

# **The Best Interests of the Child**

## **Literal Analysis, Function and Implementation**

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# The Best Interests of the Child

## Literal Analysis, Function and Implementation

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## **I. Introduction**

The Convention on the Rights of the Child (hereinafter CRC) is not a neutral text simply enumerating a list of rights. Without doubt, the Convention is the enumeration of those rights to which the child is entitled, **but it is also much more than this**. The CRC creates a new democratic dynamic. In the past, the child, as described by the Geneva Declaration (1924) and the Declaration on the Rights of the Child (1959) was seen as an object in need of attention and protection. Since the promulgation of the CRC in 1989, however, the child has been understood to be a **subject of rights**. The near-universal ratification of this human rights instrument lends significant force to the new status of the child. This latter statement is not a rhetorical declaration. Through different principles and articles, the CRC has established this concept of the child as a subject of rights.

The foundation of this new juridical position lies, in my opinion, in two interdependent articles; Article 3 (the best interests of the child) and Article 12 (the views of the child), which together recognize the right of the individual child to express her/his opinions in all matters affecting her/him.

These two articles are considered to be two of the four general principles of the Convention, but are, first and foremost, distinct individual rights:

- The right to have her/his best interests evaluated; and
- The right to be heard and to have her/his opinion taken into account.

These rights are not only available to every single child, but are also extended to children as a group of human beings defined according to their age (under the age of 18 as provided by the Convention on the Rights of the Child). Articles 3 and 12 are the “clé de voûte” of this challenging posture.

20 years after the United Nations promulgated the Convention, many questions remain unanswered regarding the actual impact of this newly recognized status of the child at the national level, in relevant legislation and in various other settings.

The purpose of this presentation is to concentrate on the first of these two articles – Article 3 (the best interests of the child). Our objective is to analyze the content and functions of Article 3 and to highlight the linkages with Article 12 in order to answer this difficult question: Are Articles 3 and 12 in diametric opposition or are they complementary provisions?

In fact, the UN Committee on the Rights of the Child faces a difficult task under its monitoring mandate: how to resolve the tension raised by Article 3 (which could be interpreted as a “welfare” article and is based on an idea of dependency and vulnerability of the child/children and the necessity of protective measures) and Article 12 (a participative article that is based on the idea of the capacities and competencies of the child and the importance of her/him having the opportunity to influence relevant decisions related to her/his life). The answer is most likely to be found in the “rights-based approach,” or in giving effect to the obligations deriving from the position of the child/children as effective and substantive rights-holders.

We all know that implementation of the Convention at the national level requires enormous and systematic efforts to ensure that the Convention's principles and provisions positively change attitudes and activities that affect the enjoyment of rights by all groups of children. As a first step, this new recognition of the rights of the child must be understood and adopted by the public at large. I also anticipate that "professionals," i.e. individuals working with or for children, will begin to utilize this new approach in situations where a child retains "the right to..." rather than simply maintaining a traditional attitude of protection. Furthermore, politicians, decision-makers, judges, magistrates and high-level officers responsible for administrative decisions must opt for and adopt this view of a child where her/his interests need to be heard and considered in matters affecting their own lives. It is for these reasons that I wish to shed some light on this somewhat difficult Article of the CRC.

## **II. The general principles of the Convention on the Rights of the Child**

### a) A small revolution

The CRC dedicates particular attention to the **protection** of children. In this sense, it takes up well-known principles such as protection from abuse, work,<sup>1</sup> and sexual exploitation. While developing some of these principles, the Convention simultaneously introduces protection into a number of new domains, namely: prevention of torture, the involvement of children in armed conflict, drug trafficking and consumption of narcotics, unjustified privations of freedom, and separation from parents without due cause. The promulgation of two optional protocols to the Convention in 2000, one on children in armed conflict and the other on sexual exploitation, trafficking and use of children in pornography, further emphasizes this protective aspect.<sup>2</sup>

Where the CRC really destabilizes all certainties of adults is with regard to the issue of **participation**. It is here where, in my opinion, the main advancements of this text reside. It actually confers a new status on the child who is no longer only provided with services or in need of protection, but someone who must be called upon to participate in decision-making processes related to her/his life and whose perspective must be noted and heard.

This is the most spectacular innovation of the CRC, since it introduces the concept that the child, in accordance with her/his development (art 5. CRC, notion of *evolving capacity*), age and maturity, has the right to participate in the life of her/his family, school, training centre and the larger community. In this sense, **the child is no longer a passive member who must only be cared for; s/he now has the possibility of becoming an active participant in her/his own life.**

### The basic mechanisms of the Convention

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<sup>1</sup> For example, ILO Convention No. 182 Concerning the prohibition and immediate action for the elimination of the on the worst forms of child labour (1999).

<sup>2</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and pornography, entered into force on 18.01.2002 and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, entered into force on 12.02.2002.

As outlined in its General Comment No. 5,<sup>3</sup> the CRC Committee has identified four articles that should be considered as “general principles” and taken into account in the implementation of all other articles of the Convention. I have many times described these “dispositions générales” as the primary **keys which turn the locks of the CRC system.**

1. **“Article 2: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind.”** This non-discrimination principle is a general principle of all human rights provisions and is part of every international human rights instrument. This obligation requires that States parties actively identify individual children and groups of children whose rights may require special measures. Here, I would like to draw attention to the Human Rights Committee’s General Comment No. 18 on discrimination which obligates States parties to undertake special measures in order to diminish or eliminate conditions that cause discrimination.<sup>4</sup>

2. **“Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children.”** This article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” The principle requires that active measures be undertaken at all levels of Government, by parliaments and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions.

3. **“Article 6: the child’s inherent right to life and States parties’ obligation to ensure to the maximum extent possible the survival and development of the child.”** The Committee expects States parties to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.” The primary aim of this article is to promote and ensure the harmonious development of every child.

4. **“Article 12: the child’s right to express his or her views freely in “all matters affecting the child,” those views being given due weight.”** This principle highlights the role of the child as an active participant in the promotion, protection and monitoring of her or his rights. It requires that States parties put in place facilitative mechanisms that are appropriate to hearing the views of the child. There is also an obligation on decision-makers to give due weight to the opinion(s) of the child and recognizing that the child can and should have a direct influence (in accordance with their age and maturity) on her/his future.

To these concepts, we must add the concept of the evolving capacity<sup>5</sup> of the child, provided in Article 5 of the Convention. Through this provision, the CRC has established this sometimes “forgotten” concept; one that does not perceive the child

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<sup>3</sup> General Comment No. 5 (2003), General measures of implementation for the Convention on the Rights of the Child (CRC/GC/2003/5), para. 12.

<sup>4</sup> Human Rights Committee, General Comment No. 18 (1989), HRI/GEN/1/Rev.6, pp. 147 et seq.

<sup>5</sup> Landsdown, G., The evolving capacity of the child, Innocenti Centre, Firenze, 2004.

as merely an adult in miniature, but as a human being in development in need of different degrees and levels of guidance, protection, provisions and participation at different stages of her/his life.

Article 5 stresses that the child has a right to direction and guidance from her/his parents, legal guardians, members of the extended family or their community, as provided for by local custom. As clearly stated in this Article, direction and guidance should be given to the child to compensate for her/his lack of knowledge, experience and understanding and be restricted according to the evolving capacities of that child.

In other words, the more the child knows, experiences and understands, the more parents, legal guardians or other persons legally responsible for the child must limit their directions and guidance. What is very interesting here is that as the child develops, her or his level of dependence recedes in direct proportion with the inverse growth of their level of autonomy.

The above-noted articles can be considered as **procedural rights**. In this sense, they establish the numerous stages that need to be passed to ensure that any decisions undertaken with a view to implementing the Convention fully respect the spirit and wording of the substantive rights of the child.

In the following section, I would like to concentrate on and develop the principle of the "best interests of the child."

### **III. The Best Interests of the Child (Article 3)**

In unpacking the concept of the interests of the child, we know that "the *best interests*" phrase was only recently introduced into Western legal systems. The earlier conception of "the well-being of the child" evolved into the "best interests" principle which is now found in Article 3 (1) of the CRC. It is therefore a thoroughly modern legal concept which has not yet been the subject of comprehensive study. As its contents remain rather vague and its potential functions are multiple, the application of this concept is more appropriately suited to precise issues or systematic elaboration in jurisprudence. It must be "allow[ed] the right to adapt to the concrete demands of life..."

In the following section, I will examine the best interests of the child principle as it is defined by the Convention, the larger meaning of this concept and what I refer to as a literal analysis.

#### **a) The best interests of the child: the concept and a literal analysis**

##### **Concept**

Article 3 (1) of the CRC is the basis for the principle of the best interests of the child:

*"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."*

The concept of the best interests of the child is found throughout the Convention, providing States parties with numerous obligations to consider the best interests of individual children in relevant decision-making processes, above all in family law:

- Article 9: separation from parents;
- Article 18: parental responsibilities for their children;
- Article 20: deprivation of family environment; and
- Article 21: adoption.

...and in relation to juvenile justice:

- Article 37 (c): separation from adults in detention; and
- Article 40 (2)(b)(iii): presence of parents at court hearings for penal matters involving a juvenile.

It is also worth noting that this concept has been introduced in other international instruments, including the UN Convention on the Rights of Persons with Disabilities (art. 23 (2)) and The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (art. 4 (b)).

The “best interests of the child” is a fundamental legal principle of interpretation developed to limit the extent of adult authority over children (parents, professionals, teachers, medical doctors, judges, etc.). The principle is based upon the recognition that an adult is only in a position to undertake decisions on behalf of a child because of the child’s lack of experience and judgement.

This principle derives from the Welfare System (or Protective system) that developed at the beginning of the 20th century and has been transformed by the UN Convention on the Rights of the Child into a rule that can be applied to determine if a State, through its decision-makers, has acted proportionally and appropriately when considering the best interests of the child. This in turn places significant emphasis on the right of the child to exercise her or his right to freedom of expression and to have her or his wishes heard and considered.

According to the Implementation Handbook of the CRC, “The 1959 Declaration of the Rights of the Child first incorporated this concept in Principle 2 which asserted: “The child shall enjoy special protection, in the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.”<sup>6</sup>

*“The principle is included in two articles of the 1979 Convention on the Elimination of All Forms of Discrimination against Women: Article 5(b) requires States parties to that Convention to “ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of children is the primordial consideration in all cases.”*

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<sup>6</sup> Implementation Handbook for the Convention on the Rights of the Child, 3d revised edition, UNICEF 2007, p. 35.

Similarly, Article 16 (1)(d) provides that in all matters relating to marriage and family relations, “the interests of the children shall be paramount.”<sup>7</sup>

This provision, if we analyze it as a whole, does not include any particular explanation of its application, fix any particular duty, or state precise rules. It instead outlines a principle:

*"The best interests of the child shall be a primary consideration."*

I believe we can ascribe two meanings to this expression. First, this concept is a **rule of procedure**: whenever a decision is to be taken that will affect a specific child or a group of children, the decision-making process must carefully consider the possible impacts (positive and negative) of the decision on the child/children concerned, and must give this impact primary consideration when weighing the different interests at stake. However, this is simply a procedural rule. Article 3 (1) imposes the introduction of this step in the decision-making process, but does not impose a particular outcome.

Second, the best interest principle is also one of **the foundations for a substantive right**: the guarantee that this principle will be applied whenever a decision is to be taken concerning a child or a group of children. States parties have an obligation to put in place mechanisms that will facilitate consideration of the best interests of the child, and must provide legislative measures to ensure that those with the authority to make decisions regarding children (judges, for example) must consider the “best interests” rule as a matter of procedure.

**The right to have one's best interests considered does not exist.** In reality, no one knows with certainty what are the best interests of a particular child or group of children. Best interests need to be assessed by decision-makers as part of a process where rules of procedure will be applied. The only input that a State party should have regarding a decision is in relation to the decision-making process itself.

However, it is clear that the best interests principle must respect:

- The importance of every child as an individual with opinions;
- The short-, medium- and long-term perspectives of the life of the child, bearing in mind that the child is a human being in development;
- The global spirit of the CRC; and
- An interpretation that is not “culturally relativist” or denies other rights of the CRC, for example, the right to protection against harmful traditional practices and corporal punishment.

This is particularly clear in General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.<sup>8</sup> The Committee explains:

*“When the Committee on the Rights of the Child has raised eliminating*

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<sup>7</sup> ibidem.

<sup>8</sup> General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (###), para. 2.

*corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of 'reasonable' or 'moderate' corporal punishment can be justified as in the 'best interests' of the child. The Committee has identified, as an important general principle, the Convention's requirement that the best interests of the child should be a primary consideration in all actions concerning children (Article 3 (1)). The Convention also asserts, in Article 18, that the best interests of the child will be parents' basic concern. But interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity."*

### **Literal analysis**

Let us try to see the issue a little more clearly by analyzing the individual elements of this article.

#### **Article 3, paragraph 1**

***"In all actions concerning children."***

In this sentence, we may begin by noting the use of the plural (children) in contrast to the more common use of the singular when referring to the "...interests of the child."

From the grammatical point of view, it is clear that the drafters of the Convention intended that all decisions affecting children would be undertaken with the systematic consideration of the interest of the child as a general criterion. In this sense, the use of the singular would have been more restrictive. Interestingly, the French version of the Convention uses the singular: "l'intérêt supérieur de l'enfant" and the Spanish version does the same: "el interés superior del niño." What are we to conclude from this divergence?

For the Committee, it seems clear that this obligation to consider the best interests applies equally both to the individual child and to children who form groups, or children "in masse."

As an example of this position, we can read what the Committee has written in its General Comment No. 7 on implementing child rights in early childhood.<sup>9</sup>

*"a) Best interests of individual children. All decision-making concerning a child's care, health, education, etc. must take account of the best interests' principle, including decisions by parents, professionals and others responsible for children. States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts*

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<sup>9</sup> General Comment No. 7 (2005), Implementing child rights in early childhood (CRC/C/GC/7/Rev.1), para. 13.

*for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences; and*

*(b) Best interests of young children as a group or constituency. All law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests' principle. This includes actions directly affecting children (e.g. related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g., related to the environment, housing or transport)."*

**"All actions"** is also a very general concept which defines, in my opinion, all interventions regarding children, both active interventions as well as decisions not to intervene. We note a slight difference between the French version (which refers to all the decisions), the Spanish version (en todas las medidas concernientes a los niños) and the English version (all actions). In the drafting discussions that took place around the adoption of Article 3, there was a proposal to include the English qualifier "official" to refer only to official interventions undertaken by authorities (legal, administrative, legislative) and not private authorities (such as parents or guardians).

But in the final reading of the text, it is evident that this proposal was not accepted. We must now ask the question: does Article 3 of the CRC in fact extend to interference in the parental sphere through application of the best interests principle?

We may be justified in believing that in family interventions, the same principle should apply when making decisions. In my opinion, the drafters, having respect for the principle established in Article 5 of the CRC, did not want to enter the family sphere in order to underline the primary responsibility of parents; and also to ensure that this great general principle would be accepted by all. This, however, should not be understood to **exclude the application of the 'best interests of the child' principle in domestic situations**. Indeed, it would be incomprehensible that only public authorities should be held to this principle, and that families would not be equally obliged to adhere to it. Hence, the general principle applies to and covers both spheres.

Another response to this question may be found in Article 18 (1) of the CRC which imposes on parents and guardians an explicitly worded "guideline" that the principle of the best interests of the child should be followed when raising a child to ensure her or his development. According to this article, *"the best interest of the child will be their (parents) basic concern."*

**"Undertaken by public or private social welfare institutions, courts of law, or administrative authorities and legislative bodies"**: I understand this phrase to mean that the legal and administrative authorities must apply this principle in all their decisions and it is the criterion to which they must subject all cases which come before them for review. This sentence therefore establishes an obligation on States parties to examine, through their decision-makers, if the best interest of a child has been guaranteed in all relevant decisions. This is otherwise a right attributed subjectively, and is at the very least a guarantee offered to children.

What is very interesting in this sentence, relative to the drafting of the text in 1981 is

that the drafters added the term "**legislative bodies**." This small addition is of crucial importance. It means that when a law is being drafted, the State, whether at the national, regional, cantonal or municipal level, must ensure that children are taken into account and that their best interests are balanced with other possibly competing interests. Hence, with the inclusion of these two small words (legislative bodies), the CRC introduces a set of clear responsibilities of States parties in all dimensions, political or macro-societal, towards children.

Consequently, the best interests of the child principle takes on a new function wherein the best interests principle should be used to measure the potential positive and negative impacts on children of relevant legal instruments, legislative or policy measures. "Consideration of the best interests of the child should be built into national plans and policies for children and into the workings of parliaments and government..."<sup>10</sup>

In its General Comment No. 5 on general measures of implementation, the CRC Committee tackles this issue:

*"Every State should consider how it can ensure compliance with Article 3 (1) and do so in a way which further promotes the visible integration of children in policy-making and sensitivity to their rights."<sup>11</sup>*

Use of the term, "**Public or private social welfare institutions**" in the CRC means that the drafters intended to underscore the obligation of the entire sector of professionals and services that work with or on behalf of children. Emphasizing the importance of observing this principle is as important and relevant for official bodies (official child welfare services, state institutions, as well as educational and medical services), as it is for the private sector.

We know the historical importance of private organizations in child welfare; and we know the services provided by innumerable associations, foundations, and NGOs who assume responsibility for children (nutrition, schooling, care, reintegration). However, we are also aware that some movements **professing sectarian ideologies** may **use children to the detriment of their rights and interests**. It is therefore critical to also subject the entire private sector to this principle.

**"The best interests"**: let us begin by underlining the particular importance of the qualifier "best." At the time of drafting, some criticism developed around the use of this superlative, arguing that "the best interests" ("best" or "superior" "el interés superior del niño" according to the French and Spanish versions) meant that in all circumstances, the interest of the child would supercede any other interests.

According to a literal interpretation of this theory, the child would be considered an exceptional being who would inevitably be in the right in any conflict with adults or other social bodies. **Clearly**, this position is untenable and certainly was not an intention of the drafters. If, for example, we again consider Article 3 (1) in relation to Article 5, it is evident that the child is not considered to be an individualized person to

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<sup>10</sup> Implementation Handbook, op. cit, p. 36.

<sup>11</sup> General Comment No. 5 (2003), General measures of implementation for the Convention on the Rights of the Child, (CRC/GC/2003/5), para. 47.

the extreme, but is a member of her or his family and community, and therefore, an integral part of the State.

Taken together, "best" and "interests" simply mean that **the ultimate goal should be the "well-being" of the child, as defined throughout the Convention, particularly in the Preamble** and in Article 3 of the CRC. Paragraphs 2 and 3 of Article 3 of the CRC provide the clearest explanation of the best interests principle:

*"Paragraph 2: States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."*

*"Paragraph 3: States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision)."*

**"Shall be a primary consideration."** This general concept of best interest does not suffice on its own; it must be qualified with another rule of criterion. Specifically, the best interests of the child should be a paramount consideration. What does this expression mean? If we undertake another literal analysis, we realize that this text refers to **"a primary consideration"** (a paramount consideration) and not **"the primary consideration."** It is a subtle, but highly relevant nuance!

Indeed, **this nuance** means that in situations where a decision-maker (judiciary, administration, legislator) is required to render a decision, particular importance must be attached to the best interests of the child. Consideration must also be given to all possible impacts of the decision on the child or group of children in question. That said, this interest will not necessarily usurp all the other interests in a case (for instance of the parents, other children, adults, public services or the State). This terminology implies that the best interests of the child will not always be the single, overriding interest and that there may be other competing interests at stake. "The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration."<sup>12</sup>

Does the article **"a"**, used in place of "the", weaken the principle? In my opinion, no. Rather, it puts the best interests principle in its rightful place since it establishes the obligation to consider, in all decisions, the best interests of the child. It is not a choice to give effect to this principle. It is an obligation.

This criterion, then, enters into competition with other criteria of value. It is the showcasing of several interests which necessitates the application of the best interests principle as one of the criterion that must be considered when weighing the relative merits of possibly divergent interests.

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<sup>12</sup> Implementation Handbook, op. cit., p. 38.

It would not be desirable for the interest of the child to be superior to all other interests. That would establish a republic of children - not in the sense that Korzack understood it - but would result in placing the child on a symbolic pedestal. Such a situation would endanger the existing protections to which each child is entitled and could cause irredeemable damage to enjoyment of the rights of the child.

Nevertheless, we must mention that, in at least two particular situations, the drafters of international human rights instruments have used “the” when referring to the paramountcy of the best interests of the child:

Article 21 of the CRC reads: States parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...

Article 23 (2) of the UN Convention on the Rights of Persons with Disabilities reads:

*“States parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount. States parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.”*

In these cases, the best interests of the child become the sole determining factor when considering a solution, or as was noted by Van Bueren “...in certain circumstances, such as adoption or for children living with disabilities, the higher standard is applicable.”<sup>13</sup>

### **Article 3, paragraphs 2 and 3**

**Paragraph 2:** *“States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or others legally responsible for him or her...”*

This paragraph provides that States parties must ensure that necessary protection and care is available for all children in their territory irrespective of their nationality and status, while also taking into account the rights and duties of parents and others legally responsible for the child. The importance of paragraph 2 (along with paragraph 3) pertains to a general principle and to the idea and ideal of the “well-being” of the child, but not to the concept of the best interests procedural rule.

It also “constitutes an important reference point in interpreting the general or overall obligations of Governments in the light of the more specific obligations contained in the remaining parts of the Convention.”<sup>14</sup>

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<sup>13</sup> Van Bueren, G., Pushing and pulling in different directions – The best interests of the child and the margin of appreciation of States, in *Child Rights in Europe*, Council of Europe 2007, p. 32.

<sup>14</sup> Implementation Handbook, op.cit., p. 40.

The verb used to describe the obligation ('to ensure') is very strong and encompasses both passive and active (including pro-active) obligations. The terms 'protection and care' must also be read expansively, since their objective is not stated in limited or negative terms (such as 'to protect the child from harm'), but rather in relation to the comprehensive ideal of ensuring the child's 'well-being'..."<sup>15</sup>

When subjected to a practical test, for instance, asking a State party how it can fulfil these obligations towards children in cases of economic crisis, environmental disasters or climate change without international cooperation, we see that the well-being of the child is at risk of being little more than an ideal.

**Paragraph 3:** "*Institutions, services and facilities for care or protection of children must conform with established standards.*"

With this paragraph, we touch on the obligation of establishing standards for institutions, services and facilities for children in the creation and operation of inspection mechanisms and of the State party to ensure that the standards are respected.

"Other articles refer to particular services that States parties should ensure are available; for example "for the care of children" (under Article 18 (2) and (3)), alternative care provided for children deprived of their family environment (Article 20), care for children with disabilities (Article 23), rehabilitative care (Article 39) and institutional and other care related to the juvenile justice system (Article 40). There should also be health and educational institutions providing care or protection."<sup>16</sup>

Here, I would like to mention a new initiative that is underway. It is a pan-European project entitled "Quality4Children" that has been launched by three major international organisations working in the field of out-of home care for children. The project is aimed at guaranteeing and improving the chances of development of hundreds of thousands of children and youths in Europe who are not being raised by their biological parents and establishes a set of quality standard guidelines that must be adhered to in providing home-based care to children.<sup>17</sup> Connected with this project is a set of quality standard guidelines entitled "Guidelines for children deprived of parental care" that has been adopted by the General Assembly.

### **"Best interest " and other articles of the CRC**

As noted above, the best interests of the child principle is promulgated by Article 3 (1). This expression is, however, also included in a number of other articles of the Convention as a reference point that must be considered in particular situations.

**Article 9:** establishes this principle in relation to the **right of the child to live**

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<sup>15</sup> Alston, Philip, "The legal framework of the Convention on the Rights of the Child", *Bulletin of Human Rights*, 91/2, p. 9.

<sup>16</sup> Implementation Handbook, op. cit, p. 41.

<sup>17</sup> [http://www.quality4children.info/navigation/cms,id,2,nodeid,2,\\_language,en,\\_country,at.html](http://www.quality4children.info/navigation/cms,id,2,nodeid,2,_language,en,_country,at.html)

<sup>18</sup> Draft UN Guidelines on the Appropriate Use and Conditions of Alternative Care for Children, available at <http://www.crin.org/NGOGroup/childrightsissues/WithoutParentalCare/>

**with her or his parents.** This seems a very important principle for the child, as well as for the family. In Article 9 (1), the CRC recognizes that a child and her/his parents may become separated as the result of an official decision and that such decisions must take into account **the best interests of the child.** These cases often involve situations of abuse within the family including active abuse, as well as passive abuse such as being left unattended or other forms of negligence. Furthermore, Article 9 (3) provides that the child must maintain personal relationships and direct contact with both parents unless this **threatens the best interests of the child.** This may include situations of open conflict between the child and one or both parents or to situations similar to those described in paragraph 1.

**Article 18:** establishes a principle according to which both parents must be involved with the education of the child. This is called the common responsibility for education. In paragraph 1 of this provision, the last sentence states: **“The best interests of the child will be their basic concern.”**

**Article 20:** provides that the child who is deprived of his family environment shall be entitled to special protection and assistance provided by the State, in particular to ensure the availability of alternative care (adoption, placement or kafalah). Paragraph 1 refers to the child who, in her or his own interest, cannot be left in their family environment and therefore is in need of assistance from the State. We are not referring to the best interest of only that particular child, but simply, the **interest** of the child.

**Article 21:** foresees situations where the child, deprived of her or his family environment, will receive alternative care in the form of adoption (national or international). In these cases, the State party must provide the child with special assistance and protection and ensure that the appropriate procedures are in place to give full effect to this principle, in particular to avoid abuse. In paragraph 1, it is clearly indicated that at the time of the adoption procedure (including the choice of parents to entrust the child to the adoption authorities, the adopting choice of parents and recourse to intermediaries etc.), it is **the best interests of the child** which must take precedence and be the deciding factor in determining the best solution.

**Article 37:** refers to general principles which should govern the administration of juvenile justice, in particular, the exclusion of torture, punishment or other forms of inhuman treatment and the prohibition of capital punishment. This article also establishes minimal rules of procedure that must be respected by judicial bodies, specialized where possible, for juveniles in conflict with the law. Article 37 (c) imposes an obligation that the child must be treated with humanity and if the child is deprived of her or his freedom, s/he must be detained separately from adults, unless being detained with adults is found to be preferable for upholding **the best interests of the child.** This may be the case if a young child is imprisoned with one of her/his parents, including a child born to a woman serving a prison sentence.

**Article 40:** is the continuation of Article 37 with regards to juvenile justice, but further elaborates the rights of children when they come into conflict with the

law and/or must appear before a judicial body. Paragraph 2 (b)(iii) provides that when a child is heard by an official authority, s/he must be questioned according to established procedural rules, including with the assistance of counsel (lawyer) or other appropriate assistance, and the presence of her/his parents, unless **these actions are considered to be in opposition to the best interests of the child**. This may be the case where the child has been a victim of one of both of the parents or possibly involved in the commission of offences.

We realize that with the enumeration of these above-noted specific rules, the principle of **the best interests of the child is a general principle which must be applied in all activities related to implementation of the Convention**. We must apply it in a specific manner, however, in cases where it is necessary to justify the exception to a recognized right; particularly when altering so-called "natural" relationships between parents and children. When severing or suspending these relationships (in cases of adoption, placements, loss of freedom); a decision to remove a child from their home and/or family must always respect this principle. In these cases, the individual interest of the child must supercede the interest of the family (to have a relationship with her/his child) and the State (to ensure the stability of families).

The foregoing discussion reaffirms the position that the rights of the child are not superior to the rights of other members of society, except in specific situations where the individual interest (for example, to no longer have a relationship between a child and her/his parents) precedes the collective interest (for example, the principle that relationships must continue between parents and children).

## **b) The best interests of the child, functions and characteristics**

### **Functions**

The concept of the best interests of the child, as it is defined by the CRC and the Hague Adoption Convention, is a concept that has two "traditional" roles; one that seeks to control and one that seeks solutions (criterion of control and criterion of solution).

Control Criterion: in this criterion, the best interests of the child principle is applied to ensure that the exercise of rights and the obligations towards children have been enabled and fulfilled. This control criterion is exclusively found in family law, child protection services, situations of alternative care and cases of migration. In all these actions or decisions, it is necessary to determine if the best interest issue has been considered.

As stated before, it is also a guarantee available to each individual child, to groups of children, or children "in masse," that the right to have their best interests taken into account in decisions that will affect their lives will be fully realized.

Solution Criterion: in this criterion, the concept of the interest of the child can assist decision-makers in finding the most appropriate decision in cases involving children. Whenever a decision-maker must render this kind of decision, s/he must

systematically look for solutions with the most positive, or least negative impact on the child or children in question. In the majority of cases, there will be a range of possibilities. The solution chosen should then be selected because it is in the “interest of the child.” This is an essential function of the decision-making process because it represents a bridge between a theoretical concept and its direct application in reality.

### **Characteristics**

The concept of the best interests of the child encompasses several characteristics:

1. Contrary to the majority of articles in the Convention, Article 3 (1) **does not constitute a subjective or substantive right *stricto sensu*, but rather institutes a principle of interpretation which must be used in all forms of interventions regarding children and which confers a guarantee to all children** that decisions that will affect their lives will be examined in accordance with this principle of interpretation.

2. This provision imposes an **obligation on States** that the best interest of the child/children must be an immediate consideration during the decision-making process (in all actions).

3. Article 3 (1) cannot be considered in a vacuum. It belongs to a larger entity (the CRC) and establishes a new status on the child as an individual that is a subject of rights. This connection of Article 3 to the rest of the Convention confers a particular dimension on this concept. This is especially the case if we link it to other general principles of the Convention, namely, non-discrimination (Article 2), the right to life and harmonious development (Article 6) and the right of the child to be heard and to have those views considered and duly weighted (Article 12). In addition to the other norms contained in the CRC, it is also essential to consider all the rights of the child. There are other legal bases, both at the international and national levels, that may affect what constitutes the best interests of a child or a group of children in a particular situation. One must, however, take into account that the higher standard of the best interests of the child shall always apply.

4. The concept of the best interests of the child is an unspecified legal concept which must be clarified in practice and should follow internationally accepted procedural rules of application. Jurisprudence will also, through case studies, lead to the development of solutions for individual situations or an entire group of children. This principle must be trusted, accepted and applied by those who must make decisions.

5. The criterion of the best interests of the child is **relative in space and time**. This criterion is relative in time since it is dependent on scientific knowledge about the child and the pre-eminence of such theories in any given time period. It is relative in space, since this criterion should take into account the valid standards present in certain countries. It must be repeated here that the principle of best interests cannot be threatened by arguments of cultural relativism that seek to justify decisions which would negatively impact on

respect for and the enjoyment of the substantive rights of the child/children!

6. When a decision must be reached with regard to a child or children, we must think of *hic* and *nunc*, but also mid- and long-term consequences. By definition, the child is a human being in development. As such, the decision-maker must bear in mind the **concept of mid- and long-term** consequences to ensure that the aims of the application of the best interests principle not only considers a short-term solution, but also takes into account the **interests of the child's future**. Since the child is always evolving, her/his interest should consequently be detached from the law of "everything, immediately," in favour of long-range vision of the future. When we listen to the child's aspirations within the framework of Article 12 of the CRC, we must remain attentive to this aspect of "futurology."

7. The concept of the criterion of the child is **evolutionary, since the projections of knowledge continue to develop and because it has only been twenty years since the adoption of the Convention**. The doctrine and jurisprudence will therefore lead to an undoubted evolution in this concept. In domains where the principle of "best interests" is regularly applied (often in cases relating to marriage, divorce, custody...) we have witnessed a rapid evolution of our sociological situation, which has in turn necessitated a redefinition of the role of parents after divorce and led to legislative adaptations. New situations appear including parental co-responsibility, or shared parental authority (found for example in Swiss legislation). All of these novelties have had a direct impact on children and on their best interests. This has required judges and courts to render their decisions while taking into account new points of view. The principle of "best interests" must continue to be applied when determining the best solution for the child, but the sub-criteria will likely continue to change in a significant manner!

8. Linked to this latter observation is one that the criterion of the interest of the child is **doubly subjective**. First, we have **collective subjectivity**. **This means that** in any given society, at any given moment of its history, there is an image of what the interest of the child is: for example, the education of the child in one religion or another or the refusal of all "excesses" as a religious practice.

In the interest of the child, there is also a **personal subjectivity**. **This personal subjectivity can be further broken down into three levels:**

First, there is the **subjectivity of parents, caregivers, or legal representatives**. What parent does not claim to act in the interest of their child, even when their actions may seem to be motivated by selfish reasons (judges in divorce cases know this all too well)?

Second, there is the **subjectivity of the child/children**. Problems emerge when the child's views or wishes under consideration do not correspond to the view(s) held by the parents (or other adults) regarding a situation or a proposed solution.

Finally, there is **the subjectivity of the judge, or the administrative authority**

invested with the power to make the decision (the decision-makers). While the strength (or risk) of this subjectivity is well-known, in most cases, it will be asserted that the decision was reached based on a "scientific" analysis of the situation.

These characteristics of the interest of the child show both the **flexibility and richness of this criterion as well as its potential and actual weaknesses**. As this concept has not yet been fully defined in a precise manner, particularly in relation to time and space, and in light of the multiple sources of subjectivity, this concept could conceivably void the understanding of children's rights, and may even appear to be counter-productive. In this sense, it may favour the interest of the State or the family to the detriment of the child. As a result, numerous criticisms have been (and continue to be) levelled against the imprecision of these criteria and the vagueness of this concept.

According to Professor Van Bueren: "...a lack of certainty or indeterminacy is inherent in the best interests principle. Indeed, such a lack of certainty, which some may regard as flexibility and as a virtue, is essential in the case-by-case approach, which the best interest standard requires."<sup>19</sup>

In its defence, let us say that this concept has the advantage of being broad and flexible and has the capacity to be adaptive (relative to time and space) to the cultural and socio-economic particularities of various legal systems. It is a universal concept can be applied everywhere and is useful to all. The principle is a practical tool, or in more colloquial terminology, can serve as the **"the jack of all trades"** of the Convention. It is the instrument which provides the link between the theory and the practice.

### c) **Attempts at objectification of the concept**

#### **In general**

To go a step further, it could be useful, in our opinion, to **clarify or supplement** these criteria with rules of application selected from various fields where the best interests of the child are regularly applied. In fact, many attempts have already been made **to clarify, supplement and "objectify" the concept** of the best interests of the child. In **Canada**, the draft amendment to the "Divorce Act" provides that the child's interests should be judged according to the following elements (quoted by N. Bala):

1. the nature, the stability and the intensity of the relationship between the child and each person concerned with the procedure;
2. the nature, the stability and the intensity of the relationship between the child and other members of the family where the child resides or is involved in the care of the child or her/his education;
3. the child's leisure activities;
4. the capacity of each person to offer a framework for life, education and complete care for the child;
5. the child's cultural and religious bonds;
6. the importance and advantages of joint parental authority, ensuring the active involvement of the two parents after separation;

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<sup>19</sup> Van Bueren, G., op. cit, p.36. See also Robert Mnookin, "Child custody adjudication: judicial functions in the face of indeterminacy," *Law and Contemporary Problems*, 1975, p. 226.

7. the importance of the relationship between the child and her/his grandparents or other members of the family;
8. the proposals of the parents;
9. the capacity of the child to adapt her/himself to the parent's views;
10. the capacity of the parents to facilitate and ensure the maintenance of the child's relationships with other members of the family;
11. all previous incidents showing violence by a relative towards the child;
12. the exclusion of preference shown to one parent because of their sex;
13. the demonstrated willingness of each parent to take part in educational meetings; and
14. any other factor that could influence decision-making.

As is evident, it is a long but not exhaustive list. The **14 elements which make up the list are not hierarchically ordered. To date, these points remain largely open and consequently only have a relative influence over the decision-making process**, allow for the possibility of a more concrete approach and offer a working method to better comprehend, *in casu*, the interest of the child. What I believe is missing from this list is the "opinion of the child." In my opinion, this must be the first point to consider when making a decision in the best interests of the child.

Other countries have taken similar steps. In accordance with **England's "Children Act" of 1984**, judges must take into account:

- the views of the child;
- her/his physical, emotional, educational needs;
- the effect of change on the child;
- her/his age, sex and personality;
- the pains which s/he has already suffered or could suffer; and
- the competencies of each of the child's parents to meet the child's needs.

These steps seem to be a particular product of the Anglo-Saxon legal system. From my perspective, it is an attempt to objectivize the concept, understand the contours, eliminate the risks of a snowballing erroneous appreciation of the interest of the child while simultaneously securing the position of judges and those subject to trial.

Admittedly, these tests are imperfect. They nevertheless **act as beacons on a particularly precarious road**. This is of particular importance in the many situations where decisions are not made by magistrates who are accustomed to the existence of sometimes diverging interests, but rather by administrative authorities who are frequently ill-prepared for this difficult exercise. Van Bueren seems to share this point of view:

*"One of the fundamental values of human rights law is certainty, yet because the principle of the best interests of the child is not expressly enshrined in the European Convention the manner in which the principle has been applied by the European Court of Human Rights makes it difficult to determine the weighting of the many components constituting best interests, and when the principle of the best interests will be applied as the overriding principle. To support such a judgement, a comprehensive study under the auspices of the*

*Council of Europe ought to be undertaken, to analyse the constituent elements of best interests relevant to the range of rights protected in the European Convention on Human Rights. Such a study ought to be multidisciplinary, and of sufficient authority to assist both Member States and the European Court of Human Rights in determining the best interests of the child.*<sup>20</sup>

In addition, it also seems necessary to supplement the concept of the interest of the child with **the concept of predictability**. This means taking into account the best interests of the child at the moment when the decision must be made, while also taking into account the various points of view and foreseeable evaluation of the situation of all concerned parties. This is crucial during childhood when situations develop and change quickly and often necessitate immediate action, yet simultaneously preserve the future interests of the child.

Moreover, it is essential that, in cases where the rights of the child may appear to conflict with the rights of others, or, where human, relational and economic issues are at stake, the decision undertaken must be subject **to revision**. Is it perhaps superfluous to say this since it should go without saying?

To conclude this point, let me add the following element. In cases of doubt when determining the best interest of the child during conflicts between competing interests, let us be humble enough to recognize that this subjective concept cannot be easily established by clear elements or stated objectives. Ultimately, it will be supplanted by the inverse notion of causing the "least pain." It is then this new consideration of "how to cause **the least amount of pain possible**" which replaces the conception of the best interest of the child and influences the final outcome. Is this a more objective test or achievable ideal? Perhaps not, but this approach would certainly have the advantage of being less dangerous than our subjective best interest principle.

### **The UNHCR Guidelines on Determining the Best Interests of the Child, as an example of best practice**

*“One of the key priorities of UNHCR (The Office of the United Nations High Commissioner for Refugees) is to protect and promote within its capacity the rights of all children including adolescents.*

*Children have needs and rights in addition to those of adults. Care must be taken to ensure that the specific needs, capabilities, and rights of children – girls and boys of all ages and backgrounds – are perceived, understood and attended to. In carrying out its activities, UNHCR has to be guided by refugee law, international humanitarian law and international human rights law, including the CRC, which has been adopted as a normative frame of reference in relation to its actions on behalf of children.*

*The principle arising from Article 3, that the best interests of the child shall be a primary consideration, should be applied in a systematic manner in any planning and policy-making by the Office that affects a child of concern to*

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<sup>20</sup> Van Bueren, G., op. cit. p. 36.

*UNHCR and must permeate all protection and care issues involving UNHCR.*<sup>21</sup>

The decision of UNHCR to publish these Guidelines stems from an increasing number of situations where staff must determine the best interests of refugee children. Since Article 4 is one of the key provisions of the CRC (ratified by nearly every Government, and evidently by all Governments where the UNHCR is active), there is a growing awareness of the need to adopt the CRC as its “normative frame of reference.” This means that the best interests rule should guide not only the operations and decisions undertaken in the field, but also in the policy-making processes of the Agency.

The Guidelines try to answer questions on individual situations: for example, whether a particular minor should be reunited with her/his parents or should continue living with a foster family. How do we know what the interest of this child is, and how can competing interests be balanced? Or, in the context of a group of unaccompanied refugee children who are awaiting a decision regarding their repatriation: how is it possible to balance the interests of the group, with the interest of the State parties where the children are living?

The purpose of these Guidelines is to give professionals in the field a practical framework that will help them “operationalize” the best interests rule. “[T]his publication offers guidance on how to apply the best interests principle in practice, and defines the three situations in which UNHCR must undertake a BID (best interests determination). These include (i) the identification of the most appropriate durable solution for unaccompanied and separated refugee children, (ii) temporary care decisions for unaccompanied and separated children in certain exceptional circumstances and (iii) decisions which may involve the separation of a child from parents against their will.”<sup>22</sup>

For more specific information on the procedures for making a formal “Best Interests Determination (BID),” please read the UNHCR Guidelines on Determining the Best Interests of the Child, May 2008.

#### **d) Links with Article 12 of the CRC : opposition or complementarity ?**

For me, the similarities between Articles 3 and 12 (the right to be heard and to have that opinion given due weight),<sup>23</sup> are so significant that I often refer to these articles as “the duo.” Actually, the two provisions have the same structure and each one recognizes the same competencies of decision-making authorities that are responsible for decisions regarding a child or group of children, either in accordance with the best interests principle, or with regard to enabling the child or group of children to express an opinion.

#### The same structure

Articles 3 and 12 are built on the same model in which each article

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<sup>21</sup> UNHCR Guidelines on Determining the Best Interests of the Child, May 2008.

<sup>22</sup> UNHCR, op. cit.. 9.

<sup>23</sup> See General Comment No. 12 (2009), The right of the child to be heard, (CRC/C/GC/12).

- Recognizes a subjective right of a child or children to express their views in all decisions that affect them (art. 12) and seeks to ensure that the best interests' principle will be applied in all decisions affecting a child/children (art. 3);
- Obligates decision-makers to take all necessary measures to evaluate the personal condition of every individual child or group of children, in the process they follow to reach a decision;
- Imposes an obligation to apply the principle of individualization (case by case analysis) which is so crucial in children's rights, where every child is recognized as different and in need of tailored solutions;
- Directs the decision-maker to give due weight to both the opinion of the child and the best interests of the child and to consider these two elements as determinant factors in the decision-making process;
- Obliges State parties to legislate in this field and institute specific mechanisms to facilitate hearing and consideration of the views of the child; while also seeking solutions which must respect the best interests of the child/children;
- Obligates decision-makers to consider the child as a person with full entitlement to their rights and sufficient capacities, regardless of age, to participate in the decisions affecting her/him and express her/his own opinions regarding her/his interests.
- **Places primary emphasis on hearing and considering the views of the child, even if other interests must also be considered.**

### **Opposition or complementarity?**

Article 3 of the CRC is commonly recognized as an expression of a protective model wherein the decision-maker undertakes decisions with a view to ensuring the well-being of the child. As noted above, this is a traditional concept borne out of the Welfare System that prevailed for the majority of the 20<sup>th</sup> century. In my opinion, it is impossible to consider Article 3 strictly from this perspective of protection as it disregards the necessity of hearing the views of the child in all decisions affecting her/him.

The link between Articles 3 and 12 is obvious. How could a decision-maker accurately determine the best interests of a child without first asking the child her/his opinion on the matter at hand?

In my opinion, the concept of the right of the child to be heard contained in Article 12 of CRC should be extended to all situations where the best interests principle must be applied. In all of those instances, the child must have the right to express her/his views. Not to do so would be very strange indeed! The child must be consulted in all relevant decisions to the extent that s/he is capable of forming her or his own views,

and that those views be given due weight in accordance with the age and maturity of the child.

The best interest principle of Article 3 (1) is primarily used to determine the best interests of a child in individual cases. Yet, one cannot imagine that the best interests of children as a group are not also considered in all actions concerning children.

*“States parties are consequently under an obligation to consider not only the individual situation of each child when identifying their best interests, but also the interests of children as a group. The extension of the obligation to “legislative bodies” clearly indicates that every law, regulation or rule that affects children must be guided by the ‘best interests’ criterion.”*

*“There is no doubt that the best interests of children as a defined group have to be established in the same way as when weighing individual interests. If the best interests of large numbers of children are at stake, heads of institutions, authorities, or governmental bodies should also provide opportunities to hear the concerned children from such undefined groups and to give their views due weight when they plan actions, including legislative decisions, which directly or indirectly affect children.”<sup>24</sup>*

For me, there is no tension, neither singular nor plural, between Articles 3 and 12, or rather, between the protective approach contained in Article 3 and the participative approach found in Article 12. If it is true that paragraphs 2 and 3 are “protective principles,” it is clear from the analysis above that paragraph 1, along with Article 12, form the foundation of the concept of the child as a subject of rights and the “rights-based approach.” Consequently, the child is no longer merely a human being in need of assistance and protection, but an individual who has something to say and an evolving capacity to influence decisions taken that will impact on her/his interest.

Articles 3 and 12 are complementary. If Article 3 represents a sort of “ideal” we wish to realize (the well-being of the child), Article 12 introduces a method to help facilitate the determination of the best interests: by allowing the child affected by the decisions to express her/his opinion about how to achieve this ideal (their own well-being). In concrete cases that are individually assessed and evaluated, there can be no contradiction since the decision-maker must:

- Hear the views of the child/children regarding the case as well as any and all possible solutions;
- Give due weight to the child’s opinion in determining the best interests of the child/children in a given situation; and
- Reach a decision after having duly weighted the opinion of the child and considered her/his best interests.

### **To summarize:**

The Convention does not explicitly describe how a decision-maker must proceed in determining the best interests of the child. One thing, however, is clear. The decision-

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<sup>24</sup> General Comment No. 12 (2009), The right of the child to be heard (CRC/C/GC/12), paras. 72-73.

maker has an obligation to hear the child if s/he is capable of forming and communicating her or his views in matters that affect her or him. This is a mandatory step for the decision-maker. As noted above, the views of the child are not likely the only competing elements at stake when establishing the best interests of the child. Yet they do represent an important factor in reaching the final decision. In accordance with the age and maturity of the child (and their competence or evolving capacity), the views of the child will be of crucial importance to the decision. This approach has been confirmed by the European Court of Human Rights in a case entitled, *Hokkaen vs Finland*. As noted by Professor Van Bueren: “In particular when considering the best interests of the child, the Court places great weight on the exercise of the child’s right to freedom of expression and the wishes of the child.”<sup>25</sup>

There is no tension between Articles 3 and 12 of the CRC. There is only a complementary role between these two inter-dependent general principles. One establishes the objective for achieving the best interests of the child (art. 3) and the other provides the methodology for realizing the goal of hearing the views of the child/children (art. 12). In fact, there can be no correct application of Article 3 if the components of Article 12 are not also respected.

**Likewise, Article 3 reinforces the functionality of Article 12 and facilitates the participative role of children in all decisions affecting their lives. In this way, Article 3 needs Article 12 while Article 12 serves the interests of Article 3.**

#### **IV. The child’s best interest: measures of implementation**

For the Committee, it goes without saying that the best interests principle obliges States parties to take action in order to implement this concept and to transform it from rhetoric into social reality. As said above, the scope of the principle is wide and surpasses State-initiated actions to also include private bodies, and embraces all actions concerning children as a group. This is a crucial point to underline as there is a common belief that this principle is only relevant for individual cases.

It is worth mentioning that the Committee has stressed the obligations of State parties to undertake the usual measures of implementation. Since the best interest principle may be considered as a rule of procedure and a “passage obligé” for decision-makers, the Committee has emphasized (for example in General Comment No. 5), the importance of legislative measures and the role of the judiciary in this regard, as quoted above (p. 4).

But legislation is not enough. States parties have other obligations, in particular in the fields of data collection, budget allocations, monitoring, dissemination and training, as provided by Article 4 of the CRC and General Comment No. 5. In this regard, the Committee refers to the necessity of building strategies, national plans of action and the allocation of essential financial, technical and human resources.

*“Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3 (1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at*

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<sup>25</sup> Van Bueren, op. cit. p. 35. See also *Hokkanen vs Finland* (1993) 19 EHRR 139, para. 61.

*all levels of Government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into Government at all levels and as early as possible in the development of policy.”<sup>26</sup>*

In taking a step further, the Committee highlights child impact assessments and evaluations:

*“Self-monitoring and evaluation is an obligation for Governments. But the Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions...”<sup>27</sup>*

The Committee has also examined the implementation of the best interests principle in various General Comments. For example, in General Comment No. 7 on early childhood, the Committee stressed a number of necessary measures of implementation in relation to the individual child and groups of children:

*“The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have day-to-day responsibility for realizing children’s rights:*

*(a) Best interests of individual children. All decision-making concerning a child’s care, health, education, etc. must take account of the best interests principle, including decisions by parents, professionals and others responsible for children. States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child’s interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences; and*

*(b) Best interests of young children as a group or constituency. All law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle. This includes actions directly affecting children (e.g. related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g., related to the environment, housing or transport).”<sup>28</sup>*

In General Comment No. 8, the CRC Committee issued a very important statement on corporal punishment and linked it to Article 3 (1) of the CRC:

*“When the Committee on the Rights of the Child has raised eliminating corporal punishment with certain States during the examination of their*

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<sup>26</sup> Idem, para. 45.

<sup>27</sup> Idem, para. 46.

<sup>28</sup> General Comment No. 7 (2005), Implementing child rights in early childhood (CRC/C/GC/7/Rev.1), para. 13.

reports, governmental representatives have sometimes suggested that some level of “reasonable” or “moderate” corporal punishment can be justified as in the “best interests” of the child. The Committee has identified, as an important general principle, the Convention’s requirement that the best interests of the child should be a primary consideration in all actions concerning children (art. 3 (1)). The Convention also asserts, in Article 18, that the best interests of the child will be parents’ basic concern.

*But interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child’s views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.”<sup>29</sup>*

In its General Comment on the rights of children with disabilities (No. 9), the Committee provided that:

*“...Article 3 should be the basis on which programmes and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them.”<sup>30</sup>*

*“The best interests of the child is of particular relevance in institutions and other facilities that provide services for children with disabilities as they are expected to conform to standards and regulations and should have the safety, protection and care of children as their primary consideration, and this consideration should outweigh any other and under all circumstances, for example, when allocating budgets.”<sup>31</sup>*

In its 2007 General Comment No. 10 on juvenile justice, the Committee draws on Article 3 (1) as the justification for child- and youth-specific justice:

*“...Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”<sup>32</sup>*

And, in 2009, in its General Comment No. 11 on the rights of indigenous children, the Committee remarked that:

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<sup>29</sup> General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (CRC/C/GC/8), para. 26.

<sup>30</sup> General Comment No. 9 (2006), The rights of children with disabilities (CRC/C/GC/9), para. 29.###

<sup>31</sup> Idem, para. 20.

<sup>32</sup> General Comment No. 10 (2007), Children’s rights in juvenile justice (CRC/C/GC/10), para. 10.

*“The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children’s rights and interests. In order to effectively guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child.”<sup>33</sup>*

#### **IV. Conclusion**

Following from the foregoing analysis, it is evident that the principle of the best interests of the child is one of the most important provisions of the CRC. It is also one of the most difficult to explain. Yet, in a practical sense, it is impossible to work with the CRC without having a clear idea of this principle of interpretation or rule of procedure, or to simply operate under the assumption that everyone is acting in the best interests of the child/children.

What we need is a more objective form of knowledge about this concept. Without clarification, there is a risk that very different decisions can easily, yet inaccurately, be justified as being in the interest of the child; depending of course on the person who subjectively “interprets” the best interests of an individual child or group of children.

Another important aspect we must consider is the political dimension of this principle which requires that legislators ask basic questions regarding the potential impact on children of relevant legislation, ordinances and rules. Do such laws, ordinances or rules exist that do not have a potential impact on children? Among all the State parties to the CRC, I can say with certainty that we are very far from the fulfilment of this particular obligation.

I hope that as we celebrate this 20th Anniversary of the adoption of the Convention on the Rights of the Child by the General Assembly, this article will help to clarify the content and scope of Article 3 of the CRC. Above all, I hope that it will help decision-makers render decisions which respect the demands of the best interests principle and the interests of all children who are waiting for decisions related to their own lives or anticipating that their politicians will take seriously their commitments and obligations!

JZe, 12.11.2009

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<sup>33</sup> General Comment No. 11 (2009), Indigenous children and their rights under the Convention (CRC/C/GC/11), para. 33.