DEFENCE FOR CHILDREN INTERNATIONAL ITALIA

GUARDIANS OF UNACCOMPANIED CHILDREN AT THE INTERSECTION OF IMMIGRATION LAW AND PRIVATE INTERNATIONAL LAW

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Introduction

The goal of Private International Law (PIL) is to coordinate the mobility of persons across borders through specific mechanisms aimed at identifying *i)* the authority holding jurisdiction to decide over the case, *ii)* the substantial law applicable, *iii)* the conditions under which decisions can circulate abroad, and *iv)* building international "administrative" co-operation between central authorities. Simplifying, while Immigration Law entails one State's public powers (the country decides "who stays or who leaves") and claims to govern the relationship between the person and a given territory (migration status), Private International Law mainly focuses on the person (personal/family status).

"Migration" and "migrant" are terms rarely used in the language of PIL, despite the goal of the latter is to regulate cases featuring one or more foreign elements. Likewise, Immigration Law shows relatively little interest in the role that PIL's rules may play in the governance of migration.

This article briefly illustrates how Private International Law rules may affect, in general, the way in which child migration can be managed. In particular, it focuses on the role that PIL may play towards guardians of unaccompanied children, moving from the assumption that the synergy between Immigration Law and Private International Law instruments is an added value, which may provide for a wider range of options in the reception and protection of unaccompanied children. Guardianship is central for managing child migration, and guardians – regardless of their (public/private) nature – are keystone within their national protection and reception systems, in need to be supported by all national, supranational and international stakeholders: guardians are reference points for "their" children, and should thus be provided with all range of tools to best perform their functions.

Migrant children at the intersection of the "Law of The Hague" and Immigration Law

The interventions that States must take on to protect unaccompanied children crossing their borders are aimed at generally safeguarding the continuity of their status along their migration route, which is a prerogative of PIL rules: the personal/family status of a person is indeed the condition to acquire any subsequent migration status (e.g. status of refugee). Issues of Private International Law can arise, for example, in the context of a procedure identification of a child (where it may be necessary to recognise a birth certificate issued in the child's country of origin or to transcribe a certificate of marriage), as well as in the context of procedures of family reunification or appointment of a (legal) guardian.

The international organisation that appears most appropriate to promote the "dialogue" between PIL and Immigration Law is the Hague Conference on Private International Law

(HCCH), which the UN Committee on the Rights of the Child has repeatedly considered a “crucial tool” for the implementation of the rights enshrined in the United Nations Convention on the Rights of the Child (UN CRC). The Hague Conference benefits indeed from a universal approach (its conventions are also open to non-member States) and its members (currently 90 States plus the European Union) belong to the categories of countries of origin, destination and transit of children’s migration flows (Albania, Morocco and Ukraine, among others).

Among the “Law of the Hague” (i.e. the set of conventions adopted within the HCCH), the convention that shows the greatest potential is the **Convention** of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, considered as the main regulatory reference for unaccompanied children (the number of Contracting Parties to this Convention is currently 53 – click **here** for the status table). The Convention is “complemented” by an **Explanatory Report,** which simplifies its application by clarifying some expressions/mechanisms contained therein.

In the **Information Note** - *Children deprived of their family environment due to the armed conflict in Ukraine*, published on its website on 16 March 2022, the Permanent Bureau of the Hague Conference on Private International Law stressed that “with regard to unaccompanied and separated children internationally displaced from Ukraine, the HCCH 1996 Child Protection Convention, to which Ukraine is a Contracting Party, constitutes an important complement to other global and regional instruments relating to the protection of children, including those dealing with unaccompanied and separated migrant and asylum-seeking children”.

The 1996 Hague Convention expressly states that “the term ‘parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child” (Article 1, par. 2). It applies “to children from the moment of their birth until they reach the age of 18 years” (Article 2), and the protection measures that fall within its scope of application may concern, among others, the attribution, exercise, termination or restriction of parental responsibility, the right of custody, guardianship and other similar institutions, the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution. “Decisions on the right of asylum and on immigration” (Article 4, let. j) are excluded from its material scope of application: the Convention’s explanatory report specifies that such exclusion only concerns *decisions*, i.e. the exclusive *granting*, for example, of the residence permit (which, therefore, falls within States’ sovereign power). The *protection* and *representation* of children seeking asylum or a residence permit thus fall within the material scope of the Convention. Article 6 also establishes a *forum necessitatis* for “refugee children and children who, due to disturbances occurring in their country, are internationally displaced”: the authorities of the Contracting

State on the territory of which these children are present as a result of their displacement hold jurisdiction.

The tool shaped to grant better protection to children in migration is, above all, the mechanism of "administrative" co-operation between national central authorities, provided for in Articles 29-39 of the 1996 Hague Convention. Article 31 states that "the Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to: a) facilitate the communications and offer the assistance …; b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies; c) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State". The "public authorities or other bodies" mentioned in the text, as stated in the explanatory report, are not specified: this allows central authorities to ask, without limitations, bodies they deem appropriate in the field of children protection (such as, for example, the International Social Service). Article 31, let. c) should therefore make it easier to locate untraceable children.

From the perspective of Immigration Law, some of the above functions are key for reunification procedures as well as for assisted voluntary repatriation between Member States. Indeed, in the context of the Hague Conference, the discourse around the use of the "Law of The Hague" as an integral tool for governing children's migration has been discussed, but the issue has not found, to date, further developments. In France, in a **2016 circular** aimed at clarifying some organisational aspects relating to children deprived of their family environment, the Ministries of the Interior, of Social Affairs, of the family, of education and justice indicated the 1996 Hague Convention as a useful tool to find information about the situation of the child and his/her family, where he/she originated from a Member State or from a Contracting State of the Convention.

Within the intra-EU context, another PIL instrument fostering international co-operation between central authorities comes into play: **Regulation** n. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels II *bis*"), to be replaced by **Regulation** 2019/1111 as from 1 August 2022. The latter's Article 1, par. 2, let. b) includes "guardianship, curatorship and similar institutions" in the matters concerning "the attribution, exercise, delegation, restriction or termination of parental responsibility".

Guardians benefiting from the dialogue between Immigration Law and Private International Law

Guardians of unaccompanied children may also benefit from the synergies between Immigration Law and Private International Law: such “integrated approach” could in fact open more possibilities to the child’s protection and, at the same time, facilitate the guardian’s work. Being the keystone and point of reference of a migrant child, the guardian should be aware of instruments and mechanisms available to simplify the child’s journey within or across the State of arrival or transit. PIL’s rules should therefore also be object of the training modules preceding the appointment.

The guardian, in particular, should be given notions on the functioning of the 1996 Hague Convention, of the Brussels II *bis* Regulation and of the Regulation 2019/1111.

The story of migrant children leaving their country of origin should be read also in the light of the principles underlying PIL rules and, among them, the continuity of status across borders. For example, the decree attributing a child’s age should be recognised in every country along the migration route, in order to prevent the unnecessary repetition of age assessment procedures and avoid possible re-victimisation of the child in this context.

Guardianship relies on an essential logic of proximity, which translates – under PIL rules – the best interests of the child. When children move, their guardians may travel with them or it might be necessary to transfer guardianship to closer guardians. In case guardians move together with children, it is important to recall that under both mentioned legal instruments the decision appointing the guardian shall be automatically recognised unless certain conditions of refusal exist (Article 23 of the 1996 Hague Convention): this is essential to identify as “accompanied” the children travelling with them, and to grant them the proper protection. It is not always clear how a transfer of guardianship is regulated within Member States: in Italy, for example, it is common to close the previous guardianship and appoint a new guardian (but this may lead to a loss of information on the child along the way). However, in the event that the child plans to reunite abroad with a family member, the support by the same guardian should also be made available in the country of destination, at least for the time required for the cross-border transfer of guardianship until another one is appointed: this would be the prerogative of the certificate provided for in Article 40 of the 1996 Hague Convention, a certificate having evidential effectiveness and recognised in all Contracting States, which would avoid costs and disputes over who holds parental responsibilities or guardianship.

Article 40, par. 1 provides that “the authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.” The Article

continues to state that "(2) [t]he capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary. (3) Each Contracting State shall designate the authorities competent to draw up the certificate." Article 40 therefore calls for a specific national implementation: Contracting parties shall establish the framework within which such certificate may operate, appointing the authority that might be suitable to issue it (e.g. in the Italian perspective, these might be both the ordinary courts – competent to deal with issues related to parental responsibility, as well as Juvenile Courts, which are competent to appoint the guardians of unaccompanied children according to **Article 11 of Law n. 47/2017**).

In individual cases of mobility and migration, as well as in situations of mass movements of persons fleeing from situations of emergency, war or armed conflict, the competent authorities of a country of origin may take recourse to issuing such certificates where children are travelling or fleeing with adults other than their parents and to whom they have been entrusted by the parents or other holders of parental responsibilities. The acceptance of such certificates and the recognition of the status "travelling" with them should be regulated in countries of arrival, transit or destination – and at the level of the EU – including through clear guidance on the steps that need to be taken to ensure the correct registration, referral, care arrangements and support for the children concerned.

Recommendations

The Hague Conference on Private International Law, the European Commission, the European Commission, the European Union Agency for Fundamental Rights and the European Guardianship Network should disseminate the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, its Explanatory Report, and Regulations Brussels II *bis* and 2019/1111 among all stakeholders involved in the migration route of children moving across borders, also fleeing from situations of emergency, war or armed conflicts. In particular, they should underline that such instruments of judicial cooperation in civil matters can be seen "through the lenses" of immigration law, as they can serve as mechanisms to manage child migration flows.

The European Coordinators on children's rights, together with the European Network of Ombudspersons for Children (ENOC), should also disseminate the above-mentioned instruments among children, in a child-friendly way.

The Hague Conference on Private International Law should call upon States to ratify the 1996 Hague Conventions, and encourage Contracting States to the 1996 Hague Convention to use the certificate under Article 40 of the Convention, circulating a standard form to ensure its effective application.

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