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Surrogacy in Wartime[1]

Abstract

The role of the law is to react and keep pace with technological progress in order to ensure the protection of the subjects involved and to emphasize the enforcement of some important values in order to prevent abuses. Assisted reproductive techniques and surrogacy are no exception, as they involve many, sometimes conflicting, interests. There is no clear consensus on this issue, which often leads to the endangerment of the land and the uncertainty of the subjects involved. This lack of stability has culminated in the ongoing armed conflict in Ukraine, where the surrogacy "business" used to flourish. Even before the war, there were instances of endangered values that have only intensified. The paper examines the legal and ethical complexities of ART and surrogacy, what motivates couples to enter into surrogacy arrangements in Ukraine, and what additional obstacles the war has created for this practice.

KEYWORDS: reproductive medicine, embryo protection, commercial surrogacy, children's rights, armed conflict

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1 Introduction

The ideal concept of the family can be generally described as the basic association of individuals who share goods, contribute to each other's support, and provide for the protection of its members. However, legislators have avoided defining the family precisely because it is quite impossible in modern society, where the concept of family ties is rapidly changing. The avoidance of specification is understandable, as it can be more inclusive[2].

The same situation can be observed with regard to other concepts related to the family, such as motherhood, fatherhood, child-rearing, etc. These are also challenged by the development of Assisted Reproductive Techniques (ART), especially surrogacy, which is becoming an increasingly popular form of creating a family with a child for couples who, for various reasons, are otherwise unable to do so. On the one hand, these techniques represent a solution for infertile couples to enjoy a healthy family life. On the other hand, it introduces more diversity in family and social relations. It is precisely this development in reproductive medicine that gives rise to a large number of legal and ethical considerations.

National legislation on this issue varies from prohibition, to authorization, to partial regulation, to silence on surrogacy. The lack of European consensus understandably leads to the emergence of cross-border surrogacy arrangements between couples from a country where surrogacy is prohibited or unregulated, and a surrogate living in a country where it is legally permitted. In Europe, Ukraine offers commercial surrogacy arrangements for foreigners, thus becoming the most popular and relevant destination for couples over the years. Despite the easy access to these services, the parties face legal obstacles when returning to their home countries with their newborns [3].

Since the outbreak of the armed conflict between Ukraine and Russia, there has been an escalation of legal risks. Surrogate mothers, babies and intended parents are exposed to both factual and legal obstacles that are more serious than in times of peace. The fact that the legal recognition of

2 Zdeňka Králíčková, „On the Family and Family Law in the Czech Republic", [in:] *Family Protection From a Legal Perspective*, ed. Tímea Barzó, Barnabás Lenkovics (Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing, 2021), 77-110.

3 Lilla Garay, „Surrogate Motherhood – the European Legal Landscape" *Law, Identity and Values*, No. 1 (2022): 68-70.

the family relationship between the intended parents and the child varies from country to country has a growing impact on the individuals involved.

This article examines the legal and ethical frameworks of ART, the circuits of pro- and contra-arguments surrounding surrogacy, by highlighting the current situation in Ukraine and how the war has intensified not only the legal risks in cross-border surrogacy cases.

2 In vitro fertilization and embryo protection

Law and bioethics have been dealing with the new biotechnological achievements since the 1980s, when several ethics commissions were set up to bring together legal, social, theological and medical experts to develop approaches to these issues. However, the moral, legal, medical, and ethical bases are far from each other in such a subject that touches on human existence, human dignity, human life, family formation, and parenthood[4]. We will focus on the legal approach to this issue.

In the international context, surrogacy can be approached from the perspectives of contract law, family law, human rights law, medical law, and criminal law, to name a few. We will accept that comparable moral and legal grounds for this issue are not easy to achieve; thus, the establishment of international legal standards through unification is quite unlikely[5].

Technological advances relativize the way we deal with human reproduction. It no longer has to take place in the most private sphere of a man and a woman, but the conception of a child can take place in a laboratory environment. However, the law has a role to play in showing that what is scientifically possible is not necessarily permissible; it must also remain vigilant against potential abuses[6].

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4 Zoltán Navratyil, „Az asszisztált reprodukciós eljárások a jogi szabályozás tükrében – különös tekintettel az in vitro embrió helyzetére" *Debreceni Jogi Műhely, 2 (Különszám)*, No. 2 (2005): 1-3.

5 Piotr Mostowik, „'May You Live in Interesting Times'. General Remarks", [in:] *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, ed. Piotr Mostowik (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 33-34.

6 Zoltán Navratyil, „Az asszisztált reprodukciós eljárások a jogi szabályozás tükrében – különös tekintettel az in vitro embrió helyzetére" *Debreceni Jogi Műhely, 2 (Különszám)*, No. 2 (2005): 2.

In the area of biotechnological progress, the Court of Justice of the European Union (CJEU) has communicated these limits in its case law. The judgment in the case of Oliver Brüstle v. Greenpeace e.V. (Case C-34/10) distinguished the boundaries between human dignity and the patentability of biotechnological inventions and provided an interpretation of articles in Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions. According to Art. 5 (1), the dignity and integrity of the human being can only be preserved by prohibiting the objectification of the human body throughout its formation and development. An element isolated from the human body or produced by means of a technical process may be patented, even if the content of this element is identical to that of the natural element, as provided by Art. 5, paragraph 2. An exclusion from patentability arises when the object of the invention could be exposed to an immoral commercial exploitation contrary to the public order. These articles of the Directive were emphasized by the ECJ in its ruling, which means that an „abusive" objectification of the human body through patents cannot be realized, regardless of the encouraging investment and progress in biotechnology that it brings[7].

Drawing attention to the potential objectification of human body parts touches on the legal status of the embryo in the context of medical research. The protection of the embryo is generally argued differently depending on its location (inside or outside the woman's body). There is a tendency to give less legal protection to an embryo created in the laboratory and existing in a „test tube", gradually objectifying it, allowing its use only for research purposes and desensitizing its liquidation.

The judgment and the opinion of the Advocate General, which had been drafted beforehand, focused on this distinction, pointing out that embryos can be granted protection of physical integrity, except when they are created for a couple to create a family with a child. The creation of embryos for commercial purposes under the Patent Directive and the creation of embryos in the context of European Court of Human Rights rulings on abortion should not be on the same page. This narrative suggests that the legal protection of embryos does not stem from a core original right, but depends on the involvement and will of external subjects[8].

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7 Andrea Erdősová, *Aktuálne otázky o človeku a jeho právach v bioetike* 1st ed. (Bratislava: Wolters Kluwer, 2016), 209.

8 Ibidem, 111 and related.

In the context of surrogate motherhood, the two approaches seem to merge, since the fertilization takes place in the laboratory, but the development of the embryo takes place in the surrogate's uterus.

In general, from the beginning, assisted reproductive techniques (ART) sharpens the contrasts between the prevalence of the legal status of the subjects involved. The legal status of the embryos, the right to freely decide to have a child, and contractual freedom are all aspects that accumulate in surrogacy arrangements.

3 Surrogacy – a solution for infertility?

The idea and practice of surrogacy appears as a new and one of the „reproductive options", which brings to light the issue as a kind of solution to infertility problems, primarily by virtue of a gestational procedure of surrogacy (most cases stem from a medical problem with the uterus). Assisted reproductive techniques, mainly through in vitro fertilization (IVF) and in vivo fertilization, offer the possibility of giving birth to a baby of another woman, with the initial idea of helping couples to have a child genetically related to the father. The controversial background is therefore to what extent we can use these techniques, that is, what kind of social-legal relationships we can establish in this way, if these methods of ART are still possible in countries where there is a problem of acceptance of ART as a solution to infertility itself. We must remember that ART as a technique has expanded over time for different reasons, not only the uterine problems or the existing uterus of a woman in a planned couple. The medical reasons can also be different, for example, when a pregnancy is risky for a woman (heart disease or eye disease, etc.), the sterility, the removal of the uterus as a result of hysterectomy, removal of the cervix, ovaries, and other reasons of not being able to get pregnant or deliver a baby, or the so-called social infertility, which means the legislative obstacles not allowed to adopt a child, for example, the gay couple or single men, lack of age condition or marital status and so on.

For infertility „treatment" in the sense of solving childlessness, adoption was originally the answer. Nowadays, however, ART procedures have become more popular among infertile couples due to the unfavorable reality of adoption procedures (few children are available for adoption, the

procedure is demanding and takes a long time, even if the adoptive parents are willing, they may be denied adoption). Moreover, ART has made it possible for the child to have a genetic link with one or both of the intended parents, which is a great and appealing increment[9]. However, access to ART is limited for medical and other reasons, as highlighted above.

The free choice to start a family or become a parent is part of human nature and our right to self-realization. It's everyone's private decision, so having children can be considered a legitimate goal that deserves legal recognition. This right is usually protected when individuals meet the appropriate criteria to become parents. This criterion is disturbed by infertility, which results in childlessness, a social fact. ART procedures are designed to „treat" such a disorder[10].

Nevertheless, surrogacy offers a solution for infertile couples to become parents and have a child that can be genetically linked to them. This type of procreation seems to be popular, e.g. in the USA, commercial surrogacy has a long history and a comprehensive rule of thumb, and its legal practice is constantly evolving in certain member states[11].

Surrogacy is quite expensive and varies depending on the country, the cost and the public insurance system. For example, in the USA, the price of surrogacy is around $100,000. In some low-income countries, the cost is much lower than in India, Mexico or Ukraine. This could be a very important reason for so-called „reproductive tourism". The other reason may be legal restrictions on the use of ART for infertile couples, and the procedure itself must be a motivation. At the same time, in some countries some methods are not accepted (for example, to perform sex selection of the offspring).

In European conditions, Ukraine is the main destination for couples to enter into surrogacy arrangements, partly because the cost[12] of the procedure is more attractive than in the USA.

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9 Zoltán Navratyil, „Az asszisztált reprodukciós eljárások a jogi szabályozás tükrében – különös tekintettel az in vitro embrió helyzetére" *Debreceni Jogi Műhely, 2 (Különszám)*, No. 2 (2005): 4.

10 Ibidem, 5.

11 Lilla Garay, „Surrogate Motherhood – the European Legal Landscape" *Law, Identity and Values*, No. 1 (2022): 68-70.

12 The prices for surrogacy procedures start from 39000 Eur. Depending on what the package involves (priority on the waiting list, attempts at baby's sex selection...), prices go up to 64900 Euro, according to the price list of BioTexCom, a reproductive center based in Kyiv. More information is available at: https://biotexcom.com/ [accessed: 09.09.2022].

Based on the above motivational factors, Ukraine has been considered the „epicenter" for cross-border surrogacy, as it is the most favorable option for intended parents, mostly from Western Europe, to conclude surrogacy contracts with surrogacy clinics, which would otherwise be impossible and problematic, given either restrictive or silent domestic laws on the matter. The permissive legislation allows for smooth legal procedures and creates an open and easily accessible environment for various ART procedures, thus encouraging „surrogacy tourism", which is not necessarily unproblematic from a legal point of view.

4 Surrogacy arrangements in Ukraine – normative framework and current challenges

The Russian invasion of Ukraine, which began on February 24, 2022, and the ongoing armed conflict forced the introduction of martial law and the military mobilization of all male Ukrainian citizens of appropriate age. The destructive events put the Ukrainian population in general at risk, including surrogate mothers and children born in clinics in the midst of the war. The war has highlighted the extreme vulnerability of the surrogacy business in Ukraine, which raises several legal issues, not to mention the safety and well-being of pregnant surrogate mothers and surrogate babies. Surrogacy arrangements, regardless of their form, are controversial. As a matter of debate in many countries, it has resulted in a disparate legal landscape. As a result, Europe is characterized by a diversity of legal systems, and cross-border surrogacy arrangements create legal ambiguities and grey areas. These characteristics are exacerbated in the current situation in Ukraine, as the international nature of surrogacy arrangements is not addressed at the international or European level. The extreme urgency and need for a comprehensive international legal solution has been confirmed by the presentation of legal and factual obstacles that have emerged since the armed conflict in Ukraine. The controversy of the „surrogacy industry"[13] in Ukraine intensified during the war, especially in issues

13 Carlos Martínez de Aguirre, International Surrogacy Arrangements: A Global 'Handmaid's Tale'?", [in:] *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, 456-457

of legal protection of all subjects involved in surrogacy arrangements, as well as the need to rethink whose choices, rights and freedoms prevail in this unique legal relationship. Now, the entire surrogacy „industry" has been pushed and rushed to make real changes in the system.

Each of the three main subjects of this unique legal relationship – the surrogate mother, the surrogate child, and the intended parents – faces different challenges, which are amplified in times of war, not to mention the role of the responsible surrogacy clinics. The common goal of all parties involved is the smooth transfer of the child to the intended parents; thus, the predetermined structure of these relationships is not endangered. This article examines the current situation of these subjects, with reference to real cases and the legal risks involved.

It is necessary to recognize that the rights of the child born through surrogacy arrangements are listed in the United Nations Convention on the Rights of the Child[14], which means that they have the same rights as all other children. However, they are in a sensitive and often unstable situation due to the recognition of their civil status, nationality and legal parents. These issues arise mainly because of the different legislation on surrogacy in European countries. Nevertheless, under the CRC, member atates have an obligation to protect the human rights of all children without discrimination, which includes a positive obligation to protect, promote and regulate their rights at the national level. However, the armed conflict in Ukraine has brought further complications.

In general, Ukrainian legislation introduced legal surrogacy practices in 1997[15]. The Family Code of Ukraine[16] in its Art. 123 primarily establishes maternal and paternal affiliation when the parties need medical assistance[17].

The primary legal authorization for surrogacy comes from the Family Code. According to Art. 123 establishes maternal and parental affiliation in

14 United Nations Convention on the Rights of the Child (1989).

15 Oleg M. Reznik, Yuliia M. Yakushchenko, „Legal Considerations Surrounding Surrogacy in Ukraine" *Wiadomości Lekarskie*, No. 5 (2020): 1048-1049.

16 Family Code of Ukraine 2002, https://cis-legislation.com/document.fwx?rgn=8677 [accessed: 02.10.2022].

17 „1. If the wife is fertilized by artificial procreation techniques upon written consent of her husband, the latter is registered as the father of the child born by his wife. 2. If an ovum conceived by the spouses is implanted to another woman, the spouses shall be the parents of the child. 3. Whenever an ovum conceived by the husband with another woman is implanted to his wife, the child is considered to be affiliated to the spouses".

the case of medical assistance, and additional specific rules regulate this practice in detail[18].

The issue of birth certificate, nationality and recognition of civil status is of high importance and priority concern for the child born from the surrogacy agreement. First of all, Decree 52/5[19] regulates the issuance of the birth certificate of the child born through surrogacy, as paragraph 11, Chapter 1, Section III states that the names of the intended parents can be listed on this document, the surrogate mother does not have parental rights over the child because she must give informed consent to the registration of the intended parents as the legal parents of the child. The intended parents have two options for obtaining a birth certificate for the child. They can obtain a birth certificate at the Ukrainian Vital Statistics Office, where they will submit a medical certificate proving their genetic link to the child and the surrogate mother's consent to officially register them as parents, or they can start the process of issuing the child's passport at the consular office of the country of origin; however, this is only effective if surrogacy is a legal practice in the country of origin[20].

> „It is necessary to explain that there are different rules usually applied to the recognition of foreign public documents and the same stands for judgments of the courts. The personal status of a child born through a cross-border surrogacy can sometimes be a question of approval of administrative bodies, by a sort of a public document. Still, it sometimes must be approved by a judgement or other kind of a court decision. In most cases, the procedure depends on the country addressed to recognize the certificate and the country where the judgment has been rendered. If the decision has been issued by a jurisdiction of a member state of the EU (European Union), which concerns a matter covered by a regulation of the EU. However, the Brussel Ibis Regulation explicitly excludes natural persons' personal status and capacity from its material scope. The Brussel II regulation excludes from the scope of parental responsibility the matters of parentage, adoption, emancipation, and the names and forenames of the child. Since the European regulation

18 Order of the Ministry of Justice of Ukraine No. 52/5 of 18 October 2000, and the Order of the Ministry of Health of Ukraine On approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine No. 787 of 9 September 2013.

19 Order of the Ministry of Justice of Ukraine of October 18, 2000 No. 52/5 About approval of Rules of state registration of acts of civil status in Ukraine.

20 Order of the Ministry of Justice of Ukraine of October 18, 2000 No. 52/5 About approval of Rules of state registration of acts of civil status in Ukraine.

> cannot be applied in the cases covering the cross-border surrogacy outside the EU, the rules for recognition of foreign judgments and international treaties (bilateral and multilateral) of conflict rules of domestic law are still available"[21].

As surrogacy is mostly prohibited, restricted or unregulated in European countries, these registration procedures of intended parents have led to legal disputes in the country of residence, some of which have been settled before the ECHR[22].

The case of Paradiso and Campanelli v. Italy (no. 25358/12, ECHR 2015/12) demonstrates how each of the subjects of surrogacy arrangements obtains protection of their rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. The case was also heard by the Grand Chamber and a substantially different judgment was delivered on January 24, 2017.

According to the facts of the case[23], an Italian couple entered into a surrogacy agreement in Russia. The child born was allegedly biologically related to the plaintiff. When the plaintiffs returned to Italy with the child, they tried unsuccessfully to register the birth and were prosecuted, while the child was released for adoption. It was later discovered that the child had no genetic link to either of the intended parents and was placed in foster care. By the time the ECtHR became involved, the child had been adopted by a third party.

It is necessary to point out that the Chamber in its decision focused on the removal of the child and its placement under guardianship and not on the issue of the legality or illegality of surrogacy.

The intended parents contested the decision of the Italian authorities to remove the child and place him under guardianship, which violated their right to respect for private and family life. The Grand Chamber found that

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21 For more see: Nathalie B. Wirtz, „Surrogate motherhood in France: ethical and legal issues", [in:] *Fundamental legal problems of surrogate motherhood*, 99 and following.

22 Paradiso and Campanelli v. Italy (Application no. 25358/12, Judgement of 24 January 2017), C. and E. v. France (Application nos. 1462/18 and 17348/18, Judgement of 19 november 2019), D v. France (Application no. 11288/18, Judgement of 16 July 2020), Mennesson v. France (Application no. 65192/11, Judgement of 26 June 2014), Valdís Fjölnisdóttir and Others v. Iceland (Application no. 71552/17, Judgement of 18 August 2021).

23 Paradiso and Campanelli v. Italy Judgement of 24 January 2017.

the contested measures did not fall within the scope of family life[24], but did affect their private life[25]. In essence, the Grand Chamber had to assess whether a fair balance had been struck between the competing interests of the children, the intended parents and the public order.

In cases involving children, their best interests are paramount. States are therefore entitled to take far-reaching measures to pursue a legitimate aim, in this case the protection of the child, by removing him from his intended parents and placing him under guardianship. Were these measures taken by the Italian authorities proportionate and sufficiently protective of the rights of the child? The Grand Chamber found that the removal of the child was in accordance with the law, pursued a legitimate aim, namely the prevention of disorder and the protection of the rights and freedoms of the child, and was necessary in a democratic society[26].

Overall, this case can be seen as a guideline for states in the protection of children born through surrogacy arrangements. The Chamber finds that states must consider the best interests of the child, regardless of the parental relationship, genetic or otherwise. The Chamber acknowledged that cross-border surrogacy arrangements may ultimately amount to child trafficking, and the state is free to take measures to prevent such criminal activity[27]. In doing so, it accepts the state's motives to ensure the general legal protection of children and allows it the discretion to justify the legality or illegality of certain types of adoption or types of ART[28].

This approach, however, somehow gives the upper hand to the states in child protection, where maintaining public order is paramount. If this particular problem were solved by analogy with the children at risk in Ukraine with their surrogate mothers, it would mean that intended parents from safe countries would have little success in getting their children out of the occupied country, This would undermine even more the interests of all parties involved (the reproductive freedom of the intended parents,

24 The court noted that, in view of the lack of a biological link between the child and the parents, the short period of time they spent with the child and the unclear legal bond between them also indicated the absence of family life and de facto family life – para. 157 of the case Paradiso and Campanelli v. Italy. Application no. 25358/12, ECHR 2015/12, ECHR. https://hudoc.echr.coe.int/eng?i=001-170359. [accessed: 13.10.2022].

25 Paradiso and Campanelli v. Italy, para. 166.

26 Ibidem, paras. 174. 178. 179.

27 Ibidem, para. 202.

28 Ibidem, para 197.

the child's right to know and be cared for by its parents, and the surrogate mother's right to self-determination by not becoming a parent), not to mention the practical danger to the health and well-being of the surrogate babies and surrogate mothers.

4.1. Legal and factual obstacles of child protection in surrogacy cases

The safety of the children is inherently in the hands of the surrogate mothers, who have been placed in a difficult situation, as the armed conflict has revealed several complexities that shed light on the most vulnerable sides of the surrogacy business in Ukraine. These include, first, the failure of media coverage to investigate and focus on the voices of surrogate mothers, which has highlighted the inequalities embedded in the structure of the surrogacy business. Second, the clash of interests was directed at the surrogates, who were faced with difficult decisions about their evacuation or relocation, where they had to consider their own safety, the babies they were carrying, and the instructions of the agencies and intended parents. The entanglement and disentanglement of relationships resulting from the interconnectedness of surrogates, intended parents and children in surrogacy procedures became extremely challenging to navigate as it had to be done in the midst of armed conflict, causing uncertainty, suffering and hardship[29].

Moreover, the shortcomings in the protection of children in surrogate motherhood have also become very clear from a legal point of view. So what are the additional obstacles in this regard during wartime? First, from a practical point of view, obtaining the necessary travel documents and children's passports became extremely difficult, since many of the Ukrainian state offices and courts were forced to stop working, and other diplomatic councils and consulates were closed. As a result, they became stateless. In general, statelessness is a high-risk factor, regardless of pre-drafted surrogacy agreements, because Ukrainian citizenship is not automatically acquired and the surrogate mother has no parental rights and obligations

29 Anika König, „Reproductive Entanglements in Times of War: Transnational Gestational Surrogacy in Ukraine and Beyond" *Medical Anthropology*, No. 5 (2023): 484-485.

to the child. Also, if surrogacy is prohibited in the country of the intended parents' citizenship, it is difficult to acquire legal parenthood in that country. The main problem is that the intended parents are required to travel to Ukraine and stay there for a sufficient period of time until the immigration issues (applying for birth certificates with themselves as the parents, applying for a passport or other travel documents) can be resolved.

In addition, the pre-arranged parental relationship is based on weak legal grounds, due to the fact that there is no genetic relationship between the child and the intended parents, or that the child was born to a surrogate mother. These indicators lead to legal uncertainty, which can be followed by criminal liability for child trafficking. It is widespread in the midst of armed conflict, as there are de facto obstacles for the intended parents to enter Ukraine. Even if the intended parents manage to take the child to a neighboring safe country, they have a „foreign" child in their custody without a court order or with only a Ukrainian birth certificate. Thus, the state authorities can investigate the child's background and start prosecution for illegal adoption or even child trafficking.

The legal inconsistencies and their impact on the child and other parties involved are detrimental when the children cannot be delivered safely and quickly to the intended parents. Many surrogates are trapped in Ukraine with their babies, waiting for the intended parents to pick them up. The need to flee the country is natural, but in reality difficult to achieve, as pregnant women and newborns are in a vulnerable position, needing extra care, and are exposed to danger in these circumstances[30].

30 Intended parents from France (Nelly and Julian Lavery) experienced the effects of war firsthand as intended parents. Their surrogate was scheduled to deliver their baby in April, but when the war broke out, she fled Odesy to give birth safely in the western part of the country. She went into labor on the run, however, and the baby was born three weeks early in Uzhhorod. The Lavery's picked up the baby safely, then traveled to Slovakia and took her to Košice Hospital for a medical checkup. The baby has since been safely with the intended parents in France. However, according to the neonatologist who examined the baby, based on the medical findings, the labor must have been complicated, stressful, and basically life-threatening. As babies are very sensitive, especially when exposed to air travel, a comprehensive medical examination is necessary before determining whether the child can continue the journey. For more see: Veronika Folentová, „Po Joy si prišli rodičia do Užhorodu. K mnohým iným deťom, ktoré porodili na Ukrajine náhradné matky, sa rodičia nedostanú" *Dennik N*, 28 March (2022). https://dennikn.sk/2787323/po-joy-si-prisli-rodicia-do-uzhorodu-k-mnohym-inym-detom-ktore-porodili-na-ukrajine-nahradne-matky-sa-rodicia-nedostanu/.

4.2. Risk of statelessness of children born from surrogacy arrangements

Legal safeguards are provided in the Convention on the Rights of the Child[31] , in particular Articles 7[32] and 8[33], which require member states to prevent children from becoming stateless. Art. 7 is clear on this obligation; however, it does not specify which nationality the child may be entitled to, nor does it guarantee the right to nationality at birth[34].

It poses a problem in cases of cross-border surrogacy agreements between intended parents from a country where surrogacy is not permitted and the surrogate mother living in a country where surrogacy is permitted. It is contrary to the obligation of member states under these articles. The solution can be interpreted as requiring member states with permissive measures on surrogacy to restrict access to it for foreign intended parents[35].

In the context of the Convention, which does not deal specifically with children, but under the umbrella of Art. 8 (the right to respect for private and family life). This right is interpreted quite broadly in the decisions of the ECtHR, so that the right to nationality, identity and the best interests of the child can be examined. In the case of Menesson v. France[36], the right to nationality of the children born out of a cross-border surrogacy agreement arose because the French authorities refused to enter the information

31 United Nations Convention on the Rights of the Child (1989).

32 „1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless".

33 „1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity".

34 Sanoj Rajan, „International Surrogacy Arrangements and Statelessness", [in:] *The World's Stateless Children*, ed. Laura van Waas, Amal de Chickera (Oisterwijk: Wolf Legal Publishers, 2017), 374-385.

35 Unicef Briefing Note, *Key Considerations: Children's rights & Surrogacy*, February 2022.

36 Menesson v. France. Application no. 65192/11, 26 June 2014, ECHR.

on the U.S. birth certificate in the French civil status register. The married heterosexual couple of French nationality entered into a surrogacy agreement in California. The ART used the sperm of the intended father and the eggs of the donor. The pregnancy resulted in the birth of a set of twins; the U.S. birth certificate listed the couple as the legal parents of the children, but made no mention of the surrogate mother; nevertheless, the twins were granted U.S. citizenship on the basis of *ius soli*[37]. Although there was no real risk of statelessness as such, the ECtHR ruled that there had been a violation of the children's right to respect for private and family life[38].

Moreover, the ECHR explicitly stated that the children's identity includes their right to a nationality, and the French authorities' refusal to recognize the children's nationality created many legal uncertainties regarding the children's civil status[39].

The risk of statelessness for children born to surrogate mothers may arise, but it is worth noting that the ECtHR has introduced another legal safeguard in its jurisprudence on this issue, namely the recognition of the legal parenthood of at least one of the intended parents (usually the one to whom the child has a genetic link); thus, the possibility of acquiring the nationality of the genetic parent must be open[40]. However, this guarantee may not be sufficient for children who do not have a genetic link with the intended parents, who cannot acquire the nationality of the surrogate mother, and where the intended parents' country prohibits surrogacy altogether.

4.3. Risk of child trafficking

The stateless „surrogate orphans" born in times of war are particularly vulnerable, both legally and de facto, as they are cared for by people to whom they have no legal ties and are trapped in their place of birth, which is under armed occupation[41].

37 In other words, birthright citizenship, is the right of anyone born in the territory of a state to nationality or citizenship.

38 Ibidem, para. 102.

39 Ibidem, paras 96. and 97.

40 Ibidem, para. 100.

41 For more infrmation, see: Andrew E. Kramer, Maria Varenikova, „In a Kyiv Basement, 19 Surrogate Babies Are Trapped by War but Kept Alive by Nannies" *The New York Times*, 12 March (2022). https://www.nytimes.com/2022/03/12/world/europe/ukraine-surrogate-mothers-babies.html.

In addition, there may be criminal liability for trafficking in human beings, particularly children. Child trafficking is defined in Art. 3 of the Palermo Protocol[42], as the recruitment, transportation, transfer, harbouring, or receipt of children for exploitation[43]. Illegal adoption can be considered as a distinct form of child trafficking, according to Art. 2 (a) of the Optional Protocol to the Convention on the Rights of the Child[44]. The organization of an illegal adoption involves improperly induced consent for the child by the perpetrator, who acts as an intermediary, which may arise in the business of surrogate motherhood. Overall, child trafficking as a crime is pursued under international treaties but also relies on the national criminal law provisions to make prosecution of perpetrators possible, regardless of their nationality and whether the crime was committed or not on the territory of the state[45].

The international legal standards for adoption procedures are set out in the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (of May 29, 1993) and the European Convention on the Adoption of Children (of April 24, 1967). In adoption procedures, international law aims to set limits on the benefits of adoption in order to protect the welfare and best interests of the child, as well as the biological family. Finally, it is left to the national legislators on adoption how to

42 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 e Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000.

43 In trafficking involving children, the means of handling the child (threat, force coercion...) and the consent of the child is irrelevant, the act itself still remains in the scope of child trafficking.

44 This Article defines "sale of children" as a mechanism whereby a child is transferred by a person or group of persons to another person for remuneration or other consideration. The key aspect in this crime is the receipt of financial or non-financial gain by the offender, not the means of the act or the purpose of the exploitation.

45 Agnieszka Laber, „International Police Cooperation Against Child Trafficking and Illegal Adoption", [in:] *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*.

navigate this issue, apart from some strict obligations required by international law documents[46].

In addition, it is worth studying the national criminal legislation of Slovakia, as it is one of the safe countries from which children born through surrogacy can flee to Ukraine with their biological mothers or other persons. According to the Slovak domestic legislation, criminal prosecution of some acts related to surrogacy may be possible if we consider some practices of surrogacy as crimes. Slovakia does not have a specific criminal law on the illegality of surrogacy. The legislator is generally silent on this issue[47]. Still, according to the Slovak Criminal Code (Act No. 300/2005 Coll., Criminal Code), a person may be criminally liable for concluding a contract about giving the child to the contracting party for remuneration, also for handing over the child into a person's custody without a court order. Sections 180[48] and 181[49] stipulate criminal offences when a child is handed over for adoption or another purpose, contrary to generally binding criminal law regulation, to receive renumerationAccording to Article 180, a passive form of this act is also a crime, so that the perpetrator who receives a child in this way is criminally liable. In section 181, the key feature of the crime is remuneration; moreover, the abstract phrase „handing over the child for other purposes" can be linked to surrogacy practices[50].

The above mentioned child trafficking is domestically regulated in the Slovak Criminal Code in para. 179, paragraph 2, which is in line with

46 Dominik Zając, „International Criminal Law Aspects of Surrogate Motherhood", [in:] *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, 969-971.

47 Slovakia belongs to the group of countries with silent law on surrogacy, i.e. there is no comprehensive and explicit regulatory framework. Nevertheless, the legislator expressed its attitude towards surrogacy issues by introducing Article 82 p. 2 and 1 of the Family Code. According to paragraph 1, the mother of the child is the woman who has given birth to it, while paragraph 2 states that all agreements and contracts containing statements contrary to paragraph 1 are null and void. Although the intention of these paragraphs was to provide certainty regarding family ties, it does not respond to the fact that the woman who gave birth to the child may not be genetically related to her (in cases of gestational surrogacy).

48 Section 1 paragraph 1 of the Slovak Criminal Code writes the act of handover of the child for the purpose of adoption, here adoption is free of charge.

49 Section 1 paragraph 1 of the Slovak Criminal Code writes the act of handover of the child for other purpose, for remuneration.

50 Elena Júdová, Martin Píry, „Surrogacy Motherhood in the Slovak Republic – an Illegal Immigrant?", [in:] *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, 790-791.

the international treaties on human trafficking in general. Surrogate motherhood and surrogacy agreements include the practices of handing over the child to the intended parents, the surrogate mother's renunciation of parental rights, and the surrogate mother's monetary compensation (in Ukraine above the medical costs related to the pregnancy), which fits within the scope of interpretation of the criminal activity of human or child trafficking in Slovakia. However, proving such criminal activity is problematic for several reasons. For example, there is a presumption of financial gain, which can be easily hidden as medical, travel and living expenses. Also, if the surrogate mother is a Ukrainian citizen, and surrogacy contracts are legal and enforceable there, proving child trafficking or illegal adoption is very limited and difficult. Surrogacy tourism in Ukraine is quite latent, so cross-border prosecution is rarely realized[51].

Questions arise about how to ensure the safety and well-being of children born through surrogacy. Overall, the situation is harsh and legally complicated. Nevertheless, reproductive clinics and agencies are required to adapt to the war in order to help their surrogates and the babies. As most of the surrogacy clinics are based around Kyiv and Kharkiv, as is the largest surrogacy agency, BioTexCom carried out radical measures to safely continue their operations. In the early months of the war, they set up a basement nursery in Kyiv where surrogate babies and surrogate mothers were placed. However, as the situation gradually stabilized in the western part of the country, all the surrogate mothers they had connections with were released from the occupied territories and shelters. The previously captured babies were delivered to their intended parents by August[52].

In any case, the transfer of the surrogate children to the intended parents is less complicated legally if they live in a country where surrogacy is permitted. Legal obstacles may arise in countries where the legislation is the opposite, regardless of the ongoing war conflict in Ukraine. Amidst all the legal complications, there are newborns who, immediately after birth, find themselves not only in legal uncertainty, but also in factual uncertainty due to the armed conflict. Despite the fact that legal parenthood is immediately established between them and their intended parents, those who have parental responsibility over them cannot exercise it, and

51 Ibidem, 793-794.

52 Maria Varenikova, Andrew E. Kramer, „How Ukraine's Surrogate Mothers Have survived the War" *New York* Times, 16 October (2022). https://www.nytimes.com/2022/10/16/world/europe/ukraine-surrogacy-war.html.

they are cared for by persons who are not legally related to them. In any case, a child rights-based approach is important in cases of surrogacy agreements. In the context of ongoing armed conflicts, it is necessary to prioritize the issues of expeditious ways to establish legal parentage and to provide travel documents to children in order to prevent the possibility of abuse of their situation.

4.4. Legal navigation in cross-border surrogacy cases

The risks mentioned above are just some of the many controversial aspects that surrogacy cases reveal. In general, states can take different paths to resolve these conflicts, resulting in different outcomes that are often not equally ideal for all parties involved.

The first advisory opinion on legal parenthood in cross-border surrogacy was issued on 10 April 2019 under Article 1 of Protocol No. 16 to the ECHR. The French Court of Cassation requested an Advisory Opinion as a follow-up interpretation on legal parenthood in cross-border surrogacy cases arising from the case of Mennesson v. France (no. 65192/11, June 26, 2014). The advisory opinion on this issue provided guidance to states on the best approach to take in a situation where the intended mother in a cross-border surrogacy arrangement does not have a biological relationship with the child. However, the intended father is genetically related to the child and has been recognized by domestic law.

The Court presented a balanced interpretation based mainly on the primary consideration of the best interests of the child, the speed and effectiveness of parental recognition procedures, and the importance of the wide margin of appreciation of States (highlighting adoption procedures as a relevant legal solution for this). However, it is important to mention that this advisory opinion is not a legally binding document for the Member State, but rather an explicit interpretation of the Convention by the ECtHR, which may serve as a starting point for States in their legal navigation of surrogacy related issues[53].

53 Andrea Erdősová, „Náhradné materstvo ako bioetický problém z pohľadu ochrany základných práv a slobôd" *Justičná Revue*, No. 4 (2020): 475-476

The answers[54] provided in the Advisory Opinion are undoubtedly relevant for future cross-border surrogacy cases in order to safeguard the right to respect for private and family life of all persons involved. Moreover, the Paradiso and Campanelli v. Italy and Mennesson v. France cases, together with the Advisory Opinion, presented such groundbreaking arguments that they defined the pillars of the ECtHR's decision-making on cross-border surrogacy cases. This is evident in the recent decision in K.K. and Others v. Denmark, where the ECtHR followed the principle of the best interests of the child in holding that the non-recognition of legal parenthood between the intended mother and the children born from a surrogacy arrangement violated the rights of the children (but not of the woman) under Article 8 of the Charter of Fundamental Rights of the European Union[55].

However, the children's rights under Article 8 were violated by the failure to recognize their relationship with the intended mother. In its conclusion, the court emphasized that it was in the best interests of the children to have the relationship recognized.

The ECtHR emphasizes a „child-friendly" approach and a smooth and quick procedure for establishing legal parenthood (even if one of the parents is not genetically related). These factors are of concern in any case, especially today when surrogate mothers and their babies face real life-threatening dangers in some areas of Ukraine.

5 Conclusion

The purpose of this article was to shed light on the double-edged sword of ART procedures. It has undoubtedly been a major step forward in reproductive medicine, making it easier for couples to build a family with a child and

54 „1. the child's right to respect for private life within the meaning of Article 8 of the European Convention on Human Rights requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother"; 2. the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used".

55 K.K. and Others v. Denmark no. 25212/21, 06 March 2023.

achieve fulfillment in their family life. However, surrogacy in particular has entered a sensitive area of moral and ethical considerations in aspects of family life. It raises questions that go beyond legal parenthood. Not only the consequences, but also the prelude to such procedures touches on questions of embryo protection, the right to life and human dignity.

These new techniques can benefit individuals, but practice shows that they can also have the opposite effect. The diversity of legal approaches to this issue demonstrates this. Differences in national legislation force individuals to seek these techniques elsewhere if their home country does not offer a solution. Thus, couples are "forced" to engage in surrogacy programs abroad, resulting in cross-border surrogacy arrangements that are far from satisfactory. The example of the Ukrainian surrogacy „business" and the complications brought about by the armed conflict make this clear. Even before the war, legal uncertainties about the position of surrogates, intended parents, and the most vulnerable subject, the child, have arisen many times. It is true that the European Court of Human Rights, in its jurisprudence, has laid down basic principles on how to navigate the legislation of the Member States in this matter. However, it has also been reluctant to provide a clear solution.

Nevertheless, states should protect their sovereignty by enforcing their laws on surrogacy, because it is not necessarily right to force them, in general, to subsequently approve and validate acts and behaviors that circumvent their legal order. On the other hand, the real problems of couples and infertility are prevalent and the solutions are often offered beyond the borders of their home country. As a result, there is a tension between the protection of the sovereignty of the state and the obligation to protect its citizens, to guarantee their rights and legal certainty.

Unfortunately, this attitude has been demonstrated by the real-life experiences of surrogate mothers, intended parents and babies in Ukraine since the outbreak of the war. The legal risk of statelessness of the child born through surrogacy creates uncertainty in the acquisition of social rights, access to health care and education. Moreover, the possible liability of intended parents for child trafficking, which also undermines the principle of the best interests of the child (in terms of negative psychological consequences, emotional trauma, deprivation of both children and intended parents), the establishment of legal maternity between a surrogate mother and the child (even without a genetic bond between them), points to the urgent need to create a system where intended parents can take in the child as soon as possible and then safely and quickly establish legal parenthood with him or her.

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