Hard Cases

Something New on the Eastern Front. The Application of the 1996 Hague Child Protection Convention in Italy to Children Fleeing the Russian-Ukrainian War

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Abstract

This article offers a critical assessment of a judgment by the Italian Supreme Court in 2023 (judgment no 17603 of 13 June 2023), concerning the recognition of a measure by which the Ukrainian Consulate in Italy appointed a woman as guardian of several Ukrainian children who had fled the war. The judgment is interesting for two reasons. First, it deals with the Hague Convention on the Protection of Children of 19 October 1996, with which Italian courts appear to have little familiarity with, despite the fact that Italy has been a party to the Convention since 1 January 2016. Secondly, the judgment addresses an issue that is rarely examined by courts and scholars, namely the role of consular authorities in the application of the Convention. Both the Supreme Court's reasoning in the judgment and its conclusions are unconvincing. The judgment refers to several legal texts, but fails to provide adequate guidance on their interaction and coordination. In addition, the Court relies on various Private International Law mechanisms in its reasoning, but does not seem to be fully aware of the specificities of each technique and of the issues raised by their combined operation. The Supreme Court's approach, it is argued, hardly contributes to ensure the proper interpretation of the Hague Convention on the Protection of Children.

I. Introduction

On 13 June 2023, the Italian Supreme Court issued its first decision on the 1996 Hague Child Protection Convention[1] to a case falling within the national migrant children's protection system and in particular, concerning several Ukrainian children fleeing the war (judgment no 17603 of 2023).

This judgment arrives just two weeks before another one issued by the Joint Divisions of the Supreme Court, which applied the 1996 Hague Convention to the recognition of a Russian judgment concerning the exercise of parental

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[1] 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. The Convention entered into force, at the international level, on 1 January 2002. To date, fifty-four States are bound by the Convention. More details on the status of ratifications and accessions available at http://tinyurl.com/srsxefjb (last visited 10 February 2024).

responsibility over a child,[2] and one month after the Joint Divisions applied the Convention to a case concerning children residing in the United States, in order to exclude the jurisdiction of Italian courts.[3] In less than two months, the Corte di Cassazione has had the opportunity to highlight a number of critical issues concerning the application of an international convention, which entered into force in Italy on 1 January 2016,[4] replacing the 1961 Hague Convention (according to Art 51),[5] and which has, since then, been rarely applied.[6]

In judgment no 17603 of 2023, the Supreme Court spends more than thirty pages reviewing the main provisions of the 1996 Hague Convention, concluding for the recognition of the appointment of a guardian carried out by the Ukrainian Consulate in Naples, based on a series of previous administrative measures issued in Ukraine.

The detail devoted to the 1996 Hague Child Protection Convention in the judgment shows the need perceived by the Italian judges to understand the application of an international instrument that establishes uniform rules on Private International Law on children's protection, and that comes into play here with renewed force, in a landscape – the cross-border movement of internationally displaced children – that requires a meaningful effort of coordination. The starting point is that the instruments of Private International Law must be intertwined with those of Immigration Law, with the unique aim of protecting the best interests of the children.

[2] Corte di Cassazione 26 June 2023 no 18199, available at www.cortedicassazione.it.

[3] Corte di Cassazione-Sezioni unite 16 May 2023 no 13438, available at www.cortedicassazione.it. The United States of America signed the Convention in 2010, but have not ratified it yet.

[4] The 1996 Hague Convention was implemented by legge 18 June 2015 no 101. On the application of the Convention in Italy, see C. Honorati, 'Norme di applicazione necessaria e responsabilità parentale del padre non sposato' *Rivista di diritto internazionale privato e processuale*, 793-812 (2015); M.C. Baruffi, 'La Convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano' *Rivista di diritto internazionale privato e processuale*, 977-1019 (2016). See also F. Albano ed, *La Convenzione dell'Aja del 1996. Prontuario per l'operatore giuridico* (Roma: Marchesi Grafiche Editoriali SpA, 2018), which provided the first translation into Italian of the Convention's Explanatory Report authored by Paul Lagarde. The volume is freely available at http://tinyurl.com/36w4hdju (last visited 10 February 2024). See in general: M.C. Baruffi, 'The 1996 Hague Convention on the Protection of Children', in I. Viarengo and F. Villata eds, *Planning the Future of Cross Border Families* (Oxford: Hart, 2020), 259-271; N. Lowe and M. Nicholls QC, *The 1996 Hague Convention on the Protection of Children* (Bristol: Jordan Publishing, 2012).

[5] Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. More information available at http://tinyurl.com/bd2592c8 (last visited 10 February 2024).

[6] In addition, see the following judgments: Corte di Cassazione-Sezioni unite 13 December 2018 no 32359 (termination of parental responsibility); Corte di Cassazione 29 December 2021 no 41930 (notion of unaccompanied child); Corte di Cassazione 24 March 2022 no 9648 (notion of unaccompanied child); Corte di Cassazione-Sezioni unite 19 October 2022 no 30903 (child's maintenance). All judgments are available awww.cortedicassazione.it.

II. The Facts and the Judgment of the Italian Supreme Court no 17603 of 2023

A woman, Yuliya Dynnichenko, applied to the Juvenile Court of Catania (Sicily) to be recognised as the 'international guardian' ('tutore internazionale')[7] of seventeen temporarily displaced children who had run away from an orphanage in Ukraine. The woman's application was based on Art 4 of legge no 64 of 15 January 1994 (the law implementing four international conventions in Italy)[8] on the recognition and enforcement of foreign measures for the protection of children in accordance with the 1961 Hague Convention.[9]

The Juvenile Court rejected the application, considered that the children did not have a legal representative in Italy and were therefore considered 'unaccompanied' (UAMs), and accordingly confirmed the appointment of a voluntary guardian pursuant to Art 11 of Law of 7 April 2017, no 47 on the protection of unaccompanied children.[10] The Juvenile Court's decision recognised that the applicant – the President of a Ukrainian-Italian association based in Catania – had only been granted custody of the children after their arrival in Italy, declaring to the competent police headquarters that she had been 'delegated' to receive them by the Ukrainian Consul General in Naples. The Juvenile Court held that Art 4 of legge no 64 of 1994 was not applicable, but rather the legge no 101 of 18 June 2015,

[7] The notion of 'international guardian' does not appear in any legal instrument dealing with children in migration, adopted at the European, international and national level, which simply deal with 'guardian'. Among all, see European Union Agency for Fundamental Rights (FRA), *Guardianship for unaccompanied children. A manual fort trainers of guardians* (2023), available at http://tinyurl.com/25tz8my2 (last visited 10 February 2024).

[8] The European Convention on the Recognition and Enforcement of Decisions on Custody of Minors and on the Restoration of Custody (Luxembourg, 20 May 1980), the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980), the Convention on the Protection of Minors (The Hague, 5 October 1961), and the Convention on the Repatriation of Minors (The Hague, 28 May 1970).

[9] Art 4 of legge 15 January 1994 no 64 provides for an *exequatur* procedure for the recognition of measures taken under the 1961 Hague Convention, stating that: '1. Recognition and enforcement in the territory of the State of the measures for children's protection adopted by foreign authorities, in accordance with Article 7 of the Hague Convention of 5 October 1961, are ordered by the juvenile court of the place where such measures must be enforced. 2. The court decides by decree in chambers, having heard the public prosecutor and, where appropriate, the child and the persons where he/she is located, upon appeal by the interested parties (…)'.

[10] Legge 7 April 2017 no 47 on Provisions on Protective Measures for Unaccompanied Foreign Minors. The English translation is available at http://tinyurl.com/ycxzcv9z (last visited 10 February 2024). Art 11 establishes a national system on 'voluntary guardianship', made of private citizens selected and trained by regional ombudspersons to be appointed by juvenile courts as guardians of UAMs. The Italian Authority for Children and Adolescents monitors the recruitment, training and supervision of voluntary guardians at regional level: the monitoring reports and any useful documentation on voluntary guardianship are available at https://tutelavolontaria.garanteinfanzia.org/homepage. On voluntary guardians, see also E. di Napoli, 'La tutela volontaria dopo la legge n. 47/2017', in A. Annoni ed, *La protezione dei minori non accompagnati al centro del dibattito europeo ed italiano. Atti del workshop Ferrara 16 novembre 2017* (Napoli: Jovene, 2018), 73.

which transposed the 1996 Hague Convention in Italy. Considering that the woman's appointment did not originate from a jurisdictional authority (namely the court of the children's habitual residence in Ukraine), it did not recognise it. In particular, the Court examines the activity of the Consulate General of Ukraine in Naples, attesting the authenticity of several notarial deeds and a decree of the Ukrainian Ministry of Education, Science, Childhood and Sport designating the orphanage's educator as the person responsible for the children's travel and for their registration in Italy, and 'recognised and delegated' the applicant as guardian. According to the Juvenile Court, the measure taken by the Consulate General was to be considered as a delegation of parental responsibility by means of purely private (ie notarial) acts, and was therefore prohibited by the jurisprudence of the Italian Supreme Court.

The woman therefore challenged the decision before the Corte di Cassazione, on two grounds: incorrect or misapplication of the law under Art 4 of legge no 64 of 1994, and incorrect or misapplication of the rules for qualifying children as UAMs. In particular, she claimed that the Juvenile Court should have considered the concept of 'unaccompanied children' as defined in Directive 2001/55/EC on minimum standards for giving temporary protection,[11] and that she had not been granted *de facto* custody (as referred to in the aforementioned Supreme Court case law), but had been correctly and legally appointed guardian by the Consulate General in accordance with the Ukrainian-Italian consular treaty of 2003.

The Supreme Court examines the main Arts of the 1996 Hague Convention and concludes that the Italian jurisdiction to decide the case is well established according to Art 6 of the Convention, which sets forth a rule of jurisdiction applicable to refugee and internationally displaced children. After reviewing the existing Italian laws and soft laws on the protection of UAMs, it finally excludes Ukrainian children from this category. It reached this conclusion by referring to Arts 23 and 24 on recognition and enforcement of the 1996 Hague Convention, recognising that the applicant's appointment as guardian, carried out by the Consul General of Ukraine in Naples pursuant to Art 50 of the 2003 bilateral consular treaty, was of a constitutive nature (and not a notarial one, ie merely the receipt of a declaration by a person delegating another person): the application was therefore upheld and the decision of the Juvenile Court of Catania overturned.

[11] Art 2, lett. f): 'unaccompanied minors' means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States'; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

III. Critical Assessment: The Application of the 1996 Hague Convention in the Italian Migrant Children's Protection System

The 1996 Hague Convention lays down uniform Private International Law rules, applicable to its Contracting States in the field of parental responsibility and children's protection. They aim to *i)* identify the competent authorities (rules on jurisdiction: Arts 5-14), *ii)* determine the applicable law (conflict-of-laws rules: Arts 15-22), *iii)* establish the conditions for the cross-border circulation of measures (rules on recognition and enforcement: Arts 23-28), and *iv)* regulate the administrative 'dialogue' between central authorities (rules on cooperation: Arts 29-39).

The material and personal scope of application of the Convention is set out in Arts 1 to 4, which define the concept of 'child' for the purposes of the Convention,[12] and the measures to be included and excluded from the concepts of 'parental responsibility' and 'children's protection'. Such measures 'may concern', *inter alia*: the attribution, exercise, termination or restriction of parental responsibility; guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the person or property of the child, representing or assisting the child; the placement of the child in a foster family or in an institutional care, or the provision of care by *kafala* or an analogous institution; the supervision by a public authority of the care of a child by any person having charge of the child (Art 3). The Convention exhaustively excludes a number of measures as the establishment or contesting of a parent-child relationship, emancipation, and decisions on the right of asylum and on immigration (Art 4).

At first sight, therefore, the Convention does not seem to apply to situations involving migrant children. However, the Explanatory Report to the Convention clarifies that this exclusion shall be limited only to decisions, ie only to the *granting* of the right of asylum or residence permit, as these fall within the States' sovereign powers. This means that the protection and representation of children applying for asylum or a residence permit falls within the scope of the Convention. Art 6 of the Convention, as already mentioned, establishes a *forum necessitatis* for 'refugee children and children who, due to disturbances occurring in their country, are internationally displaced', establishing that the authorities of the Contracting State holding jurisdiction are those on the territory of which such children are present as a result of their displacement. The Explanatory Report further explains that the children concerned are those who abandoned their countries because of the conditions existing there, who are often unaccompanied and, in any case, temporarily or permanently deprived of their family environment.

[12] Art 2: 'The Convention applies to children from the moment of their birth until they reach the age of 18 years'. The Convention thus embraces the general definition of 'child' as contained in Article 1 of the UN Convention on the Rights of the Child of 20 November 1989. It is worth mentioning that not all Hague Conventions have made the same choice: it is the case of the Convention of 25 October 1980 on the civil aspects of international child abduction, which ceases to apply when the child attains the age of 16 years (Art 4).

The Convention clearly declares to come into play in contexts relating to 'children on the move', and thus applying to be an instrument for the governance of child migration: it does not aim to replace other instruments applicable to these situations – namely the tools pertaining to the realm of Immigration Law – but rather requires a coordination effort, in order to effectively ensure the best interests of the child, as enshrined in Art 3 of the 1989 UN Convention on the Rights of the Child (CRC).[13] Discussions on the relationship between the 1996 Hague Convention and the European instruments adopted in the field of judicial cooperation in civil matters have taken place within the European Parliament,[14] the Hague Conference on Private International Law,[15] and among scholars,[16] but have never taken root.[17]

The 'integrated protection' of children – through a coordinated reading of Private International Law and Immigration Law measures – was advocated by the UN CRC Committee in its statement of 24 March 2022, where it urged States to provide 'core and integrated support to traumatised Ukrainian children, especially those who are unaccompanied.'[18] To this end, the UN Committee

[13] On the instrumentality of the 'law of the Hague' to the protection of children's rights contained in the CRC, see H. van Loon, 'Protecting Children Across Borders: The Interaction Between the CRC and the Hague Children's Conventions', in Id ed, *The United Nations Convention on the Rights of the Child. Taking Stock After 25 Years and Looking Ahead* (Leiden: Brill Nijhoff, 2017), 31, 41; C. Bernasconi and P. Lortie, 'La CRC e i lavori della Conferenza dell'Aja di diritto internazionale privato nel settore della protezione delle persone di minore età', in Autorità Garante per l'infanzia e l'Adolescenza ed, *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza Conquiste e prospettive a 30 anni dall'adozione* (2019), available at http://tinyurl.com/3huxxs8u (last visited 10 February 2024).

[14] See S. Corneloup et al, Private International Law in a Context of Increasing International Mobility: Challenges and Potential, Study for the JURI Committee, European Parliament (2017); S. Corneloup et al, Children on the Move: A Private International Law Perspective, Study for the JURI Committee, European Parliament (2017); M. Erb Klünemann, Potential and Challenges of Private International Law in the Current Migratory Context. Experiences from the Field, Briefing, European Parliament (2017).

[15] See The Hague Conference on Private International Law – HCCH, Permanent Bureau, *The Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children* (2023), available at http://tinyurl.com/mpbyvrda (last visited 10 February 2024).

[16] See, among others, C. Honorati, 'La tutela dei minori migranti e il diritto internazionale privato: quali rapporti tra Dublino III e Bruxelles II-bis?' *Rivista di diritto internazionale privato e processuale*, 691-713 (2019); F. Ippolito and G. Biagioni eds, *Migrant children: challenges for public and private international law* (Napoli: Editoriale Scientifica, 2016); V. Van Den Eeckhout, 'The Instrumentalisation of Private International Law: quo vadis? Rethinking the "Neutrality" of Private International Law in an Era of Globalisation and Europeanisation of Private International Law' *Social Science Research Network* (2014).

[17] It would not be wrong to say that the discussion provoked political agitation among Member States of the Hague Conference on Private International Law. This is witnessed, for instance, by the fact that the document entitled 'The Application of the 1996 Hague Child Protection Convention to Unaccompanied and Separated Children', was published on 7 July 2017 on the website of the Hague Conference and soon after removed. It re-appeared, substantially unchanged, authored by P. Lortie and C. Armstrong Hall, 'Tools in International Law for the Protection of Unaccompanied and Separated Children' *International Family Law, Policy and Practice*, 5 (2017).

[18] 'Ukraine: Urgent and extra support needed for separated and unaccompanied children, says UN child rights committee', 24 March 2022, available at http://tinyurl.com/bddzefwc (last visited 10

encouraged States to develop national strategies for the non-discriminatory inclusion of unaccompanied, asylum seeking and refugee children in national child protection systems and urged them to

> 'take measures to protect all unaccompanied and separated children who, due to their vulnerability, are inevitably at risk of trafficking, exploitation and abuse'.

Such measures, in particular,

> 'should include international and regional cooperation and coordination across borders for identification, registration and tracing of children with the aim of ensuring that no child is unaccounted for, and to enable and support family reunification, having the best interests of the child taken as a primary consideration.'

In order to assist legal practitioners and national policy makers in using all possible instruments to protect the best interests of children on the move's wellbeing, the European e-Justice Portal has published a factsheet providing for guidance on the application and coordination between the EU Regulation 2019/1111 ('Brussels IIb')[19] and the 1996 Hague Child Protection Convention.[20]

From an Italian perspective, the 'need' to apply the 1996 Hague Child Protection Convention was not seriously perceived[21] until the war between Russia and Ukraine broke out.[22] One need only look at the communication of the Italian

February 2024).

[19] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1. It replaced Regulation (EC) no 2201/ 2003 ('Brussels IIa' or 'Brussels IIbis') as from 1 August 2022. See C. González et al eds, *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)* (London: Edward Elgar Publishing, 2023).

[20] *Children from Ukraine – civil judicial cooperation*, available at http://tinyurl.com/ysfr64v (last visited 10 February 2024).

[21] This was not the case, for instance, of France. See Ministère de l'éducation nationale, de l'enseignement supérieur et de la recherche; ministère de la justice; ministère des affaires sociales, de la santé et des droits des femmes; ministère de l'intérieur; secrétariat d'Etat chargée de la famille, de l'enfance des personnes âgées et de l'autonomie, *Circulaire interministérielle relative à la mobilisation de services de l'Etat auprès des conseils départementaux concernant les mineurs privés temporairement ou définitivement de la protection de leur famille et les personnes se présentant comme tels*, 25 janvier 2016, 3. The document is available at http://tinyurl.com/aw2v4d3x (last visited 10 February 2024).

[22] The Fifth Report on the Monitoring of the Voluntary Guardianship System, published in November 2023 by the Italian Authority for Children and Adolescents, contains a focus on Ukrainian children. It shows that between January and December 2022, 3.427 voluntary guardians were appointed for children arriving with adults. In 50% of such cases they had shown documents issued in Ukraine appointing their accompanying adult as a guardian. The Report does not contain any reference to the 1996 Hague Child Protection Convention. The Report is available at http://tinyurl.com/vbmz4ddf (last visited 10 February 2024).

Central Authority's details to the Permanent Bureau of the Hague Conference – an obligation laid down in Arts 29 and 45 – which was made in April 2022,[23] more than six years after the entry into force of the Convention in Italy. The massive influx of children from Ukraine meant that the transmission of such information could no longer be delayed:[24] cooperation between the Ukrainian and the Italian Central Authority was certainly considered essential to facilitate the communication, offer assistance, and arrange for the placement of children fleeing the conflict.

The Russian-Ukrainian war has boosted the application of the 1996 Hague Convention in Italy, highlighting old and new problems related to it.

Among the 'old' ones, some of which have already been reported to the UN Committee on the Rights of the Child (as they are considered to undermine the effectiveness of children's human rights enshrined in the UN CRC),[25] there is the critical issue of the designation of the Italian Central Authority. Unlike all other Hague Conventions and EU instruments adopted in the field of judicial cooperation in family matters, for which the Ministry of Justice has been designated,[26] under the 1996 Hague Convention the Italian Presidency of the Council of Ministers was appointed Central Authority. This choice, presumably made in line with the 1993 Hague Adoption Convention,[27] is a 'natural consequence' of legge no 101 of

[23] See Italy - Central Authority (Art 29) at http://tinyurl.com/yf7muh35 (last visited 10 February 2024).

[24] According to the data provided by the Italian Ministry of Labour and Social Policies, immediately after the war started – to 28 February 2022 – the total number of unaccompanied children was 11.201, with no Ukrainian children counted. Soon after, to 31 March 2022, the number of UAMs increased to eleven thousand nine hundred thirty-seven, and Ukrainian children were one thousand four hundred and nineteen, ie the third nationality after UAMs from Egypt and Bangladesh. Since April 2022, and throughout the year, Ukrainian UAMs became the first largest group in Italy, with three thousand nine hundred and six out of a total of fourteen thousand twenty-five and progressively increased until they touched and exceeded the highest rate ever reached, in 2016 (they were five thousand one hundred twenty-two out of fourteen thousand five hundred and twenty-eight in May; five thousand three hundred and ninety-two out of fifteen thousand five hundred and ninety-five in June; five thousand five hundred and seventy-seven out of sixteen thousand four hundred seventy in July; five thousand four hundred and twenty out of seventy thousand six hundred and sixty-eight in August; five thousand two hundred and eighty out of eighteen thousand eight hundred one in September; five thousand one hundred and fifty-three out of eighteen thousand eight hundred and seventy-six in October; five thousand seventy-three out of twenty thousand thirty-two in November; five thousand forty-two out of twenty thousand eighty-nine in December). In 2023, Ukrainian UAMs are still among the first groups counted in Italy: numbers are decreasing but still very significant (to 31 July 2023, they were the twenty point forty percent of the total, equal to twenty-one thousand seven hundred and ten). More information at http://tinyurl.com/47n5nbs6 (last visited 30 September 2023).

[25] See the Opinion of the Italian Authority for Children and Adolescents on the Fifth and Sixth Government Report to the UN Committee on the Rights of the Child, pursuant to Art 3, para 1, lett i), of legge 12 July 2011 no 112, instituting the Italian Authority for Children and Adolescents (April 2017): see https://www.garanteinfanzia.org/.

[26] Office IV of the Department of Juvenile and Community Justice (Ministry of Justice): https://www.giustizia.it/giustizia/it/mg_12_4_4_4.page.

[27] The Italian Central Authority appointed under the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is the Commission for

2015, which simply ordered the Convention to be 'fully and entirely' implemented in Italy, without any legal intervention aimed at integrating it into the Italian legal system ('*piena ed intera esecuzione è data alla Convenzione*'; so-called '*ratifica secca*'), which would have been necessary for its effective functioning. The implementation of the Convention in Italy is therefore flawed from the outset.

In addition to the lack of a systematic vision in the designation of the Italian Central Authority, an issue that has only recently been resolved by the Italian civil law reform concerns the so-called exequatur procedure under Art 26. Art 15, para 3 of the decreto legislativo no 149 of 2022 amended the decreto legislativo no 150 of 2011, introducing Art 30-*bis*, which specified the procedures applicable to the effectiveness of foreign judgments under EU law and international conventions. Art 30-*bis*, para 5, in particular, extends the proceedings for interim relief – in accordance with Art 281-*decies* of the Italian Code of Civil Procedure – to proceedings for the declaration of enforceability (*exequatur*) of foreign judgments or, more specifically, for the verification of the existence of the conditions for recognition, or for the refusal of recognition, when the effectiveness of the judgments is based on an international convention. Although not clearly specified, the protective measures adopted under the 1996 Hague Convention fall within its scope of application. Art 30- *bis* applies to proceedings initiated after 30 June 2023: there is no evidence yet of its application.

The optional certificate provided under Art 40 of the 1996 Hague Convention has not yet been implemented.[28] It should be issued by 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, and would indicate the capacity in which the person is entitled to act and the powers conferred on him or her: this would greatly facilitate the cross-border movement of migrant children.

The 'new' critical issues surrounding the Convention are closely linked to its application and could be addressed with from two different perspectives. The first reflects the recent trend – developed after the outbreak of the war – to refer to the 1996 Hague Child Protection Convention in policy documents on the reception of migrant children. This is the case of the Unaccompanied Children's Plan ('*Piano minori stranieri non accompagnati*') adopted by the *ad hoc* Commissioner of the Italian Ministry of Interior, appointed after the war to coordinate the measures

International Adoptions (www.commissioneadozioni.it), whose President is the Minister for Family, Birth and Equal Opportunities (Minister without portfolio, thus directly relying on the Presidency of the Council of Ministers).

[28] In particular, Art 40, para 3, states that 'Each Contracting State shall designate the authorities competent to draw up the certificate'. See E. di Napoli, 'Sinergie tra diritto dell'immigrazione e diritto internazionale privato: il caso dei minori stranieri non accompagnati', in Autorità Garante per l'infanzia e l'Adolescenza ed, *La Convenzione delle Nazioni Unite sui diritti dell'infanzia* n 13 above, 431. In particular, on the implementation of Art 40 of the Convention, see Id, 'Guardians of unaccompanied children at the intersection of immigration law and private international law' *Thematic Issue Papers,* Defence for Children Italy, (2022).

and procedures for assisting UAMs from Ukraine.[29] The section on the definition of unaccompanied children includes a reference to the 1996 Hague Convention (4): the document first outlines the concept of UAMs, and then states that such definition does not prejudice the provisions set forth in the legge no 101 of 2015 implementing the Convention in Italy.[30] However, the reference appears to be a mere declaration of the intent to apply the Convention, an opening signal towards it: as the same Supreme Court shows, there is in fact no awareness of the *ways* in which such application should be carried out in practice.[31]

The second perspective is a purely legal one, and in particular, the incorrect application of the 1996 Hague Convention by Italian judges. Due to their unfamiliarity with the Convention, coupled with a lack of understanding of the rules and mechanisms of Private International Law,[32] Italian courts have *always* applied the Convention on the basis of Art 42 of the Law of 31 May 1995, no 218 on the reform of the Italian system of Private International Law. Judgment no 17603 of 2023 is no exception. The provision, used indiscriminately as an 'entrance door', in fact extends the application of the 1961 Hague Convention (and now of the 1996 Hague Convention) to those cases to which the Convention would not apply *per se*. Conversely, the Convention applies when the conditions for its application are met. A further proof of the lack of awareness towards the 1996 Hague Convention and its legal paradigm is the tendency of the Supreme Court to make an a-critical reference to all the articles contained therein, instead of limiting itself to those that are strictly necessary. The Supreme Court has followed the same approach in the present judgment: even though the case concerned the recognition in Italy of a measure adopted under the Convention, the Court has referred not only to the

[29] The 'Commissario delegato per il coordinamento delle misure e delle procedure finalizzate alle attività di assistenza nei confronti dei minori non accompagnati provenienti dall'Ucraina – Ministero dell'interno', Francesca Ferrandino, adopted the Plan on 13 April 2022, and updated it on 5 May 2022: https://www.interno.gov.it/it/notizie/aggiornato-piano-minori-stranieri-non-accompagnati.

[30] It reads as follows: 'Restano ferme le disposizioni della legge 18 giugno 2015, n. 101 di ratifica ed esecuzione della Convenzione sulla competenza, la legge applicabile, il riconoscimento, l'esecuzione e la cooperazione in materia di responsabilità genitoriale e di misure di protezione dei minori, fatta all'Aja il 19 ottobre 1996'.

[31] See para IV.

[32] Strengthening the Italian dimension of the European Judicial Network (EJN) also through the organization of training sessions for judges is among the reasons underlying the co-funded European Project, now in its second edition (2023-2025), entitled '*EJNita 2.0: Building Bridges and New Roadmaps*' (https://aldricus.giustizia.it/). The Consortium is led by the Ministry of Justice and composed of the main Italian stakeholders (practitioners and academics) daily applying instruments of civil judicial cooperation: the Superior School of the Judiciary ('*Scuola Superiore della Magistratura*' - SSM), the National Council of Notaries ('*Consiglio Nazionale del Notariato*' - CNN), the National Lawyers' Council ('*Consiglio Nazionale Forense*' - CNF), the National Association of Civil Registrars ('*Associazione Nazionale Ufficiali di Stato Civile e d'Anagrafe*' - ANUSCA), the Catholic University of the Sacred Heart of Milan, the Universities of Ferrara and Turin and, as associate partners, the National Association of Bailiffs in Europe ('*Associazione Ufficiali Giudiziari in Europa*' - AUGE) and the Italian Authority for Children and Adolescents ('*Autorità garante per l'infanzia e l'adolescenza*' - AGIA).

articles on recognition and enforcement of judgments (23, 24, 25 together with 43), but also to the rules on jurisdiction (5, 6, 7, 11, 13, 14), the conflict-of-laws rules (15, 16), the rules on co-operation (33, 34) and even the general provisions of Art 40.

IV. In Particular: The Concept of Unaccompanied Children Was Not the Core Issue

The overall reasoning of the Supreme Court reveals the main concern underlying the entire decision: the lack of a combined reading between the instruments of Immigration Law and Private International Law. In fact, the Court develops its understanding of the case in two distinct and self-contained compartments, which it ultimately attempts to merge in order to draw its conclusions: judgment no 17603 of 2023 represents a dangerous judicial interpretation, which mirrors the same 'pointillist approach' adopted by Italian policy and law makers.

This is all the more evident when one considers the Court's approach to the qualification of migrant children as unaccompanied: it proceeds along blind alleys, missing the opportunity to 'build bridges' between the two fields of law.

The Court moves from the definition of 'unaccompanied children' in Italian Immigration Law, and then focuses on the activity of the Consulate General of Ukraine in Naples in appointing the applicant as their guardian. However, by applying a coordinated reading and an 'integrated protection' approach to children, Immigration Law considerations should have given way to Private International Law considerations.

The case involved three levels: *i)* a chain of foreign acts appointing different guardians over the children (first the director of the orphanage and then another woman who brought the children to Italy); *ii)* the adoption of a guardianship measure by a foreign authority on Italian soil (the Ukrainian Consulate), under the 1996 Hague Children Protection Convention, appointing Mrs Dynnichencko; *iii)* its recognition in Italy. The proceedings before the Supreme Court concerned only the third level, which in turn was based on the first two.

It thus seems quite clear that the qualification of children as UAMs under Italian Immigration Law instruments – the main issue to deal with, according to the Court, which was also inevitably bound by the applicant's request – was anything but a *consequence* of the recognition of the Ukrainian guardianship measure.

In any case, a coordinated reading could also have been successfully carried out on the other way round: the Court could have moved from Immigration Law considerations, as it did, to connections with Private International Law. The Supreme Court examines the definitions of unaccompanied children contained in several Italian legal instruments.[33] In particular, it refers to legge no 47 of 2017, the main

[33] In addition to legge no 47 of 2017, the Court refers to the decreto del Presidente del Consiglio

instrument for the protection of UAMs in Italy, whose Art 2, para 1, states that

> '(f)or the purposes of this Law, an unaccompanied foreign child present in the territory of the State is a child who has neither Italian nor EU citizenship, who is, for any reason, in the territory of the State or who is otherwise subject to the Italian jurisdiction, without any assistance and representation by his parents or other adults legally responsible for him *according to the laws in force within the Italian legal systems*' (italics are added).

The Supreme Court clearly understands the reference to 'laws in force' as limited to the rules adopted in the field of Immigration Law: it shall be given a broader meaning instead, including applicable Private International Law rules, namely those provided for in the 1996 Hague Convention. This strong need for a coordinated interpretation is even evident in the wording of the aforementioned national Plan on UAMs,[34] which the same Supreme Court recalls in its review: the document indeed includes the identical concept under legge no 47 of 2017, adding that it is applied into play 'without prejudice' to the application of legge no 101 of 2015, which implements the 1996 Hague Convention.

V. The 1996 Hague Convention and the Measure Adopted by the Ukrainian Consulate in Italy

The case presented an additional element of complexity in that the measure appointing Mrs Dynnichenko as the children's guardian was issued by a Ukrainian consular authority in Italy. The Tribunale per i Minorenni di Catania had already (and wrongly) refused to recognise it on the grounds that it was not issued by a Ukrainian judicial authority, which it considered to be the only competent to decide on the appointment of a guardian, given that the children at the time still had their habitual residence in Ukraine.

The Supreme Court dealt with this matter by examining the powers exercised by the Consul in adopting such a measure and, consequently, its legal nature. In doing so, it adopts the same fragmented approach, referring to the instruments regulating the exercise of the powers of foreign consuls in Italy (the 1963 Vienna Convention on Consular Relations,[35] the 2003 Consular Treaty between Italy

dei Ministri 9 December 1999 no 535 regulating the functions of the Committee for foreign children and to the decreto legislativo 18 August 2015 no 142 implementing the European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60, and the European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

[34] See fn 29.

[35] The Vienna Convention on Consular Relations of 24 April 1963 was implemented in Italy through Law of 9 August 1967, no 804.

and Ukraine),[36] but without explaining how they interact, in the present case, with the 1996 Hague Convention. In addition, the Supreme Court wrongly refers to the decreto legislativo no 71 of 2011, which applies to Italian consular offices abroad, ie offices that are depended on the Italian Ministry of foreign affairs (Art 1).[37]

Again, it would have been sufficient to start from the 1996 Hague Convention rules on recognition. Art 23 provides that 'measures' taken by the 'authorities' of a Contracting State shall be recognised by operation of law in all other Contracting States. On the one hand, according to the Convention, the 'measures' are those referred to in its Arts 3 and 4. On the other hand, the Convention says nothing about the characteristics of the authority, neither about its nature nor about the nature of the powers it is to exercise. This implies that it need not necessarily be a court, but might also be an administrative authority. However, it is evident that in order to issue a 'measure' relating to parental responsibility, guardianship or the placement of a child in a foster family, there must be a 'constitutive control of effectiveness' by a public authority: in other words, the measure should not be the mere result of a (joint) declaration of individuals.[38] It is the law applicable to the proceedings[39] that confers the relevant powers on the authority: for example, under Italian law, measures relating to parental responsibility can be adopted by the courts, as well as by parties assisted by their lawyers, following authorisation by the public prosecutor ('*negoziazione assistita*').[40]

The Consulate General of Ukraine in Naples is to be considered an 'authority' within the meaning of Art 23 of the 1996 Hague Convention: it is, by its very nature, a public authority of the sending State and, pursuant to Art 50, para 2, of the 2003 Consular Treaty between Italy and Ukraine, 'in accordance with the legislation of the State of residence and international agreements in force between the Parties', to take measures to appoint guardians of children and to monitor the exercise of their mandate.

The Explanatory Report further clarifies that the expression 'recognition by operation of law' in Art 23 of the 1996 Hague Convention means that it is not

[36] Consular Convention between Italy and Ukraine of 23 December 2003. The Supreme Court wrongly refers to an instrument dated 2016.

[37] Decreto legislativo 3 February 2011 no 71 on the organization and functions of consular offices ('Ordinamento e funzioni degli uffici consolari, ai sensi dell'articolo 14, comma 18, della legge 28 novembre 2005, n. 246').

[38] E. D'Alessandro, 'Divorzio davanti all'ufficiale di stato civile' *Diritto Processuale Civile e ADR*, 321-324 (2023).

[39] The judgment mentions at least one significant decision, concerning a child arrived in Italy for study purposes, on the basis of an Albanian notarial act through which his parents had delegated the sister, already living in Italy, to take care of him (Supreme Court's order no 41930 of 2021). The Court ascertained that under Albanian law the delegation of parental responsibility is not possible: the child had *de facto* – not legally – been entrusted to his sister, had consequently to be qualified as unaccompanied, and a voluntary guardian according to Art 11 of legge no 47 of 2017 had thus to be appointed.

[40] Art 6 of the decreto legislativo 12 September 2014 no 132, as converted and amended into legge 10 November 2014 no 162.

necessary to have recourse to any proceedings in order to obtain recognition as long as the person invoking the measure does not take any steps to enforce it; it is for the party against whom the measure is invoked, who must allege one or more grounds for non-recognition, among those exhaustively enumerated in the following para 2. Letter *a)* in particular, provides that the measure shall not be recognised if it 'was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II'. Art 5, para 1, of the Convention – the general rule on jurisdiction set out in Chapter II – entrusts to the authorities of the Contracting State of the habitual residence of the child the principal jurisdiction to take measures for the protection of his or her person and property. In this case, it was undisputed that the children's habitual residence,[41] ie the place where they had 'some degree of integration in a social and family environment',[42] was in Transcarpathia (Ukraine) at the time of the appointment. The Ukrainian Consulate General in Naples held jurisdiction under the 1996 Hague Convention: there were no impeding reasons for recognition.

VI. Concluding Remarks: Taking Stock and Moving Forward

The Supreme Court's judgment no 17603 of 2023 is the first 'attempt' by the Court to shed light on the functioning of the 1996 Hague Child Protection Convention in the context of the migration of Ukrainian children to Italy after the outbreak of the war. Even if it did not quite work, it could be seen as a first tentative step towards a coordinated reading of Immigration Law and Private

[41] The connecting factor of the child's habitual residence is commonly used within EU legal acts in the field of family law with cross-border implications, and it is borrowed from the 'Law of The Hague' (namely from all Conventions adopted within the Hague Conference on Private International Law in the field of family matters). It embodies the principle of proximity, which in turn translates the principle of the best interests of the child, a substantial right, a procedural rule, and an interpretive principle, which shall be a primary consideration in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' (UN Committee on the Rights of the Child, *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. Art 3, para 1*).

[42] Case C-523/07 *A*, Judgment of 2 April 2009, available at www.eurlex.europa.eu, para 38. There is no definition of habitual residence, neither within EU Law nor in the Hague Conventions. However, since 2009, the Court of Justice of the European Union has been interpreting the child's habitual residence a number of times, giving the legal interpreter uniform (objective and subjective) elements to look at, on a case-by-case approach, in order to identifying it. A useful list of the decisions issued by the Court of Justice of the European Union interpreting the child's habitual residence may be found athttps://tinyurl.com/37vaszkv (last visited 10 february 2024). On the child's habitual residence see, among others: E. di Napoli, 'A place called home: il principio di territorialità e la localizzazione dei rapporti familiari nel diritto internazionale privato post-moderno' *Rivista di diritto internazionale privato e processuale*, 899-922 (2013); C. Fossati, 'La residenza abituale nei regolamenti europei di diritto internazionale privato della famiglia alla luce della giurisprudenza della Corte di giustizia' *Rivista di diritto internazionale privato e processuale*, 283-314 (2022); M. Mellone, 'La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie' *Rivista di diritto internazionale privato e processuale*, 685-716 (2010).

International Law instruments.

The judgment reflects the gaps, which the 1996 Hague Child Protection Convention's implementation currently faces in Italy[43] and, in a broader perspective (as it comes after a series of judgments focusing on issues related to judicial cooperation in civil matters), the increasing attention that the Italian Supreme Court is devoting to issues of Private International Law.[44] There is also a growing interest in scenarios such as the cross-border movement of children, especially those coming from third countries, which has traditionally been the prerogative of other branches of law, better known and applied by legal practitioners as Immigration Law.[45]

The approach of Italian judges is thus changing, and Private International Law instruments are gaining attention. The openness to the use of 'new' instruments and mechanisms must, however, be guided by a strong training on corresponding 'languages' and rationales. Moreover, when children are involved, the 'integrated approach' of the legal practitioner (looking at the range of possible legal tools applicable) requires a further overture: it implies a case-by-case analysis, but it must be based on a strong foundation, ie a solid knowledge of the legal instruments that come into play.

As shown in the case of the Ukrainian children, judgment no 17603 of 2023, the lack of implementation of the 1996 Hague Convention and the lack of coordination not only jeopardise the best interests of the child, but also multiply the judicial efforts. If Ukrainian children had been issued with a certificate under Art 40 of the Convention, indicating the capacity and powers of the guardian(s) appointed in Ukraine and by the Consulate General in Italy, the case would probably not have reached the Supreme Court and the children would not have been subjected to additional stress and frustration.[46] Furthermore, the lack of an

[43] See the decision of the Tribunale per i Minorenni di Bolzano 6 April 2022 no 37, in the framework of the request to appoint a voluntary guardian for children fleeing the Russian-Ukrainian war with a woman deemed to be their guardian under Ukrainian law, duly certified by the General Consul of Ukraine in Milan. The Juvenile Judge in particular ascertained that the woman in question was the director of the children's orphanage and that, under the Ukrainian Family Code, she was their guardian. The decision may be downloaded from the section 'Case Law' available at https://famimove.unimib.it/case-law/.

[44] See Corte di Cassazione-Sezioni unite 5 December 2023 no 34032, available at www.cortedicassazione.it interpreting Art 3, para 2 of legge no 218 of 1995.

[45] The smooth and correct application of the 1996 Hague Child Protection Convention, in a broader scenario, fits in the UN 2030 Agenda, whose Sustainable Development Goal (SDGs) no 10.7 aims at facilitating an 'orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'. See widely, R. Michaels et al eds, *The Private Side of Transforming our World. UN Sustainable Development Goals 2030 and the Role of Private International Law* (Cambridge: Intersentia, 2021).

[46] See the *Conclusions & Recommendations* adopted on 19 October 2023 by the Special Commission (SC) on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, available at http://tinyurl.com/2p9buczr (last visited 10 February 2024). The SC noted that 'the use of a certificate under Article 40 would facilitate the recognition of measures by operation of law under Article 23(1)' (para 73).

integrated interpretation prevents the Supreme Court from fulfilling its main function, which is to ensure that the law is strictly observed and interpreted in a uniform manner (‘*funzione nomofilattica*’).