



PRESENTAZIONE DEL VOLUME (a cura dell'autore o del curatore)

Informazioni generali

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Titolo del volume: Migrant Children: Challenges for Public and Private International Law

Casa editrice e luogo di stampa: Editoriale Scientifica, Napoli

Anno di pubblicazione: 2016

Pagine complessive e costo del volume: XXXIII-504, € 35,00

Informazioni sul volume

Abstract

Article 1 of the 1989 UN Convention on the Rights of the Child (CRC) defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. The term “child” thus spans what is a condition of complete and absolute dependence on older carers through to what may be a state of partial or complete independence from such carers, or a state in which the person has acquired responsibility towards older or younger dependants. In particular older children, especially teenagers, also have the capacity to make independent decisions about migration and can therefore be involved in “autonomous” migration. They may be able to secure visas to enter as students or as au pairs (from the age of 17 in EU countries). Therefore, to speak of “child migration” is thus to speak of a phenomenon that is highly differentiated in terms of who initiates it, as well as in terms of the reasons that prompt it.

While those who migrate through legal channels with relatively affluent parents are generally fully able to secure all the rights set out in the CRC, other children who migrate are *especially vulnerable* to fundamental rights violations at the point of destination because of the way

through which they migrate (migration at sea has seen a great number of tragedies); because they are stateless so without any access to basic rights, trafficked persons or smuggled persons, undocumented, irregular and separated or unaccompanied children.

In addition, the special vulnerability of children emerges when they are involved in situations that, even though usually not qualified as “migration”, imply that the transfer of the child between different States can bring about legal consequences. Such a context may arise in the case of surrogacy, but may be also occasioned by a transnational family crisis, for instance when the child is abducted by a parent or by a relative or when the child leaves temporarily the State of his/her habitual residence in order to ensure the implementation of the right of access of the non-custodial parent. In those cases, the circumstances of the transfer of the child, being completely independent from his/her own will, can have an impact on fundamental values inherent to the protection of the child, namely on his/her identity and on his/her family life.

In that context, it has been chosen to devote attention to the issue of inter-country adoption mainly as a measure of protection of the best interests of the child. In fact, while it presents some similarities in its general features with the above mentioned situations, inter-country adoption is based on a long-established legal framework, which is exactly intended to take into account the position of special vulnerability of the child. On the contrary, current international practice seems to point out the existence of mobility processes in which the implementation of the principle of the best interests of the child is not ensured on an *a priori* basis, but must be taken into account in shaping the international and domestic legal framework governing those processes.

Faced to such a reality, the idea of the editors was to reflect on how international law can address the rights and needs of children involved in international migration. This was seen also as an occasion for filling a gap in international legal doctrine, which prefers to focus on the unique subjective category of children seeking asylum and refugee children; or on specific rights of migrant children. As to the first case, for instance, the question of whether the Common European Asylum System (CEAS) complies with the rights of the child offering a comprehensive examination of the place of the child within European asylum law and policy has been addressed; as well as a comparative method have been proposed as to some countries reception systems for unaccompanied children seeking asylum. As to the other case of migrant children rights, policies and practices, child welfare systems (and welfare states) of many countries have been compared especially in terms of how they conceptualize and deal with immigrant children and their families.

Even when a more holistic approach has been used, the analysis aimed to show how difficult it is for children to reunite with parents who left them behind to seek work abroad, looking at the often-insurmountable obstacles we place in the paths of adolescents fleeing war, exploitation, or destitution; and the limited support we give to young people brutalized as child soldiers, with a part history, part in-depth legal and political analysis.

Rather, the present volume attempts to combine the *special vulnerabilities* of migrant children – because age is taken as the basis making them ‘inherently vulnerable’ because of innate or physical characteristics, but qualifying factors such as sex (girls, including teenage mothers) and relocation (voluntary (nomads) as much as involuntary (refugees)), or exploited migratory status elevate them to the status of even more vulnerable – with the principle of their *best*

interest as minimum common denominator to public and private international law, in order to show how and to what extent both systems consider such vulnerability trying to find adequate forms of protection.

International law first explicitly recognized the particular protection needs of children in 1924, when the Geneva Declaration on the Rights of the Child was adopted by the League of Nations. Subsequently, the core international human rights instruments¹⁰ were developed, which contain general provisions that are applicable to children in the context of migration.

All children are thus entitled to enjoy equal access to fundamental civil, political, economic, social and cultural rights. The principal normative standards of child protection are equally applicable to migrant children and children implicated in the process of migration. Accordingly, international law provides that all such children be seen and protected as children first and foremost, rather than letting their migratory or other status, or that of their parents, dictate their access to protection and assistance. The Convention on the Rights of the Child is the primary normative standard in relation to children's rights in addition to which all the general provisions of international human rights law contained in the core human rights instruments are applicable to children and to migrant children as well. And the major value of the convention for migration and mobility issues is the introduction of the principle of the best interest of the child. The best interest of the child is also inspiring and guidance in the application of other international migration standards such as the ones provided by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. An analogous interpretative guidance of the best interest of the child principle emerges considering some of the International Labour Organization (ILO) conventions which relate to the situation of migrant workers.

But the same can be said for core international human rights, both universal (ICCPR, ICESCR, CAT) and regional ones (African Charter on the Rights and Welfare of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the Inter-American Convention on Human Rights; and the Inter-American Convention on International Traffic in Minors), mainly as interpreted by United Nations treaty bodies or regional human rights bodies who have provided authoritative guidance on the situation of children in the context of migration in the form of general comments or traditional jurisprudence.

The protection of the best interests of the child is also a primary consideration in recent instruments of private international law. This can easily be seen in EU and international instruments devoted to the matters of parental responsibility and protection of children, in which domestic courts are called upon to assess the best interests of the child when solving jurisdiction or applicable law issues or when dealing with the recognition and enforcement of judgments. Similar provisions on jurisdiction and on the recognition and enforcement of judgments are also contained in the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, now in force between 44 Contracting States, including all EU Member States. It is worth noting that in other international and EU instruments relating to family matters the principle of the best interests of the child is often recalled as a general requirement in the interpretation of those instruments or as a source of inspiration of some

provisions (for instance, the 2007 Hague Convention on the international recovery of child support and other forms of family maintenance, the 2007 Hague Protocol on the law applicable to maintenance obligations, the EC Regulation No. 4/2009).

The strong emphasis placed on the principle of the best interests of the child is especially important, in the context of private international law, for the protection of migrant children. As no special provision has been developed thus far in order to deal with their position, the necessity to take their best interests into account in the determination of jurisdiction and of the applicable law helps avoid a formalistic application of private international rules and serve the particular needs of those children involved in a migration process.

The book is divided in two parts.

The contributions included in the first part investigate selected situations of special vulnerability that require a protective response by public international law and/or private international law. While the description thus provided is far from being exhaustive, the choice has been prompted by the conviction that they represent some of the most troublesome scenarios affecting migrant children (in the above mentioned broader notion of “migration”).

The second part of the volume is devoted to analyse the spectrum of protection provided by public and private international law with regard to the general phenomenon of child migration, as well as its deficiencies and some of the possible ways to overwhelm them.