The best interests of the child: a right, a principle and a rule of procedure

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“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

UN Convention on the Rights of the Child (art. 3, para. 1)

1. Article 3, paragraph 1, of the Convention on the Rights of the Child of 20 November 1989 (Hereafter “The Convention”) gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of the fundamental values of the Convention. The Committee on the Rights of the Child (Hereafter “the Committee”) has identified article 3, paragraph 1, as one of the four general principles of the Convention for interpreting and implementing all the rights of the child.

2. The concept of the “child’s best interests” is already enshrined in many other international instruments, including the Hague Conventions adopted by the Hague Conference on Private International Law dedicated to the protection of children.

- So it is for example of the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hereafter “The 1993 Hague Convention”), designed to regulate intercountry adoption and providing in its

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1 The Committee’s general comment No. 5 (2003) on the general measures of implementation of the Convention on the Rights of the Child, para. 12; and No. 12 (2009) on the right of the child to be heard, para. 2.
preamble “…the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights,…” and announcing the desire to establish common provisions to this effect, “…taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989,…". Article 4 of the 1993 Hague Convention provides also that “An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –
a) have established that the child is adoptable;
b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests; …”.

- So it is also of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (Hereafter “The 1996 Hague Convention”) which preamble states: “…Confirming that the best interests of the child are to be a primary consideration…”.

3. The Convention also explicitly refers to the child’s best interests in other articles: article 9: separation from parents; article 10: family reunification; article 18: parental responsibilities; article 20: deprivation of family environment and alternative care; article 21: adoption; article 37(c): separation from adults in detention; article 40, paragraph 2 (b) (iii): procedural guarantees, including presence of parents at court hearings for penal matters involving children in conflict with the law. Reference is also made to the child's best interests in the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography (preamble and art. 8) and in the Optional Protocol to the Convention on a communications procedure (preamble and arts. 2 and 3).

4. As recalled by the Committee on the Rights of the Child (Hereafter “The Committee”) in its 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)”, “…the concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child”. The full application of the concept of the child’s best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity”.

2 Adopted by the Committee at its sixty-second session (14 January – 1 February 2013).
3 Ibid. Paras. 3-4.
(I) The best interests of the child: a right, a principle and a rule of procedure

5. According to the Committee, the child's best interests is a threefold concept:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.

(II) The child’s best interests and the right to be heard (art. 12)

6. Assessment of a child’s best interests must include respect for the child’s right to express his or her views freely and due weight given to said views in all matters affecting the child. This is clearly set out in the Committee’s general comment No. 12 on “The right of the child to be heard”\textsuperscript{4}, which also highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child’s best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. According to the Committee, “…Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3,

\textsuperscript{4} CRC/C/GC/12, 20 July 2009.
paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives.\(^5\)

7. The evolving capacities of the child (art. 5) must be taken into consideration when the child’s best interests and right to be heard are at stake. The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing.\(^6\)

8. The Committee recalls also that article 12, paragraph 2, of the Convention provides for the right of the child to be heard, either directly or through a representative, in any judicial or administrative proceeding affecting him or her. Any decision that does not take into account the child’s views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests. The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child’s views in determining his or her best interests. The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must be subject to an individual assessment which assures a role to the children themselves in the decision-making process, and the provision of reasonable accommodation\(^7\) and support, where necessary, to ensure their full participation in the assessment of their best interests.

9. A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.

10. Where the child wishes to express his or her views and where this right is fulfilled through a representative, the latter’s obligation is to communicate accurately the views of the child. In situations where the child’s views are in conflict with those of his or her representative, a procedure should be established to allow the child to approach an authority to establish a separate representation for the child (e.g. a guardian ad litem), if necessary.

\(^5\) General comment No. 12, Paras. 70-74.
\(^6\) Ibid., para. 84.

\(^7\) See Convention on the Rights of Persons with Disabilities, art. 2: "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure [...] the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.
(III) Elements to be taken into account when assessing the child's best interests

11. In addition to the right of the child to be heard, the Committee considers that the elements to be taken into account when assessing and determining the child’s best interests, as relevant to the situation in question, are in particular as follows:

(a) The child’s identity

12. Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child’s best interests.

13. Regarding religious and cultural identity, for example, when considering a foster home or placement for a child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background (art. 20, para. 3), and the decision-maker must take into consideration this specific context when assessing and determining the child's best interests. The same applies in cases of adoption, separation from or divorce of parents. Due consideration of the child's best interests implies that children have access to the culture (and language, if possible) of their country and family of origin, and the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country (see art. 9, para. 4).

14. Although preservation of religious and cultural values and traditions as part of the identity of the child must be taken into consideration, practices that are inconsistent or incompatible with the rights established in the Convention are not in the child's best interests. Cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions and cultural values that deny the child or children the rights guaranteed by the Convention.

(b) Preservation of the family environment and maintaining relations

15. The Committee recalls that it is indispensable to carry out the assessment and determination of the child’s best interests in the context of potential separation of a child from his or her parents (arts. 9, 18 and 20). It also
underscores that the elements mentioned above are concrete rights and not only elements in the determination of the best interests of the child.

16. Preventing family separation and preserving family unity are important components of the child protection system, and are based on the right provided for in article 9, paragraph 1, which requires “...that a child shall not be separated from his or her parents against their will, except when [...] such separation is necessary for the best interests of the child”. Furthermore, the child who is separated from one or both parents is entitled “...to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests” (art. 9, para. 3). This also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.

17. Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child. Before resorting to separation, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family’s capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents.

18. The Guidelines for the Alternative Care of Children\(^8\) aims to ensure that children are not placed in alternative care unnecessarily; and that where alternative care is provided, it is delivered under appropriate conditions responding to the rights and best interests of the child. In particular, “financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care [...] but should be seen as a signal for the need to provide appropriate support to the family” (para. 15).

19. Likewise, a child may not be separated from his or her parents on the grounds of a disability of either the child or his or her parents.\(^9\) Separation may be considered only in cases where the necessary assistance to the family to preserve the family unit is not effective enough to avoid a risk of neglect or abandonment of the child or a risk to the child’s safety.

20. In case of separation, the State must guarantee that the situation of the child and his or her family has been assessed, where possible, by a multidisciplinary team of well-trained professionals with appropriate judicial

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\(^8\) General Assembly resolution 64/142, annex.

\(^9\) Convention on the Rights of Persons with Disabilities, art. 23, para. 4.
involvement, in conformity with article 9 of the Convention, ensuring that no other option can fulfil the child’s best interests.

21. When separation becomes necessary, the decision-makers shall ensure that the child maintains the linkages and relations with his or her parents and family (siblings, relatives and persons with whom the child has had strong personal relationships) unless this is contrary to the child’s best interests. The quality of the relationships and the need to retain them must be taken into consideration in decisions on the frequency and length of visits and other contact when a child is placed outside the family.

22. When the child’s relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.

23. The Committee is of the view that shared parental responsibilities are generally in the child’s best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child’s best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case.

24. The Committee encourages the ratification and implementation of the conventions of the Hague Conference on Private International Law, which facilitate the application of the child’s best interests and provide guarantees for its implementation in the event that the parents live in different countries.

(IV) Procedural safeguards to guarantee the implementation of the child’s best interests

25. To ensure the correct implementation of the child’s right to have his or her best interests taken as a primary consideration, some child-friendly procedural safeguards must be put in place and followed. As such, the concept of the child's best interests is a rule of procedure (see para. 6 (b) above).

26. While public authorities and organizations making decisions that concern children must act in conformity with the obligation to assess and determine the child’s best interests, people who make decisions concerning children on a daily basis (e.g. parents, guardians, teachers, etc.) are not expected to follow strictly this two-step procedure, even though decisions made in everyday life must also respect and reflect the child’s best interests.

27. States must put in place formal processes, with strict procedural safeguards, designed to assess and determine the child’s best interests for decisions affecting
the child, including mechanisms for evaluating the results. States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children.