

# Francesca Maoli

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organizations for the promotion of a  
child-friendly justice

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# EU diplomacy and children's rights: the dialogue with regional and global organizations for the promotion of a child-friendly justice

by

Francesca Maoli\*

## Abstract

*The contribution explores the role of EU diplomacy for the protection and promotion of children's rights, examining the relationships and interactions existing between the EU and other regional and global organizations in the field. The intention is to present part of the results of the EU co-funded research project "MiRI - Minor's Right to Information in civil actions - Improving children's right to information in cross-border civil cases" (JUST-JCOO-AG-2018-831608). In particular, the issues connected with the creation of a "child-friendly" civil justice will be addressed in the perspective of the dialogue between the EU and those international organizations, in order to examine the modalities, mechanisms and difficulties underlying this dialogue. The action of the EU must be read in the light of the founding Treaties, where there is no direct and general power conferred upon the EU institutions to protect and promote human rights: accordingly, there is no general competence attributed to the EU as concerns children's rights. In this context, the EU has acknowledged many ways in which it is possible to take concrete steps in the field concerned: for instance, through "soft law" instruments. The EU action in the field concerned has necessarily intertwined with the one of other regional and global organizations, such as the Council of Europe and to the system of the Hague Conference on private international law.*

**Keywords:** Children's Rights – Civil Proceedings – European Union Law – Child-Friendly Justice – Hague Conference on Private International Law – Council of Europe – EU Diplomacy

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# EU diplomacy and children's rights: the dialogue with regional and global organizations for the promotion of a child-friendly justice

## I. Introduction: a child-friendly (civil) justice in EU and beyond borders

Every child in Europe and across the world should enjoy the same rights and be able to live free of discrimination, recrimination or intimidation of any kind. [...] This is why the protection and promotion of the rights of the child is a core objective of the European Union's work at home and abroad.

Those words introduce the 2021 European Union's Strategy on the Rights of the Child,<sup>1</sup> with which the goals, objective and directions of EU institutions are settled for the following years. In defining six different thematic areas, the EU recognizes that the promotion and implementation of children's rights, as defined by Article 3 TEU, is not only a matter of internal policy, but requires a constant interaction with the other actors operating in the international community. Therefore, EU diplomacy plays a key role, since many relationships are growing between the EU and other regional and global organizations operating in the field.

This paper mainly focuses on the thematic area No 4 – «*Child-friendly justice*», with particular reference to civil justice.<sup>2</sup> In this area, the goal of the EU is to ensure a safe and effective participation of children in proceedings involving them and affecting their lives, which should therefore be adapted to their age and needs, as well as be respectful of their rights. Needless to say, the best interests of the child obtain a primary role in this process. In this context, the Strategy makes explicit reference to the willingness of EU institutions to strengthen the implementation of the 2010 Guidelines on Child-Friendly Justice adopted by the Council of Europe (hereinafter, CoE),<sup>3</sup> already highlighting the necessity to act in synergy with other international actors in order to achieve this common goal.

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<sup>1</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on the Rights of the Child*, COM(2021) 142 final, p. 1.

<sup>2</sup> *Ibid.*, p. 13.

<sup>3</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, [2010] adopted by the Committee of Ministers on November 17, 2010 at the 1098<sup>th</sup> meeting of the Ministers' Deputies, available at <https://www.coe.int/en/web/children/child-friendly-justice> (consulted on 15 September 2021).

An example of this need of synergy and cooperation is the analysis on how participation rights and the best interests of children are (or could be better) enhanced in the EU judicial space. As highlighted in the research conducted within the EU co-funded project «*Minor's Right to Information in civil actions (MiRI) - Improving children's right to information in cross-border civil cases*» (JUST-JCOO-AG-2018-831608),<sup>4</sup> that mainly focuses on the right of the child to information, different standards of protection are actually applied in the EU Member States. An implementation of children's rights in family proceedings in EU cannot disregard the role and action of other international organizations, which are working in order to ensure the promotion of a child-friendly justice. As it will be seen in the present contribution, this assumption is supported not only by the institutional structure of the EU and its legal framework, but also by practical opportunities.

## II. The role of the EU in the promotion and implementation of the rights of the child in the space of freedom, security and justice: between internal action and international cooperation

The competences and the action of the EU for the protection of human rights in general – and children's rights in particular – have increased throughout the years. The legal framework has evolved and the protection of children has made its way in the agenda of EU institutions.

The Treaty of Lisbon has marked an important structural step, since it has *i*) included the respect of fundamental rights among the core values of the EU, in Article 2 TEU;<sup>5</sup> *ii*) explicitly introduced the protection of children's rights among its fundamental values and interests, since Article 3 TEU makes explicit that this value shall also be promoted «*In its relations with the wider world [...]*»;<sup>6</sup> *iii*) expressly qualified the EU Charter of Fundamental Rights as an act of primary EU law having the same value of the founding Treaties (Article 6 TEU).<sup>7</sup>

In particular, the EU Charter is part of a multilevel system of protection of fundamental rights. Being inspired by already existing international instruments, such as the European

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<sup>4</sup> The contribution presents part of the research undertaken under the «*Minor's Right to Information in EU civil action (MiRI) – Improving children's right to information in cross-border civil cases*» Project, funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831608 (coordinated by the University of Genoa, Italy). Partners of the project are Defence for Children International – Italy, Turība University in Riga, Institute of Private International Law in Sofia, University of Valencia, European Association for Family and Succession Law. More information about the MiRI project, including all the materials and research reports, as well as the case law database, is available on the official webpage: <https://dispo.unige.it/node/1159> (consulted on 15 September 2021). The present work represents the views of the author only and is her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

<sup>5</sup> Art. 2 TEU: «*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*»

<sup>6</sup> Art. 3(5) TEU.

<sup>7</sup> Art. 6(1) TEU.



Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),<sup>8</sup> the document has codified and strengthened part of the common constitutional traditions of Member States, which are part of EU primary law according to Article 6(3) TEU.<sup>9</sup> The provision of Article 6(1), in establishing that the EU Charter is part of EU primary law, has the effect to bind the EU institutions and Member States to the Charter, when they apply EU law and in any relevant EU policy and action. This means that any act of the EU institutions, as well as any act of Member States when applying EU law, should comply with the fundamental rights stated in the EU Charter in order to be consistent with primary law.<sup>10</sup>

Children's rights are expressly considered in Article 24 of the EU Charter<sup>11</sup>, which creates a bridge between the instruments adopted at the international level and the EU legal framework. The provision is openly based on the UNCRC of 1989<sup>12</sup> and is built on the four pillars of the convention (stated in Articles 3, 9, 12 and 13 UNCRC): *i*) the right of the child to be provided with the protection and care that are necessary for his or her well-being; *ii*) the right to be heard and to have his or her opinion taken into account; *iii*) the best interests of the child; *iv*) the right to maintain a personal relationship with both parents.<sup>13</sup> As it will be seen in the following paragraph, the fact that the EU Charter has incorporated the rights stated by the UNCRC has relevant consequences in the synergy and coherent application of those instruments in the EU judicial space.

Undoubtedly, the EU Charter has contributed to shift from a context in which children were almost «invisible in EU law»<sup>14</sup> from a new phase with a more structured children's policy. A few years after the adoption of the Charter, the first EU agenda for the rights of the

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, opened for signature in Rome on November 4, 1950 and entered into force on September 3, 1953. The Convention has been ratified by all 47 States of the Council of Europe.

<sup>9</sup> Art. 6 TEU consecrates fundamental rights as general principles of EU law, other than providing for the EU accession to the ECHR. As concerns the accession to the ECHR, the procedure is still ongoing. On the criticalities of the accession process, see CALLEWAERT Johan, *The Accession of the European Union to the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing (2014), 1st ed., 13 p.; GAJA Giorgio, *Lo statuto della Convenzione Europea dei Diritti dell'Uomo nel diritto dell'Unione*, Rivista di Diritto Internazionale (2016), pp. 677-689; IVALDI Paola, *Diritti fondamentali e diritto internazionale privato dell'unione europea nella prospettiva dell'adesione alla CEDU*, Rivista di Diritto Internazionale Privato e Processuale (2021), pp. 7-36; TIZZANO Antonio, *The European Courts and the EU Accession to the ECHR*, Il Diritto dell'Unione Europea (2011), pp. 29-57; CANNIZZARO Enzo, *Unitarietà e frammentazione delle competenze nei rapporti fra l'ordinamento dell'Unione e il sistema della Convenzione europea: in margine al parere della Corte di giustizia 2/2013*, Il Diritto dell'Unione Europea (2015), pp. 623-634; ECKES Christina, *EU Accession to the ECHR: Between Autonomy and Adaptation*, The Modern Law Review (2013), pp. 254-285. With specific reference to children's rights within the EU Charter and Art. 6 TEU, see STALFORD Helen, SCHUURMAN Mieke, *Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda*, International Journal of Children's Rights (2011), pp. 381-403.

<sup>10</sup> For this reason, the EU Charter has been qualified as the 'shadow' of EU law, since there is no situation that is governed by EU law to which the Charter does not apply: see LENAERTS Koenraad, GUTIÉRREZ-FONS José Antonio, *The Place of the Charter in the EU Constitutional Edifice*, in Peers Steve, Hervey Tamara, Kenner Jeff, Ward Angela (eds), "The EU Charter of Fundamental Rights – A Commentary", Oxford, Hart Publishing (2014), pp. 1600-1637.

<sup>11</sup> LAMONT Ruth, *Article 24*, in Peers Steve, Hervey Tamara, Kenner Jeff, Ward Angela (eds), cit., pp. 661-692.

<sup>12</sup> United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entered into force on September 2, 1990. See BEIGBEDER Yves, *Children*, in Weiss Thomas G., Daws Sam (eds), "The Oxford Handbook on the United Nations", Oxford and New York, Oxford University Press (2007), pp. 511- 524, p. 513.

<sup>13</sup> See the *Explanations relating to the EU Charter of Fundamental Rights* [2007] OJ C 303/25.

<sup>14</sup> MCGLYNN Clare, *Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights*, European Public Law (2002), pp. 387-400, p. 387. See also STALFORD Helen, *Children and the European Union: Rights, Welfare and Accountability*, Oxford, Hart Publishing (2012), 27 p.

child of 2011 had confirmed the need to make children's rights an integral part of the EU's fundamental rights policy.<sup>15</sup> The Agenda, which combines internal and external policy dimensions, identified four main areas of concrete actions (namely child-friendly justice, vulnerable children, child participation and awareness raising, and children in the EU's external action) that have been subsequently refined and included in the most recent policy framework. The 2021 Strategy on the Rights of the Child, acknowledging the new challenges that surround the protection of children's rights in the present decade, has continued the work and has expanded its priorities among six thematic areas, continuing *inter alia* its efforts in the field of child-friendly justice.<sup>16</sup> In this field, the internal action has been connected with the external one: as mentioned in the section dedicated to «*The global dimension*», addressing the EU commitment outside the borders, the EU will support partner countries in «*building and strengthening child-friendly justice and child protection systems*».<sup>17</sup>

As noticed by authoritative legal theory,<sup>18</sup> the EU external policy documents in the field of children's rights and child-friendly justice have traditionally emphasized the needs of children rather than their rights, addressing situations of serious threats such as armed conflicts and violence, or criminal justice. Numerous non-binding human rights guidelines have been adopted to orient EU diplomacy in its external action<sup>19</sup> and EU embassies are responsible (since the Lisbon Treaty) for the creation of country human-rights Strategies that may or may not comprehend children's rights issues.<sup>20</sup>

At the same time, soft law instruments have been adopted within the Area of Freedom, Security and Justice in order to support EU institutions and Member States in promoting children's rights: this was the case of the 2019 EASO Practical Guide on the best interests of the child in asylum procedures,<sup>21</sup> aimed at giving substance to the best interests principle in line with EU and international law.

<sup>15</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: an EU Agenda for the Rights of the Child*, COM(2011) 60 final, p. 4, followed by the European Commission's recommendation *Investing in Children: Breaking the Cycle of Disadvantage* (2013), 2013/112/EU. See also the European Parliament resolution of 28 April 2016 on safeguarding the best interests of the child across the EU on the basis of petitions addressed to the European Parliament (2016/2575(RSP)), in OJ C 66, 21.2.2018, p. 2, and the study of the European Commission, *EU Acquis and Policy Documents on the Rights of the Child*, last updated July 16, 2020.

<sup>16</sup> The other thematic areas envisaged by the Strategy are: participation in political and democratic life; socio-economic inclusion, health and education; combating violence against children and ensuring child protection; digital and information society; the global dimension.

<sup>17</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on the Rights of the Child*, COM(2021) 142 final, p. 20.

<sup>18</sup> VANDENHOLE Wouter, *Children's Rights in EU External Action: Beyond Charity and Protection, Beyond Instrumentalisation and Conditionality*, International Journal of Children's Rights (2011), pp. 477-500.

<sup>19</sup> See for instance the *Guidelines on Children and Armed Conflict* [2003] available at [https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/docs/eu\\_guidelines\\_on\\_children\\_and\\_armed\\_conflict.pdf](https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/docs/eu_guidelines_on_children_and_armed_conflict.pdf) (consulted on 5 October 2021), updated on 2015, and the *Guidelines for the Promotion and Protection of the Rights of the Child – Leave no Child Behind* [2017] available at [https://ec.europa.eu/anti-trafficking/sites/default/files/eu\\_guidelines\\_rights\\_of\\_child\\_0.pdf](https://ec.europa.eu/anti-trafficking/sites/default/files/eu_guidelines_rights_of_child_0.pdf) (consulted on 5 October 2021).

<sup>20</sup> On the topic, and investigating the EU external strategies to promote child rights through diplomatic pressure and economic aid, VON BAHN Johanna, *European Union's External Strategies for the Rights of the Child*, Childhood (2019), pp. 386-406, p. 388.

<sup>21</sup> Available at <https://www.easo.europa.eu/sites/default/files/Practical-Guide-Best-Interests-Child-EN.pdf> (consulted on 5 October 2021).

Lastly, civil justice presents a need for coordination and concerted action with other international actors. The application of the EU instruments of judicial cooperation in civil matters need to be coordinated with international conventions in force in the same field. This means that the EU action has (and will be) necessarily intertwined with international organizations, such as the Hague Conference on Private International Law (hereinafter, HCCH). An example of coordination need is represented by the Brussels II bis Regulation<sup>22</sup> (as well as its recast Brussels II ter Regulation)<sup>23</sup> concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, whose material scope of application overlaps with the one of the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.<sup>24</sup>

The coordination and dialogue is not only limited to ensure a coherent application of the instruments, but has evolved when the EU – alongside the other actors – has started to foster the rights of children that are in contact with the civil justice system with various means. The growing interaction between private international law and human rights law has determined a strong interest of the institutions for the promotion of children's rights.

In this context, some reflections should be made on the role of the EU Charter in the EU external action, under the perspective of extraterritorial applicability. Contrary to the ECHR,<sup>25</sup> the EU Charter does not contain a territorial jurisdiction clause: its scope of application is rather *ratione materiae* and is defined by Article 51(1), according to which the provisions of the Charter apply to the EU institutions, as well as to Member States only when they are implementing EU law.<sup>26</sup> This means that any territorial criteria bear no relevance in the definition of the EU Charter's scope of application, which derives from the

<sup>22</sup> Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000, [2003] OJ L 338/1.

<sup>23</sup> Council Regulation 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, [2019] OJ L 178/1. On the new Regulation see CORNELOUP Sabine, KRUGER Thalia, *Le règlement 2019/1111, Bruxelles II: la protection des enfants gagnés du terrain*, *Revue critique de droit international privé* (2020), pp. 215-245; CARPANETO Laura, *La ricerca di una (nuova) sintesi tra interesse superiore del minore «in astratto» e «in concreto» nella riforma del Regolamento Bruxelles II-bis*, *Rivista di Diritto Internazionale Privato e Processuale* (2018) pp. 944-977; CARPANETO Laura, *Impact of the Best Interests of the Child on the Brussels II ter Regulation*, in Bergamini Elisabetta, Ragni Chiara (eds), "Fundamental Rights and Best Interests of the Child in Transnational Families", Cambridge/Antwerp/Chicago, Intersentia (2019), pp. 265-285; BIAGIONI Giacomo, CARPANETO Laura, *Children Under Brussels II ter Regulation*, *Yearbook of Private International Law* (2020/2021), pp. 139-154; TUO Chiara Enrica, *Superiore interesse del minore e regolamenti UE di diritto internazionale privato della famiglia*, *Nuova giurisprudenza civile commentata* (2020), pp. 676-686; HONORATI Costanza, *La proposta di revisione del regolamento Bruxelles II-bis: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, *Rivista di Diritto Internazionale Privato e Processuale* (2017), pp. 247-282; DANIELI Diletta, *I diritti dei minori nei casi di sottrazione internazionale: esigenze di tutela dei diritti fondamentali nel nuovo regolamento Bruxelles II-ter*, *Ordine Internazionale e Diritti Umani* (2020), pp. 643-660; DANIELI Diletta, *EU Instruments of Civil Judicial Cooperation in Matters of Parental Responsibility: Considerations on Competence and Scope*, *Rivista della cooperazione giuridica internazionale* (2020), pp. 85-101; MUSSEVA Boriana, *The Recast of the Brussels IIa Regulation: the Sweet and Sour fruits of Unanimity*, *ERA Forum: Journal of the Academy of European Law* (2020), pp. 129-142.

<sup>24</sup> 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, adopted under the auspices of the Hague Conference on Private International Law and entered into force on 1 January 2002. The full status table of the Convention is available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> (consulted on 7 October 2021).

<sup>25</sup> Article 1 ECHR: «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention».

<sup>26</sup> On the topic see KASSOTI Eva, WESSEL Ramses, *The EU's Duty to Respect Human Rights Abroad: the Extraterritorial Applicability of the EU Charter and Due Diligence Considerations*, in *CLEER Papers* (2020/2), pp. 1-24.

applicability of EU law.<sup>27</sup> If EU institutions (or bodies, offices, and agencies) act outside the geographical confines of the EU, the fact of extraterritoriality is immaterial to the question of the Charter's applicability.<sup>28</sup> The same holds true for Member States, when they are implementing EU law.<sup>29</sup>

For this reason, the doctrine has defined the Charter as the 'shadow' of EU law, in the sense that there can be no situation that is governed by EU law in which the Charter does not apply.<sup>30</sup> The defining issue concerns the scope of application of EU competences, and not the territorial or extraterritorial action undertaken by an EU institution or by a Member State. The main consequence, at least as concerns the scope of the present contribution, is that any legislative instrument of the EU shall be interpreted in accordance with the EU Charter, when its scope of application has some influence on fundamental rights. The same is true as concerns the external action of the EU, when it interfaces with other international organizations acting in the field of children's rights, or when negotiating international conventions aimed at improving the situation of children.

### III. The EU and the UNCRC

The UNCRC is the main source of inspiration for the EU child-related policy measures. All the relevant actions of the EU in this field are inspired by the UNCRC norms and principles, notwithstanding the fact that the EU is not a party of the treaty (but all member States are).<sup>31</sup> What is lacking, according to some authors, is the effective implementation of this commitment in practice, rather than only in policy narratives.<sup>32</sup>

The identification of the UNCRC as a reference point for the EU action<sup>33</sup> compensates the fact that the EU did not have a long-standing tradition in protecting children's rights. This may be the reason why, according to authoritative legal theory,<sup>34</sup> the EU has struggled in

<sup>27</sup> See ECJ, case C-617/10 *Åklagaren*, ECLI:EU:C:2013:105, para. 21.

<sup>28</sup> MORENO-LAX Violeta, COSTELLO Cathryn, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, in Peers Steve, Hervey Tamara, Kenner Jeff, Ward Angela (eds), "The EU Charter of Fundamental Rights: a Commentary", cit., pp. 1700-1727.

<sup>29</sup> *Ibidem*.

<sup>30</sup> LENAERTS Koen, GUTIÉRREZ-FONS José Antonio, *The Place of the Charter in the EU Constitutional Edifice*, in Peers Steve, Hervey Tamara, Kenner Jeff, Ward Angela (eds), "The EU Charter of Fundamental Rights: a Commentary", cit., 1600-1637.

<sup>31</sup> Moreover, it should be considered that some of the UNCRC rules are believed to be a codification of customary international law, which can be used in American courts even if the United States have not adopted it, or by the ECHR and the Inter-American Court of Human Rights in their case-law: ELROD Linda, *Please Let Me Stay: Hearing the Voice of the Child in Hague Abduction Cases*, Oklahoma Law review (2011), pp. 663-690, p. 672; REISMAN W. Michael, *Sovereignty and Human Rights in Contemporary International Law*, American Journal of International Law (1990), pp. 866-876; DOHRN Bernardine, *Something's Happening Here: Children and Human Rights Jurisprudence in Two Courts*, Nevada Law Journal (2006), pp. 749-773.

<sup>32</sup> See IUSMEN Ingi, *How are Children's Rights (Mis)Interpreted in Practice? The European Commission, Children's Rights and Policy Narratives*, in Rodhes Rod (ed), "Narrative Policy Analysis – Cases in Decentered Policy", London, Palgrave Macmillan (2018), pp. 97-120; SCHAPPER Andrea, *Children's Rights Implementation as a Multi-Level Governance Process*, Human Rights Quarterly (2017), pp. 104-129, p. 110.

<sup>33</sup> See the EPRS briefing *Children's Rights in EU – Marking 30 Years of the UN Convention on the Rights of the Child*, [2019] available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/644175/EPRS\\_BRI\(2019\)644175\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/644175/EPRS_BRI(2019)644175_EN.pdf) (consulted 8 October 2021).

<sup>34</sup> VON BAHR Johanna, *European Union's External Strategies for the Rights of the Child*, cit., pp. 402-403.



developing an independent policy position on children's rights: presumably, one of the reasons why was the lack of interests among EU member States in fostering this process.<sup>35</sup>

On the other hand, the UNCRC has shaped the global thinking – being the most ratified international treaty in the world<sup>36</sup> – and the EU institutions have the obligation to respect the principles and provisions of human rights law in relation to the matters that fall within the scope of application of EU competences.<sup>37</sup> The UNCRC is an integral part of EU primary hard law, as an effect of the incorporation of children's rights in the Treaties and as a consequence of the provision of Article 6 TEU. Even if the position of international conventions in EU law is not always crystal clear, those conventions play a role in the definition of general principles of EU law under the last-mentioned provision.<sup>38</sup>

At the same time, the already mentioned Article 24 of the EU Charter is directly inspired by the UNCRC and represents an incorporation of the convention's principles into an act of primary EU law (which has the same value of the Treaties, according to Article 6.1 TEU). This means that the UNCRC has a bearing on the interpretation of the EU Charter's provisions.<sup>39</sup>

From all the above considerations, it can be affirmed that the UNCRC is also part of the *acquis communautaire*, to which all acceding countries are obliged to commit.<sup>40</sup>

When UNCRC rights are incorporated in EU acts and instruments, the principle of primacy of EU law has the effect to reinforce the position of the UNCRC within Member States law,<sup>41</sup> creating coherence between the international obligations of States (art. 4 UNCRC) and the actions of EU institutions in matters attributed to their exclusive or concurrent competences. Many legislative acts of the EU cite, recall or mention the UNCRC as a whole, as well as one or more specific rights.<sup>42</sup> Over the years, an increasing number of children-

<sup>35</sup> *Ibidem*. On the topic, see also KISŪNAITĒ Aida, *Children's Rights Protection in the EU: The Need for a Contextual Perspective*, Peace Human Rights Governance (2019), pp. 171-192.

<sup>36</sup> The UNCRC has been currently ratified by 196 States, among which there are all 27 EU Member States.

<sup>37</sup> IUSMEN Ingi, STALFORD Hellen, *Introduction: the EU as a Children's Rights Actor: Law, Policy and Structural Dimensions*, in Iusmen Ingi, Stalford Hellen (eds), "The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions", Opladen, Berlin and Toronto, Barbara Budrick Publishers (2016), pp. 9-18.

<sup>38</sup> BIAGIONI Giacomo, *The Convention on the Rights of the Child and the EU Judicial Cooperation in Civil matters*, Diritti Umani e Diritto Internazionale (2020), pp. 265-386.

<sup>39</sup> FRANZINA Pietro, *Human Rights and the Private International Law of the Union in Family Matters*, in Bergamini Elisabetta, Ragni Chiara (eds), "Fundamental Rights and Best Interests of the Child in Transnational Families", cit., pp. 141-155, p. 143.

<sup>40</sup> *EU acquis and policy documents on the rights of the child*, [2019] JUST.C2/MTF-NCP, available at [https://ec.europa.eu/info/sites/default/files/eu\\_acquis\\_and\\_policy\\_documents\\_rights\\_of\\_the\\_child\\_march\\_2019.pdf](https://ec.europa.eu/info/sites/default/files/eu_acquis_and_policy_documents_rights_of_the_child_march_2019.pdf) (consulted on 12 October 2021).

<sup>41</sup> ADINOLFI Adelina, *La rilevanza della CRC nell'ordinamento dell'Unione europea*, in Autorità Garante dell'infanzia e dell'Adolescenza (ed), "La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza: conquiste e prospettive a 30 anni dall'adozione", Roma, Rossini (2019), pp. 63-86, p. 66.

<sup>42</sup> This is particularly evident in migration and international protection law, where there are many references in the preambles of Regulations or Directives. Reference to the UNCRC is made, *inter alia*, by recital 22 of Directive 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/08; by recital 18 of Directive 2011/95 of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9; by recital 33 of Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] OJ L 180/60; and by recital 13 of Regulation

related issues have been covered by EU legislative acts in private and procedural international law. While substantial family law or some aspects of national civil procedure have been left untouched, the regulations have been characterized by a growing interaction between private international law and human rights law. Therefore, many references to the rights and principles of the UNCRC are to be found in the EU instruments. This is evident in the contest of the drafting of the Brussels II ter Regulation, where it was made clear that the entire discipline is inspired by the principle of the best interests of the child. Even more than the preceding Brussels II bis Regulation, the recast expressly mentions Article 24 of the EU Charter, the UNCRC and the ECHR in its recitals,<sup>43</sup> specifying at recital 19 that any reference to the best interests of the child made in the Regulation shall be interpreted in accordance to the aforementioned instruments. Already in its Recital 2, it is stated that *«this Regulation clarifies the child's right to be provided with an opportunity to express his or her views in proceedings to which he or she is subject»*,<sup>44</sup> thus recognizing the already existing obligations stemming from international law.

At the same time, the aforementioned instruments have introduced specific obligations arising from the UNCRC's principles (such as the principle of the child's best interests and the duty to hear the child), which are of mandatory application. The incorporation of the UNCRC in EU instruments represents an added value, compared to the obligations of the Member States arising from the convention, because of the direct applicability and the direct effect of EU law before national courts.

If the *acquis communautaire* allows for the consistent development of EU law and for the preservation of the EU patrimony by Member States, the export of the *acquis* is considered an important element of the foreign policy of the EU.<sup>45</sup> In this context, the due application of the UNCRC in practice has been promoted by the EU not only through the realization of instruments of diplomacy aimed at fostering the dialogue and collaboration with international and regional organizations (being a UN observer<sup>46</sup> and member of the G20),<sup>47</sup> but also by strengthening the internal framework of children's rights within the EU area of

No. 604/2013 of the Parliament and Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31. On the best interests of unaccompanied children and children in migration, see POBJOY Jason M., *The Best Interests of the Child Principle as an Independent Source of International Protection*, International and Comparative Law Quarterly (2015), pp. 327-363.

<sup>43</sup> Recitals 19, 39, 71, 83 and 84 of the Brussels II ter Regulation.

<sup>44</sup> Emphasis added.

<sup>45</sup> PETROV Roman, *The External Dimension of the Acquis Communautaire*, European University Institute Working Paper, No. 02/2007, available at <https://cadmus.eui.eu/handle/1814/6931> (consulted on 12 October 2021).

<sup>46</sup> See RASCH Maximilian, *The European Union at the United Nations: The Functioning and Coherence of EU External Representation in a State-centric environment*, Leiden/Boston, Nijhof, (2008) 21 p. See also the *Council conclusions of 12 July 2021 - EU priorities at the United Nations during the 76th United Nations General Assembly, September 2021 - September 2022*, [2021] available at <https://data.consilium.europa.eu/doc/document/ST-10393-2021-INIT/en/pdf> (consulted on 12 October 2021). The priorities refer to the fundamental rights of the child in relation to children involved in armed conflicts and in the context of humanitarian actions.

<sup>47</sup> On the EU-G20 relationship, see WOUTERS Jan, VAN KERCKHOVEN Sven, ODERMATT Jed, *The EU at the G20 and the G20's Impact on the EU*, in Van Vooren Bart, Blockmans Steven, Wouters Jan, "The EU's Role in Global Governance: The Legal Dimension", Oxford, Oxford University Press (2013), pp. 259-271; DEBAERE Peter, *The European Union and the G20: a central role for the European Commission?*, Proceedings of the 52nd International Studies Association Annual Convention, International Studies Association (2011).

freedom, security and justice. Indeed, in the last mentioned field, the action of the EU seems to be more oriented towards taking inspiration from international principles and translating them into EU law, rather than working through diplomacy. However, the need to coordinate the application of European instruments with other international and regional legal frameworks has determined new ways in which EU diplomacy routes may constitute a good instrument. In this context, the potential of diplomacy can be appreciated within the relationships existing between the EU and, respectively, the CoE and the HCCH.

#### IV. The EU and the Council of Europe

While the CoE is an international organization working in the promotion of democracy and the protection of human rights and rule of law in Europe, comprising 47 States, the scope of application and the objectives of the EU – even though among 27 Member States – are clearly wider. However, comparing the policy agendas on children's rights, it results that the EU and the CoE share an interest in the child-friendly justice/access to justice sector.<sup>48</sup> Because of the existence, *inter alia*, of those common goals, the willingness is to build a close cooperation: the strategic partnership between the two organizations has evolved and strengthened over time, also due to the fact that the EU has extended its actions even in fields in which it traditionally lacked power and competences, slowly overlapping traditional topics of the CoE.<sup>49</sup>

On the other hand, the cooperation between the two organizations has not been free from tensions. The EU has developed a proactive fundamental rights policy, which has even triggered a debate on its qualification as a «*human rights organization*».<sup>50</sup> The adoption of the EU Charter was seen with some suspicion and was regarded as an attempt by the EU to set different standards of human rights protection from those of the CoE.<sup>51</sup> At the same time, the CoE – whose traditional task was (and currently is) to set standards and monitor the protection of fundamental rights – has always protected its functions and its long-standing traditions,<sup>52</sup> that find its cornerstone in the ECHR. From the point of view of diplomatic relations and dialogue between the two organizations, it is worth highlighting the fact that the EU now comprises 27 Member States, that are all part of the CoE: therefore, the EU

<sup>48</sup> DESMET Ellen, *European and International Policy Agendas on Children, Youth and Children's Rights: Comparison and Possible Synergies*, Children's Rights Knowledge Centre, [2010] available at [https://www.childwatch.uio.no/publications/policy-briefs/KeKi\\_Comparison%20and%20Possible%20Synergies\\_2011%20printexemplaar-1\(1\).pdf](https://www.childwatch.uio.no/publications/policy-briefs/KeKi_Comparison%20and%20Possible%20Synergies_2011%20printexemplaar-1(1).pdf) (consulted on 12 October 2021), 3 p.

<sup>49</sup> The most important phase in which the European Community increased its activities was between the early 1970s to 1993, followed by an increasing EU-CoE cooperation from the Maastricht Treaty onwards: on the topic see CALLIGARO Oriane, PATEL Kiran Klaus, *From Competition to Cooperation in Promoting European Culture: The Council of Europe and the European Union since 1950*, *Journal of European Integration History* (2017), pp. 129-149.

<sup>50</sup> See VON BOGDANDY Armin, *The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union*, *Common Market Law Review* (2000), pp. 1307-1338.

<sup>51</sup> DRZEMCZEWSKI Pierre, *The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights*, *Human Rights Law Journal* (2001), pp. 14-31.

<sup>52</sup> On the topic specifically DE SCHUTTER Olivier, *The Two Europes of Human Rights: The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, *Columbia Journal of European Law* (2008), pp. 509-563.

Member States form a majority of the CoE's 47 members, with the consequence that the margin of negotiations within the last mentioned organization may be increasingly narrow.<sup>53</sup>

The relationship and dialogue between the EU and the CoE are currently governed by a Memorandum of Understanding, adopted in 2007.<sup>54</sup> The document explicitly states that «*The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe*», stressing the interests of the CoE to maintain its primacy in the field. Moreover, according to points 17 to 19 of the Memorandum, the EU shall cite the relevant CoE norms as a reference in EU documents in the field human rights and shall develop cooperation with the Commissioner for Human Rights.

The ECHR still represents one of the most important regional sources of human rights law. Its evolutive interpretation by the European Court of Human Rights (ECtHR) grants the convention a persisting primary role in protecting human rights in Europe, since the Strasbourg Court has recognized how the ECHR is a living instrument and could not operate without taking into account legal, social and cultural influences.<sup>55</sup> In the effort to promote synergy and recognize the role of the CoE, the EU accession to the ECHR became a legal obligation under Article 6(2) TEU. At the same time, the legal basis for the accession has been provided by the ECHR through Article 59(2), as amended by the Protocol No. 14, which entered into force on 1 June 2010.<sup>56</sup> With the EU becoming the 48<sup>th</sup> contracting party to the convention, the effect would be to accept the supervision of the ECtHR. This means that individuals would have the opportunity to apply to the ECtHR for review of the acts of EU institutions. The latter would be subject to the legal binding decisions of the Strasbourg Court. As first and most evident consequence, the EU would probably not benefit anymore from the so-called 'Bosphorus presumption' (from the homonymous ECtHR decision),<sup>57</sup> according to which the protection of fundamental rights provided by the EU

<sup>53</sup> DE SCHUTTER Olivier, *The Two Europes of Human Rights: The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, cit., p. 513; on the topic see also POLAKIEWICZ Jörg, *A Council of Europe perspective on the European Union: Crucial and complex cooperation*, Europe and the World: A law review (2021), pp. 1-19.

<sup>54</sup> Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117<sup>th</sup> Session of the Committee of Ministers held in Strasbourg on May 10 and 11, 2007, CM (2007) 74. The Memorandum follows a proposal contained in the so-called "Juncker report" on the future of the EU-CoE relationship, entitled *Council of Europe-European Union: a sole ambition for the European continent*, [2006] Doc. 10897, available at <https://pace.coe.int/pdf/175486787ddf2cab41577a0c93f536671f1661d55caa5cca0ef026bd0e5a3b28/doc.%2010897.pdf> (consulted on 13 October 2021).

<sup>55</sup> Already in ECtHR, App. No. 5856/72, judgment of 25 April 1978, *Tyrer v. the United Kingdom*, paras. 31 and 54, the Court held that the ECHR is «*a living instrument which [...] must be interpreted in the light of present-day conditions*», and that «*it is of crucial importance that the ECHR is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory*».

<sup>56</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, [2004] CETS No. 194, 13 May 2004. See CAFLISCH Lucius, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, Human Rights Law Review (2006), pp. 403-415; SACCUCCI Andrea, *L'entrata in vigore del protocollo n. 14 e le nuove regole procedurali per la sua applicazione*, Diritti Umani e Diritto Internazionale (2010), pp. 319-343.

<sup>57</sup> ECtHR, GC, App. No. 45036/98, judgment of 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, paras. 150-156. On the Bosphorus presumption see LOCK Tobias, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights*, Human Rights Law Review (2010), pp. 529-545; GONÇALVES Anabela, *The balance between the protection of fundamental rights and the EU principle of mutual trust*, Freedom, Security & Justice (2018), pp. 111-13.



law is presumed equivalent to that of the ECHR system, unless the presumption to that effect is rebutted.<sup>58</sup>

As it is known, this long and difficult process has not ended yet: an abrupt stop was caused by the ECJ Opinion 2/13, which has concluded for the draft Accession Agreement to be incompatible with EU primary law.<sup>59</sup> Negotiations have been relaunched in 2020,<sup>60</sup> with an *ad hoc* Group composed by representatives of the 47 CoE members and one EU representative (the '47+1 Group'). Many aspects that were object of the Opinion 2/13 have been and will be discussed, even if the revised Agreement may not be subject to another future scrutiny by the ECJ (provided that the procedure of Article 218(11) is not mandatory).

Among the many issues involved, a new scheme of relationships between the EU legal order and the ECtHR case law will certainly have an impact on the application of the EU instruments adopted in the field of judicial cooperation in civil matters. It is sufficient to recall the debate on the many applicative issues that have emerged in the context of international child abduction cases. The Brussels II bis regulation have confirmed the immediate return mechanism foreseen by the 1980 Hague Convention on the Civil Aspects of International Child Abduction,<sup>61</sup> but has introduced a huge corrective mechanism (the so-called 'trumping order') for intra-EU abductions, according to which a decision of non-return may be rebutted by a contrary decision released by the Member State of habitual residence of the child.<sup>62</sup> This system had been put into crisis when the ECtHR has started to condemn the judicial authorities of the ECHR contracting States for not having adequately considered the entire family situation and the best interests of the child.<sup>63</sup> Now, it remains to be

<sup>58</sup> See also ECtHR, App. No. 17502/07, judgment of 23 May 2016, *Avotins v. Latvia*.

<sup>59</sup> ECJ, Case Opinion 2/13, *Opinion of the Court (Full Court) of 18 December 2014*, ECLI:EU:C:2014:2454. For a comment see GAJA Giorgio, *Lo statuto della Convenzione Europea dei Diritti dell'Uomo nel diritto dell'Unione*, cit., pp. 677-689; CALLEWAERT Johan, *The accession of the European Union to the European Convention on Human Rights*, Council of Europe Publishing (2014), available at <https://johan-callewaert.eu/wp-content/uploads/2015/05/eu-accession.pdf> (consulted on 11 October 2021); IVALDI Paola, *Diritti fondamentali e diritto internazionale privato dell'unione europea nella prospettiva dell'adesione alla CEDU*, cit., pp. 7-36; PEERS Sara, *The CJUE and the EU's accession to the ECHR: a clear and present danger to human rights protection*, available at <http://eulawanalysis.blogspot.com>, December 2014; JACQUÈ Jean Paul, *Pride and/or prejudice? Les lectures possibles de l'avis 2/13 de la Cour de justice*, Cahiers de Droit Européen (2015), pp. 19-45; CANNIZZARO Enzo, *Unitarietà e frammentazione delle competenze nei rapporti fra l'ordinamento dell'Unione e il sistema della Convenzione europea: in margine al parere della Corte di giustizia 2/2013*, cit., pp. 623-635; AMALFITANO Chiara, *General Principles of EU Law and the Protection of Fundamental Rights*, Cheltenham, Edward Elgar Publishing (2018), 40 p.; SPAVENTA Eleanor, *A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13*, Maastricht Journal of European and Comparative Law (2015), pp. 35-56.

<sup>60</sup> The first official meeting has been held in October 2020 and the Report is available at <https://rm.coe.int/cddh-47-1-2020-r6-en-1680a06313> (consulted on 12 October 2021).

<sup>61</sup> Article 11 of the Brussels II bis Regulation. On the topic see TRIMMINGS Katarina, *Child Abduction within the European Union*, Oxford, Hart Publishing (2013), 21 p.; QUEIROLO Ilaria, *EU Law and Family Relationships*, Rome, Aracne Editrice (2015), 153 p.; CARPANETO Laura, *Child Abduction within the European Union: the Functioning of Article 11.8 of Regulation No. 2201/2003 from an Italian Perspective*, International Family Law, Policy and Practice (2014), pp. 46-52; MCELEAVY Peter, *The New Child Abduction Regime in the European Union: Symbiotic Relationship of Forced Partnerships?*, Journal of Private International Law (2005), pp. 5-34; TONOLO Sara, *La sottrazione dei minori nel diritto processuale civile europeo: il regolamento Bruxelles II-bis e la convenzione dell'Aja del 1980 a confronto*, Rivista di Diritto Internazionale Privato e Processuale (2011), pp. 81-100.

<sup>62</sup> Article 11(6)-(8) of the Brussels II bis Regulation.

<sup>63</sup> ECtHR, GC, App. No. 41615/07, judgment of July 6, 2010, *Neulinger and Shuruk v. Switzerland*, paras. 131-151; ECtHR, GC, App. No. 27853/09, judgment of November 26, 2013, *X v. Latvia*, paras. 95-102. On the topic WALKER Lara, BEAUMONT Paul, *Shifting The Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, Journal of Private International Law (2015), pp. 231-249; KELLER Hellen, HERI Corina, *Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights*, Nordic Journal of International Law (2015), pp. 270-296; BARUFFI Maria Caterina,

seen whether the new Brussels II ter regulation, with an entire Chapter dedicated to international child abduction, will be able to strike a fair balance and to effectively foster the child's best interests.<sup>64</sup>

Other than the ECHR legal framework and protection system, the CoE's activities are characterized by many other initiatives aimed at fostering the creation of a child-friendly justice and at promoting the fundamental rights of the child in the context of civil proceedings. The most famous and recalled instrument is represented by the 2010 Guidelines on Child-Friendly Justice,<sup>65</sup> that are aimed at giving concrete indications not only to European States and institutions, but also to legal practitioners. Even if the Guidelines are a 'soft law' instrument, lacking *per se* a binding force, the recourse to this tool has relevant effects as concerns a better awareness of practitioners and a correct implementation of children's rights in practice. , also providing a bridging-the-gap function between the rules and principles in force at the international and regional level and the current laws and practices of States: therefore, they may favour the correct implementation of children's right at the local and practical level. In the light of those potential effects, the use of soft law instruments may also represent a good way of cooperation and dialogue between the EU and the CoE, since their adoption is surrounded by less procedural requirements and guarantees.

A joint effort in setting children's rights standards in the field of civil justice results very much needed in the context in which – as already explained – the EU instruments are not neutral anymore, but are more and more inspired by human rights considerations.<sup>66</sup> Again, the example of the right of the child to be heard and express his or her opinion, before a decision is adopted, is a well-fitting example. The Brussels II-ter Regulation introduces in its Article 21 a very detailed obligation to hear the child in all proceedings on parental responsibility, in line with the wording of Article 12 UNCRC. The same provision is reiterated in Article 26 with specific reference to child abduction proceedings, as a gentle reminder that this is opportune in the light of the importance of an effective examination of the child's situation. Article 21 states that the opportunity to be heard is provided by Member States «*in accordance with national law and procedure*».<sup>67</sup> Thus, the principle of procedural autonomy of Member States is preserved and child participation is still not harmonized. However, the EU lawmaker has stretched the boundaries between private international law and national procedural law. The balance between the competences of Member States and the interests of the EU for the fundamental rights of the child is still to be found, but the

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*A Child-Friendly Area of Freedom, Security and Justice: Work in Progress in International Child Abduction Cases*, Journal of Private International Law (2018), p. 385-420; ONYOJA Momoh, *The Interpretation and Application of Article 13(1) b) of the Hague Child Abduction Convention in Cases Involving Domestic Violence: Revisiting X v Latvia and the Principle of "Effective Examination"*, Journal of Private International Law (2019), p. 626-657.

<sup>64</sup> On the novelties introduced by the Brussels II ter Regulation see the contributions cited above, at fn. 22.

<sup>65</sup> Cit. above, at fn. 3.

<sup>66</sup> On the topic BIAGIONI Giacomo, *The Convention on the Rights of the Child*, cit., pp. 265-386.

<sup>67</sup> This indication is reiterated two times, at Article 21(1) and Article 21(2).

general tendency seems to go towards a greater influence of supranational sources of law over national legal systems.

In this context, the dialogue with the CoE – and the opportunity to take advantage to its standard-setting instruments – is crucial. In particular, a recent CoE initiative seems to be of particular interests also for the future application of the Brussels II ter Regulation: a new Committee of experts on the rights and the best interests of the child in parental separation and in care proceedings has been created.<sup>68</sup> The Committee's objective is to create a practical instrument that will specifically address children's rights in situations of parental separation and care proceedings, such as a Recommendation to develop standards or social policies, and/or practical tool(s) aimed at practitioners, institutions and possibly parents, or common guidelines, for example on best interests determination or the child's right to be heard. According to the Committee's Terms of Reference, the European Union is qualified as a possible participant to the works, having the possibility to send one or more representatives, without the right to vote.<sup>69</sup> The EU did send its representatives from the European Commission – DG Justice and Consumers.

## V. The EU and the Hague Conference on Private International Law

Within the field of judicial cooperation in civil matters, the other EU's leading partner in developing a child-friendly justice and in promoting the fundamental rights of the child is the HCCH. Differently from the experience with the CoE, the EU is an official member of the HCCH since April 2007.<sup>70</sup> Even if the declaratory intent of both organizations is to unify the rules of private international law (which also is the main objective of the HCCH),<sup>71</sup> the increasing interaction between the latter and human rights law has made children's rights the other face of the medal.

The accession to the HCCH was a result of the exercise of EU external exclusive competences in the field of judicial cooperation in civil matters, according to Article 216(1) TFEU

<sup>68</sup> CJ/ENF-ISE, more information available online at <https://www.coe.int/en/web/children/cj/enf-ise> (consulted on 12 September 2021).

<sup>69</sup> The Terms of Reference are available at <https://rm.coe.int/cj-enf-ise-2020-2021-en/1680992cb5> (consulted on 12 September 2021). It is worth highlighting that the European Union is listed among the «participants» to the works of the Committee, and not as an «observer».

<sup>70</sup> See the Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, [2006] OJ L 297/1. The accession was possible following the entry into force, on 1 January 2007, of the amendments to the HCCH Statute which made it possible for certain regional economic integration organisations – and thus the EC – to become a member of the HCCH. On the topic see KUIPERS Jan-Jaap, *The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership?*, in DE WAELE Henri, KUIPERS Jan-Jaap (eds), «The European Union's Emerging International Identity», Leiden/Boston, Nijhof (2013), pp. 159-186; SCHULZ Andrea, *The Accession of the European Community to the Hague Conference on Private International Law*, *International and Comparative Law Quarterly* (2007), pp. 939-950.

<sup>71</sup> See the Statute of the HCCH available at <https://www.hcch.net/en/instruments/conventions/full-text> (consulted on 15 October 2021). On the HCCH's work with regard to matters concerning children, see MCELEAVY Peter, *Luxembourg, Brussels and now The Hague: congestion in the promotion of free movement in parental responsibility matters*, *International and Comparative Law Quarterly* (2010), pp. 505-519.

(which is a codification of the ECJ's case law on implied external competences)<sup>72</sup> and transferred from the Member States as a direct effect of the adoption of instruments dealing with private and procedural international law.<sup>73</sup> Therefore, the EU started to participate in the negotiations on the Hague Conventions with third States, as a full member. Indeed, the participation to global instrument may represent, in some cases, a strategic choice of the EU, which opposes to the creation of its own internal legal framework.<sup>74</sup>

With specific reference to family law, exclusive competence arises with respect to the adoption of the Brussels II bis Regulation (now Brussels II ter Regulation). Indeed, the issue of the existence of external competences of the EU is not free from complications, since there are international agreements that may fall only partially within the exclusive competence of the EU.<sup>75</sup> The result is that the EU action needs to be balanced with the one of its Member States. Moreover, only sovereign States could be party to a Convention.<sup>76</sup> This happened with reference to the 1996 Hague Convention on the Protection of Children: the EU authorized Member States to ratify the Convention in the interests of the Union.<sup>77</sup> The 1996 Hague Convention complements the Brussels II bis regulation, since the latter does not contain provisions on applicable law, and the relationship between the two instruments is regulated by Article 61 of the Regulation.

The co-existence between the EU legal framework and the Hague Convention will be of particular interest also with reference to the new Brussels II ter Regulation, from the perspective of the attention that both instruments reserve to the fundamental rights of the child. The 1996 Convention states in its preamble the will to have the best interests of the child as a primary consideration, as well as the desire to establish common provisions «*taking into account*» the UNCRC. The Brussels II ter Regulation, adopted in 2019, is certainly more advanced, providing for express obligations of Member States as concerns the child's best interests and the right to be heard. The 1996 Convention does not “directly” provide for

<sup>72</sup> DE BAERE Geert, GUTMAN Kathleen, *The Impact of the European Union and the European Court of Justice on European Family Law*, in SCHERPE Jens M., “European Family Law – Volume I – The Impact of Institutions and Organizations on European Family Law”, Cheltenham, Edward Elgar Publishing (2016), pp. 5-48, p. 23.

<sup>73</sup> On the topic FRANZINA Pietro, *The External Dimension of EU Private International Law after Opinion 1/13*, Cambridge, Intersentia (2017). See also the *Declaration of competence of the European Community specifying the matters in respect of which the competence has been transferred to it by its Member States*, contained in Annex II to the Council Decision 2006/719/EC.

<sup>74</sup> DE BAERE Geert, GUTMAN Kathleen, *The Impact of the European Union and the European Court of Justice on European Family Law*, cit., p. 27.

<sup>75</sup> See BARIATTI Stefania, *Cases and Materials on EU Private International Law*, Oxford, Hart Publishing (2011), 39 p.

<sup>76</sup> Recent HCCH practice shows an evolution, since international conventions now include a specific clause that make possible for the EU to ratify or accede. See DE MIGUEL ASENSIO Pedro A., *International Conventions and European Instruments of Private International Law: Interrelation and Codification*, in DE MIGUEL ASENSIO Pedro A., BERGÈ Jean-Sylvestre, “The Place of International Agreements and European Law in a European Code of Private International Law”, Frankfurt am Main, Peter Lang (2011), pp. 185-212.

<sup>77</sup> Council Decision 2003/93/CE of 19 December 2002 authorising the Member States, in the interests of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, [2002] OJ L 48/1.

any duty to hear the child.<sup>78</sup> Therefore, the protection of children's rights may be jeopardized in cross-border situations.

The potential of a concerted action between the EU institutions and the HCCH – or, more precisely, the role of EU as a member of the HCCH as an international organization – lays in the possibility to create better standards in the protection of children's rights. Even if the HCCH activity is not centered upon the creation of protocols or other soft law instruments, being more focused on the promotion of the conclusion of international conventions, the dialogue within the organization may recognize the importance of sharing good practices. This can also raise trust between the different international actors.<sup>79</sup>

## VI. Conclusions

The promotion of a child-friendly civil justice in the EU is characterized by the contemporary efforts of different international organizations. While the CoE retains a traditional role in this regard, with the ECtHR still retaining a primary role in setting adequate standards in the European regional area, the EU is constantly affirming its growing role in protecting children's rights. Lastly, the HCCH action is focused on more classical private international law cooperation, which – differently from the abovementioned organizations – has a global aspiration and therefore makes it a more difficult task to build confidence among contracting States. The main point of reference for all those actors remains the 1989 UNCRC, which orients the efforts of the international community.

The instruments adopted under the auspices of the CoE or the HCCH, as well as the EU legal framework, make multiple references to the UNCRC as well as to standards settled by the others. However, rather than the mere recognition of children's rights in the legal texts, the potential for increased exchange and cooperation between those organizations seems to lay on the adoption of relevant institutional documents and by soft law instruments. The abovementioned initiative of the CoE, through the launch of a Committee on experts on the rights and the best interests of the child in parental separation and in care proceedings, with the participation of EU representatives, may represent a good example of shared efforts on the creation of common standards and guidelines for practitioners. The participation of the EU should be very much welcomed, provided that the scope of application of the soon-to-be-adopted guidelines or policy instruments will easily interests proceedings falling under the scope of application of the Brussels II ter Regulation.

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<sup>78</sup> The 1996 Convention only provides, under Article 23(2)(b), that it is possible to stop recognition and execution of a decisions in case the child has not been heard.

<sup>79</sup> As expressed by FREEMAN Marilyn, TAYLOR Nicola, *The Child's Voice – 15 years later*, The Judges' Newsletter on International Child Protection, No. 3/2018, available at <https://assets.hcch.net/docs/a8621431-c92c-4d01-a73c-acdb38a7fde5.pdf> (consulted on September 10, 2021).

In the context of the initiatives promoted by those international actors in the field of child-friendly justice, it is worth mentioning the recent initiative of the Institute of International Law, foreseeing the adoption on a resolution concerning the relationships between human rights and private international law instruments.<sup>80</sup> The resolution, that also contains some provisions expressly devoted to the protection of children's rights, highlights how «*private international law can inspire and guide the implementation and interpretation of human rights, notably by ensuring respect for the plurality of traditions, cultures and legal systems*».

The strong relationship between private international law and human rights law seems now complete, and appears to represent one of the most challenging issue that may interest EU diplomacy in the future.

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<sup>80</sup> *Draft resolution on human rights and private international law*, 27 January 2021, available at <https://www.idi-iil.org/app/uploads/2021/05/Report-4th-commission-human-rights-and-private-international-law-vol-81-yearbook-online-session.pdf> (last accessed 15 October 2021).



**List of abbreviations**

CoE	Council of Europe
EASO	European Asylum Support Office
EC	European Community
ECHR	European Charter of Human Rights
EctHR	European Court of Human Rights
EU	European Union
EU Charter	European Union Charter of Fundamental Rights
HCCH	Hague Conference on Private International Law
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UNCRC	1989 United Nations Convention on the Rights of the Child
UNICEF	United Nations Children's Fund

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United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entered into force on September 2, 1990

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