

THE 30TH ANNIVERSARY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD ACHIEVEMENTS AND PERSPECTIVES

*Now that you are thirty
You are old enough to know it better
But still young to go ahead and do it*

PART I THE UN CONVENTION ON THE RIGHTS OF CHILD: THE EXTERNAL DIMENSION

1. Fausto Pocar: *The CRC within the UN system*

With its 196 contracting States, the CRC is the most successful international treaty aimed at the protection of the human rights of children in the UN system. The chapter examines the success of the CRC at the international level, the innovations it brought about and the role played by its three optional Protocols. The paper also provides an account of the tasks entrusted to the UN Committee on the Rights of the Child and other relevant monitoring bodies.

2. Alessandra Annoni: *The CRC and the European Convention on Human Rights*

The European Court of Human Rights has repeatedly asserted that the European Convention on Human Rights (ECHR) cannot be interpreted in light of the other relevant international instruments on the protection of human rights. Having been ratified by all the States parties to the ECHR, the Convention on the Rights of the Child (CRC) plays a prominent role in this context. In its case-law, the Strasbourg Court frequently makes reference to the principle of the best interests of the child, enshrined in Article 3 of the CRC. The relevance that the Court assigns to the principle seems to go beyond what Article 3 CRC prescribes. There are, however, several other provisions of the CRC that may affect the interpretation of the rules of the ECHR. The two treaties interact in at least three different ways: a) there are provisions in the CRC that protect rights that are also enshrined in the ECHR (e.g. freedom of expression) or in its Protocols (e.g. the right to education). To the extent that their formulation is more precise than that of the corresponding ECHR norms, these provisions provide a significant interpretative tool to the European Court, allowing it to adapt the provisions of the ECHR to the specific needs of children and adolescents; b) the CRC enshrines further rights, which are not expressly taken into consideration by the ECHR (e.g. the right to a name). While being aware that the systematic interpretation of the ECHR in the light of the other relevant international instruments cannot lead to the recognition of new rights, the European Court does not hesitate to bring the rights protected under the CRC under the umbrella of existing provisions of the ECHR (e.g. article 8, protecting the right to private and family life); c) the CRC places upon States Parties a number of obligations of conduct, the respect of which is functional to guaranteeing the full enjoyment of children's rights. Respect for those obligations of conduct can also serve as a parameter for assessing the fulfilment by States of their due diligence obligations stemming from the ECHR (e.g. the obligation to prevent human rights violations).

3. Sara De Vido: *The CRC and the Council of Europe Conventions for the protection of children and adolescents*

The chapter explores the legal relationship between the CRC and the Council of Europe Lanzarote and Istanbul Conventions. The latter instruments reinforce the innovative scope of the CRC by providing for obligations of prevention, repression and protection States must abide by, and by deepening the protection of minors from violence. The chapter will also reflect on some limitations of the two regional conventions, including the exclusion of provisions that criminalise corporal punishment. After a short analysis of the two conventions, their monitoring mechanisms and the provisions that regulate the relation with the CRC, the analysis focuses on three key provisions of the CRC itself, namely Articles 19, 24(3) and 34, regarding violence within the family with specific regard to witnessing violence, prohibition of traditional practices reflecting on female genital mutilation and child marriages, and prohibition of sexual exploitation.

4. Adelina Adinolfi: *The relevance of the CRC to EU Law*

The chapter purports to ascertain the role that the CRC plays within the EU legal system. The Court of Justice relies on the Convention to identify EU general principles of law, and construes EU legislation accordingly. Article 24 of the Charter of fundamental rights of the EU largely reflects the principles enshrined in the Convention, and the CRC is sometimes expressly mentioned in the preambles of EU legislation with the view of ensuring a consistent interpretation. The chapter highlights the importance that the Convention has in EU's law as a benchmark for the interpretation and application of legislative acts. It also argues that the case-law of the Court of Justice entails a uniform interpretation of the CRC in the European context, eventually fostering a similar construction of the Convention even in areas that are not within the scope of application of EU law. A strengthening of the value of the CRC may result by virtue of the principle of primacy of Union law, namely when some of its provisions find expression in the EU legislation. Overall the "codification" of the CRC into EU acts and into the Charter of fundamental rights may arguably increase, on the one hand, the (effective) compliance with the CRC, and, on the other, helps to transform into concrete rules some of the rights granted by the Convention itself.

5. European Asylum Support Office: *The CRC and the European Asylum Support Office (EASO)*

EASO is committed to support Member States (MS) authorities of the European Union (EU) in the implementation of European law related to asylum, which reflects principles of international human rights law. This includes rights and obligations derived from the Convention ensuring children enjoy the rights and conditions to which they are entitled. The objective of this contribution is to take stock of EASO's work on asylum-seeking children since its establishment, the current projects and its future vision. Firstly, the contribution defines the legal framework where EASO operates in order to support the implementation of the Convention's rights in the EU MS. Then, the activities on children developed by EASO aimed at promoting the effective enjoyment of applicable rights set forth in the Convention are presented. Finally, the future plans of EASO's work on children are introduced.

6. Cristophe Bernasconi and Philippe Lortie: *The CRC and the work of the Hague Conference on Private International Law (HCCH) in the field of child protection*

The chapter deals with the four modern HCCH Conventions relating to children, i.e. the 1980 Child Abduction, the 1993 Adoption, the 1996 Child Protection and the 2007 Child Support Conventions, including the 2007 Protocol on the Law Applicable to Maintenance Obligations. Other HCCH projects concerning the protection of children, such as the Parentage / Surrogacy Project and the Malta Process, are also covered. The work of

the HCCH is illustrated in light of the CRC such as Article 2 on non-discrimination, Article 3 on the best interest of the child, Article 8 on the right of the child to preserve his or her identity, Articles 9 and 10 on the right of the child to have contact with both parents, Article 12 on the rights of the child to express his or her views freely in all matters affecting him or her, Article 21 on the principle of subsidiarity in the context of adoption, Article 22 on the rights of refugee children, Article 27 on the right of the child to an adequate standard of living, and Articles 11 and 35 on the prevention of abduction, sale or traffic of children. The chapter also addresses remarks of the UN Committee on the rights of the child, in relation to the work of the HCCH, made in its latest Report concerning Italy.

PART II

THE UN CONVENTION ON THE RIGHTS OF CHILD: THE INTERNAL DIMENSION

7. Fausto Pocar: *The CRC in Italy: the general framework*

The chapter underlines Italy's positive and negative obligations stemming from the CRC, distinguishing between obligations that require immediate implementation and obligations whose obligations may be deferred. The chapter identifies the recipients of the rights enshrined in the CRC ("each child within [a Contracting State's] jurisdiction"), illustrates the scope of the clause prohibiting discrimination and focuses on the measures taken by Italy to implement the CRC. The chapter goes in to describe the role played by the Italian Independent Authority for Children and Adolescents, the CRC monitoring body, also within the periodic control of the UN Committee on the implementation of the CRC in Italy as well as within other international control procedures.

8. Elisabetta Lamarque: *The best interests of the child*

Over the years, Italy has integrated the principle of the best interests of the child in all legislative, administrative and judicial proceedings concerning children. The reasons for the considerable success of the principle are various. It can be mentioned, inter alia, the rhetoric strength of the Italian translation ("superiore", or "preminente" interests of the child), the openness of the Italian legal system to the international sources and the fact that the Italian Constitution contains several principles and rules that anticipate and support the content of Article 3 of the CRC, and confirms Article 21 of the CRC with regard to adoption. Above all it must be considered the 'personalistic principle' laid down by Article 2 of the Italian Constitution, under which "The Republic shall recognize and protect the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed", that refers also to children considered as human persons, in addition to other provisions, as Article 31, para. 2, under which "The Republic shall protect [...] children and the young by adopting necessary provisions". The contribute focuses especially on the large use of the best interests of the child standard by the Italian courts, beginning with the central role played by the Constitutional Court.

9. Giacomo Biagioni: *The right to inclusion*

Even though the right to inclusion is not expressly mentioned in the UN Convention on the Rights of the Child, several provisions thereof actually refer to that notion, being a general purpose of the Convention to characterise all children as holders of fundamental rights and to ensure awareness of such rights. The duty of non-discrimination enshrined in Article 2 of the Convention is especially relevant to the achievement of the social inclusion of children. In addition, also the evaluation of fundamental rights connected to the identity of

the child, namely the right to citizenship and the rights of children belonging to ethnic, religious or linguistic minorities or of indigenous origin, must be taken into account to this aim.

10. Costanza Honorati: *The right to a name and to personal identity*

The right to have a name, to carry that name and to be identified by it expresses the right to “be oneself” and therefore the right to personal identity. In addition to its private dimension, the name carries out a public and a social function: in fact, while it translates the interest of the State to identify those who bring it in order to ensure control and maintain public order, it is also a distinctive sign of the elementary community to which the individual pertains, the family. The article first gives an overview of Articles 7 and 8 of the CRC, focusing then on their application within the Italian legal system. In particular, it highlights the right to be registered immediately after birth and the right to a name within the procedures aimed at ascertaining paternity and motherhood, also with particular reference to surrogacy.

11. Roberta Clerici: *The right to be heard and the rights to participation*

The right to be heard enshrined in Article 12 of the CRC represents one of the four fundamental principles which inspire the CRC, together with the prohibition of discrimination, the right to life and development, and the best interests of the child. For its cross-cutting nature, the right to be heard is closely connected to the principle of the best interests of the child. The radiance of this right in such diverse and numerous, as well as unexpected, areas justifies its new qualification as right to participation, even if such wording is absent in the text of the Convention but incisively adherent to the multiple possibilities of applying it. The chapter underlines the conditions and ways of exercising the rights to participation and highlights it in the framework of private international law conventions and of the case law of the European Court on Human Rights and of the Court of Justice of the European Union. It concludes by looking at the implementation in Italy of the right to be heard and of the rights to participation, moving from the UN Committee on the Rights of the Child’s concluding observations.

12. Fabiana Di Porto: *The freedom of expression and the right to access media and privacy*

Over the past 30 years, a dramatic change occurred as regards the means that children can employ to express themselves. The advent of Internet and the digital revolution have indeed multiplied the means and sources of information she can use, while also generating new risks. Against this background, the contribution analyses the application of Articles 13 and 17 of the CRC since its implementation in Italy. It further provides an overview of the measures Italy has put in place to prevent minors from accessing potentially harmful content, both on TV, gaming and, more recently, on digital platforms (such as video-sharing or social networks). In this respect, two regulatory ‘seasons’ are envisaged: the first one, based on pure self-regulation by the industry; and the second one, more recent, where the regulator and the industry tend to cooperate to co-regulate. Given the importance of consent to access digital services, the last part of the contribution deals with the legal threshold data-protection laws establish for minors. It expresses doubts as per whether a one-size-fits-all threshold is suitable for all and every minor. The chapter concludes by advancing some proposals to enhance the existing legal tools that both protect and empower minors in the digital environment.

13. Mirzia Bianca: *The right to a family*

The chapter addresses the issue of whether the CRC, based on a comprehensive reading of its provisions, can be considered to enshrine a “right to a family”. The Convention does not provide for an express right of the

child to have a family or to grow within a family (as conceived in some Italian sources of law), even if its preamble recognises that the family is the “fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children”. The right to the family of origin is implicitly set forth in Article 7 of the CRC, which establishes, as far as possible, “the right to know and be cared for by his or her parents”, while Article 8 recognises the right to preserve his or her identity, including, among other things, “family relations”, and Article 9 establishes that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when such separation is necessary for his or her best interests. When it is not possible to ensure the child’s rights to his family of origin, the CRC prescribes the child’s right to a family (Articles 20 and 21). The article concludes by setting the discussion in a *de jure condendo* perspective.

14. Antonio Leandro and Cinzia Zonile: *The protection against violence*

Violence against children gives rise to serious concern for the United Nations, other international organizations and States. In this regard, the Convention on the Rights of Child compels States to positive and negative duties so as to effectively secure children whatever the violence’s features may be. Such duties require States to adopt such national measures as may be necessary to prevent, combat and eradicate the violence within their territory. The chapter assesses whether and to what extent Italy actually fulfills this commitment in compliance with the CRC and other relevant international instruments.

15. Adriana Di Stefano: *The right to education*

The chapter provides a brief commentary on Articles 28 and 29 of the United Nations Convention on the Right of the Child (CRC), both devoted to the right to education. It analyses the core contents of these fundamental guarantees, to be read together, as well as the nature and scope of States’ obligations to respect, protect and fulfil the right in question “progressively and on the basis of equal opportunity” (Article 28). Starting from the meaning of ‘education’ in the context of the CRC, the text offers an overview of the four qualitative dimensions of the right to education as compared to other international human rights provisions and interpreted by the UN monitoring bodies and the Special Rapporteur: availability, accessibility, acceptability and adaptability (the 4A framework). It also explores the requirement for a right-based approach to school discipline, grounded on the dignity of the child, and the international cooperation in matters relating to education. Finally, it focuses on the implementation of the CRC international standards within the Italian legal order, as a reference tool for those working in the field of children’s rights and educational matters.

16. Pietro Franzina and Ilaria Aquironi: *Children with disabilities*

Article 23 of the UN Convention on the Rights of the Child provides, *inter alia*, that mentally and physically disabled children “should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”. Other international rules are concerned with the protection of the fundamental rights of children with disabilities. That is notably the case of Article 7 of the UN Convention on the Rights of Persons with Disabilities, which requires that States take “all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children”. The provision further recognises the right of children with disabilities “to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”. The rules that combat discrimination in the enjoyment of human rights also play an important role in this area, in that they include disability (either implicitly or explicitly) among the grounds on which discrimination is prohibited. The chapter provides an

overview of the above rules in light of their connections. After discussing the notion of disability, as used by the international law of human rights, the paper examines the principle according to which the best interests of the (disabled) child must be regarded as a primary consideration, and the steps that States are required to take in order to promote the autonomy and social inclusion of children with disabilities, and to provide them the assistance they may need in the enjoyment of their rights. The chapter also highlights the relevance of international cooperation to the effective realisation of the fundamental rights of children with disabilities.

17. Vitulia Ivone and Stefania Negri: *The right to health and welfare*

The chapter is focused on the right to health. It examines the content and scope of Article 24 of the Convention and the interpretation provided by the Committee in General Comments nos. 3 of 2004, 15 of 2013 and 20 of 2016. It also explores the intersections between Article 24 and other provisions of the Convention, as well as the relationship between article 24 and the relevant provisions of other international conventions protecting children's health and wellbeing. Moving from the international to the national perspective, the chapter analyses the measures adopted at the domestic level to implement the Convention and the criticalities highlighted in Italy's periodic reports and the corresponding concluding observations issued by the Committee. Special attention is devoted to some topical issues such as informed consent, vaccinations, abuse of harmful substances and products (especially tobacco, drugs, alcohol and unhealthy foods), mental health and Internet addiction.

18. Elena D'Alessandro: *Towards a child-friendly justice in civil matters: safeguards and fair trial*

Even if the CRC does not contain an express reference to civil justice, there are clear indications related to the necessity of a child-friendly justice system in civil matters (Article 3, par. 1). In Italy, the scenario is fragmented, as the competences towards cases involving children are divided between Ordinary and Juvenile Courts. In particular, the latter were instituted in 1934 and are composed by two professional judges and two "honorary judges". The article explores the civil justice system before and after the adoption and the implementation of the CRC in Italy, underlying the effective remedies children have in case of violation of their rights: in particular, the article focuses on the right to be heard and the child's representative in civil proceedings, as well as on the communication mechanism to the UN Committee on the Rights of the Child established by the Third Optional Protocol to the CRC, which is in force, in Italy, since 4 May 2016.

19. Benedetta Bertolini: *Towards a child-friendly justice in criminal matters: safeguards, diversion and restorative justice*

The article reflects around Articles 37 and 40 of the CRC, which enshrine children's right within criminal justice, in particular focusing on the evolutions of judicial proceedings in criminal matters since the entry into force of the Convention. Looking at the application of the CRC in this field over the last 30 years, the article notices that a lot still needs to be done, and looks ahead at restorative justice, as also underlined by the UN Committee on the Rights of the Child in its General Comment no 24(2019).

20. Olivia Lopes Pegna: *Private international law techniques safeguarding the best interests of the child: flexibility looking for the best outcome in the concrete case*

The chapter focuses on private international law methods used in order to guarantee "the best interests of the child" in each decision concerning children (Article 3 of the CRC). The paper tries to show how, and to what extent, "the best interests of the child" principle requires "flexibility", or even derogations, to the traditional

private international law methods, dealing with jurisdiction, applicable law and enforcement of foreign judgments concerning children. The work focuses mainly on the EU Regulation 2201/2003 (and its recast) and on the 1996 Hague Convention on parental responsibility and the protection of children, with some references to Italian legislation (in particular, the legislation on filiation).

21. Ornella Feraci: *The protection of the status of the child across borders*

The chapter addresses the incidence of the UN Convention on the Rights of the Child (CRC) on the recognition in the Italian legal order of the minor's status as lawfully acquired abroad in light of the foreign applicable law. The paper aims at verifying in which way Article 3 CRC on the best interests of the child (and, more marginally, Articles 7 and 8 on the right to a name and to personal identity) modulates the circulation of foreign parent-child relationships in three different situations. First, when the foreign legal parentage derives from the recourse to Artificial Reproductive Techniques (ARTs), which are not allowed under the Italian statute on the matter (Law No 40/2004) e.g. if they involve a same-sex couple or surrogacy. Second, when the minor's status stems from methods of adoption, which are still prohibited in the Italian legal system and finally when the latter derives from Islamic institutions, which are unknown to the western legal tradition (e.g. kafala).

22. Laura Carpaneto: *International child abduction*

30 years after its adoption, the CRC is still the cornerstone instrument for the protection of children at global level. Aim of this chapter is to consider the CRC's *effet utile* in cases of international child abductions, the number of which – despite the intensification of judicial cooperation at international and regional level – unfortunately does not seem to diminish.

The CRC interaction with other sources of international and European law aimed at granting the immediate return of the abducted child to the State of previous habitual residence is firstly considered. Specific attention is given to the reaction of the latter sources of law to the “human rights test” and to the effects deriving in applying, interpreting and also recasting the mentioned sources of law.

Where, on the contrary, specific instruments for the return of the child are not in force, the chapter considers whether Article 9 of the CRC protecting the fundamental right of the child to have regular contacts with both parents together with other provisions of the CRC shall be interpreted as having “direct effect” and, therefore, as imposing on the States a real duty of adopting a pro-active behavior in order to grant the return of the child to the place of habitual residence. From the above, it results that the CRC plays a crucial and growing role in the protection of abducted children.

23. Ester di Napoli: *The synergies between migration law and private international law - The case of unaccompanied minors (UAMs)*

Celebrating the CRC's 30th anniversary provides an opportunity both to assess its application and to discuss the measure that Contracting States might consider taking to enhance its operation. Against this backdrop, the chapter discusses the synergies between private international law and immigration law as regards, in particular, child migrants. “Migration” and “migrant” are terms rarely used in the language of private international law, despite the goal of the latter is to regulate cases with a foreign element. Likewise, immigration law scholarship shows relatively little interest in the role that private international law rules may play in the governance of migration. The chapter illustrates how private international law rules may affect, in general, the way in which child migration can be managed, focusing, in particular, on the protection of unaccompanied minors (UAMs) under the Italian legislation. Based on the foregoing, the chapter illustrates the added value of dialogue and synergy between the law of children in migration and private international law instruments, looking at UAMs' age assessment evaluation within the identification procedure, and at the

Italian voluntary guardianship system. Both immigration mechanisms – set forth in Law No 47/2017 on UAMs – provide for interesting grounds of discussion to be read through the “lenses” of private international law.

24. Filomena Albano: *The Italian Independent Authority for Children and Adolescents 30 years after the adoption of the CRC: taking stock and looking ahead*

In addition to the reflections on the future of its implementation, the CRC’s 30 Anniversary raises some considerations about the functions conferred on the Italian Authority for Children and Adolescents, the institution aimed at monitoring its implementation and promotion in Italy. Almost ten years after its creation, despite some regulatory changes, which have expanded the Authority’s tasks, its structure and the absence of appropriate powers, together with the quest for real autonomy and independence, risk to jeopardize the Authority’s effective action aimed at guaranteeing the CRC’s effective and uniform application in Italy.