

6

COMMERCIAL SURROGACY AND THE SALE OF CHILDREN: A CALL TO ACTION FOR THE COMMITTEE ON THE RIGHTS OF THE CHILD

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I. INTRODUCTION

One of the many unsettled issues in relation to commercial surrogacy is whether a commercial surrogacy arrangement amounts to an unlawful sale of children in breach of article 35 of the United Nations Convention on the Rights of the Child (CRC)¹ and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (CRC-OPSC).² For the purposes of this chapter, commercial surrogacy is understood as an arrangement where the surrogate is not only compensated for her expenses, but also receives a sum of money in addition to her reimbursable expenses. Some commentators assert that commercial surrogacy per se amounts to unlawful sale of children, while others argue that commercial surrogacy simply involves remuneration to the surrogate for her reproductive services rather than payment for a child. Many commentators agree that there is a need for regulation, whether it be at the national or international level. For some of those commentators who are of the view that commercial surrogacy per se amounts to the unlawful sale of children, then international regulation of the same is seen as largely redundant as it is already fully regulated by the prohibition in the CRC and CRC-OPSC.³

This chapter examines the tentative engagement of the United Nations Committee on the Rights of the Child on this issue. To date, this has largely been via the Committee's concluding observations on periodic reports of individual states where international commercial surrogacy is permissible (or at least not prohibited). Given that the prospects of a binding international

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1 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

2 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (signed 25 May 2000, entered into force 18 January 2002).

3 John Tobin "To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?" (2014) 63 *International and Comparative Law Quarterly* 317 at 319.

agreement on surrogacy are extremely unlikely in the near future, this chapter argues that the time has come for the Committee on the Rights of the Child to show some leadership on this issue (and, depending on its conclusion, other child rights issues associated with surrogacy). It suggests that the Committee should build on the recent work of the Special Rapporteur on the sale and sexual exploitation of children,⁴ and issue a general comment on commercial surrogacy. Such a general comment would assist in providing guidance to states in developing their domestic regulatory responses to surrogacy in the absence of an international agreement. A general comment could also be useful groundwork to contribute to the work of the Permanent Bureau of the Hague Conference on Private International Law (Hague Conference) on a possible private international law agreement, and the work of the International Social Service Network (ISS) on developing a set of principles for protecting children's rights in the international commercial surrogacy context.

The next section of this chapter explains the issue at stake in terms of whether commercial surrogacy amounts to sale of children. It then goes on to set out the key arguments of those who argue that commercial surrogacy amounts to sale of children, and those who argue that it does not. Following that, it looks at what the Committee on the Rights of the Child has said to date on commercial surrogacy, including whether or not it amounts to sale of children. The chapter then argues that the time has come for the Committee to adopt a general comment on surrogacy.

At the outset, it should be emphasised that of the myriad legal and ethical issues associated with surrogacy, this chapter considers just one, i.e. whether or not commercial surrogacy amounts to unlawful sale of children in breach of art 35 CRC and the CRC-OPSC. This means the issue is being considered in something of a vacuum. Ryznar points out that "...it would be very difficult, and perhaps unwise, to consider only the legal framework of international commercial surrogacy while ignoring public policy goals."⁵ While I have some sympathy with Ryznar's point, especially given the undoubted complexities of the surrogacy debate, there is still merit in considering this specific question in relative isolation – especially in the wider context of a contribution to a book on commercial surrogacy. If commercial surrogacy does amount to unlawful sale of children in terms of art 35 CRC and CRC-OPSC, then either art 35 and CRC-OPSC should be re-negotiated to allow commercial surrogacy to continue, or commercial surrogacy should be prohibited. If the latter course of prohibition were taken, then this would arguably make many of the other issues in relation to commercial surrogacy redundant as they typically consider questions of regulation of commercial surrogacy either on the implicit assumption that it is a valid practice, or on the pragmatic

4 United Nations Human Rights Council *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (A/HRC/37/60, 15 January 2018).

5 Margaret Ryznar "International Commercial Surrogacy and Its Parties" (2010) 43 J Marshall L Rev 1009 at 1024.

basis that since it is occurring, it should be regulated. Alternatively, it may be the case that provided certain criteria are met, then commercial surrogacy does not amount to prohibited sale of children. If this is the case, then a clear statement from the Committee on the Rights of the Child to this effect would be welcome.

II. THE ISSUE: DOES COMMERCIAL SURROGACY AMOUNT TO SALE OF CHILDREN?

Article 35 of the Convention on the Rights of the Child provides that:

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, adopted in 2002, provides greater focus on the issue of exploitation of children. Article 1 of CRC-OPSC provides:

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

Article 2(a) of CRC-OPSC defines the phrase “sale of children” as:

any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.

At first glance, the terms of CRC and CRC-OPSC appear wide and all-encompassing and as clearly covering commercial surrogacy contracts. A commercial surrogacy arrangement involves a ‘transaction’ where a child is ‘transferred’ from the surrogate mother to the intending parent(s) in exchange for ‘remuneration’ beyond reimbursement for expenses. This arguably amounts to the ‘sale’ of a child. However, as noted by John Tobin, interpretation of any human rights treaty is an “imprecise task”, and “rarely a simple exercise”. Tobin points out that the definition raises a number of interpretive dilemmas:⁶

For example, does the purpose of the ‘sale’ matter? Does it matter if the transferors and/or transferees have a biological connection with the child? What does ‘transfer’ mean and is a child actually transferred under a commercial surrogacy arrangement? Finally, is the remuneration paid ‘for’ the transfer of the child or merely ‘for’ the service of gestating a child?

To this list of issues could also be added the following: Does the timing of payments to the surrogate mother affect whether or not there is a ‘sale’ of the resulting baby? Can intending parents buy ‘their own’ children? Does it make a difference if the remuneration is paid via an intermediary rather than directly from the intending parents to the surrogate mother? Is gestational surrogacy

6 Tobin, above n 3, at 335.

somehow different from traditional surrogacy? Are expenses regarded as ‘any other consideration’? Is compensation for losses such as time, physical symptoms, health risks, pain and suffering to be regarded as ‘remuneration or any other consideration’? Is there a material difference between commercial, compensated and paid surrogacy arrangements?⁷

An important point to note, which is unsurprising given the date of adoption of CRC and CRC-OPSC and the comparatively recent rise of surrogacy as a technique of artificial reproduction, is that neither the CRC nor the CRC-OPSC expressly mentions surrogacy.⁸ Nor was there any mention of commercial surrogacy during the drafting of CRC or CRC-OPSC.⁹ Until relatively recently (as discussed further below), neither the Committee on the Rights of the Child nor the UN Special Representative on the sale of children had considered surrogacy either. However, academic commentators have been prolific on this issue, and it is to their views that I now turn.

III. THE ARGUMENTS: BABY SELLING OR WOMB RENTAL?

Surrogacy has generated a huge amount of academic commentary. But, until the last few years, the rights of the child in the surrogacy context were often overlooked, with much greater prominence given to the rights of the surrogate mother and the intended parents.¹⁰ References to human rights and children’s best interests tended to be “incidental and superficial rather than substantive.”¹¹ This has changed in recent years however, with more attention being given to children’s rights. Strong views are held on all matters to do with surrogacy, and the issue of whether or not commercial surrogacy amounts to sale of children is no exception. The issue, as colourfully put by Watson, is whether or not commercial surrogacy amounts to “womb rental” or “baby selling”?¹²

7 On this last issue, see Julia Carrington and Debra Wilson “Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements” (2015) 21 NZBLQ 178.

8 For a discussion of historical antecedents to modern surrogacy, see David Smolin “Surrogacy as Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children” (2016) 43 PeppLRev 265 at 289-302.

9 Tobin, above n 3, at 337.

10 For a summary of the shortcomings of earlier literature, see Tobin, above n 3, at 318, n 6. See also Claire Achmad “Contextualising a 21st century challenge: part two: public international law human rights issues: why are the rights and interests of women and children at stake in international commercial surrogacy arrangements?” [2012] NZFLJ 206 at 206.

11 Tobin, above n 3, at 318.

12 Clara Watson “Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?” (2016) 22 New Bioethics 212 at 223.

A. Contract for Sale of a Child

Over 20 years ago, in the early days of traditional surrogacy arrangements, child rights philosopher Michael Freeman noted that the child born of a commercial surrogacy arrangement was the product of a business transaction – “[t]echnically, the commissioning parents may be buying gestational services but they feel they are buying a baby.”¹³ It is this sentiment which underlies wider ethical and moral concerns that surrogacy amounts to immoral commodification. For example, writing in 1990, Holder argued that it was “repugnant” for children to be the topic of contracts and commerce.¹⁴ Similarly, the United Kingdom 1984 Warnock Committee on Human Fertilisation and Embryology determined commercial surrogacy to be a degrading practice primarily because “the child will have been bought for money”.¹⁵ The subsequent Brazier Report also argued that it was “not necessarily in children’s best interests to learn that their surrogate mother benefitted financially from their birth or from giving them away to the commissioning couple.”¹⁶

More recently, a strong proponent of the argument that commercial surrogacy amounts to the sale of children and is therefore prohibited by art 35 of the CRC and CRC-OPSC is John Tobin.¹⁷ In response to what he regarded as an overlooking of public international law considerations in the work of the Hague Conference, Tobin argued in 2014 that there is a “strong argument to suggest that commercial surrogacy arrangements amount to sale of a child, in which case, international human rights law requires that this practice be prohibited.”¹⁸ He argues that for the Hague Conference to treat international human rights obligations as simply “needs to be met” rather than binding international legal obligations is problematic because it risks marginalising the role of public international law in resolving the issues associated with international surrogacy.¹⁹

Tobin conducts a textual analysis of art 35 CRC and CRC-OPSC in order to consider some of the interpretive issues noted above.²⁰ He notes that although there is no mention of surrogacy in the drafting history of the CRC

13 Michael Freeman “The new birth right? Identity and the child of the reproductive revolution” (1996) 4 *International Journal of Children’s Rights* 273 at 286.

14 Angela R Holder “Surrogate Motherhood and the Best Interests of Children” in Larry Gostin (ed) *Surrogate Motherhood, Politics and Privacy* (Indiana University Press, Bloomington, 1990) 77 at 77.

15 Mary Warnock *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984, reprinted 1988) at [8.11].

16 Margaret Brazier, Alistair Campbell and Susan Golombok *Surrogacy: Review for health ministers of current arrangements for payments and regulation: report of the review team* (1 October 1998) at [5.18]-[5.19].

17 Tobin, above n 3.

18 Tobin, above n 3, at 326.

19 Tobin, above n 3, at 320-321.

20 Tobin, above n 3, at 335-341.

or CRC-OPSC, the drafting history of the latter does make it clear that states wanted a broad definition of the sale of children to “cover activities beyond those contemplated at the time of drafting.”²¹ He argues that given the ordinary meaning of the terms ‘transfer,’ ‘remuneration,’ and ‘consideration’ in art 35 CRC, it would appear that a commercial surrogacy agreement falls within the definition of the sale of a child.²² His view is that the purpose of a contract for sale of a child does not matter, i.e. the fact that the purpose of (most) commercial surrogacy arrangements is non-exploitative does not exclude them from the reach of art 35 CRC and CRC-OPSC. Similarly, he concludes that the identity of the persons involved in the transfer of a child is not relevant given the reference to ‘any person’ in the CRC-OPSC. Thus, even a biological father intended as the recipient of a child under a commercial surrogacy arrangement does not have an entitlement to custody, and so is potentially captured by the prohibition in art 35 and CRC-OPSC. Tobin also discounts arguments that a commercial surrogacy arrangement does not involve a transfer of ownership, and so cannot therefore be characterised as a sale. He points out that if the surrogate mother and the intending parents had merely entered a contract for gestational services, if the surrogate mother refused to give up the resulting baby, then the parents would not be able to demand delivery of the baby, but only seek monetary damages, concluding that this point “reveals the disingenuous nature of the contract for services argument.”²³ Finally, Tobin argues that to characterise a commercial surrogacy arrangement as the mere provision of gestational services is “deeply problematic” because it objectifies and commodifies women’s reproductive capacity, overlooks the health risks associated with pregnancy, and places the surrogate in an invidious position if the intending parents decide they do not want the resulting child.²⁴

Other proponents of the argument that commercial surrogacy amounts to an unlawful sale of children include David Smolin who notes that “when surrogacy is viewed through the legal lens of adoption, its commercial aspects are interpreted as a kind of illicit sale of children.”²⁵ He argues that most surrogacy arrangements constitute the sale of children and so should not be legally legitimated. Sonia Allan notes that no matter what language is used to describe the transaction, no matter how the relationship between the surrogate mother and the child is viewed, the literal interpretation of the law means that the transaction equates to sale or commodification of children

21 Tobin, above n 3, at 336-337.

22 Tobin, above n 3, at 335.

23 Tobin, above n 3, at 341.

24 Tobin, above n 3, at 340.

25 Smolin, above n 8, at 303.

because it amounts to “the delivery of a child to others for remuneration or other consideration.”²⁶

B. Contract for Reproductive Services (or at least not a Contract for Sale of a Child)

Opposing these arguments are those commentators who suggest that a surrogacy contract is not a contract for the sale of a child, but instead a contract for reproductive services. Proponents of this view sometimes relabel surrogate mothers as “gestational carriers,” “surrogate carriers,” or “gestational surrogates.”²⁷ Jason Hanna argues that commercial surrogacy involves remuneration to the surrogate for her services in carrying and giving birth to a child, rather than payment for purchase of a child.²⁸ Jenny Millbank points out that the social science evidence demonstrates that payment alone cannot be used to differentiate ‘good’ surrogacy arrangements from ‘bad’ ones.²⁹

Paula Gerber and Katie O’Byrne build on these perspectives to argue that commercial surrogacy is not sale of children. They note that it is clear that the object and purpose of the CRC and CRC-OPSC is to “prevent harm to children, to protect children’s rights and to promote their best interests.”³⁰ The list of prohibited acts in the CRC-OPSC (sexual exploitation, transfer of organs for profit and forced labour) clearly involve exploitation and degradation of the child in a way that surrogacy usually does not.³¹ The Preamble to CRC-OPSC refers to the context of “international traffic in children” and so adds weight to the argument that the primary aim of art 35 and the Protocol is “harmful activities that compromise the best interests of the child.”³² Commercial surrogacy is thus described as “wholly different in character” to the activities covered by the CRC-OPSC.³³ Wade also suggests that the CRC and CRC-OPSC seek to guard against practices involving the ownership of children which would be detrimental to the enjoyment of their

26 Sonia Allan “The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, London, 2016) 113 at 120.

27 United Nations Human Rights Council, above n 4, at [47].

28 Jason KM Hanna “Revisiting child-based objections to commercial surrogacy” (2010) 24 *Bioethics* 341.

29 Jenny Millbank “Rethinking ‘Commercial’ Surrogacy in Australia” (2014) 12 *Journal of Bioethical Inquiry* 477.

30 Paula Gerber and Katie O’Byrne “Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, London, 2016) 81 at 97.

31 Gerber and O’Byrne, above n 30, at 97.

32 Gerber and O’Byrne, above n 30, at 97.

33 Gerber and O’Byrne, above n 30, at 97.

rights, and that if this perspective is applied, commercial surrogacy cannot be said to contravene the prohibition on the sale of children.³⁴

Supporting the view that a commercial surrogacy arrangement is not a contract for sale of children is the practical point that a surrogacy contract is agreed before a child is even conceived, even though a healthy child is the desired outcome at the end of the contract. In other words, in view of the perils of conception and pregnancy, it may be that the intended 'product' of a commercial surrogacy arrangement, i.e. a healthy child, may not ultimately be delivered. Equally, many surrogacy contracts provide for payments to the surrogate mother at various stages of the pregnancy as opposed to a single lump sum upon delivery of the child. In addition, it is argued that there is no sale of children in gestational surrogacy arrangements because of the lack of a genetic relationship between the surrogate mother and the child, i.e. the child is not 'hers' to sell.³⁵

If a commercial surrogacy arrangement is not a contract for sale of a child, then what sort of contract is it? Some commentators simply assert that it is not a contract for sale of a child, but do not go further to explain what it is a contract for. Others explicitly assert or imply that it is instead a contract for reproductive services. For example, Hanna argues that intending parents in a commercial surrogacy arrangement are paying a surrogate mother for her reproductive labour.³⁶ If this is the case, then it raises separate issues beyond the scope of this chapter around possible exploitation of the surrogate mother and issues of gender equality.

A compelling argument is put forward by Gerber and O'Byrne who say that commercial surrogacy is not about 'sale' or 'transfer' of a child, but instead about "allocation of responsibility between the parties to the arrangement as to the care of the child at different points in time, with the aim of bringing to child into its intended family."³⁷ Thus, where a commercial surrogacy arrangement has reached the courts, subject to the national legal framework in an individual case, the courts have typically not approached the arrangement as a contract for sale, a contract for services, or engaged in a discussion of specific performance or contractual purpose. Instead, they have made determinations about allocation of responsibility for care of the child based on the best interests of the child.³⁸

34 Katherine Wade "The regulation of surrogacy: a children's rights perspective" (2017) 29 CFLQ 113 at 121.

35 Allan, above n 26, at 117.

36 Hanna, above n 28.

37 Gerber and O'Byrne, above n 30, at 98.

38 Gerber and O'Byrne, above n 30, at 99.

C. Just Regulate!

Many commentators either set to one side or avoid commenting altogether on whether or not a commercial surrogacy contract amounts to sale of a child, and instead take a realist position that commercial surrogacy is happening and then consider how best to regulate it so as to mitigate its various potentially adverse impacts. For example, Claire Achmad largely leaves to one side the issue of whether commercial surrogacy amounts to sale of children, and considers how international commercial surrogacy might be regulated to better protect the rights of children. She is however of the opinion that:³⁹

although not all instances of ICS [international commercial surrogacy] amount to sale of children, in some instances ICS arrangements are being undertaken in ways that fall within the definition of ‘sale of children’ under public international law.

She suggests that whether a specific surrogacy arrangement amounts to sale of children “depends on the facts of the situation involved, in particular the payment structure of the ICS arrangement in relation to the transfer of the child.”⁴⁰ While approaches which leave the issue of sale of children to one side are understandable, they also seem a little presumptive – after all, if commercial surrogacy per se is regarded as unlawful sale of children, then issues of regulation may be largely redundant. The argument is that CRC and CRC-OPSC can be seen as fully ‘regulating’ the issue by prohibiting commercial surrogacy. There is likely to be little demand for cross-border altruistic surrogacy, and so no corresponding need for international regulation, aside perhaps from regulating to address the consequences of illegal surrogacy. Tobin argues that the idea that “mere regulation” of commercial surrogacy is a pragmatic response to the dilemmas associated with the practice is misplaced.⁴¹

Despite this perspective, there are currently two initiatives underway which are premised on the ‘just regulate’ approach, and seemingly leave to one side the threshold issue of whether commercial surrogacy amounts to unlawful sale of children. The Hague Conference is currently studying private international law issues in relation to the legal parentage of children, and in relation to international surrogacy arrangements specifically. An Experts’ Group has been established, and although it has met three times since 2016, progress is slow, and surrogacy arrangements are not due to be

39 Claire Achmad “Children’s Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective” (PhD thesis, Leiden University, 2018) at 353. See also Claire Achmad “Contextualising a 21st century challenge: part one: understanding international commercial surrogacy and the parties whose rights and interests are at stake in the public international law context” [2012] NZFLJ 190; Achmad, above n 10.

40 Achmad “Children’s Rights in International Commercial Surrogacy”, above n 39, at 353.

41 Tobin, above n 3, at 351.

discussed until its February 2020 meeting.⁴² The ultimate aim of the work of the Hague Conference is the development of an international treaty. The ISS is an international non-governmental organisation (NGO) that assists children and families confronted with social problems in the migration context. The ISS also has a surrogacy project with an Experts' Group that is in the process of developing "Principles for a better protection of children's rights in cross-border reproductive arrangements, in particular international surrogacy."⁴³ This project has also been running since 2016, but the proposed Principles are not yet finalised.⁴⁴ Although neither of these initiatives has yet made clear its position on whether commercial surrogacy amounts to sale of children, both appear to be taking a 'just regulate' approach.

From this review of existing literature and initiatives, it is apparent that whether or not commercial surrogacy amounts to the sale of children under international law is unresolved and deeply contested. In this context then, what has the Committee on the Rights of the Child - the body charged with monitoring and oversight of CRC and CRC-OPSC - had to say on the issue?

IV. THE LACUNA: THE TENTATIVE VIEWS OF THE COMMITTEE ON THE RIGHTS OF THE CHILD

The Committee on the Rights of the Child is yet to issue a definitive statement on whether or not commercial surrogacy per se amounts to unlawful sale of a child contrary to art 35 CRC and CRC-OPSC. However, since 2013, the Committee has, in its concluding observations on the periodic reports of individual states, made some tentative observations on the practice.

A. Concluding Observations 2013-2018

The first comments of the Committee that directly address surrogacy appear in its 2013 concluding observations on the second report of the United States under the CRC-OPSC (to which the United States is a party, even though it remains a non-party to CRC). The Committee noted that it was particularly concerned about "the absence of federal legislation with regard

42 For more information, see HCCH "The Parentage / Surrogacy Project" <www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>. New Zealand's representative on the Experts' Group on the Parentage/Surrogacy Project is Margaret Casey QC.

43 International Social Service Network "Call for Action 2016: Urgent need for regulation of International surrogacy and artificial reproductive technologies" (January 2016) <<http://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy>>.

44 For more information, see International Social Service Network, above n 43.

to surrogacy, which if not clearly regulated, amounts to sale of children.”⁴⁵ Also in 2013, in its concluding observations on Israel, the Committee noted its concern “when regulating surrogate motherhood arrangements, the State party has paid insufficient attention to the rights and interests of children born as a result of assisted reproduction technologies, particularly with the involvement of surrogate mothers.” The Committee recommended that:⁴⁶

in the regulation of assisted reproduction technologies, particularly with the involvement of surrogate mothers, the State party ensure respect for the rights of children to have their best interests taken as a primary consideration and to have access to information about their origins.

The Committee also recommended that Israel “consider providing surrogate mothers and prospective parents with appropriate counselling and support.”⁴⁷

In 2014, the Committee considered surrogacy in India. Although the Committee welcomed India’s 2011 guidelines on the adoption of children, it also noted its concern that “[c]ommercial use of surrogacy, which is not properly regulated, is widespread” and recommended that India:⁴⁸

[e]nsure that the Assisted Reproductive Technology (Regulation) Bill, 2013, or other subsequent legislation contain provisions which define, regulate and monitor surrogacy arrangements and criminalizes [sic] the sale of children for the purpose of illegal adoption, including the misuse of surrogacy.

In its contemporaneous concluding observations on India’s first report under CRC-OPSC, the Committee recorded its concern at “[t]he widespread commercial use of surrogacy, including international surrogacy, which is violating various rights of children and can lead to the sale of children.”⁴⁹

The following year, the Committee noted its concern in relation to Mexico that “the regulation on surrogacy in the State of Tabasco does not provide sufficient safeguards to prevent surrogacy from being used as a means to sell children” and recommended that Mexico “ensure that the State of Tabasco reviews its legislation on surrogacy and introduces safeguards to prevent its

45 Committee on the Rights of the Child *Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography* (CRC/C/OPSC/USA/CO/2, 2 July 2013) at [29(b)].

46 Committee on the Rights of the Child *Concluding observations on the second to fourth periodic reports of Israel* (CRC/C/ISR/CO/2-4, 4 July 2013) at [33]-[34].

47 Committee on the Rights of the Child, above n 46, at [34].

48 Committee on the Rights of the Child *Concluding observations on the combined third and fourth periodic reports of India* (CRC/C/CRC/IND/CO/3-4, 7 July 2014) at [57(d)] and [58(d)].

49 Committee on the Rights of the Child *Concluding observations on the report submitted by India under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (CRC/C/OPSC/IND/CO/1, 7 July 2014) at [23(g)].

use for the sale of children.”⁵⁰ At the same session, the Committee considered the first report of Israel under CRC-OPSC. It noted the efforts of Israel to regulate international surrogacy arrangements but recorded its concern that “there is no appropriate procedure for screening prospective parent(s) of children born to surrogate mothers abroad, aimed at preventing the hidden sale of children and/or possible sexual abuse” and recommended that Israel “put in place more stringent policies to secure the protection of children born through international surrogacy arrangements.”⁵¹

In 2017, the Committee issued concluding observations on Georgia. Surrogacy is mentioned by the Committee in the context of identity and nationality rights (arts 7-8 CRC). The Committee referred to the regulation of birth registration of children born in Georgia via surrogacy under a new 2016 decree and recommended that Georgia address possible obstacles to the decree, especially with regard to international surrogacy arrangements; ensure that a child born through surrogacy will be able to get access to information about his/her origin; amend the law on status of aliens and stateless persons to fully comply with the provisions of the Convention relating to the Status of Stateless Persons; establish an identification and referral mechanism for children who are undocumented and at risk of statelessness; and accede to the European Convention on Nationality 1997 and the Council of Europe Convention on the avoidance of statelessness in relation to State succession 2006.⁵² Interestingly, in the section of the observations dealing with “special protection measures” (including under art 35 CRC), although there were a number of recommendations for Georgia to combat exploitation, sale, abduction and trafficking in children, there was no specific mention of surrogacy.⁵³

Commercial surrogacy was, however, a focus of the Committee in its subsequent consideration of the United States. Before its interactive dialogue with the United States’ delegation, the Committee explicitly sought information about pre-birth payments and pre-conception contracts.⁵⁴ It sought information on the action taken “to explicitly prohibit payments before birth and other expenses to surrogate mothers...”. The Committee asked for an indication of “how the legalization, in some states, of pre-

50 Committee on the Rights of the Child *Concluding observations on the combined fourth and fifth periodic reports of Mexico* (CRC/C/MEX/CO/4-5, 3 July 2015) at [69(b)] and [70(b)].

51 Committee on the Rights of the Child *Concluding observations on the report submitted by Israel under article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (CRC/C/OPSC/ISR/CO/1, 13 July 2015) at [28]-[29].

52 Committee on the Rights of the Child *Concluding observations on the fourth periodic report of Georgia* (CRC/C/GEO/CO/4, 9 March 2017) at [19].

53 Committee on the Rights of the Child, above n 52, at [42].

54 Committee on the Rights of the Child *List of issues in relation to the report submitted by the United States of America under article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (CRC/C/OPSC/USA/Q/3-4, 8 November 2016) at [7].

conception contracts between commissioning parents and surrogate mothers is compatible with the State's obligation to prevent the sale of children" and an explanation of how those contracts were being enforced. In reply, the United States asserted that surrogacy did not appear to fall within the scope of the CRC-OPSC because it did not involve any of the forms of exploitation listed in art 3 CRC-OPSC.⁵⁵ Disappointingly, the Committee did not directly address this argument and instead recommended that the United States:⁵⁶

consider the possibility of developing legislation that would address the issue of sale of children that may take place in the context of surrogate motherhood and that is outside the scope of family law.

The Committee also noted that surrogate motherhood is a complex area that raises many different questions that fall outside the scope of the CRC-OPSC, but expressed its concern that "widespread commercial use of surrogacy ... may lead, under certain circumstances, to the sale of children." The Committee was also concerned about "the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage."⁵⁷

The most recent comments by the Committee were in July 2018, in its concluding observations on Russia's first report under CRC-OPSC. The Committee noted that surrogate motherhood was a "complex area that raises many different questions," and that "in the light of articles 1 and 2 of the Optional Protocol the Committee recommends that the State party strengthen its legislation in order to prevent surrogacy arrangements that may lead to the sale of a child."⁵⁸

Other countries which have been reasonably involved in commercial surrogacy arrangements, with either an established or emerging surrogacy industry, or intending parents travelling overseas for international commercial surrogacy arrangements, which have not to date received any comment from the Committee in this context are Armenia, Cambodia, Guatemala Kyrgyzstan, Laos, Nepal, Thailand, Uganda and Ukraine. There has been no comment by the Committee on New Zealand's approach to commercial surrogacy. The lack of comment by the Committee on these countries may

55 Committee on the Rights of the Child *List of issues in relation to the report submitted by the United States under article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography - Addendum* (CRC/C/OPSC/USA/Q/3-4/Add.1, 23 March 2017) at [35].

56 Committee on the Rights of the Child *Concluding observations on the combined third and fourth reports submitted by the United States of America under article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (CRC/C/OPSC/USA/CO/3-4, 12 July 2017) at [25].

57 Committee on the Rights of the Child, above n 56, at [24].

58 Committee on the Rights of the Child *Concluding observations on the report submitted by the Russian Federation under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (CRC/C/OPSC/RUS/CO/1, 3 July 2018) at [22].

however be partly attributed to the timing of state reports, i.e. the state's most recent engagement with the Committee may have been before commercial surrogacy developed in that country.

B. Individual Communications involving Surrogacy

Since April 2014, when the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure entered into force, the Committee on the Rights of the Child has been able to consider communications from individuals alleging breaches of CRC or CRC-OPSC. To date, only one decision of the Committee under this Protocol has raised issues of surrogacy. In *JABS v Costa Rica*, the complainant father challenged the way in which the Costa Rican authorities recorded the birth of his twin sons, born via a surrogacy arrangement.⁵⁹ The sons were born in California, by means of in vitro fertilisation, using a donor's ovum and the father's sperm, with the pregnancy carried to term by a surrogate mother. The Supreme Court of California issued a pre-birth order declaring the father to be the sole legal parent. However, the sons' United States birth certificates contained two surnames: the author's first surname and the egg donor's maiden name. The egg donor had agreed to disclose her identity to allow for the possibility that, when the boys reached 18, they could contact her if they so desired. However, when the father and his sons returned to Costa Rica, the authorities assigned the boys their father's two surnames and did not include the egg donor's maiden name. The father alleged that this was a violation of art 8 CRC and the right of his sons to have full knowledge of their biological origins. However, in a surprisingly brief decision, the Committee on the Rights of the Child found the communication to be inadmissible, noting that the father had failed to demonstrate that the Costa Rican approach constituted a barrier to his sons' ability to have full knowledge of their biological origins or breached their right to preserve their identity.⁶⁰

There is one case pending before the Committee that is noted as involving art 35 CRC, although the description of the case suggests it concerns a custodial dispute.⁶¹

C. Comment on the Approach of the Committee

The views of the Committee on the Rights of the Child, at least as derived from its concluding observations, are somewhat enigmatic. However, three points can be made. First, and very disappointingly, the Committee failed

59 *JABS v Costa Rica* (CRC/C/74/D/5/2016, 1 March 2017).

60 *JABS v Costa Rica*, above n 59, at [4.2].

61 See Case against Spain 13/2017 in Office of the High Commissioner for Human Rights "Table of pending cases before the Committee on the Rights of the Child" <<https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf>>.

to engage directly with the argument made by the United States (and by a number of commentators as noted above) that surrogacy does not fall within the scope of CRC-OPSC because it does not involve exploitative conduct. This issue is at the heart of whether or not commercial surrogacy amounts to sale of children, and it was an opportunity missed for the Committee not to engage directly on this question. Secondly, the Committee clearly harbours concerns that at least under ‘certain circumstances’ which it suggests involve an absence of ‘clear’ or ‘proper’ regulation, commercial surrogacy arrangements ‘may’ amount to sale or ‘hidden sale’ of children. Regrettably, the Committee has not gone much further to explain these circumstances, or indicate what would be acceptable as clear or proper regulation although there is clearly a concern with pre-conception contracts and pre-birth payments. Thirdly, the Committee has identified other child rights issues arising from surrogacy beyond the threshold issue of sale of children including issues around identity and nationality (statelessness) of a child born via surrogacy.

Thus, it seems that the Committee’s views can best be described as nascent. As pointed out by Wade, it remains unclear whether the Committee’s comments on inadequate regulation refer to the failure to ban commercial surrogacy outright or instead suggest that commercial surrogacy is permissible provided it is well regulated.⁶² Although it is tempting to conclude that the Committee is tending towards the latter approach of recognising that commercial surrogacy is here to stay, and so needs to be properly regulated, recent comments by Olga Khazova, Vice Chair of the Committee on the Rights of the Child, suggest that the Committee’s views are still evolving. At a 2018 side event at the United Nations Human Rights Council on surrogacy and sale of children held following release of the Report of the Special Rapporteur (discussed below), Khazova described the Committee’s position as “still developing.”⁶³ She referred to “the importance of a human rights approach to designing laws on surrogate motherhood and of taking measures for the prohibition of sale of children.”⁶⁴ She also noted that the Committee was clear on a number of key aspects, including the right of surrogate born children not to be discriminated against, the right of children to get access to information about their origins, and a need for appropriate screening procedures for prospective parents of children born via international surrogacy arrangements.⁶⁵ Notable by omission from this list is that there is no reference to sale of children – suggesting that the Committee’s views on this key threshold issue are not yet fixed.

That the Committee is yet to reach a definitive view on whether commercial surrogacy amounts to sale of children is confirmed by its February 2019 Draft

62 Wade, above n 34, at 120.

63 Office of the High Commissioner for Human Rights “Summary of side event on surrogacy and the sale of children” (6 March 2018) <<https://www.ohchr.org/EN/Issues/Children/Pages/SurrogacySummary.aspx>>.

64 Office of the High Commissioner for Human Rights, above n 63.

65 Office of the High Commissioner for Human Rights, above n 63.

Guidelines on the Implementation of CRC-OPSC. Surrogacy is mentioned in only one paragraph of these draft guidelines, where the Committee notes that “[w]hile not all forms of surrogacy constitute sale of children, the practice, in particular in its commercial form, may have this effect.”⁶⁶ The Committee encourages states “to regulate this practice to avoid any form of sale of children under surrogacy arrangements.”⁶⁷

D. Contrast: the Views of the Special Rapporteur

In notable contrast to the tentative views of the Committee on the Rights of the Child, the Special Rapporteur on the sale and sexual exploitation of children has been far more definitive on the question of whether or not commercial surrogacy amounts to unlawful sale of children. Appointed in 2014, the current Special Rapporteur, Maud de Boer-Buquicchio, has ensured that surrogacy is a key focus of her mandate. In her 2016 report, which focused primarily on illegal adoptions, she noted that children born via international commercial surrogacy were often “vulnerable to breaches of their rights, and the practice often amounts to the sale of children and may lead to illegal adoption.”⁶⁸ Subsequently, in the report on her visit to Georgia, she noted that a new trend of unregulated international commercial surrogacy arrangements was taking place within Georgia, with a negative impact on the rights and best interests of children resulting in “irregularities and protection gaps.”⁶⁹

More recently, her 2018 report is a *tour de force* with a thematic study on surrogacy and sale of children.⁷⁰ In it, the Special Rapporteur asserts that commercial surrogacy often involves abusive practices, and that current responses to regulating commercial surrogacy involve direct challenges to the legitimacy of human rights norms by purporting to legalise practices that violate the international prohibition on the sale of children.⁷¹ She unequivocally rejects the notion that there is a “right to a child” under international law.⁷² She notes that surrogacy regulations in some jurisdictions are designed to enforce contracts, obtain children for intending parents, maintain the industry’s profits, and intentionally reject most protections for

66 Committee on the Rights of the Child “Draft Guidelines on the Implementation of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography – Draft 0” (February 2019) at [52].

67 Ibid.

68 United Nations Human Rights Council *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography* (A/HRC/34/55, 22 December 2016) at [52].

69 United Nations Human Rights Council *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography on her visit to Georgia* (A/HRC/34/55/Add.1, 21 December 2016) at [10] and [40]-[41].

70 United Nations Human Rights Council, above n 4.

71 United Nations Human Rights Council, above n 4, at [24].

72 United Nations Human Rights Council, above n 4, at [64]-[65].

children or surrogate mothers.⁷³ Ultimately, she concludes that “the essence” of the commercial surrogacy arrangement is the transfer of a child and that “[c]ommercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law.”⁷⁴

However, she agrees that:⁷⁵

[c]ommercial surrogacy *could* be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child.

She sets out a number of conditions to be met in order for this to be more than a “legal fiction”⁷⁶ including that surrogate mothers must be accorded the status of the mother at birth, and at birth must be under no contractual or legal obligation to legally or physically transfer the child. In the view of the Special Rapporteur, the physical transfer of the child “must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation.”⁷⁷ Thus, all payments to the surrogate must be before the post-birth legal or physical transfer of the child, and must be non-reimbursable. She asserts that unless and until clear regulatory systems are established, states should prohibit commercial surrogacy. In particular, states should not adopt commercial surrogacy regulations based on obligatory or automatic enforcement of surrogacy contracts and pre-birth parentage orders, for such would make the States “complicit in authorizing practices that constitute the sale of children.”⁷⁸ The transfer of a child from the surrogate to the intending parent(s) must be a gratuitous act, otherwise it will be characterised as an unlawful ‘sale’ of a child.

V. THE CALL TO ACTION: WHY A GENERAL COMMENT IS IMPERATIVE

In light of the emphatic views of the Special Rapporteur, it is now essential the Committee on the Rights of the Child take some action of its own. The logical step for the Committee to take is to issue a general comment. In common with other treaty bodies, as part of its mandate, the Committee is able to issue “general comments.”⁷⁹ General comments provide authoritative interpretive guidance on the treaty obligations of states. They can serve a number of purposes, including legal analysis, policy recommendation and

73 United Nations Human Rights Council, above n 4, at [33].

74 United Nations Human Rights Council, above n 4, at [41].

75 United Nations Human Rights Council, above n 4, at [72] (emphasis added).

76 United Nations Human Rights Council, above n 4, at [72] and [75].

77 United Nations Human Rights Council, above n 4, at [72].

78 United Nations Human Rights Council, above n 4, at [75].

79 CRC, art 45(d).

practice direction.⁸⁰ General comments typically address either a thematic issue (more common) or a specific article of the CRC (less common).⁸¹

It could be argued that it would be premature for the Committee on the Rights of the Child to issue a general comment on surrogacy, and that it would instead be better to wait for the work of other organisations such as the Hague Conference or the ISS to progress. However, there are a number of compelling reasons why the Committee should act now. First, and foremost, unlike other parties involved in surrogacy arrangements (including intending parents, surrogate mothers, and surrogacy brokers) children born as a result of surrogacy lack any independent agency or voice to advocate for their own rights and best interests, which leaves them especially vulnerable. The Committee needs to fill this gap and speak on their behalf. Secondly, the work of the Hague Conference and ISS is progressing slowly and seems unlikely to result in either a comprehensive international agreement or guiding principles any time soon. Even at the regional level, where it might be expected that agreement could be more easily reached, a recent attempt by the Council of Europe to adopt a position on surrogacy was unsuccessful, even though a majority of states favoured either prohibiting commercial surrogacy or prohibiting all surrogacy.⁸² Of course, given the multi-dimensional nature of surrogacy issues, the Committee on the Rights of the Child may be no more successful at making quick progress or reaching a consensus view, but this is not a reason to preclude an attempt being made.

Another very practical reason why the Committee should issue a general comment is because of the different ways in which the Committee's (in-)action has been characterised to date. For example, relying on the Committee's comments on India (noted above), Gerber and O'Byrne suggest that the Committee has considered "substantial evidence on the practice of compensated surrogacy" and:⁸³

restricted its findings to the context of unlawful adoption where there is a lack of regulation, and ... not made any statement to the effect that compensated surrogacy constitutes the sale of children per se.

On the other hand, Tobin suggests that "limited significance" should be read into the (then) silence of human rights monitoring bodies, because they

80 Helen Keller and Leena Grover "General Comments of the Human Rights Committee and their legitimacy" in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies* (Cambridge University Press, Cambridge, 2012) 116 at 143.

81 For example, in recent years the Committee has issued general comments on children in street situations and on public budgeting for the realisation of children's rights. Committee on the Rights of the Child *General Comment No 21 on children in street situations* (CRC/C/GC/21, 2017); Committee on the Rights of the Child *General Comment No 19 on public budgeting for the realization of children's rights (art 4)* (CRC/C/GC/19, 2016).

82 United Nations Human Rights Council, above n 4, at [20].

83 Gerber and O'Byrne, above n 30, at 96-97.

are instead preoccupied with more exploitative and harmful ways in which children are sold and trafficked.⁸⁴

A final reason why the Committee should issue a general comment now is that if the Committee on the Rights of the Child were to draw a line in the sand and boldly and definitively assert that commercial surrogacy per se amounts to prohibited sale of children, then this would be essential input into the work of the Hague Conference and the ISS. Indeed, it may render their work largely redundant: if the argument that commercial surrogacy per se amounts to sale of children is accepted in its strongest form, then logically, there is little need for further international agreement on the issue, as the matter could be seen as fully regulated by art 35 CRC and CRC-OPSC, i.e. commercial surrogacy would be prohibited because it amounts to the unlawful sale of children. With limited cross-border interest in altruistic surrogacy, there could be little need for an international agreement, aside perhaps from an agreement about how to deal with the consequences of illegal surrogacy arrangements.

A practical challenge in developing a general comment would be reaching consensus amongst the 18 expert members of the Committee on the Rights of the Child on its substantive content. Achmad has pointed out that reaching a definitive view under international law on whether commercial surrogacy amounts to sale of children will be difficult.⁸⁵ One of the reasons for the Committee's tentative and cautious approach to date may be a lack of consensus amongst its members on surrogacy issues. Bantekas and Oette have noted that although there is an established process for adoption of a new general comment:⁸⁶

In practice, general comments are the outcome of particular dynamics within the treaty body. Is there a readiness to use general comments generally or in relation to a particular issue? Who is taking the lead? How well informed and capable are the drafters? And how successfully does the body overcome any differences to produce an authoritative draft?

Aside from the internal dynamics of the Committee, the process for adopting a general comment is typically transparent and consultative.⁸⁷ Draft general comments are usually circulated for feedback. The Committee on the Rights of the Child has often held a Day of General Discussion to get wide civil society input into the drafting of a general comment.⁸⁸ The Committee also benefits from the preparatory work of experts of UN agencies such as

84 Tobin, above n 3, at 338.

85 Achmad "Children's Rights in International Commercial Surrogacy", above n 39, at 353.

86 Ilias Bantekas and Lutz Oette *International Human Rights Law and Practice* (2nd ed, Cambridge University Press, Cambridge, 2016) at 209.

87 United Nations General Assembly *Report of the Chairs of the human rights treaty bodies on their twenty-seventh meeting* (A/70/302, 7 August 2015) at [91].

88 Jaap E Doek "The CRC: Dynamics and Directions of Monitoring its Implementation" in Antonella Invernizzi and Jane Williams (eds) *The Human Rights of Children: From Visions to Implementation* (Ashgate, Farnham, 2011) 99 at 105.

the Office of the United Nations High Commissioner of Human Rights (OHCHR) and the United Nations International Children's Emergency Fund (UNICEF).⁸⁹ In the case of a general comment on surrogacy, the Committee will be able to draw on the work of the Special Rapporteur, as well as that of Hague Conference and ISS. It may also make sense for the Committee to explore the possibility of issuing a joint general comment with the Committee on the Elimination of Discrimination Against Women (CEDAW Committee).⁹⁰

If the Committee on the Rights of the Child were ultimately successful in reaching agreement and issuing a general comment on surrogacy, a number of benefits would follow. A general comment would provide authoritative guidance to states in determining their own national regulatory responses to surrogacy. Importantly, this would be using a children's rights lens. Although the Committee's general comments are only soft law and so not legally binding, they are nevertheless a "vital tool" for the interpretation of treaty obligations and act as "key reference points" for states.⁹¹ Given that artificial reproduction is such a fast-evolving area, the non-binding nature of a general comment may in fact be a blessing, as it will not lock the Committee permanently into one fixed interpretation.

A second benefit of a general comment is that the Committee is able to use its general comments to evaluate the compliance of states with their obligations under the CRC. The Committee can refer to its general comments in its subsequent concluding observations on state reports.⁹² In this regard, although the Special Rapporteur's report on surrogacy is impressive, it simply will not engage the attention of states in the same way that a general comment would. A general comment will speak much more directly to the 196 states that have ratified CRC and the 175 states that have ratified the CRC-OPSC.⁹³ Even though little is known about how states use the general comments of treaty bodies,⁹⁴ and there is no systematic follow-up to ensure that states take into account general comments, a treaty body at least has more tools at its disposal than the Special Rapporteur to engage in ongoing monitoring and encourage states to implement a general comment.

General comments are also regularly used as a source of guidance in international and national judicial or quasi-judicial processes. States and

89 Doek, above n 88, at 106.

90 See, for example, Committee on Elimination of Discrimination against Women and Committee on the Rights of the Child *Joint General Recommendation No 31 of the Committee on Elimination of Discrimination against Women and General Comment No 18 of the Committee on the Rights of the Child on harmful practices* (CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014).

91 Bantekas and Oette, above n 86, at 209-210.

92 Doek, above n 88, at 105.

93 Ratification numbers are as at the time of writing. For up-to-date ratification numbers, see Office of the High Commissioner for Human Rights "Status of Ratification: Interactive Dashboard" <<http://indicators.ohchr.org/>>.

94 Doek, above n 88, at 106.

complainants often invoke general comments in individual complaints processes, and national courts increasingly refer to general comments of treaty bodies in domestic judgments.⁹⁵ Finally, a general comment would also be useful as guidance to the myriad of other actors involved in commercial surrogacy - surrogate mothers, intending parents, genetic donor parents, medical practitioners, lawyers, judges, surrogacy brokers and social workers.⁹⁶

It is not the aim of this chapter to put forward suggested content of such a general comment; that is ultimately the job of the Committee itself. However, there is clearly much groundwork in the comprehensive 2018 report of the Special Rapporteur that could form the basis of a general comment by the Committee, especially on the threshold issue of whether commercial surrogacy amounts to unlawful sale of children, and the conditions which might be appropriate in order for it to be lawful.⁹⁷ The next step is for the Committee to decide whether it agrees with the Special Rapporteur's approach, and to make its stance clear by way of a general comment. Beyond this key threshold issue, Achmad has proposed a wide-ranging framework for a general comment on surrogacy,⁹⁸ and so her work will be a valuable resource for the Committee, along with that of myriad other academic commentators. Given the highly contentious nature of surrogacy, the drafting process will be important, and so Keller and Grover's study, which offers a number of suggestions for the drafting process in order to enhance the normative legitimacy of the resulting general comment, offers useful guidance.⁹⁹

In the meantime, at the very least, and as already suggested by the Special Rapporteur, the Committee on the Rights of the Child should request states to provide information about concerns relating to commercial surrogacy arrangements as part of their regular periodic reporting.¹⁰⁰ The Committee should amend its current guidelines for states on reporting on the implementation of CRC-OPSC to include an explicit requirement for information on commercial surrogacy.¹⁰¹ This information would help the

95 Jane Connors "United Nations" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd ed, Oxford University Press, Oxford, 2018) 369 at 392.

96 Achmad "Children's Rights in International Commercial Surrogacy", above n 39, at 350.

97 United Nations Human Rights Council, above n 4.

98 Achmad "Children's Rights in International Commercial Surrogacy", above n 39, at 340-349.

99 Keller and Grover, above n 80, at 192-194.

100 United Nations Human Rights Council, above n 68, at [99].

101 Committee on the Rights of the Child *Revised guidelines regarding initial reports to be submitted by states parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (CRC/C/OPSC/2, 3 November 2006); Committee on the Rights of the Child *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by states parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child* (CRC/C/58/Rev.3, 3 March 2015).

Committee to become familiar with the issues and be useful background information in formulating a general comment.

VI. CONCLUSION

The complexities of commercial surrogacy, and the correspondingly slow pace at which the international community is inching towards some sort of international framework undoubtedly illustrate some of the limits of international law in dealing with multi-faceted, cross-border and fast-evolving areas such as artificial reproduction. Similarly, the way in which surrogacy and other artificial reproduction developments have outpaced national laws, and effectively left international commercial surrogacy arrangements either unregulated or only lightly regulated at the national level, also suggest that there is a gap to fill. Given the fundamental and threshold nature of the question of whether or not commercial surrogacy amounts to sale of children, it is imperative for the Committee on the Rights of the Child to issue a general comment on the matter sooner rather than later. As pointed out by the Special Rapporteur, the current largely demand-driven system is endangering the rights of children.¹⁰²

The main aim of this chapter has been to examine the Committee's engagement to date on the issue of commercial surrogacy, and argue that it is time for the Committee to be more proactive in this space. This chapter does not advocate a view one way or the other on the content of a general comment; that is the responsibility of the Committee. However, it is worth observing that given the lack of a consensus on whether or not commercial surrogacy amounts to sale of children, perhaps the moderate centrist position will ultimately be confirmed by the Committee, i.e. commercial surrogacy is happening, and provided certain conditions are complied with, it is permissible and should be regulated accordingly. Although the Special Rapporteur is adamant that much of the way in which commercial surrogacy is currently practised amounts to unlawful sale of children, she does indicate a way forward for commercial surrogacy under certain conditions. Such an approach would avoid the risks of a totally prohibitionist stance that the practice then goes underground and does even more harm to the rights of children (and surrogate mothers).

The Committee on the Rights of the Child is strongly urged to fully engage with this issue, and go beyond its tentative approach to date. As the guardian of the CRC and the CRC-OPSC, the Committee must stop prevaricating and instead start putting some public international law pegs in the ground to frame the development of the law and practice on surrogacy. In particular, an authoritative interpretation from the Committee on art 35 CRC and CRC-OPSC is overdue. For the Committee to continue to sit on the sidelines of this contentious issue would be an abdication of its duty.

102 United Nations Human Rights Council, above n 4, at [13].