

Workshop on the best interests of the child

**The impact of the CRC on the concept of “best interests of the child”**

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**1. Introduction**

The concept of “the best interests of the child” – formulated as such or in similar terms – is not new. Over and above its use in everyday parlance (such as in “it’s for your own good”, “we have your interests at heart”), it figures in several national legislative texts that pre-date the CRC, as well as in a limited number of international instruments, usually in relation to decision-making on custody and access issues. However, its incorporation as a broad principle underlying the Convention on the Rights of the Child (CRC) has led to confusion and controversy. These need to be resolved for the optimal implementation of the treaty, and a useful contribution to securing a solution would be a thoughtful General Comment on the issue from the Committee on the Rights of the Child.

**2. Interpreting the substance of the right**

The inclusion of the “best interests” principle in the CRC was a somewhat logical step. The problem lies in the fact that its foreseen field of application according to this treaty is, almost literally, infinitely broader than had previously been the case: “*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*” (CRC Art. 3.1, my italics). This far wider perspective is ostensibly – or, more accurately perhaps, potentially – a positive development. The all-encompassing wording – which, moreover, subsequently led the Committee on the Rights of the Child to designate this provision as one of the “general principles” of the Convention – also has the merit of setting “best interests” once and for all in a rights framework. But for the moment, it is undoubtedly still causing much confusion, for three main reasons:

- first of all, it suddenly requires application in spheres where it had never previously been tested, let alone demonstrated as being helpful, as a legal tool for securing children’s rights;
- second, it is not immediately clear whether “actions concerning children” are confined to those specifically targeting children or cover any decision which may affect them. While an impact assessment of any policy or initiative that may directly or indirectly affect the rights of children is desirable, to enable remedial measures to be taken, this is not the same as ensuring that such actions are, as a primary consideration, based specifically on the best interests of the child;
- third, by ending with reference to the best interests of “the child”, in the singular, it provokes debate as to whether it is in fact intended to apply only to children individually or, more comprehensively, to children as a group – or groups of children – as well.

Indeed, this confusion is arguably the most significant impact the CRC has had on the concept. Witness the vigour of the so-far inconclusive debate that its inclusion in the treaty has provoked regarding, *inter alia*, the real intentions of the drafters, the appropriate scope of its application

and, of course, how it is to be interpreted (and by whom) given that it remains necessarily undefined in absolute terms.

### 3. Differentiated status and continuing abuse

Although some commentators minimise their importance, the variations in status given to “best interests” as a basis for action in the text of the Convention itself hardly facilitate bringing the debate to a successful conclusion: qualified “a primary consideration” as a general principle, in specific cases it becomes:

- the determining criterion for removing children from parental care (Art. 9), envisaging deprivation of liberty with adults (Art. 37.c), and preventing parents from being present during judicial proceedings (Art. 40.2.b.iii),
- “the paramount consideration” in deciding on a child’s adoption (Art. 21), and
- the “basic concern” of primary caregivers (Art. 18.1).

In addition, a major obstacle to maximising the CRC’s impact in determining “best interests” undoubtedly stems from the massive legacy of misuse and abuse of the concept in pre-CRC days to justify highly questionable initiatives in the sphere of child “welfare” and “protection”, including removal from parental care on the grounds of ethnicity or material poverty. Notwithstanding the fact that having “best interests” taken into account is now a fully-fledged right, and as such is inherently inter-dependent with all the others in the CRC, the ramifications of this legacy still abound, and often contribute substantially to violations of the rights of the child today.

The following two examples can serve to give insight into some of the questions that are posed.

### 4. The “headscarves” affair(s)

The debate prior to and following the recent enactment of legislation in France outlawing the wearing of “signs and dress that conspicuously show the religious affiliation of students” in State schools is well-known. This is not a new issue in that country. In 1989, the year the CRC was adopted, a similar debate had raged over whether the wearing of Islamic headscarves by girls was compatible with the secular nature of the public school system. The French Government, which had announced its intention of becoming one of the first to ratify the Convention, determined that there was no justification for a generalised and absolute prohibition of the headscarf, although local circumstances may be such as to warrant some restrictions. It simultaneously stated that neither religious propaganda nor the refusal to take part in certain compulsory lessons (referring notably to some Moslem girls seeking exemption from physical education and biology classes on religious grounds) would be tolerated.

In an article at that time, I noted that:<sup>1</sup>

*“the policy adopted would seem to be in line with relevant provisions of the CRC which – against the background of the principle of the best interests of the child – lay down inter alia:*

- *the compulsory nature of education to which the child has a right;*
- *the State’s obligation to respect the child’s freedom of religion under the guidance of the parents;*
- *the child’s right to manifest his or her religion;*
- *the right of children of ethnic or religious minorities to profess and practise their religion;*

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<sup>1</sup> Cantwell, N.: ‘The “headscarves” affair’, International Children’s Rights Monitor, Vol. 6, 1989, DCI Geneva.

- *the State's obligation to ensure that all children benefit from these rights without discrimination on whatever basis.*"

and that the French Government seemingly had little choice:

*"barring a decision to proscribe by law the wearing of such attire in the classroom on the grounds that this endangers 'public safety, health or morals or the fundamental rights and freedoms of others'."*

I ended the article as follows:

*"The debate [...] showed once more how much controversy is likely to be aroused over the concept of the 'best interests of the child', especially when there is apparent conflict between two rights – such as freedom to profess a religion and the right to compulsory education."*

But fifteen years later, the French Authorities have decided that the generalised and absolute prohibition of the headscarf in schools is, after all, perfectly justified. So, in this "action concerning children", have the parameters of best interests changed in the meantime, are the realities different, or is the concept quite simply of little relevance in this type of case? In its critical stand condemning the 2004 law, for example, Human Rights Watch makes no mention at all of "best interests", simply basing its argument on several of the CRC provisions I noted above, as well as pointing out that:

*"States are responsible for taking appropriate legislative, administrative, social and educational measures to protect children where parents are responsible for physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Unnecessary restrictions on children's personal rights and freedoms should not be promoted as a means of child protection."<sup>2</sup>*

Indeed, how useful is the concept of "best interests of the child" here, when a valid rights-based assessment can be very adequately founded on less vague CRC provisions? My reference to it in 1989 was quite possibly unwarranted. Or maybe, quite simply, in 2004 the best interests of the child were indeed a primary consideration but not the one that prevailed...

## **5. Intercountry adoption**

"Best interests" has been the basic justification for a child to be adopted abroad since intercountry adoption became a recognised practice some fifty years ago. Unfortunately, in many cases, the opinion that a child will be "better off" with adoptive parents in another country is deemed the equivalent of an adoption being "in the child's best interests" and thus sufficient to validate decisions and actions that may violate his or her other rights.

The apparently key place of "best interests" in determining whether or not an intercountry adoption should be carried out is reflected in the CRC. Indeed, the importance given to it arguably increased during the drafting period. Thus, the provisional draft text of what is now Article 21, approved in 1982, was phrased as follows:

*"States Parties shall take all appropriate measures to secure the best interests of the child who is the subject of intercountry adoption..."<sup>3</sup>*

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<sup>2</sup> Human Rights Watch, *France: Headscarves Ban Violates Religious Freedom*, News Release, 27 February 2004.

<sup>3</sup> UN Doc. E/1982/12/Add.1, C.

The definitive text figuring in the CRC, applying to both domestic and foreign adoptions, goes a step further:

*“States Parties which recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...”*

The formulation of this provision introduces some interesting questions about “best interests” in the context of adoption. First among them, undoubtedly, is the obvious one: the child’s best interests being “paramount” (i.e. supreme and overriding), it is implicit that (valid?) interests other than those of the child, ruled as lesser under the terms of the CRC, may be at stake: but frankly, whose, for example...? This aside, two other examples are illustrative of highly significant questions raised.

- *Diverging reactions to intercountry adoption:* Only States that “recognise and/or permit” adoption are obligated by this article. This clause was included more especially to take account of the situation of countries based on Islamic Law which in principle forbids adoption because certain aspects thereof, including the invariably consequent change of the child’s identity, violate Islamic Law. In practice the derogation clearly extends, however, to any country that decides not to permit intercountry adoption for political, ideological, practical or other reasons. At the same time, these countries, like those that do permit adoption, are bound under the “general principle” to found their policy decision – this time indisputably an “action concerning children” – on the best interests of the child. Does this mean that Laos or Rwanda, for example, should be criticised on “best interest” grounds for banning the adoption of their children abroad? Conversely, might Guatemala therefore be applauded, by the same token, for having the world’s highest per capita international adoption rate? And where would countries that permit intercountry adoption subject to very limitative criteria regarding the adopters – such as Romania, Spain and Nicaragua – stand on the “best interests scale”, in comparison to Bulgaria, Belgium and Brazil, which simply apply the “subsidiarity principle” whereby intercountry adoption is only to be considered if suitable in-country care is not available?
- *Diverging reactions to abuses of intercountry adoption:* in late 2001, the USA decided to halt all adoptions from Cambodia because of concerns about trafficking and other problems it had documented. The existence of these problems was acknowledged by the Cambodian Authorities in February 2002. Other countries, such as the Netherlands and Sweden, followed the US lead. It was only in mid-2004, however, that the UK announced a suspension of adoptions from that country. If the best interests of the child is the paramount consideration in adoption, what evaluation should be made of the 30-month gap between the respective decisions of the US and UK? In contrast, whereas several countries – including Spain, Canada, the Netherlands – have completely or partially suspended adoptions from Guatemala because of gross irregularities under the “notarial system” in place for arranging them<sup>4</sup>, the USA simply warns its citizens to take particular care in their choice of intermediary. What “best interests” ramifications might these differing responses have?

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<sup>4</sup> Guatemalan law provides for the adoption process to be carried out either by the courts or by notaries public. Under the judicial procedure, the adoption is overseen by an independent judge who, among other responsibilities, ascertains the origin of the child, verifies the mother’s motive for giving the child up for adoption, and approves the fitness of the potential adoptive parents. In contrast, the extra-judicial – “notarial” – procedure is not subject to oversight by the State. It is managed almost entirely by the private sector through specialised lawyers who themselves determine “adoptability” and fitness to adopt, and whose interest lies solely in seeing the adoptions completed as planned. Ostensibly because the notarial system is therefore quicker and far less subject to safeguards and checks and balances, it has reportedly been used in up to 99 per cent of intercountry adoptions from Guatemala.

In the last resort, trying to apply the best interests principle in the field of intercountry adoption may in fact be unnecessarily confusing the issue. As in the “headscarves” affair, the more explicit provisions of the CRC – such as, in this case, protection of identity, rules governing substitute care and removal from parental care, protection from sale and trafficking, etc. – would seem to suffice in determining the desirability and legality of a child’s adoption abroad, and whether or not such adoptions should be taking place from and/or to a given country.

## **6. Where “best interests” serves a purpose**

If doubt might validly be cast on the usefulness of applying the best interests principle in some spheres, in others it can provide a positive backdrop to decision-making. This is especially so in certain individual situations where the legality of the potential outcomes is not an issue and where the protection of other rights of the child is thereby to be enhanced rather than compromised.

One example of this is a decision reached by a South African court which was considering a settlement agreement in a divorce case.<sup>5</sup> The parents had each undertaken to ensure that, subsequent to their divorce, their (3-year-old) son would be educated in a specified church and would participate fully in the activities of that church. Examining the best interests of that child (which, under the CRC-inspired South African Constitution, are “paramount”), the court concluded that the child’s right to freedom of religion, belief and opinion would be unduly jeopardised by such an agreement, and modified it in consequence. But interestingly, the issue here seems not to have been whether or not the child’s rights were in danger of being violated – the court’s conclusion clearly affirms that they were – but the *status* of those rights vis-à-vis those to which his parents might pretend.

There are many other situations where the best interests of the child may be a key factor. It should, for instance, underpin any decision regarding whether or not, and in what circumstances, to return an unaccompanied minor to his or her country of origin. It should be the foundation of a response for a child who was wrongfully adopted and whose family of origin seeks contact with him or her – the case for several Argentinean children kidnapped and put up for adoption by the country’s military junta in the 1970s, for example. But again, these applications pertain more to finding the most appropriate solution to difficult individual situations – notably to prevent or remedy violations of other rights – than to providing blanket backing for a given pre-determined path.

## **7. By way of conclusion: a clear case for a General Comment!**

Of course, this does not mean that the “best interests” principle is otherwise unimportant. Its mere existence puts children’s rights on at least an equal footing with other considerations in spheres where, despite their fully-fledged human rights status, they might otherwise be neglected almost by force of habit.

But overall, the issues discussed above would seem to point to the need for a close and clinical look to be taken at the implications of the “best interests” concept in the context of the CRC: how and when it can and should be used, but also its limitations and the dangers it can spawn, especially if its “general principle” status is manipulated as a justification for using it to “trump” other rights of the child.

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<sup>5</sup> Kotze v. Kotze 2003 (3) SA 628 (T)

The “best interests of the child” is one of a number of concepts and requirements – such as setting an appropriate minimum age of criminal responsibility – that the CRC stipulates without providing adequate guidance as to their practical interpretation. It is precisely on these topics that an authoritative and appropriate General Comment from the Committee on the Rights of the Child could be invaluable in tackling the inevitable grey areas they create. By taking on this admittedly delicate task in regard to “best interests”, the Committee would contribute immeasurably to ensuring that the CRC has the “right” impact.

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