical, or religious restrictions on surrogacy. In addition to that, the cost of care may be significantly lower abroad and the intended parents may seek privacy,[42] genetic engineering options, specific genetic material or ethnicity that only certain countries provide.[43]

The regulation of surrogacy worldwide reveals a disjointed and often incoherent legal framework, symptomatic of deeper jurisprudential and policy failures to adapt to the realities of modern reproductive technologies.[44] The crux of the contestation is on birth registration which is a requirement for many states as provided in international instruments.[45] In the majority of jurisdictions, the woman who gives birth to a child is recognised as the legal mother by automatic operation of law, rooted in the principle of *mater semper certa est* 'the mother is always certain'.[46]

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41 Lisa C Ikemoto, 'Reproductive tourism: Equality concerns in the global market for fertility services', 27(2) *Law and Inequality Journal* (2009) 278.

42 American Society for Reproductive Medicine, 'Cross-border reproductive'.

43 Ikemoto, 'Reproductive tourism', 278.

44 Sally Howard, 'Taming the international commercial surrogacy industry', 349 *British Medical Journal* (2014) 1.

45 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 24(2); Convention on the Rights of the Child, Article 7.

46 The jurisdictions are as follows: Australia (NSW, VIC, QLD, WA, SA, TAS), Belgium, Canada (Alberta, BC, Manitoba, NWT), Chile, Croatia, Czech Republic, Denmark, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Hungary, Ireland, Israel, Japan, Latvia, Lithuania, Madagascar, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden, Switzerland, Thailand, Turkey and Uruguay.

This legal presumption is codified in statutory law in some states, while in others, it emerges from established practice or common law principles.[47] However, certain civil law jurisdictions adopt a nuanced approach to this issue such as Quebec and the Republic of Korea. In these jurisdictions, legal maternity is not established solely by operation of law but requires the completion of formal registration procedures. Specifically, the legal relationship between the birth mother and child is contingent upon the 'act of birth', which involves the formal attestation of birth by the attending physician and a declaration by the mother.[48]

Only one state, Monaco, has expressly prohibited the use of Assisted Reproductive Technology.[49] Most states like Kenya are in the process of enacting laws on Assisted Reproductive Technology.[50] India, too, has attempted to tighten its surrogacy laws through the Assisted Reproductive Technology (Regulation) Act, 2021 which restricts surrogacy to altruistic arrangements for Indian nationals.[51] However, the Act has been widely criticised for its insufficient protections for surrogate mothers, who often remain vulnerable to exploitation, health risks, and inadequate post-birth support. This legislative failure exemplifies the inadequacy of national regulations in addressing the inherently transnational character of surrogacy.[52]

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47 *Marckx v Belgium* (judgement on merit), App No 6833/74, ECtHR (13 June 1979), para 42; Council of Europe's 2011 Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities, para 50 and 51.

48 Ikemoto, 'Reproductive tourism'.

49 Hague Conference on Private International Law, 'A study of legal parentage and the issues arising from international surrogacy agreements' (Preliminary Document No 3C, March 2014) 11.

50 Assisted Reproductive Technology Bill of 2022.

51 Assisted Reproductive Technology (Regulation) Act, 2021, Part IV and V.

52 Mamatha Gowda, Bobbity Deepthi and Kubera Nichanahalli, 'The Assisted Reproductive Technology Act, 2021: Provisions and implications', 61 *Indian Pediatrics* (2024) 675.

In Ukraine,[53] Georgia,[54] and South Africa,[55] surrogacy is not only legal but also heavily commercialised, though these countries only couch surrogacy as altruistic.[56] Despite being legally sanctioned, the commodification of reproductive labour raises critical ethical concerns regarding the exploitation of women, especially in economically disadvantaged regions.[57] By embedding surrogacy within a legal framework that treats it as a transactional service, these jurisdictions inadvertently validate practices that prioritise financial gain over the dignity and autonomy of surrogate mothers.[58] Such legal structures neglect to consider the long-term implications for both surrogates and children born through these arrangements, thereby undermining fundamental human rights principles.[59]

Conversely, nations like France, Italy, and Switzerland enforce blanket bans on surrogacy, refusing to recognise any legal relationship between children born through surrogacy abroad and their commissioning parents.[60] This absolutist approach, while ostensibly being protective of societal and moral values, creates untenable situations where children are rendered stateless or parentless, effectively punishing them for circumstances beyond their control. The rigid application of such laws ignores the rights of the child enshrined in international legal instruments such as the United Nations Convention on the Rights of the Child (CRC), which mandates the recognition of a child's identity,

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53 The Ukrainian Family Code (amended December 22, 2006, No 524-V), Article 123; Health Ministry of Ukraine, Order 24 and Order 771. The parties are free to choose the type of surrogacy they want; the only condition is that there has to be an informed consent from all the parties.

54 Hague Conference on Private International Law, 'A study of legal parentage and the issues arising from international surrogacy agreements' (Preliminary Document No 3C, March 2014) 58.

55 South Africa's Children Act No 38 of 2005 (Chapter 19).

56 Howard, 'Taming the international commercial surrogacy industry', 1.

57 Anne Louw, 'Surrogacy in South Africa: Should we reconsider the current approach?', 76 *Journal of Contemporary Roman-Dutch Law* (2013) 580-581.

58 Louw 'Surrogacy in South Africa', 580-581.

59 Louw, 'Surrogacy in South Africa', 580-581.

60 Howard, 'Taming the international commercial surrogacy industry', 1.

including their legal relationship to their parents.[61] This inconsistency between national laws and international human rights obligations illustrates a fundamental doctrinal failure to reconcile national sovereignty with global human rights standards in the context of surrogacy.

The United States (US),[62] and Australia present a more complex legal landscape, where surrogacy is regulated on a sub-national level, leading to a patchwork of contradictory laws. This lack of uniformity exposes the inherent risks of devolving regulatory authority to subnational entities, particularly in matters as ethically and legally significant as surrogacy. In the US, some states like California have embraced commercial surrogacy, enforcing contractual agreements that reduce gestational carriers to mere service providers.[63] However, other states like Nebraska and Louisiana (only allows altruistic surrogacy) criminalise the practice, creating a scenario where surrogacy arrangements that are legally valid in one state may have no recognition in another.[64] This fragmented regulatory approach not only undermines legal certainty but also facilitates cross-border surrogacy tourism, where individuals exploit legal loopholes to circumvent more restrictive laws. By failing to establish a cohesive national framework, these countries implicitly endorse legal arbitrage, thereby perpetuating inequalities in the access to reproductive services and protections.

In several EU countries, judges have devised legal solutions that confer legal parentage to children born through commercial gestational surrogacy, aligning them with their 'intended parents'. In a number of states, *ad hoc* and *ex post facto* remedies have been implemented to

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61 United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Article 7.

62 Charles P Kindregan and Danielle White, 'International fertility tourism: The potential for stateless children in cross-border commercial surrogacy arrangements', 36 *Suffolk Transnational Law Review* (2013) 534-35.

63 Creative Family Connections, 'California surrogacy laws: A comprehensive guide', 9 January 2025.

64 Circle Surrogacy, 'Surrogacy by state', 9 January 2025.

mitigate the negative effects of the legal limbo faced by these children.[65] These measures aim to address situations where the child has already been born and the surrogate mother, in most cases, does not wish to assume parental responsibilities, leaving the intended parents to care for the child. When regulating the use of surrogacy technologies and addressing their legal consequences, it is crucial to strike a fair balance between private and public interests, the European Court of Human Rights (ECtHR) has been playing a pivotal role in this process.[66]

Notably, in disputes involving surrogacy, the ECtHR has frequently ruled in favour of the intended parents. In the case of *Mennesson v France*, the Court emphasised that states should be granted broad discretion in making decisions about surrogacy, given the ethical complexities and the lack of consensus on the issue across Europe.[67] However, the Court noted that this discretion is more limited when it pertains to matters of parenthood, as such decisions impact fundamental aspects of an individual's identity.[68] In determining whether a fair balance was achieved between state interests and the personal interests of the individuals involved, the Court underscored the fundamental principle that the best interests of the child should always take precedence.[69]

India and Thailand have long been the epicentres of 'fertility tourism', driven by a combination of lax regulations and low costs.[70] However, scandals such as the *Baby Gammy case*,[71] (Thailand) where a child

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65 Oksana M Ponomarenko, Yuriy A Ponomarenko and Kateryna Yu Ponomarenko, 'Legal regulation of surrogacy at the international and national levels: Optimisation of permissions, prohibitions and liability' (2020) 73 (12 p II) *Wiadomości Lekarskie* 2879.

66 Ponomarenko and others, 'Legal regulation of surrogacy at the international and national levels', 2878.

67 Case of *Mennesson v France* (judgement on merit),65192/11, ECtHR (2014) para 78.

68 *Mennesson v France* (judgement on merit) ECtHR (2014) para 94.

69 *Mennesson v France* (judgement on merit) ECtHR (2014) para 99.

70 Cyra Akila Choudhury, 'The political economy and legal regulation of transnational commercial surrogate labor', 48(1) *Vanderbilt Journal of International Law* (2015) 4–5 (discussing the high costs of surrogacy and reproductive health care in the United States, particularly for those patients without insurance coverage, as compared to India, which offers similar care at a fraction of the cost).

71 *Farnell and another and Chanbua* [2016] FCWA 17.

with down syndrome was abandoned by his commissioning parents, have exposed the vulnerabilities inherent in these loosely regulated markets.[72] The Thai government's reaction preceding this case was to criminalise commercial surrogacy. This represents a piecemeal response to a systemic problem.[73] The legislative shift to altruistic surrogacy only for Thai nationals was a step towards addressing exploitation. However, the government failed to address the broader international implications, particularly in light of the global nature of surrogacy arrangements.[74] There is however a possibility that the ban may be lifted by the Thai government.[75]

China, one of the few countries in Asia to impose a strict ban on commercial surrogacy from the outset, presents an interesting counterpoint.[76] While the legal prohibition is clear, the rise of an underground surrogacy market suggests that such bans are not a viable solution in the globalised world.[77] China's approach reveals the limitations of legal prohibition in a context where demand remains high and alternative jurisdictions offer more permissive environments.[78] The persistence of black-market surrogacy highlights the failure of prohibitionist policies to address the root causes of the surrogacy market, including the growing demand for reproductive assistance and the economic disparities that drive women to become surrogates.

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72 Agence France Presse, 'Australia investigates "paedophile" father in Thai baby scandal', *NDTV World*, 6 August 2014.

73 Michelle Goodwin, 'Thailand bans foreign commercial surrogacy', *Petrie-Flom Center Blog*, 2 March 2015.

74 Jutharat Attawet, 'Reconsidering surrogacy legislation in Thailand', 90(1) *Medico-Legal Journal* (2022) 45-48.

75 Reuters, 'Thailand plans to legalise surrogacy for foreign couples', 1 March 2024.

76 Chinese Administrative Measures on Human Assisted Reproductive Technology, 2001, Article 3.

77 Shanyun Xiao, 'Uterus rental: Regulating surrogacy in China', 90(1) *Medico-Legal Journal* (2022) 41.

78 Xiao, 'Uterus rental: Regulating surrogacy in China', 41.

Legal and ethical considerations for cross border surrogacy in the Global South: A case study of Kenya

Surrogacy in Kenya occupies a legally ambiguous position, operating in a grey area where it is neither explicitly legal nor illegal.[79] It takes the position of being totally unregulated as presented by John Pascoe.[80] This legal vacuum arises from the absence of statutory provisions, policies, or regulatory frameworks to govern surrogacy arrangements.[81] Despite this lacuna, Kenya witnessed its first gestational surrogacy in 2006, with the birth of the first child from such an arrangement being in 2007. Presently, several prominent medical institutions facilitate for fertility treatment.[82] These include: Aga Khan Hospital,[83] The Nairobi IVF Centre, Myra IVF Centre, Nephromed Wings IVF Centre, Surrogate Mothers Kenya and Footsteps to Fertility.[84]

The legislation that purposes to regulate surrogacy in Kenya is the Assisted Reproductive Technology Bill of 2022 which is yet to be enacted into law. With the enactment of this bill, surrogacy in Kenya will be altruistic surrogacy requiring the payment of only legal expenses.[85] Nevertheless, a thorough reading of the Bill does not mitigate any instances of cross border surrogacy, with the Bill articulating that all surrogacy agreements will be deemed valid if entered into while in Kenya.[86]

The enforceability and legal standing of surrogacy agreements in Kenya have periodically been subject to judicial scrutiny, positioning the courts as pivotal in shaping the jurisprudential landscape surrounding surrogacy. Through these judicial interventions, surrogacy

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79 Naipanoi Lepapa, 'Hard labour: The surrogacy industry in Kenya: Part II', *The Elephant*, 29 May 2021.

80 Pascoe, 'Sleepwalking through the minefield', 455.

81 Pascoe, 'Sleepwalking through the minefield', 456.

82 Kenya IVF, 'What are the top 10 IVF best centres in Nairobi with high success rates in 2023', 9 January 2025.

83 Aga Khan Hospital, 'Fertility and reproductive endocrinology', 9 January 2025.

84 The Nairobi IVF Centre, 'The Nairobi IVF Centre', 9 January 2025.

85 Assisted Reproductive Technology Bill (2022) Section 28(7).

86 Assisted Reproductive Technology Bill (2022) Section 28(3)(b).

arrangements, though operating in a legal grey area due to the absence of comprehensive legislation, have nonetheless given rise to precedents that inform future adjudications. These rulings serve as a form of *de jure* regulation, guiding the resolution of disputes and providing the judiciary with a platform to articulate the enforceability of such agreements. Cases in Kenya surrounding the enforceability of surrogacy agreements have taken the trajectory of ensuring that the best interest of the child is protected.[87]

The case of *JLN and 2 others v Director of Children Services and 4 others*,[88] looked at the question of which party should be registered as a parent,[89] due to the birth notification requirement under the Births and Deaths Registration Act.[90] In this case, the petitioners, WKN and CWW, entered into a surrogacy arrangement with JLN, who consented to serve as a surrogate mother through the process of in vitro fertilisation (IVF).[91] After the birth of the children, a dispute arose regarding whether CWW should be registered as the mother on the acknowledgment of birth notification.[92] MP Shah Hospital, having notified the Director of Children Services of the circumstances surrounding the twins' birth, prompted the director to conclude that the children were in need of care and protection, resulting in their placement in a children's home.[93] Subsequently, the children were released to JLN, and the hospital proceeded to issue the birth notifications in JLN's name.[94] This sequence of events demonstrates the legal complexities inherent in surrogacy arrangements in Kenya, particularly concerning the recognition of parental rights and the registration of births.

87 Constitution of Kenya (2010) Article 53(2).

88 *JLN and 2 others v Director of Children Services and 4 others*, Petition 78 of 2014, Judgement of the High Court, 30 June 2014 [eKLR].

89 *JLN and 2 others v Director of Children Services and 4 others*, para 8.

90 Births and Deaths Registration Act (Chapter 149).

91 *JLN and 2 others v Director of Children Services and 4 others,* para 2.

92 *JLN and 2 others v Director of Children Services and 4 others,* para 2.

93 *JLN and 2 others v Director of Children Services and 4 others,* para 3.

94 *JLN and 2 others v Director of Children Services and 4 others,* para 3.

Pursuant to Section 10 of the Births and Deaths Registration Act, the obligation imposed upon those reporting a birth is to provide, to the extent of their knowledge and capacity, the requisite particulars of the new-born.[95] These particulars encompass critical identifiers such as the child's name, birth date, sex, type and nature of birth, location of birth, and the names of both the parents.[96] In addition to that, the identity of the individual receiving the notification is documented.[97] Upon the completion of this notification, the Registrar of Births and Deaths is responsible for issuing a birth certificate.[98]

In his judgment, the late Justice David Shikomera Majanja emphasised the state's obligation to establish a comprehensive legal framework governing surrogacy arrangements in the country.[99] He affirmed that a child's right to the identity of their genetic parents is paramount and, in principle, the registration of the genetic parents, rather than the surrogate mother, should be allowed.[100] Justice Majanja further held that the Children's Court's directive to register the intended (genetic) parents as the legal parents effectively upheld the surrogacy agreement, given that no dispute existed between the parties involved.[101] He clarified that, in cases where disputes do arise, it is incumbent upon either the Children's Court or the High Court to issue necessary directions, guided by the best interests of the child principle, thereby ensuring that the child's welfare remains the primary consideration in such legal determinations.[102]

A year later, the case of *AMN and 2 others v Attorney General and 5 others,*[103] decided by Justice Isaac Lenaola took a different trajectory

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95 Births and Deaths Registration Act (Chapter 149) Section 10.

96 Births and Deaths Registration Rules (1966) Form No 1.

97 Births and Deaths Registration Rules (1966) Form No 1.

98 Births and Deaths Registration Rules (1966) Rule 11.

99 *JLN and 2 others v Director of Children Services and 4 others,* para 41.

100 *JLN and 2 others v Director of Children Services and 4 others,* para 42.

101 *JLN and 2 others v Director of Children Services and 4 others,* para 42.

102 *JLN and 2 others v Director of Children Services and 4 others,* para 42.

103 *AMN and 2 others v Attorney General and 5 others*, Petition 443 of 2014, Judgement of the High Court, 13 February 2015 [eKLR].

from the one given by Justice Majanja. The learned judge held that a surrogate mother shall be registered as the mother of a born child pending legal proceedings to transfer legal parenthood to the commissioning parent.[104] The case centres on the issue on whether the surrogate mother or genetic mother should be registered as the mother of the child. In this case, there were three parties involved: X, a woman suffering from secondary infertility,[105] her partner Y, and the surrogate Z. After numerous miscarriages and a diagnosis preventing X from undergoing an embryo implantation, the couple turned to The Nairobi IVF Centre and, on 6 June 2012, entered into a surrogacy agreement with Z, who consented to the transfer of three embryos.[106] The surrogate successfully delivered twin babies on 5 February 2013.[107]

Upon the birth of the twins, Kenyatta Hospital, following advice from the Attorney General, issued a birth notification listing X and Y as the parents.[108] However, complications arose when the couple later sought UK citizenship for the children, and it was discovered that the birth notification was inaccurate.[109] Justice Lenaola observed that, under the current legal framework, the host woman (the surrogate) is presumptively recognised as the legal mother of the child in surrogacy arrangements until formal legal processes are followed to transfer legal motherhood to the commissioning woman.[110]

The court's decision highlighted that, despite the surrogacy agreement, Z retained her status as the legal mother until formal legal steps were undertaken to transfer parental rights.[111] The court further identified that the issuance of the birth certificate, which falsely listed X and Y as the biological parents, was unlawful and contrary to statutory re-

104 *AMN and 2 others v Attorney General and 5 others*, para 58.
105 *AMN and 2 others v Attorney General and 5 others*, para 3.
106 *AMN and 2 others v Attorney General and 5 others*, para 4.
107 *AMN and 2 others v Attorney General and 5 others*, para 4.
108 *AMN and 2 others v Attorney General and 5 others*, para 5.
109 *AMN and 2 others v Attorney General and 5 others*, para 6.
110 *AMN and 2 others v Attorney General and 5 others*, para 29.
111 *AMN and 2 others v Attorney General and 5 others*, para 46.

quirements.[112] This case underscored the urgent need for a robust legal framework to govern surrogacy not only in Kenya but the world and ensure proper registration and legal recognition of parental rights in surrogacy arrangements.[113] Justice Lenaola quoted the case; *In Re: X and Y (Foreign Surrogacy)* where the judges made references to the diversity of approaches taken by different countries and the conflict that arose between UK and Ukrainian laws.[114] This conflict made children be marooned stateless and parentless since the children could neither remain in any of the two countries.[115]

The conflict between Kenya's legal presumption and the commissioning parents' expectations, compounded by the complications in obtaining UK citizenship, underscores the need for a harmonised international legal framework.[116] Without such a system, surrogacy remains governed by inconsistent national laws that fail to account for the transnational realities of modern reproductive practices. This patchwork of regulations creates legal uncertainty for both parents and children, potentially leaving children stateless or in legal limbo.[117] An international law on surrogacy would establish uniform standards for the recognition of parenthood, protect the rights of surrogates, commissioning parents, and children, and prevent the kind of jurisdictional conflicts that this case exemplifies. The absence of such a framework allows for exploitation, confusion, and injustice, particularly when surrogacy agreements transcend national borders.

The case for an international legal framework

The absence of an international legal framework governing surrogacy is not merely a legislative gap but a profound failure of the global

112 *AMN and 2 others v Attorney General and 5 others*, para 45.

113 *AMN and 2 others v Attorney General and 5 others*, para 47.

114 [2008] EWHC.

115 *AMN and 2 others v Attorney General and 5 others*, para 27.

116 *AMN and 2 others v Attorney General and 5 others*, para 28.

117 Michelle Ford, 'Gestational surrogacy is not adultery: Fighting against religious opposition to procreate', 10 *Barry Law Review* (2008) 96.

legal order to respond to the evolving nature of reproductive technologies and their attendant ethical, legal, and human rights concerns.[118] Surrogacy, by its very nature, crosses national boundaries, making the development of a cohesive international regime not only desirable but essential.[119] The current fragmented legal landscape, where surrogacy practices range from outright prohibition to unrestricted commercialisation, leaves significant room for exploitation, legal uncertainties, and inequality.[120]

Some international courts such as the European Court of Human Rights (ECtHR), under the auspices of the Council of Europe, has issued numerous rulings on international surrogacy.[121] In addressing such cases, particularly those involving assisted reproductive technologies, the Court has employed the doctrine of the margin of appreciation to reconcile individual freedoms, such as the freedom of movement, with the varying moral frameworks of member states.[122] Notably, the ECtHR has affirmed the legal recognition of both the nationality and parentage for children born through international surrogacy, grounding its decisions on the child's right to private and family life.[123]

Despite the growing practice of international surrogacy, there remains a notable absence of specific international regulation addressing its legal complexities. Current legal instruments fail to provide ade-

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118 Howard, 'Taming the international commercial surrogacy industry', 1.

119 Noelia Igareda Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 113(5) *Fertility and Sterility* (2020) 916.

120 Katarina Primmings and Paul Reid Beaumont, 'International surrogacy arrangements: An urgent need for regulation at the international level', 7(3) *Private Journal of International Law* (2011) 627.

121 Esther Farnós Amorós, 'La reproducción asistida ante el Tribunal Europeo de Derechos Humanos: *De Evans c Reino Unido* a *Parrillo c Italia*', 36 *Revista de Bioética y Derecho* (2016) 93-111 cited in Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 918.

122 Amorós, 'Assisted reproductive technologies before the European Court of Human Rights', 94.

123 Claire Fenton-Glynn, 'International surrogacy before the European Court of Human Rights', 13(3) *Private Journal of International Law* (2017) 562; Eleonora Lamm, 'Gestacion por sustitucion: Realidad y derecho', 3 *Rev Anal Derecho* (2012) 1-49 cited in Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 918.

quate provisions to manage the challenges posed by cross-border surrogacy arrangements.[124] One potential regulatory model could be the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption,[125] which sets a minimum procedural standard among signatory states while acknowledging varying national legal approaches to adoption. However, some scholars underscore a critical distinction between surrogacy, as a form of assisted procreation, and adoption, which involves the legal transfer of parental rights.[126] In 2011, the Permanent Bureau of the Hague Conference on Private International Law released a Preliminary Report on International Surrogacy Arrangements.[127]

The Hague Conference on Private and International Law (HCCH) consisting of 91 members, 90 states and the European Union itself,[128] took steps to create a working group.[129] This group explores the 'feasibility of advancing work' on private international law issues related to the status of children, particularly those arising from international surrogacy arrangements.[130] While discussions continue regarding the adoption of a Hague Convention to regulate international surrogacy, it appears unlikely that a consensus on minimum standards will be achieved in the near future.[131] There was a working group meeting by

[124] Ponomarenko and others, 'Legal regulation of surrogacy at the international and national levels', 2877.

[125] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, A-31922.

[126] Chelsea Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 49 *University of Memphis Law Review* (2019) 847-882 cited in Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 918.

[127] Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference. See also, Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 919.

[128] Hague Conference on Private and International Law (HCCH), 'About HCCH' https://www.hcch.net/en/about accessed 9 January 2025.

[129] Think Tank European Parliament, 'Regulating international surrogacy arrangements: State of play', 30 August 2018.

[130] Think Tank European Parliament, 'Regulating international surrogacy arrangements: State of play', 4.

[131] Noelia Igareda Gonzalez, 'Legal and ethical issues in cross-border gestational surrogacy', 919, commenting about this in 2020.

the working group on parentage/surrogacy, held between 8 April 2024 and 12 April 2024, and a third meeting in November 2024.[132] The complexity of reaching an agreement stems from the divergent legal, ethical, and cultural perspectives on surrogacy among states, which hinders the development of a unified regulatory framework.[133]

Katarina Trimmings and Paul Beaumont's seminal work is considered as a key reference for the doctrinal debate on international surrogacy arrangements.[134] In their arguments, the authors present what would be the ideal convention on international surrogacy arrangements aimed at harmonising private international law in the field.[135] They take an interventionist approach by arguing, 'the primary goals of the convention should be: to develop a system of legally binding standards that should be observed in connection with international surrogacy arrangements, to develop a system of supervision to ensure that these standards are observed and to establish a framework of cooperation and channels of communication between jurisdictions involved.[136]

Blauwhoff and Frohn provide for the same framework as provided by Trimmings and Beaumo. However, they emphasise that the determination of legal parentage in international surrogacy arrangements must be grounded exclusively in the best interests of the child, with no consideration given to the autonomy of the parties involved, as this is a matter of public order.[137] The authors extend their argument by pro-

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[132] Working Group on Parentage/Surrogacy, 'Working group on parentage/surrogacy: Report of the second meeting (from 8 to 12 April 2024) Preliminary Document No 1 of April 2024', para 5. The third meeting occurred from 4-8 November and it will present a report on the progress of its work to the Council on General Affairs and Policy in March 2025, see, HCCH, 'Third meeting of the working group on parentage/surrogacy', 13 November 2024.

[133] Reforming Surrogacy Law, 'International rights frameworks: Are the law commissions recommendations for reform conforming to international legal standards?', *Reforming Surrogacy Law Blog*, 3 July 2023.

[134] Katarina Trimmings and Paul Beaumont 'International surrogacy arrangements: An urgent need for legal regulation at the international level', 7(3) *Journal of Private International Law* (2011) 627-647.

[135] Trimmings and Beaumont 'International surrogacy arrangements', 630.

[136] Trimmings and Beaumont 'International surrogacy arrangements', 636.

[137] Richard Blauwhoff and Lisette Frohn, 'International commercial surrogacy arrange-

posing that where procedural standards are upheld and the child's best interests are ensured, a central authority should be responsible for issuing certificates of conformity.[138] This measure would serve as a legal safeguard by ensuring that surrogacy arrangements are conducted in accordance with established international standards and that the rights of the child are protected across jurisdictions.[139]

Regardless of the prioritised regulatory approach for international surrogacy arrangements, there is consensus on several key principles of paramount importance at the international level.[140] These include the best interests of the child, the legal status of both the child and the intended parents, and the protection of the surrogate mother's status.[141]

More crucially, cross-border surrogacy perpetuates a colonial legacy within international law that disproportionately impacts the Global South, a dynamic which can be critically examined through the lens of Third World Approaches to International Law (TWAIL). TWAIL scholars argue that international law, as is traditionally conceived, reflects the interests and values of powerful, developed states, often to the detriment of countries in the Global South.[142]

In the context of surrogacy, this dynamic manifests in the commodification of women's reproductive labour in economically disadvantaged regions, where local surrogates are often employed to serve the reproductive needs of wealthier, foreign couples.[143] Countries such as

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ments: The interests of the child as a concern of both human rights and private international law' in Christophe Paulussen, Tamara Takacs, Vesna Lazić and Ben Van Rompuy (eds) *Fundamental rights in international and European law: Public and private law perspectives*, TMC Asser Press, 2016, 211.

138 Blauwhoff and Frohn, 'International commercial surrogacy arrangements', 212.

139 Blauwhoff and Frohn, 'International commercial surrogacy arrangements', 241.

140 Jasmina Alihodžić and Anita Duraković, 'International surrogacy arrangements: Perspectives on international regulation', 2 *Medicine Law and Society* (2020) 15.

141 Alihodžić and Duraković, 'International surrogacy arrangements', 15.

142 Antony Anghie, 'Legal aspects of the New International Economic Order', 6(1) *Human Spring* (2015) 149.

143 Jyostna Agnihotri Gupta, 'Towards transnational feminisms: Some reflections and concerns in relation to the globalisation of reproductive technologies', 13(1) *European Journal of Women's Studies* (2006) 23-38.

India, Thailand, and, more recently, Mexico, have become central hubs for the so-called 'fertility tourism', driven largely by the demand from affluent Global North countries.[144] This dynamic, far from empowering women in the Global South, entrenches existing socioeconomic inequalities and exposes vulnerable populations to exploitation.[145] In fact, those countries have passed laws to limit surrogacy to their nationals or to use only the altruistic model: Thailand limited access to nationals in its Protection of Children Born Through Assisted Reproductive Technologies Act, 2015, while India limited access to nationals and only to altruistic surrogacy in its Surrogacy (Regulation) Act 2021.[146] The downside of this is that surrogates may be ferried to a different country that favours the intended parents circumnavigating this law.

Nevertheless, there is a lack of international regulation of surrogacy, because the existing legal instruments do not contain any provisions that could be applied to the potential legal problems of international surrogacy.[147]

A critical examination of international surrogacy through a TWAIL lens also exposes the inherent neo-colonial structures within the global reproductive industry.[148] The fact that wealthier countries can export their reproductive needs to poorer countries, while externalising the ethical and legal complexities, reflects a global system that prioritises the needs of the Global North at the expense of the Global South.[149]

An international legal framework would serve to equalise the playing field by ensuring that surrogate mothers, regardless of where they reside, are accorded adequate legal protection and that their labour is

144 Jyostna Agnihotri Gupta, 'Reproductive bio-crossing: Indian egg donors and surrogates in the globalized fertility market', 5(1) *International Journal of Feminist Approaches to Bioethics* (2012) 28.

145 Gupta, 'Reproductive bio-crossing', 28.

146 India's Surrogacy (Regulation) Act (No 47 of 2021).

147 Trimmings and Beaumont, 'international surrogacy arrangements', 627.

148 Claudia Flores, 'Accounting for the selfish state: Human rights, reproductive equality, and global regulation of gestational surrogacy', 23(2) *Chicago Journal of International Law* (2023) 391-450.

149 Flores, 'Accounting for the selfish state', 400.

neither undervalued nor exploited. It would mandate minimum standards for the treatment of surrogates, enforceable across borders, thus preventing the creation of legal vacuums that allow for exploitation. Moreover, such a framework would require stringent oversight of fertility clinics and surrogacy agencies, many of which currently operate with minimal accountability in developing nations. A globally recognised legal regime would impose mandatory health protections for surrogates, ensure fair compensation, and provide for post-birth support and legal recourse in case of contract breaches and protection of their rights.[150]

Beyond the immediate need to protect surrogates, an international legal framework would address the rights of the intended parents. Certain states have implemented policies that effectively deny specific groups the right to enter into lawful surrogacy contracts, raising significant questions about equity and access within reproductive rights.[151] Surrogacy makes it possible for LGBTQI+ persons who are unable to gestate a foetus to have biological children.[152] The rights of the LBTQI+ communities are safeguarded in international treaties and conventions.

The Inter-American Court of Human Rights (IACtHR) has delineated the fundamental rights to personal integrity and liberty, along-

[150] These include the right to privacy, health, and reproductive freedom. Under the Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III), Article 12, the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Article 17, the European Convention on Human Rights (ECHR) Article 8, the American Convention on Human Rights (ACHR), the Pact of San Jose, Costa Rica (B-32), 22 January 1969, Article 11; the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration Principles and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), 18 November 2012, Article 21; women are protected against arbitrary and unlawful interferences with their privacy. Under the UDHR, Article 25 and International Covenant on Economic, Social, and Cultural Rights, 3 January 1976, UNTS/993, Article 12; women have the right to the highest attainable standard of health. See also CESCR, General Comment No 14: Article 12 on the Right to the Highest Attainable Standard of Health, 11 August 2000, UN Doc E/C 12/2000/4, para 8; CESCR, General Comment No 22: Article 12 on the Right to Sexual and Reproductive Health, 1 May 2016, E/C 12/GC/22.

[151] Christine Straehle, 'Is there a right to surrogacy?', 33(2) *Journal of Applied Philosophy* (2016) 3-4.

[152] Straehle, 'Is there a right to surrogacy?', 3-4.

side the right to family life, as essential components of human dignity.[153] Article 11 of the American Convention on Human Rights specifically safeguards couples' access to artificial reproductive technologies, thereby recognising the importance of reproductive autonomy.[154] In parallel, the European Court of Human Rights has underscored the imperative for states to evolve their regulatory frameworks concerning reproductive technologies, emphasising the necessity for legal systems to remain responsive to the dynamic interplay of social progress and scientific advancements.[155]

Furthermore the complex legal status of children born through surrogacy, who are often caught in a web of conflicting nationality and parentage laws could be resolved through an international law on surrogacy.[156] Under current conditions, children born in one country may not be recognised as legal citizens in another, leaving them stateless and vulnerable.[157] This outcome violates their rights under international human rights law, particularly the United Nations Convention on the Rights of the Child which mandates the protection of a child's right to nationality and identity.[158] Therefore, the absence of global regulations has, far-reaching implications on the human rights of children born through surrogacy, a situation that an international legal framework could rectify by standardising parentage recognition and citizenship rules.

Furthermore, an international surrogacy regime would force a re-evaluation of the role of the state in regulating reproductive rights, particularly in countries that have historically sought to control wom-

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153 *Artavia Murillo and others v Costa Rica*, (preliminary objections, merits, reparations and costs) Inter-American Court Human Rights, Series C No 257 222–53 (28 November 2012) discussing whether embryos are protected as persons under international law.

154 *Artavia Murillo and others v Costa Rica*, para 142.

155 *SH and Others v Austria* (judgement on merits), 57813/00, Grand Chamber, ECtHR (3 November 2011); *Dickson v United Kingdom* (judgement on merits), 44362/04, Grand Chamber, ECtHR (4 December 2007) (finding a violation of Article 8, right to respect for private and family life, due to a denial of access to artificial insemination facilities to a prisoner).

156 *In Re: X and Y (Foreign Surrogacy)* [2008] EWCH.

157 *In Re: X and Y (Foreign Surrogacy)* [2008] EWCH.

158 Convention on the Rights of the Child, Article 7.

en's reproductive autonomy.[159] TWAIL scholars have long critiqued the imposition of Global North norms onto the Global South through international law, and the regulation of surrogacy is no exception. Therefore, the development of an international legal framework must be an inclusive process that involves meaningful participation from the Global South to ensure that any resulting regime reflects diverse values and legal traditions. This is particularly relevant given that many countries in the Global South have distinct cultural and religious perspectives on reproduction, family, and the role of women in society.[160] An international framework that does not account for these differences risks becoming another tool for neo-colonialism, enforcing Global North norms on surrogacy onto the Global South.

Potential challenges to implementation: Legal and political barriers

International regulation could infringe upon national sovereignty, particularly in states that have chosen to ban surrogacy altogether. However, the establishment of a multilateral framework need not impose a one-size-fits-all model. Instead, it could create a baseline of minimum protections and standards while allowing states to retain some regulatory flexibility. In practical terms, no jurisdiction fully governs the development of surrogacy practices.[161] Instead, private contracts largely dictate the arrangements, with the parties' understanding and the norms evolving from these agreements shaping the landscape.[162] This reliance on private agreements highlights the absence of comprehensive oversight and the resulting variability in how surrogacy is practiced across different legal systems.[163]

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159 Ikemoto, 'Reproductive tourism', 278.

160 Ikemoto, 'Reproductive tourism', 278.

161 June Carbone and Christina O Miller, 'Surrogacy professionalism', 31(1) Jo*urnal of the American Academy of Matrimonial Lawyers* (2018) 1.

162 Carbone and Miller, 'Surrogacy professionalism', 13.

163 Carbone and Miller, 'Surrogacy professionalism', 13.

The Hague Conference on Private International Law, in conjunction with the Hague Convention on Parental Responsibility and the Protection of Children, has been actively engaged in addressing the complex legal challenges posed by international surrogacy.[164] Their efforts aim to strike a delicate balance between the diverse legal and cultural positions of various countries, seeking to establish a framework that harmonises conflicting national approaches while safeguarding the rights and welfare of all parties involved, particularly the children born through surrogacy arrangements.[165] The expert group has chosen a more restrained and conservative strategy, proposing that the protocol, be limited to addressing the recognition of court rulings from foreign jurisdictions that stem from the execution of international surrogacy agreements.[166]

These complexities are compounded by issues of national sovereignty and fragmented domestic legal systems that make global consensus difficult to achieve.[167] The diversity in cultural and legal perspectives on surrogacy presents one of the most significant challenges to creating a global regulatory framework. Across the world, views on parenthood, family, and reproduction vary widely, shaped by historical, religious, and cultural factors.[168] In some jurisdictions, surrogacy is perceived as a matter of individual autonomy and contractual freedom, where people are free to make reproductive choices based on their own preferences.

The question of national sovereignty further complicates the development of a global surrogacy framework. Sovereignty remains one of the foundational principles of international law, with family law and reproductive rights traditionally falling within the purview of domestic legal systems. Consent is the cornerstone of international law, as no sov-

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164 Lottie Park-Morton, 'International rights frameworks: Are the Law Commission's recommendations for reform conforming to international legal standards?', *Reforming Surrogacy Law Blog*, 9 January 2025.

165 Morton, 'International rights frameworks: Are the Law Commission's recommendations for reform conforming to international legal standards'.

166 Alihodžić and Duraković, 'International surrogacy arrangements', 19.

167 Kristiana Brugger, 'International law in the gestational surrogacy debate', 35(3) *Fordham International Law Journal* (2012) 678.

168 Brugger, 'International law in the gestational surrogacy debate', 678.

ereign state is obligated to adhere to a legal rule unless it has voluntarily consented.[169] The doctrine of consent reflects the fundamental principle of state sovereignty, ensuring that no external legal obligations can be imposed on a state without its agreement. However, this reliance on consent also raises critical questions about the legitimacy and enforceability of certain norms within international legal frameworks, particularly when customary law comes in.[170]

Additionally, commentators have expressed concerns regarding the potential influence of certain countries over international organisations.[171] A large, influential nation could obstruct the development of an international instrument by either refusing to sign it or by being reluctant to amend its domestic laws to safeguard surrogates in other countries, particularly if it believes that its existing laws already provide sufficient protection within its borders.[172] Even if a comprehensive international instrument were established, there remains a considerable risk of non-compliance, particularly within individual surrogacy operations in countries that lack either the capacity or the political will to monitor and enforce treaty obligations effectively.[173] This risk is especially pronounced in jurisdictions with limited regulatory frameworks or resources for overseeing cross-border surrogacy arrangements.[174]

In addition to states that explicitly prohibit surrogacy in their national legislation, there are also states where surrogacy is treated as a profitable enterprise.[175] It is likely that both categories of states would

169 Anghie, 'Legal aspects of the New International Economic Order', 150, where he discusses expropriation without compensation.

170 Anghie, 'Legal aspects of the New International Economic Order', 150.

171 Kal Raustiala, 'Form and substance in international agreements', 99(3) *American Journal of International Law* (2005) 584.

172 Brugger, 'International law in the gestational surrogacy debate', 684.

173 Brugger, 'International law in the gestational surrogacy debate', 684.

174 Brugger, 'International law in the gestational surrogacy debate', 684.

175 Konstantinos Rokas, 'National regulation and cross-border surrogacy in European Union countries and possible solutions for problematic situations', 16 *Yearbook of Private International Law* (2014) 302.

oppose any international convention regulating surrogacy.[176] States that prohibit surrogacy may resist efforts to legitimise or regulate the practice internationally, while those that benefit economically from commercial surrogacy may be reluctant to support restrictions or reforms that could affect their lucrative surrogacy industries.[177]

This fear is particularly pronounced in countries where surrogacy intersects with religious and moral values. For example, countries where religion strongly influences their legal systems, a good example being that countries following Sharia law, are unlikely to adopt international standards that contradict their domestic norms.[178] This is not merely a legal issue but a political one, as governments may face backlash from conservative segments of their population if they are perceived as ceding control over family law to an international body. Countries governed by Sharia law explicitly prohibit adoption and chose not to accede to the 1993 Hague Convention on Intercountry Adoption.[179] A similar issue could likely arise with any proposed protocol governing international surrogacy arrangements, particularly in states that explicitly ban surrogacy.[180]

Despite these challenges, there are ways to overcome resistance to the implementation of an international surrogacy framework. One approach is to use 'soft law' instruments which are non-binding guidelines or model laws developed by international organisations.[181] Soft law provides flexibility, allowing states to adapt international principles

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176 Rokas, 'National regulation and cross-border surrogacy in European Union countries and possible solutions for problematic situations', 302.

177 Rokas, 'National regulation and cross-border surrogacy in European Union countries and possible solutions for problematic situations', 302.

178 Neelam Chagani, 'Surrogacy in Islam: A complex and controversial issue', IVF Conceptions, 9 January 2025.

179 Cyra Akila Choudhury, 'Transnational commercial surrogacy: Contracts, conflicts and the prospects of international legal regulation', *Florida International University Legal Studies Research Paper Series*, No 16-18, 2016, 22.

180 Choudhury, 'Transnational commercial surrogacy: Contracts, conflicts and the prospects of international legal regulation', 22.

181 Richard Edwards Jr, 'Interpretation: The IMF and international law by Joseph Gold', 91(2) *American Journal of International Law* (1997) 405.

to their domestic legal systems without feeling that their sovereignty is being compromised.[182] This 'expressed preference' for specific conduct is designed to promote practical collaboration between nations, helping them collectively pursue common international objectives.[183] Organisations like the Hague Conference on Private International Law (HCCH) and the World Health Organisation (WHO) could play a leading role in developing soft law instruments that promote best practices in surrogacy while allowing for regional and cultural variation.

The Hague Conference has already initiated discussions on the feasibility of regulating international surrogacy arrangements, drawing on its experience with international adoption.[184] While surrogacy presents unique challenges, the success of the Hague Adoption Convention in creating a framework for the cross-border transfer of parental rights suggests that a similar approach could work for surrogacy. The key to this approach is flexibility. Rather than imposing a one-size-fits-all model, soft law allows states to implement international principles in a way that reflect their domestic, legal and cultural context.

Chelsea Caldwell proposed the idea of using international comity as a way of recognising cross-border surrogacy agreements.[185] Comity as defined in the *Black's Law Dictionary* to mean that a court will, through the principle of mutual benefit, agree to enforce or respect the decisions of other countries.[186] In fact, she argues that the parentage and citizenship challenges faced by international intended parents are not disputes between the intended parents and the surrogate, but rather conflicts between different national legal systems.[187] More precisely, the

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182 Edwards Jr, 'Interpretation: The IMF and international law by Joseph Gold', 405.

183 Cynthia Lichtenstein, 'Hard law v soft law: Unnecessary dichotomy?', 35(4) *The International Lawyer* (2001) 1433.

184 Think Tank European Parliament, 'Regulating international surrogacy arrangements: State of play'.

185 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 878.

186 *Black's Law Dictionary* (12th edition 2024).

187 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 879.

crux of the problem lies in the tension between the private surrogacy contract and the national laws of the intended parents' home countries, which can lead to the troubling issue of 'statelessness' for children born through such arrangements.[188]

The situation ultimately boils down to a clash of reform approaches with one side advocating for international regulation of surrogacy, drafted in a way that aligns with the policies of nations where surrogacy is considered contrary to public policy.[189] The opposing approach favours a principle of comity with no regulation, essentially saying, 'accept and enforce our decisions, even if they contradict your own laws', a method that benefits surrogacy-friendly countries.[190]

This tension underscores the broader debate between restrictive and permissive legal regimes in managing cross-border surrogacy.[191] A restrictive regulatory framework is not only destined to fail but also counterproductive. It will drive individuals to bypass formal regulations and seek out 'grey' or 'black' markets, thereby exacerbating the very risks of exploitation and trafficking that most nations are primarily concerned about in the context of surrogacy. In effect, such an approach may intensify the dangers it seeks to mitigate, undermining efforts to protect vulnerable parties and regulate surrogacy ethically.[192]

Another potential solution is to adopt a child-centric approach to surrogacy regulation. By focusing on the rights and welfare of the child, this approach avoids some of the more contentious issues surrounding reproductive autonomy and the commodification of women's bodies. A child-centric framework would prioritise the protection of children

188 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 879.

189 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 880.

190 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 880.

191 Caldwell, 'Baby got back? Enforcing guardianship in international surrogacy agreements when tragedy strikes', 880.

192 American Bar Association Section of Family Law, 'American Bar Association draft position paper on proposed Hague surrogacy convention', 1 September 2013.

born through surrogacy from legal uncertainty, statelessness, and exploitation. This approach aligns with international human rights law, particularly the United Nations Convention on the Rights of the Child (UNCRC), which mandates that the best interests of the child should be the primary consideration in all legal matters.

A child-centric approach has the potential to garner broader international support, as it reframes the surrogacy debate in terms of protecting vulnerable individuals rather than imposing foreign values on national legal systems. By focusing on the child's rights to legal parentage, nationality, and protection from exploitation, this approach could create a common ground for international cooperation. States that are resistant to regulating surrogacy based on concerns about reproductive autonomy or sovereignty may be more willing to engage in international agreements if the focus is on protecting children's rights rather than regulating adult behaviour.

Incremental harmonisation through regional cooperation is another viable solution. While achieving global consensus on surrogacy may be difficult, regional agreements could serve as stepping stones toward broader international regulation. Regional organisations like the European Union, the African Union, and ASEAN could facilitate cooperation among member states, allowing for the gradual harmonisation of surrogacy laws. For example, the European Union could develop regional standards that provide for the mutual recognition of parental rights in surrogacy arrangements, ensuring that children born through surrogacy are not left in legal limbo when their parents move between member states.

Similarly, regional organisations in Africa, Asia, and Latin America could play a role in promoting regulatory convergence among neighbouring countries with shared legal traditions or cultural values. Regional cooperation offers the advantage of addressing surrogacy regulation in a way that is sensitive to local norms and values while still promoting greater consistency across borders. Over time, these regional agreements could serve as models for a more comprehensive global framework.

Finally, incentivising states to participate in international surrogacy agreements through reciprocal treaties could help overcome resistance. Bilateral or multilateral treaties that simplify the legal process for intended parents and surrogates, while ensuring that parental rights and citizenship are recognised across borders, could encourage states to align their domestic laws with international standards. These treaties would provide much-needed legal certainty for all parties involved, reducing the risks associated with cross-border surrogacy arrangements.

Conclusion

The international surrogacy industry, in its current form, is a patchwork of inconsistent laws and ethical vacuums, where the most vulnerable, surrogate mothers in the Global South and children born through cross-border arrangements, are inadequately protected.[193] The absence of a global legal framework exacerbates these inequities, allowing the exploitation of women's reproductive labour to flourish and leaving children stateless and legally unrecognised.[194] Through the lens of TWAIL, it becomes evident that the Global South disproportionately bears the burdens of this unregulated industry, perpetuating a neo-colonial dynamic where the reproductive needs of the affluent Global North are met at the expense of economically disadvantaged women.

An international legal framework is not only necessary but urgent. Such a regime would harmonise the diverse and fragmented national laws governing surrogacy, providing clear protections for all parties involved. It would set minimum standards that ensure surrogate mothers are treated with dignity, paid fairly, and afforded full legal rights. Children born through surrogacy would be granted the security of legal parentage and nationality, eliminating the threat of statelessness. Moreover, it would address the structural inequalities that allow wealthier individuals to exploit legal loopholes in the Global South, ensuring that all jurisdictions operate on a level playing field.

193 Ford, 'Gestational surrogacy is not adultery', 96.

194 Howard, 'Taming the international commercial surrogacy industry', 1.

However, as TWAIL scholars argue, this framework must not become another tool of domination by Global North states. The creation of an international surrogacy regime must be an inclusive process, where the voices of the Global South are heard and respected. Any framework that emerges must take into account the diverse cultural, legal, and ethical perspectives on reproduction and family life, ensuring that it is not simply an imposition of western norms on the rest of the world.

Ultimately, the establishment of an international legal framework for surrogacy is not just a matter of law, but of ensuring justice. It represents a necessary step towards ensuring that reproductive technologies serve the interests of all humanity, rather than perpetuating global inequalities. A standardised global regime, informed by the principles of fairness, human rights, and inclusivity, would be a decisive move toward protecting the dignity of surrogate mothers and safeguarding the future of children born through surrogacy, irrespective of the borders that currently divide them.

While the implementation of an international legal framework for surrogacy faces significant legal, political, and cultural barriers, these challenges are not insurmountable. Through the use of soft law instruments, a child-centric approach, regional cooperation, and reciprocal treaties, it is possible to create a framework that respects national sovereignty while promoting ethical and protective regulations for surrogacy arrangements. Achieving this goal will require sustained international effort and careful negotiation, but it is essential for ensuring that the rights and dignity of surrogates, intended parents, and children are protected in the increasingly globalised practice of surrogacy.