

For an Effective Ban of Surrogacy in International Law

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Abstract

Surrogacy has become an international industry. Some people single or in couple, go abroad to obtain a child, most likely in violation of national law. Many provisions of international law, especially meant to fight the exploitation of women, human trafficking and the sale of children, should apply to the practice but have not been used so far.

Surrogacy could also be tackled by a specific standard of international law, whether a convention or an additional protocol to an existing convention or, in a simpler way, an amendment to an existing convention. This solution would be easier and would permit immediately to place the abolition of surrogacy in the agenda of the Council of Europe and United Nations.

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Introduction

In surrogacy, the child is the object of a contract. The child is conceived pursuant to the contract, transferred after birth by the surrogate to the sponsor, and his parentage is manipulated both biologically (choice of egg donor according to genetic characteristics, pre-implantation diagnosis) and legally (falsely registered as the sponsor's child). The child is therefore treated as a chattel that can be disposed of.

Surrogacy is often presented as a method allowing a couple whose wife suffers from uterine infertility to have a biological child, through entrusting gestation to a third party; preferably a volunteer. In fact, surrogacy is primarily commercial and often benefits couples in which the woman is menopausal or single men. When performed for a single man, it consists in hiring a woman to have a child that she abandons at birth for payment. Surrogacy is the subject of a growing competitive international market. The price of a child and the benefits vary considerably, from 10,000 euros in India to more than 100,000 euros in the United States for a child implanted after preimplantation genetic diagnosis (PGD), with choice of physical characteristics, including sex. As for business taxation or biomedical research, competition depends largely on differences in national legislation; countries with more liberal legislation have a competitive advantage.

In Europe, surrogacy is prohibited in most countries, tolerated in some, such as Belgium, and allowed in some (U.K., Russia, Ukraine, Greece). In Russia, where surrogacy is legally practiced since 1995, a child costs around 50,000 euros. 1,000 births were reported in 2012. It is available to single people with the sale of gametes. Authorized in Ukraine since 1997 only for married couples, the market there is said to increase by 40% annually. In the U.K., it has been allowed since 1985. The surrogate mother may receive compensation of around 15,000 euros. The descent from sponsors can be established only with the consent of the surrogate mother after birth. A hundred cases are reported each year; however, about a thousand British nationals resort to surrogacy in India every year. In the U.S., surrogacy has been practiced since the 1970s. According to estimates, there are between 1,400 and 4,000 births per year. The law varies according to states. The surrogate mother is not entitled to parental rights and receives \$15,000 to \$25,000. The mothers' selection criteria are very strict. This can cost over \$100,000 to sponsors, with paid options (multiplication of surrogate mothers for more speed, elimination of surplus babies, an additional twin for a fraction of the cost, choice of sex and eye colour...) In India, where surrogacy is legal since 2002, a child costs between \$18,000 and \$30,000. There are over 1,000 clinics in the country, for a turnover estimated at \$2 billion for the entire reproductive tourism. It is the combination of poverty of the people and the liberalism of the law that allows the explosion of this market in India.

Such a phenomenon raises the question of its regulation. The answer to this question depends on several factors, particularly the importance given to financial gains brought about by this practice, the moral sensitivity to the interests of children and the surrogates, human dignity, and emotional sensitivity to the sponsors' desire for a child.

International law contains many provisions for surrogacy in various aspects. These are mainly the standards for children's rights, the ban on the sale of children and trafficking, as well as standards for international adoption. Some surrogacy cases clearly constitute the sale of a child and fraud to international adoption law while others involve trafficking of surrogate mothers.

As evidenced by the development of the surrogacy market, these international standards are poorly enforced. From the perspective of poor countries, this practice inexpensively

creates a highly profitable economic sector and source of foreign exchange. From the perspective of the European countries importing children, the authorities do not or hardly punish sponsors and tend to endorse this practice, including under the constraint of the European Court of Human Rights.

The choice for the legislature is often presented as an alternative between prohibition and regulation of surrogacy. This choice is fundamental and should take place in two stages: It is first necessary to assess the practice of surrogacy itself and then to consider what is the best response to bring to it. The risk is not to judge the practice in itself in the name of a moral casuistry.

A society based on values, especially affirmed in human rights, cannot omit, as a purely liberal society, the passing of a moral judgment on the practice of surrogacy itself. Yet it is in this liberal direction that the Hague Conference appears to be moving: it considers “regulating” the practice, which amounts to legitimizing the principle. Conversely, other authorities, and many States have chosen to ban surrogacy, but often lack the means to enforce this prohibition, particularly when placed before a fait accompli.

Abolition is a principled position in response to a moral judgment on surrogacy itself, in the same way as the prohibition of drug trafficking and prostitution. Prohibition is easy to conceive legally, and many States prohibit this practice in their internal order and could engage in that route in the international order. It should be kept in mind that international law is developed like an oil stain: by progressive adherence to its principles. The most important is to establish the principle of the abolition of surrogacy in the international legal order and then extend its recognition and effectiveness. It is the same, for example, in the progressive abolition of the death penalty. Finally, an international ban on surrogacy does not prevent States from addressing the situations of children born through surrogacy.

Regulation claims to be a liberal approach. It implies an acceptance in principle of the practice of surrogacy and aims at its organization. Everything then depends on the degree of “constraint” than society is willing to exert on the “freedom” of the contracting parties, knowing that according to liberal logic, the constraint must be minimal. This constraint could be exerted to “frame” the conditions of interstate recognition of the civil status of the child, but also the relative conditions for the surrogacy contract, the living conditions of surrogate mothers, etc.

In reality, it is illusory to want to admit particular cases and regulate to prevent abuse, like in the U.K. and Belgium, because many citizens of those States go abroad to escape rules applied at home. They thus fuel the exploitation of women and the commodification of children. Thus, a survey conducted by the *London Sunday Telegraph* revealed that in 2011 the British practiced 100 surrogacies in the U.K. compared to 1000 in India. They go to India because the procedure there is faster, cheaper, and less strictly regulated.

A “regulation” of surrogacy would not settle the problems inherent in this practice but only secondary aspects such as the establishment of the civil status of the child. The rules determining the conditions of access to surrogacy would be circumvented by going to a country where they are more flexible. The regulation of the conditions of the production and the sale of the child could only be effective in the countries that accept such regulation and have the means to enforce it. By analogy, the regulation of prostitution in the Netherlands and Germany did not prevent trafficking and sexual exploitation; these countries return to a stricter prohibition model.

Thus, a legal frame would legitimize surrogacy and develop the market, without addressing the serious problems inherent in this practice. Furthermore, experience shows

that many people wanting to have a child at any cost do not hesitate to bend the rules and to travel abroad even when their countries consent under conditions.

The choice between abolition and supervision must be carried out not only in terms of the effectiveness of each option, but first in terms of the society that we want. This choice does not take place in nothingness: there are already applicable standards for certain aspects of surrogacy, particularly relating to adoption, the sale of children and trafficking. Indeed, surrogacy, in particular international, can attach to several existing practices that are the subject of conventions (I). However, without a strong political will to apply them to surrogacy, these instruments are not sufficient. It is therefore necessary to expressly state that surrogacy is contrary to international law and to devote a specific instrument to it (II).

I. RELEVANT INTERNATIONAL CONVENTIONS

Surrogacy undermines the rights of the child, as well as those of the women employed to carry them. For children, several provisions of the Convention on the Rights of the Child must be recalled: Article 3: *“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”*; Article 7, according to which the child has, *“as far as possible, the right to know and be cared for by his or her parents”* and Article 8 that affirms: *“State parties undertake to respect the right of the child to preserve his or her identity”*.

The surrogate mother, meanwhile, is regarded merely through her reproductive capacity, as an incubator, not as a human person, which is clearly contrary to dignity. She is obliged, with varying degrees of constraint according to situations, to rent her body, which is the definition of prostitution. However, according to Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women: *“State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”*.

Surrogacy is more particularly between the scope of international law related to adoption, the sale of children and trafficking.

A. Adoption

In some countries, adoption is used to validate surrogacy. In Belgium, which does not expressly authorize the practice, if the man sponsor is actually the genetic father of the child, he can recognize the child, permitting parentage to be established in his respect. His wife will then adopt the child. In France, this is also the means used by surrogacy organizations, before the courts put an end to these practices. Surrogacy is also performed with third parties gametes to "manufacture orphans," in other words adoptable children.

As adoption, surrogacy presumes the mother, the one who gives birth, gives up the child. In the same way as adoptions, many surrogacies are international. As surrogacy is close to adoption and is sometimes used, the international law for adoption applies to it, at least by analogy; in particular, the Hague Convention on the Protection of Children and the Cooperation in Respect of International Adoption of 1993 and the European Convention on the Adoption of Children (revised) of 2008.

Now, both the Hague Convention (Art. 4) and the European Convention concerning adoption (art. 5) require that parental consent has not been induced by payment or compensation of any kind, and that the consent of the mother be given only after the child's birth (the European Convention regarding adoption, states that this period shall not be less than six weeks). In addition, international law related to adoption prohibits contact between adoptive and biological families until that consent is given, which means after birth (Art. 29 of the Hague Convention). The Hague Convention (Art.32) and the European Convention concerning adoption (Art.17) specify: "*No one shall derive any improper financial or other gain from an activity relating to the adoption of a child*", which corresponds to Article 21 (d) of the Convention on the rights of the child. All these provisions are violated by surrogacy. The purpose of these treaties can be confirmed by Article 1 of the Hague Convention: "*to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child (...) and thereby prevent the abduction, the sale of, or traffic in children.*" The Committee on the Rights of the Child expressly considers irregular international adoption as the sale of a child.¹

B. The Sale of Children

The provisions of international law related to the sale of children are equally applicable, at least when the child is born to a surrogate mother and is delivered in exchange for a payment from one or more people; especially when the child and the buyers have no genetic link.

A widely ratified instrument (169 state parties) is specifically devoted to the sale of children: The Optional Protocol to the Convention on the Rights of the Child, Concerning the Sale of Children, Child Prostitution and Child Pornography of 25 May 2000. Article 1 prohibits the sale of children, defined by Article 2(a) as: "*Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*". Therefore surrogacy, in the vast majority of cases, is the sale of child: under a contract, the mother or the intermediary transfer the child to the sponsor(s) for payment, or sometimes other benefits.

The sale or trafficking of children is prohibited by international law "*for any purpose or in any form*" (Art. 35 of the Convention on the Rights of the Child). That it relates to a particular form does not prevent surrogacy from being manifestly contrary to existing international law.

C. Trafficking

Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and Article 4 of the Council of Europe Convention on Action against Trafficking in human beings state:

“ a) “Trafficking in human beings” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or

¹ Final Observations France CRC/C/OPSC/FRA/CO/1, 15 October 2007, § 18.

benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

b) The consent of a victim of “trafficking in human beings” to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;”

In surrogacy, the child is transferred from mother to sponsors for remuneration. Although most sponsors have good intentions towards him, the child is treated as property that is available under contract, which is reminiscent of the definition of slavery: “*Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised;*” according to the 1926 Slavery Convention.

In some circumstances, the situation of surrogate mothers also falls within the scope of trafficking, particularly in Asia. Women are recruited in villages with the same methods as prostitutes: promise of a job, rape, confinement away from home and confiscation of their papers. Recruitment may also take the appearance of a free contract, but the economic situation of these women makes a refusal impossible: they agree in order to feed, cure or send their own children to school. Under the pretext of being well fed and cared for, they are kept in “baby farms” where they do not usually come out, cut off from their families throughout pregnancy. Most of the time, the child is born by Caesarean section, not for medical reasons but to match the date of birth to sponsors’ airline tickets. The mother has theoretically given her consent, but the above provisions specify that the consent of the victim is irrelevant when it was obtained “*by the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits.*”

The existence of remuneration vitiates consent, all the more glaringly that this remuneration is high compared to the mother’s standard of living. In India, the remuneration of a surrogate mother (between 1500 and 5000 €) is 3 to 10 years of a worker’s wages. Even in non commercial surrogacy, one can legitimately question the quality of consent. Rapporteur Yves Chartier² wondered about the reality of the consent of women who carried a child for others, considering the reasons given, such as the desire to redeem a previous abortion. The mother may also be subjected to emotional blackmail and even promises or threats concerning her employment. This is already the case regarding egg donation in France, as highlighted by IGAS³. This echoes the abuse of power or of a position of vulnerability.

D. Exploitation of women's reproductive function

The Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979 and entered into force on 3 September 1981 is also applicable to this situation. Article 6 provides that States parties “*shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.*” Article 11.f) adds that States Parties must ensure,

² Report Yves Chartier, under Cass. Plen. 31 May 1991 No. 90-20105, D. 1991 p. 417.

³ Inspection générale des affaires sociales, *Etat des lieux et perspectives du don d'ovocytes en France*, February 2011, Documentation Française, p. 25,

<http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000113/0000.pdf>

in particular “*The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*” This perfectly applies to the exploitation of the function of reproduction of surrogate mothers. After setting out a list of specific rights, Article 11 provides in the third paragraph that “*protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.*” The development of the practice of surrogacy, caused in particular by the extension of IVF techniques definitely creates the need to revise national laws.

Other international law provisions conflict with surrogacy, including the European Convention on the Legal Status of Children born out of Wedlock adopted on 15 October 1975, which explicitly states in Article 2 that “*Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child.*” This Convention was signed by France on 2 September 1977 and ratified by 23 member states of the Council of Europe including Greece June 15, 1988, Ukraine March 26, 2009 and the United Kingdom February 24, 1981.

The explanatory report of this Convention states that “*The principle set out in the Convention and which is in force in most of the member States of the Council of Europe is that maternal affiliation is automatically established by the sole fact of giving birth to the child*”. The only possible reservation to this provision is to allow the practice of anonymous births. Such a reservation should then be made on accession to the Convention.

We conclude from this quick and non exhaustive inventory that many international law provisions preclude surrogacy in various aspects. However, they are little or not enforced. The United Kingdom has applied certain provisions relating to adoption to surrogacy, but Russia did not condemn the practice of conceiving a child by *in vitro* fertilization, have it carried by a surrogate mother and sold to a wholly unrelated couple.

The application of these provisions to surrogacy largely depends on the goodwill of States and the existence of individual petition mechanisms or monitoring systems to control the compliance of States with their obligations. This is a way to explore further, but that is difficult because children, who are the main victims of this practice, are not yet old enough to go to court; surrogate mothers, also victims, are often consenting or even complicit in the practice.

The practice of surrogacy can only be countered by the firm common political will of a sufficient number of influential States, deciding to apply the existing law and to supplement it with specific standards.

II. A SPECIFIC INTERNATIONAL INSTRUMENT DEDICATED TO SURROGACY

An international instrument is needed to specifically target surrogacy. However, the difficulty is to obtain an agreement because colossal financial interests are at stake; just in India, reproductive tourism is a market of two billion dollars. As a consequence, pressure on States to prevent them from prohibiting surrogacy is enormous.

Such an instrument could be developed within the United Nations or the Council of Europe. The latter is particularly suitable because it gathers the majority of States whose nationals are surrogacy customers and several countries providers of children, such as Russia and Ukraine. Another obstacle: diplomatic heavyweights, especially Russia, India, the United States and the United Kingdom, are currently in favour of legalizing surrogacy.

Two ways are possible for States to commit to suppressing this practice: on the one hand, adopt a new treaty (convention or protocol) specifically dedicated to surrogacy, on the other hand amend an existing agreement.

The abolition of surrogacy in international law can only stem from raising international moral awareness about the indignity of this practice. Raising awareness is gradual, and requires strong mobilization. The progress of international law is always the result of the activism of some governmental actors. The main role of NGOs is to push the government and international actors to discuss a new topic and to adopt the necessary measures as a development of existing international law. Thus, a certain degree of activism is needed for international law to progress. Although some initiatives do not lead to the adoption of a Convention, they are useful to impose the subject and advance awareness and law.

A. A new instrument

This new instrument could be either a convention or an additional protocol to an existing convention. The development of such an instrument could be - and has been - considered particularly within the Council of Europe and the Hague Conference on Private International Law.

1. Council of Europe

The Statute of the Council of Europe (Article 15) provides that the Committee of Ministers, which gathers the ambassadors of the 47 member states, “*On the recommendation of the Consultative Assembly or on its own initiative, (...) shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters*”. The statute also provides that the conclusions of the Committee may, if appropriate, take the form of recommendations to governments. The creation of such a specific instrument requires a strong political will among European governments and the possibility of a common policy, that is to say, a broad consensus among States, or at least, a lack of opposition to the initiative that a group of States might take.

Legally, it is much easier to agree to ban surrogacy than to develop a common framework for the practice, particularly in its cross-border aspects.

The text of such an instrument could be inspired by the opinion delivered in 1989 by the ad hoc committee of experts of the Council of Europe on the progress of biomedical sciences, about "*surrogate motherhood*". *The Committee called on States to ensure that:*

No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother.

2. *Any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable.*

3. *Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited.*

The draft resolution (Doc. 13562) on "Human rights and ethical issues related to surrogacy," currently under discussion within the Parliamentary Assembly of the Council of Europe could recommend the development of common standards. The proposed resolution introduced by deputies from various parties declare unequivocally that "*Surrogacy undermines the human dignity of the woman carrier as her body and its reproductive function are used as a commodity.*" and "*The practice of surrogacy also disregards the rights and human dignity of the child by effectively turning the baby in question into a product..*" The draft resolution invites the Assembly to "*further examine the issues arising from the practice of surrogacy, especially its links with the reproductive health of women, human trafficking and the rights of children, and discuss tools for addressing the problem.*" The challenge for the Assembly will be to choose between the prohibition and the supervision of this practice.

Within the bodies parts of the Committee of Ministers, that is to say working on the intergovernmental method, the adoption of standards to "frame" surrogacy requires a long process of preparation and negotiation, including the development of standards of "soft law", such as resolutions and recommendations. Already, in 2010 and 2011, the European Committee on Legal Co-operation (CDCJ) of the Council of Europe has developed a "Draft Recommendation on the rights and legal status of children and parental responsibilities." According to this project, the Council of Europe was then "*convinced of the need for a new Council of Europe international instrument in this area taking into account the legal, social and medical developments of the last decades.*" Although discussed at length in committee of experts, the draft recommendation has met the final refusal of the Committee of Ministers because of moral disagreements between governments. This text, based on the principle of non-discrimination between children according to the situation of their "parents", defined these as "*the persons who according to law are the parents of the child.*" This text intended to recommend to all 47 member States of the Council of Europe to adopt the most liberal legislative principles regarding reproduction and family life. It implied in particular the acceptability of surrogacy and

provided, among other controversial measures, a legal presumption of maternity for the spouse or registered partner of the woman who gave birth.⁴

The adoption of a convention, or even just a draft recommendation asking, unlike the 2011 draft, the principle of the prohibition of surrogacy in Europe would not be easier, for the Committee of Ministers usually adjudicates by consensus. A notable exception to this practice was held in 2010 to allow the adoption of Recommendation CM / Rec (2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity. This recommendation was not adopted by consensus but by majority vote.

In the absence of consensus among member States, the imposition of standards applicable to all the member States regarding surrogacy at present results mainly from the case-law of the European Court of Human Rights.

2. The Hague Conference on Private International Law

Since 2011, the Hague Conference on Private International Law has been addressing the issue of surrogacy because of the problems of private international law it raises, particularly concerning the establishment of parentage and nationality. It considers that the 1993 Convention on the Adoption is not appropriate for surrogacy. The Permanent Bureau of the Conference, which completed the preparatory work of feasibility study of such a convention, has not considered the option of the ban, but only of the frame, indicating the will of searching to establish 'minimum standards'. Yet surrogacy is explicitly prohibited by many member States of the Conference.

The working methods of the Permanent Bureau were strongly criticized because, in a technician manner, it has only consulted "experts" personally engaged in the practice of surrogacy, and people who had resorted to surrogacy. As the Group of feminist associations and defence of Human Rights highlighted in its contribution to the work of the Hague Conference on Private International Law, "*No discussion of the soundness of the practice or its compatibility with human rights was initiated.*"⁵ Such an approach, if it were successful, would be a decline in the international protection of children and vulnerable women; Furthermore, it would contradict many provisions of international law. The argument that it exists anyway, so we cannot ban it is not convincing: trafficking and paedophilia exist, that is no reason why we should supervise them instead of banning and punishing them. On the contrary, we must clearly state that surrogacy is incompatible with human dignity therefore with international law.

B. Amending an existing treaty.

Another approach, easier to initiate, would be to introduce an amendment within an existing agreement in order to enter an explicit provision on surrogacy. At the Council of Europe, this approach would at least provoke a debate and an institutional process in the

⁴ Grégor Puppink, *Council of Europe to impose a new definition of family, parents and children?*, October 26, 2011, ECLJ, <http://eclj.org/Releases/Read.aspx?GUID=d298cd04-c82b-4dfb-a2b7-a7adf455c27b>

⁵ https://collectifcorp.files.wordpress.com/2015/01/surrogacy_hcch_feminists_english.pdf

Committee of Ministers. Within the United Nations, it is not impossible that it leads to the adoption of an international standard.

1. Within the Council of Europe

a. Trafficking in human beings

In the Council of Europe, the Convention on Action against Trafficking in Human Beings adopted in Warsaw, on 16 May 2005, would be suitable for such an amendment, at first because of the very purpose of the Convention and then because of the existence of a relatively open procedure.

According to Article 41 of the Convention, one State Party can indeed initiate the amendment process. The State party communicates the proposal for an amendment to the Secretary General of the Council of Europe. The text is then transmitted to the "*member States of the Council of Europe, any signatory, any State Party, the European Community, to any State invited to sign this Convention (...) and to any State invited to accede to this Convention*".

Then, the amendment proposal is communicated for opinion to the Group of Experts on Action against Trafficking in Human Beings (GRETA). This Group is responsible for ensuring the implementation of the Convention of the Council of Europe on Action against Trafficking in Human Beings.

The Committee of Ministers then considers the proposed amendment and the opinion submitted about it by GRETA. It will then be able, after consulting the Parties to the Convention and obtaining their unanimous consent, to adopt the amendment, which will then be communicated to the Parties for acceptance.

This procedure has the advantage of allowing a government to take the initiative to place the abolition of surrogacy in the agenda of the Council of Europe, but its result is not guaranteed, with regard to the need for unanimous consent.

b. The Convention on Human Rights and Biomedicine

The *Convention on Human Rights and Biomedicine*, called Oviedo Convention of 4 April 1997 also provides for an amendment procedure (Article 32). Any Member State may propose an amendment to the Convention. This is subject to the review of the former "Steering Committee on Bioethics (CDBI)" (now called DH-Bio) which may adopt it by a majority of two thirds of votes cast. It is then submitted to the Committee of Ministers for approval and then forwarded to the Parties for ratification, acceptance or approval.

Simple to launch, the amendment mechanisms however require unanimity in the Committee of Ministers, difficult to obtain.

2. Within the United Nations.

Within the United Nations, three treaties are well suited to an amendment procedure on surrogacy: the Protocol on the Sale of Children, the Protocol on trafficking and the Convention on the elimination of all forms of discrimination against women.

a. The Optional Protocol on the sale of children, child prostitution and child pornography was adopted in 2000. It has been ratified by 169 countries (including the United States who do not have ratified the Convention on the Rights of the Child) and entered into force on 18 January 2002. The Protocol supplements the Convention on the Rights of the Child.

According to its Article 16:

“1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments they have accepted.”

Thus, according to this procedure, one State may, as in the Council of Europe, take the initiative to open the discussion among all States Parties. A conference of all States Parties shall be held if 60 of them are in favour. The following decisions, until approval, are taken by a majority, and the amendment comes into force when it has been approved by the General Assembly and accepted by a two-thirds majority of States Parties.

States Parties to the Optional Protocol that have legalized surrogacy, as the United States, might not ratify the amendment, but would nevertheless be morally affected by its content.

b. The additional Protocol to the United Nations Convention against transnational organized crime to prevent, suppress and punish trafficking in persons, especially women and children was adopted by resolution A / RES / 55/25 of the 15th of November in 2000 at the fifty-fifth session of the general Assembly of the United Nations. It was ratified by 166 States and entered into force on the 25th of December in 2003. *“It is the first global legally binding instrument with an agreed definition on trafficking in persons. The intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights.”*⁶

Article 18 concerning the amendment procedure states:

“1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make

⁶ United Nations Office against Drugs and Crime,
<http://www.unodc.org/unodc/en/treaties/CTOC/index.html>

every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties. (...)

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties. (...)

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.”

The amendment procedure is even easier since only one State party may cause the meeting of the Conference of the Parties that *"shall make every effort to achieve consensus on each amendment."* Otherwise, it is adopted by a majority of two thirds of States Parties and is subject to ratification, acceptance or approval by States Parties without prior approval of the General Assembly.

c) The Convention on the Elimination of All Forms of Discrimination against Women provides a mode of amendment even lighter, since according to Article 26:

“1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.”

In this case, at the request of one or more States Parties, the United Nations General Assembly may be seized of the issue of universal prohibition of surrogacy. The General Assembly could decide to include this amendment to the agenda of the next World Conference on Women.

Finally, many policy options are available to a government that would like to enhance the protection of women and children by promoting the universal abolition of surrogacy.