

The Best Interests of the child

Literal analysis, Function and Implementation

Plan of the presentation

1. Introduction : the child subject of rights
2. The general principles of the Convention
3. The Best interests of the child (art. 3 CRC)
 - a) Concept and Literal analysis
 - Concept
 - Literal analysis
 - Par 1
 - Par 2 + 3
 - “best interest” and other articles of the CRC
 - b) Functions and characteristics
 - c) objectivation of the principles : example of the UNHCR
 - d) links with art 12 CRC : opposition or complementarity
4. The Best interests’ principle : Political dimension and general measures of implementation
5. Conclusion

I. Introduction

The Convention on the Rights of the Child (hereinafter CRC) is not a neutral text enumerating a list of rights. Without doubt, the Convention is the enumeration of rights to which the child is entitled, **but it is 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. However, since the promulgation of the CRC in 1989, 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, subject of rights

The fundament of this new juridical position lies, in my opinion, in two articles . article 3 (the bests interests of the child) and in article 12 (the views of the child), which recognises the right of the individual child, to express her/his opinions in all matters affecting her/him.

These two articles are considered as general principles of the Convention , but are, first of all, two rights :

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

These rights are not only reserved to every single child, but also extended to children as a group of human beings defined

according to age. Articles 3 and 12 are the “clé de voûte” of this challenging posture. And these two articles are interdependent on one another.

Furthermore, articles 3 and 12 is closely linked with the concept of evolving capacity¹ and are related to civil rights and freedoms, particularly article 13 (the right of freedom of expression), article 14 (the right to freedom of thought, conscience and religion), article 15 (the right to association and peaceful assembly) and article 17 (the right to information). Article 12 is also connected to article 7 (the right to a name and nationality), article 8 (the right to an identity), article 16 (the right to privacy), article 19 (protection from all forms of violence) and article 37 (prohibition of torture).

20 years after the United Nations promulgated the Convention; many questions remain unanswered regarding the actual impact of this newly recognised status of the child in different national jurisdictions, relevant legislation, and varied settings.

The purpose of this presentation is to concentrate on one of these two articles (the best interests of the child), and try to analyse its content and its functions, and to see the link between art. 12 in order to answer this difficult question: are art 3 and 12 in opposition or are they complementary? In fact, the UN Committee on the rights of the child, in its monitoring mandate, faces a difficult task: how to resolve the tension raised by article art 3 (which could be interpreted as a “welfare” article, based on the idea of dependency and vulnerability of the child/children and the necessity of protective measures) and art 12, (which is a participative article, based on the idea of capacities and competencies of the child and the necessity to make him/her influence the decision) . The answer is

¹ Landsdown G., The evolving capacity of the Child, Innocenti Center, Firenze, 2004

probably in the “rights based approach” or the requirements deriving from the position of the child/children, who hold effective and substantive rights.

We all know that implementation of the Convention at the national level requires enormous and systematic efforts to ensure its principles and provisions change the attitudes and activities affecting 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. people working with or for children, will begin to utilize this new approach in situations where a child retains “the right to...”, rather than simply continuing to maintain 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. This is the reason why I will try to present this difficult article 3 of the CRC

II. The Convention and its mechanisms

a) A small revolution

The CRC dedicates particular attention to the **protection** of children. In this, it takes up the well-known principles such as protection from abuse, work,² sexual exploitation. It develops some of these principles and extends protection to some new

² For example, ILO Convention no 182 on the worst forms of child work

domains: protection against torture, the involvement of children in armed conflict, drug trafficking and consumption of narcotics, unjustified privation of freedom, separation from its parents without due reason. Promulgation of two optional protocols on children in armed conflict and sexual exploitation in 2000, trafficking and using children in pornography further emphasize this protective aspect³ⁱ.

But where the CRC really upsets all certitudes of adults is in the third P, **namely the one of participation**; it is there where, in my opinion, the main advance of this text resides. It actually conveys a new status to the child who is no longer only the one who is provided with services or who is protected, but someone whose word has to be taken note of and heard and who is called to **participating** in the decisions that concern him/her. So this is the most spectacular innovation of the CRC, since it introduces the concept that the child, as it develops (art 5. CRC, notion of *evolving capacity*), and in accordance with the age and maturity of the child, may participate in the life of his/her family, the school, the training center and in the community in general. **The child is no longer a passive member who is taken care of; he/she becomes an active player in his/her life.**

b) The basic mechanisms of the Convention

According its General Comment no 5⁴, the CRC Committee has identified four articles as “general principles”

“Article 2: the obligation of States to respect and ensure the rights set forth in the Convention to each child within

³ Optional protocol to the Convention concerning the rights of the child, concerning the sale of children, child prostitution, and pornography showing children, entered into force on 18.01.2002 and the Optional protocol to the Convention regarding the rights of the child, concerning the involvement of children in armed conflicts, entered into force on 12.02.2002

⁴ General Comment No. 5 on “General measures of implementation for the Convention on the Rights of the Child, par. 47 (CRC/GC/2003/5), par 12

their jurisdiction without discrimination of any kind”.

This non-discrimination principle is a very general principle in all human rights and is part of every human rights legal instruments. This obligation requires States actively to identify individual children and groups of children whose rights may demand special measures. Here, we must also refer to the Human Rights Committee’s General Comment no 18 on discrimination which impose on the SP to take special measures in order to diminish or eliminate conditions that cause discrimination⁵.

“Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children. The article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The principle requires active measures throughout Government, parliament 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” . It will be the object of the following presentation.

“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 to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development”. What is aimed, is the harmonious development of every child.

Article 12: the child’s right to express his or her views freely in “all matters affecting the child”, those views being

⁵ Human Rights Committee, general comment No. 18 (1989), HRI/GEN/1/Rev.6, pp. 147 et seq

given due weight. This principle highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights. It forces the SP to install a mechanism to get the views of the child, and the obligation for the decision maker to give due weight to this opinion or to recognize that the child can influence directly (according to age and maturity) his/her future.

I'm used to explain that these "dispositions generales" primarily constitute **the keys which make the locks turn in the CRC system:**

I think that the CRC has also invented another concept "may be a forgotten principle" Article 5 of the Convention, which recognizes that the child is not just a little man (an adult in miniature) but is a human being in development which needs at different stages, different degrees of guidance, protection, provisions and participation. Art 5 stresses that the child has a right to direction and guidance of parents, legal guardians, or members of the extended family or community as provided for by local custom. Direction and guidance have to compensate for lack of knowledge, experience and understanding of the child and are restricted by the evolving capacities as stated in this article. The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to limit their directions and guidance. What is very interesting is the curbs of dependency and the inverse curbs of autonomy, of a child related to this/her evolution.

These articles therefore rather consecrate **procedural rights**, i.e. the stages that need to be passed for the decisions taken in application of the CRC to respect the spirit and the wording of the substantive rights of the child. In this article, I would like to concentrate the focus on and to develop the principle of the "best interests of the child".

III. The Best Interests of the Child

Examining the concept itself of the interest of the child, "the *best interests* of the child" is a phrase which entered legal systems only very recently, initially with the concept of "the well-being of the child", then in its current form of "the best interests of the child" which was established in article 3 par. 1 of the CRC. It is thus a very modern legal concept, which has hardly been the subject of thorough studies, because the contents remain rather vague and the functions are multiple. It is consequently examined more relatively to a precise point or clearly systematically explained by jurisprudence. It must "allow the right to adapt to the concrete demands of life...".

In this study, I will examine the best interests of the child as it is defined by the Convention, this concept and what I call literal analysis.

a) The best interests of the child, as defined by the CRC, concept and literal analysis

Concept

Article **3 par.1 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.”

Within the Convention, the concept is also mentioned in other articles, providing obligations to consider the best interests of individual children , above all in family law:...

Article 9: separation from parents,

Article 18: parental responsibilities for their children,

Article 20: deprivation of family environment,

Article 21: adoption.

...and in Juvenile Justice:

Article 37(c): separation from adults in detention,

Article 40(2)(b)(iii): presence of parents at court hearings of penal matters involving a juvenile.

And it's worth to mention the use of this concept in other international instruments, as the UN Convention on the Rights of Persons with Disabilities (art. 23, par. 2) and The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (art. 4, lit. b).

The “best interests of the child” is a fundamental legal principle of interpretation developed to limit the adult power (parents, professionals, teachers, medical doctors, judges...). The principle is based upon the recognition that an adult is only in a position to take decisions on behalf of a child because of the child's lack of experience and judgment.

This principle is deriving from the Welfare System (or Protective system) from the beginning of XXth Century and has been transformed by the UN Convention on the Rights of the Child in a rule to examine whether the State through its decision maker has acted proportionately when considering the best interests of

the child, and placing great weight on the exercise of the child's right to freedom of expression and the wishes.

According to the Implementation Handbook of the CRC, "The 1959 Declaration of the Rights of the Child uses it in Principle 2: "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."⁶

"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."

Similarly, article 16(1)(d) provides that in all matters relating to marriage and family relations "the interests of the children shall be paramount"⁷.

This provision, if we analyze it as a whole, does not give any particular explanation of its application, does not fix any particular duty, nor does it state precise rules. It poses a principle:

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

I think that we can give two significations to this expression.

First it's 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 go through the consideration of

⁶ Implementation Handbook for the Convention on the Right of the Child, 3d revised edition, UNICEF 2007, p. 35

⁷ ibidem

the possible impacts (positive or negative) on the child /children concerned and must give this impacts a primary (high) consideration in the appreciation of the different interests in play. It's a procedural rule, because art 3. par 1 imposes this step in the decision making process, but does not impose a solution.

Second, the best interest principle is also **the fundament 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. The State party has the obligation to put in place the mechanism to consider the best interests, and has to legislate on the obligation made for the people who has to decide for children (judges, for example) to consider the “best interests” rule of procedure.

And this is for the individual child, as well for the children who form groups, or “children in masse”. For example, we can read what the Committee has written in its GC no 7 , Implementing child rights in early childhood⁸.

“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;

(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

⁸, GC no 7, Implementing child rights in early childhood, par. 13 (CRC/C/GC/7/Rev.1), Para. 13)

indirectly impact on young children (e.g., related to the environment, housing or transport).”

But it does not exist a right to the best interest. Because, nobody knows what is the best interests of this child, or of these children. These best interests will be assessed by the decision maker in a process where the rule of procedure will be applied and the State party does not say what the decision maker has to decide, but just how he has to take his/her decision.

However, it's clear that the principle of of best interests must respect :

- The importance of every child as an individual with his/her opinions
- The global spirit of the CRC
- The short, medium and long term perspective, because the child is a human being in development
- the interpretation cannot be “culturally relativist” and deny the other rights of the CRC for example to protection against traditional practices and corporal punishments

This is particularly clear in the General Comment No. 8 on “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment”⁹. The Committee explains:

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

⁹ GC no 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment , (CRC/C/GC/8),Para. 2

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 it a little more clearly, by analyzing the elements of this article.

"In 6all actions concerning children".

In this sentence, we can start by noting the use of plural (children) which opposes the more common use of singular when referring to the "...interests of the child".

From the grammatical point of view, it is clear that the legislator wanted that in all decision affecting children we would systematically apply the general criterion of the interest of the child as a unit of recognition for the decision that will be made. The use of the singular would have been more restrictive. The French uses the singular : "l'intérêt supérieur de l'enfant" and the Spanish version does the same "el interés superior del niño ". What to think about this divergence? For me, the plural of best interest is refers to the possibility to have not only one interest but several interests....e

"All actions" is also a very general concept which defines, in my opinion, all the interventions . it's to say active interventions, but also all no actions (decision not to intervene) made in regard to children. We note a slight difference between

the French version (in all the decisions), the Spanish one (en todas las medidas concernientes a los niños) and the English version (all actions). In the discussion on the adoption of article 3, there was a proposal to integrate the English qualifier "official" in order to limit the intervention to all official actions, coming from an authority (legal, administrative, legislative) and not from a private authority (parents).

But in the final reading of the text, this proposal was not accepted. We now ask the question : does article 3 CRC intend to interfere in the parental sphere, through the obligation to apply the best interests of the child principle? We can legitimately think that it seems that in family interventions, the same principle should apply as a means of measuring the decision. In my opinion, the legislator, having respect for the principle established in Article 5 of the CRC, did not want to enter the family sphere to underline the responsibility of parents; and to preserve the chances that this great general principle would be accepted by all. But this absolutely does not **exclude the application of the principle of the best interests of the child in domestic situations**. Indeed, it would be incomprehensible, that only the authorities be held to this principle, whereas families would not be obliged to adhere to it; the general principle applies and covers the particular situations. The response to this questioning is certainly otherwise found in Article 18 ch. 1 of the CRC which imposes as a "guideline" to raise the child and to **ensure his development, to follow the principle of the best interests of the child**. The text is quite explicit in this art. 18, par. 1 "*the best interest of the child will be their (to parents) basic concern*".

"Undertaken by public or private social welfare institutions, courts of law, or administrative authorities and legislatives bodies": by this I understand that the legal and administrative authorities must, in all their decisions, apply this principle. It is the criterion to which they must subject the cases which call for their decisions. This sentence thus establishes an obligation for States to examine, in all the decisions to be returned relative to a child, if its best interest is guaranteed; it is otherwise a right attributed subjectively, at the very least a guarantee offered to children.

What is very interesting in this sentence, relative to the text project of 1981, is that the legislator added the term **"legislative bodies"**. This small addition has a crucial importance: that means that, when a law is established, the State, be it national, regional, cantonal or municipal, must check that children are taken into account and that their best interests are balanced. It is thus by these two small words (legislative bodies), that all dimensions, political or macro-societal, are introduced into the CRC Convention. The best interests of the child takes on a new function: to be used to establish, in a legislative program, what is relevant for the child and what is not, in relation with the possible impacts (positive or negative) of the future legal instrument. "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..."¹⁰

I will come back to this point in part IV (implementation).

The term, **"Public or private social welfare institutions"**, means that the will of the legislator was to subject the entire sector of intervention that works for the childhood to the

¹⁰ Implementation Handbook for the Convention on the Right of the Child, 3d revised edition, UNICEF 2007, p. 36

obligation to respect this principle. If the question is not truly put forward to official bodies (official child welfare services, state institutions, but also school and medical services), pointing out the application to the private sector is not useless. We know the historical importance of private organizations in child welfare; we know the services provided by innumerable associations, foundations, and NGOs who assume responsibility of children (nutrition, schooling, care, reintegration); but we also know that certain movements who **profess sectarian ideologies, use children for prejudicial ends to their rights and interests**. It thus appears necessary to also subject the entire private sector to this principle.

"The best interests": let us begin by underlining the plural sense of this phrase which is used, in our opinion, as a general expression attached to the concept of "interest of the child". Is it necessary to attach a particular importance to the qualifier "best"? Some criticisms were built 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 version) meant that in all circumstances, the interest of the child was to precede any other interest.

In another literal interpretation, the child is an exceptional being who, as of the moment when he is in interference with other non-child people or other social bodies, would inevitably always be right. This position is unbearable because if we once again put Article 3 ch.1 in relation to Art. 5 for example, we understand well that the child is not an person individualized to the extreme, but remains a member of his family and member of the community, and therefore an integral part of the State.

"Best" and "Interests" put together simply mean that **the ultimate goal is the "wellbeing" of the child, as defined throughout the Convention, in particular in the preamble** and in art. 2 of Article 3 of the CRC. We can thus read par. 2 and 3 of Article 3 of the CRC as providing the explanation of the best interest since:

par.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.

Par. 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 still be imposed as a rule of criterion for application. It is the objective of this group of phrases: grant to the best interests of the child value of paramount consideration.

What does this expression mean? If we make another literal analysis, we realize that legislation speaks about "a primary consideration" (a paramount consideration) and not "**the**

primary consideration" (the paramount consideration). It is a very subtle nuance!

Indeed, **this nuance** means that in case situations where the decision maker (judiciary, administration, legislator) intends to make a decision, it must attach a particular importance to the best interests of the child, and consider first the interests of child/children and the possible impacts of the decision. But this interest will not systematically take over all the other interests (of the parents, other children, adults, or the State). This terminology seems to mention that in a decision the best interests of the child will not always be the single, overriding interest to be considered; there may be competing other interests, for example, between individual children, between different groups of children and between children and adults (parents, caregivers, public services, State...). "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"¹¹.

Does the article "**a**", used in place of "the", weaken the principle?

In my opinion, no, but it gives it its rightful place, since it establishes the obligation to consider, in all decisions, the best interests of the child; it is not a choice, but an obligation to examine this principle.

Then, this criterion enters into competition with other criteria which also have value. It is the showcasing of several interests which leads the element of the child to enter into consideration and to becoming one of the criterion in the weighing of possibly divergent interests..The fact of not systematically giving the

¹¹ Implementation Handbook for the Convention on the Right of the Child, 3d revised edition, UNICEF 2007, p. 38

child reason is a factor of balance. It would not be desirable that the interest of the child be superior to all other interests and systematically have an edge. That would establish the republic of children, not in the sense that Korzack understood it, but in the sense that the child would be put on a pedestal, to regain an image. Such a position would have ends that oppose protection due to the child and would irremediably cause the disappearance of the rights of the child.

But we have to mention that, in at least two particular situations, the legislator used the terminology “the paramount consideration” or “the interests of the child shall be paramount” :

- Article 21 CRC :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** and they shall...

- Art. 23.par.2 of UN Convention on the Rights of Persons with disabilities : “States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, warship, 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 becomes the sole factor to determine the solution, or as said by van Bueren “... in certain circumstances, such as adoption or for children living with disabilities, the higher standard is applicable”¹²

¹² van Bueren G., Child Rights in Europe, Council of Europe 2007, *Pushing and pulling in different directions – The best interests of the child and the margin of appreciation of states*, p.32

Art. 3, par 2 and par 3

Par. 2 : *“States to ensure necessary protection and care for the child, taking account of rights and duties of parents and others legally responsible”*

States must ensure necessary protection and care for all children in their territory irrespective of their nationality and status. They must take account of the rights and duties of parents and others legally responsible for the child. The importance of par. 2 (along with 3) is to pertain to a general principle, and to the idea and ideal of “well-being” of the child, no more on best interests. But “ it 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”¹³.

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’...¹⁴ ()

We can ask if in case of economic crisis, or of environmental disaster /climate change and its effects on children and families), how the States can fulfil their obligations, without the international cooperation? The well-being of the child risk being just an ideal and not a reality...

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

¹³ Implementation Handbook for the Convention on the Right of the Child, 3d revised edition, UNICEF 2007, p. 40

¹⁴ Alston Ph, “The Legal framework of the Convention on the Rights of the Child”, *Bulletin of Human Rights*, 91/2, p. 9

Here we touch on the obligation of establishing standards for institutions, services and facilities for children and the State must ensure that the standards are respected, in establishing inspection mechanisms. “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”¹⁵.

We can mention here the project of “Guideline for children deprived of parental care”¹⁶ to be presented to the GA 2009, and at the European level the “Quality for Children standards project. In “Quality4Children”, three big international organisations working in the field of out-of home care of children have launched an initiative aiming at guaranteeing and improving the chances of development of hundreds of thousands of children and youths in Europe who cannot grow up with their biological parents”¹⁷.

The Interest of the child and other articles of the CRC

The best interests of the child is thus promulgated by Art.3 ch.1. This expression is however included in a certain number of Articles of the Convention, as a reference to be taken into account for particular situations. We thus find it in the following articles:

- Art. 9.

¹⁵ Implementation Handbook for the Convention on the Right of the Child, 3d revised edition, UNICEF 2007, p. 41

¹⁶ Draft of UN Guidelines on the Appropriate Use and Conditions of Alternative Care for Children, on web page <http://www.crin.org/NGOGroup/childrightsissues/WithoutParentalCare/>

¹⁷ http://www.quality4children.info/navigation/cms,id,2,nodeid,2,_language,en,_country,at.html

fixes the principle according to which the child has the **right to live with his parents**. This seems a very important principle for the child himself, as well as for the family. In par.1, art 9, the CRC admits that a separation of the child from its parents is possible, with the help of an official decision and in so far as this decision is in **respect of the best interests of the child**. We are thinking here of situations where the child is a victim of his family (all types of abuse, active abuse) or when the child is left by him/herself (passive abuse).

As well, par. 3 of the art.9, we look at the principle that the child must maintain personal relationships and direct contact with his two parents, unless this goes **against the best interests of the child**. Here we refer to situations of open conflict between the child and one of his parents (sometimes both) or to situations identical to those described in par. 1 (problematic relationship with one or both of the parents)

- **art.18.**

establishes the principle according to which the two parents must be involved with the education of the child; this is called the common responsibility for education. In par. 1 of this provision, the last sentence states: **The best interests of the child will be their basic concern**, as said before.

- **art. 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 alternative care (adoption, placement or kafalah). In fpar. 1, we discuss the state of the child who, in his own interest, cannot be left in his family environment and who must then receive assistance from the State. We are not speaking of the best interest, but simply, in short, **the interest of the child**.

- **art. 21.**

Article 21 of the CRC foresees the situations where the child, deprived of his family environment, is subjected to the situation of alternative care in the form of adoption (national or international). In these cases, the State must provide the child special assistance and protection and must take care to observe the procedures that are in place to give to this measure all its respect, in particular to avoid abuse.

In par. 1, it is clearly indicated that at the time of the adoption procedure (choice of the parents entrusting the child to the adoption, adopting choice of the parents, recourse to intermediaries etc. ...), it **is the best interests of the child** which precedes and determines the best solution.

- **art. 37.**

looks at general principles which should chair the administration of the juvenile justice, in particular the exclusion of torture, punishments or inhuman treatments and the prohibition of capital punishment. But, this article also fixes minimal rules of procedure to be respected by judicial bodies, specialized if possible, for juveniles in conflict with the law. Subparagraph C imposes that the child be treated with humanity and that if the child is deprived of freedom, it is separated from adults, except if the opposite proved to be preferable for **the best interests of the child**; we are thinking here if the child is imprisoned with one of his/her parents or a mother who gives birth while she is serving a sentence.

- **art. 40.**

Article 40 is the continuation of Article 37 in regards to the juvenile justice, but further explains recognized children's rights when they are in conflict with the law and the children appear before a judicial body. Par. 2, subparagraph B, iii, imposes that when a child is heard by an official authority, he/she must be

questioned according to established procedural rules, including the assistance of council (lawyer) or other appropriate assistance such as the presence of his/her parents, unless **these actions are considered to not be in the best interests of the child**. We are thinking here of a situation where the child is victim of the parents or this kind of situation is implied, for example, in the commission of offences.

We realize, with the enumeration of these specific rules mentioned just previously, that the principle of **the best interests of the child is a general principle which must be supreme over the entire Convention**, and that we call on it in a specific manner, when it is necessary to justify the exception to a right which is recognized for the child, in particular to a right which we could describe as a “natural” right to maintain relationships with the parents. When cutting these relationships is at stake (adoption for example), or suspending them (placements, loss of freedom); the decision of the child’s removal must always respect this principle. This means that in these cases, the individual interest of the child precedes the interest of the family (to have a relationship with his/her child) or the State (to ensure the stability of families).

That shows that the rights of the child are not superior to rights of other members of society, except in certain specific situations where the individual interest (for example, to no longer have a relationship with parents) precedes the collective interest (for example the principle of relationships continues between parents and children).

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

Functions

We can say that the concept of the best interests of the child, such as it is defined by the CRC, but also for example in the Convention of the Hague on international adoption, is a concept that has two "traditional" roles, one to control and one that finds solutions (criterion of control and criterion of solution).

Control Criterion: the best interests of the child is used here to oversee that the exercise of rights and the obligations towards children be correctly carried out. It is in particular , but not exclusively, , family law, child protection, child in alternant tive care, migrations.... that are concerned with this aspect of control ; in all actions or decisions, it's necessary to control if the question of the best interest has been checked.

But, as stated before, it's also a guarantee given to the individual child, or a group of children, or children "in masse" that their right to the determination of his/her or their best interests will be fulfilled.

Solution Criterion: in the sense where the concept of the interest of the child itself must intervene to help the people that needs to make the right decisions for children. Whenever a decision maker is about deciding on a subject that will affect a child or children, he has systematically to look for solutions where the impacts of the child will be positive, or the less negative possible. In the majority of the cases, there will not be just one solution, but a range of possibilities. The solution chosen will then be selected because it is in the "interest of the child". This function is an essential function because it

represents the bridge between the theoretical exercise and the reality in the field. .

Characteristics

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

1. Contrary to the majority of the Articles of the Convention, Art. 3 par. 1 **does not constitute a subjective or substantive right *stricto sensu*; but it institutes a *principle of interpretation* which must be used in all forms of interventions regarding children and which confers a guarantee to children** that their fate will be examined in accordance with this principle of interpretation.

2. This provision imposes an **obligation to States**: that to take into account the best interest of the child/children as soon as a decision must be made (in all actions).

3. This Article 3 par. 1 cannot be taken in isolation. It belongs to an entity (the CRC) and establishes a new status: the child subject to rights. This belonging confers a particular dimension to this concept, particularly if we link it to the principle of non-discrimination (2 CRC), to the principle of art. 6 CRC (the right to a harmonious development) and to ensure the views of the child are given due weight (12 CRC). Furthermore, in addition to the norms contained in the CRC, it is important to consider all the rights of the child. There are other legal bases, both at the international and the national level, that may affect the decision on what constitutes the best interests in a particular situation. One has, however, to take into account that the higher standard shall always apply.

4. The concept of the best interests of the child is an unspecified legal concept which must be specified by practice and which should follow the rules of application. Jurisprudence will also, on the basis of case studies, bring applicable solutions to other situations or to the entire group of children. It must be trusted by those who must make decisions.

5. The criterion of the best interests of the child is **relative in relation to space and time**: in time, since it is dependent on scientific knowledge of the child and the pre-eminence of such theory in any given time period; relative in space, since this criterion should take into account the valid standards present in certain countries. But we have to repeat that the principle of best interests can't be threatened by the cultural relativism and justify decision which would affect the respect of substantive rights of the child/children!

6. When a decision has to be taken for a child / or for children, we must think hic and nunc, but also mid and long term. By definition, the child is an human being in development, and the decision maker has to refer to the **concept of mid, long term** to better affirm that the aims of the application of the best interests of the child are not just the solution for today, but are in the **interests of the child's future**. Since the child evolves; consequently, its interest should be detached from the law of "everything, immediately", to privilege a vision of a future. At the moment when we listen to the child's aspirations within the framework of Article 12 of the CRC, we have to remain attentive to this aspect of "futurology".

7. The concept of the criterion of the child is **evolutionary, since indeed the projections of knowledge continue and it is only twenty years after the adoption of the Convention**. The doctrine and jurisprudence should thus make this concept evolve. In a domain where the principles of best interest is very

often applied, (marriage, divorce, custody...) we observe a very rapid evolution of the sociological situation and the necessity to redefine the role of the parents after the divorce and to adapt the legislation. New situations appear: parental co-responsibility, or shared parental authority (if I refer to the Swiss legislation) ; all this novelties have a direct impact on children, and on their best interests and force the judges and the courts to examine their decision with a new angle of view. The principle of best interests remains to determine the best solution for the child, but the sub-criteria used will have changed in a significant manner!

8. Linked with the latter observation, the criterion of the interest of the child is **doubly subjective**. First of all we have **collective subjectivity**,..., one that in any given society, at any given moment of its history, creates 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” of religious practice. We can take the example of educational assistance and "modes" that it could have known.

... and a **Personal subjectivity**, at three levels.

First of all the **subjectivity of** parents, caregivers, or legal representatives: what parent doesn't claim to act in the interest of the child although seems to be motivated by selfish reasons (judges in divorce cases know this all too well)?

The **subjectivity of the child /children as well**: the problem emerges in particular at the time of taking into account the child's views or wishes, because the interest of the child expressed by the child him/herself doesn't necessarily correspond to the image that the parents (or others adults) have of the same situation and on the different solutions / possibilities envisaged.

Finally **the subjectivity of the judge**, or the administrative authority invested with the power to make the decision (the decisions makers): however everyone here knows how strong this subjectivity is (or in any case the risk of subjectivity), while at the same time the decision claims to rest on a "scientific" analysis of the situation " .

These characteristics of the interest of the child show at the same time **the flexibility and the richness of this criterion as well as its weaknesses**. Not being defined in a precise manner, relating to time and space and containing a good amount of subjectivity, this concept could void the sense of children's rights, it may even appear counter-productive, meaning it might favour the interest of the State or the family to the detriment of the child. That is true, and criticisms were (and continue to be) numerous against imprecision of the criterion and the vagueness of this concept.

I quote here Prof. 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^{18 19} .

For its defence, let us say that it has the advantage to be broad, flexible and able to adapt itself (relative to time and space) to the cultural, socio-economic differences of various legal systems.

It can be applied everywhere and is useful to all. I use the wording that the principle is a practical tool, or In a trivial wording, I would say that It is **"the jack of all trades"** of the

¹⁸ van Bueren G., Child Rights in Europe, Council of Europe 2007, *Pushing and pulling in different directions – The best interests of the child and the margin of appreciation of states*, p.36

¹⁹ See also Mnookin, "Child custody adjudication: judicial functions in the face of indeterminacy», *Law and Contemporary Problems*, 1975, 226

Convention. It's the instrument which makes the link between the theory and the reality.

c) **Attempts at objectivation of the concept**

In general

But to go further, it could be useful, in our opinion, that this criterion **be specified or supplemented** by rules for application, chosen according to the various fields where the best interests of the child must apply. Many attempts were made **to specify, supplement and "to objectify" the concept** of the best interests of the child. Let us note for example, in **Canada**, the draft amendment to the "Divorce Act" which wishes that the child's interests be judged according to 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 implicated in the care or the child's education,
3. the child's leisure activities,
4. the capacity of each person to offer a framework for life, education and all 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,

7. the importance of the relationship between the child and his/her grandparents or other members of the family,
8. the proposals of the parents,
9. the capacity of the child to adapt him/herself 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,
14. any other factor that could influence decision-making.

As you can read, it is a long list that is not exhaustive and the **14 elements which make up the list are not hierarchical. These points to be examined remain largely open and consequently only have a relative influence**, as well they allow for a more concrete approach and offer a working method to better comprehend, in casu, the interest of the child. What I regret, in this list, is that the authors have not mention the "opinion of the child" ; in my opinion, it has to be the first point to consider when making a decision in the best interests of the child...

Other countries have taken identical steps: In **England's "Children Act" of 1984**, the judge must take into account:

- the views of the child

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

These steps seem to be especially the product of Anglo-Saxon legal systems. From my point of view it is an attempt to objectivise the concept, to understand the contours, to eliminate the risks of snowballing erroneous appreciation of this interest of the child and to secure at the same time judges and those subject to trial. Admittedly, these tests are imperfect; they nevertheless **act like beacons on a particularly delicate road**. It appears important in the many situations where decisions are not made by magistrates, accustomed to the existence of sometimes diverging interests, but by the administrative authorities, where the people charged with resolving the problem are not always very well 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 judgment, 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”.²⁰

In addition, it also seems necessary that the concept of the interest of the child be supplemented by **the concept of predictability**, which means taking into account the best interests of the child not only at the moment when the decision must be made, but also from the point of view of the foreseeable evaluation of the situation of the concerned parties. This appears particularly important in one field, childhood, where the situations by definition develop quickly, and where it certainly appears necessary to act immediately, while simultaneously preserving the future interests of the child.

Moreover, it appears essential that, in this matter where the rights of the child enter into conflict with others' rights, meaning where there are human, relational, economic stakes that are important, where the decision taken can be subject **to revision**. Is it perhaps superfluous to say, since it should go without saying?

To conclude this point, let me add the following element: in case of doubt in the difficult exercise of determining the best interest of the child during conflicts with other interests or the interests of other people or groups of people, let us be humble enough to recognize that this concept, which is not objective, cannot really be established by clear elements or objectives and must then be supplanted by the opposite notion of the "least pain". It is then this new consideration "How to cause **the least amount of pain possible**" which replaces the best interest of the child and should carry the decision. Is this more objective? Perhaps not, but this approach would certainly have the advantage of being less dangerous.

²⁰ Van Bueren G., op. Cit p- 36

The UNHCR Guidelines on determining the Best Interests of the Child

“One of the key priorities of UNHCR 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 UNHCR and must permeate all protection and care issues involving UNHCR”²¹.

The necessity of the UNHCR to publish this Guidelines stems for the an increasing number of situations where the staff is confronted with situations where they must determine the best interests of refugee children. Since the art. 4 is one of the key provisions of the CRC (ratified by already all the governments, and evidently by all governments where the UNHCR is active), there is a growing awareness to adopt the CRC as its “normative frame of reference,” which means that the best interests rule should guide not only the operations and decision in the field, but also the policy of the Agency.

²¹ UNHCR Guidelines on Determining the Best interest of the Child, May 2008

The Guidelines try to answer questions on individual situations: for example, whether a particular minor should be reunited with the parents or should continue to live with a foster family. How do we know what the interest of this child is, and how to balance the competing interests?

Or in a context of a group of children refugees when a decision is to be made to repatriate this group of unaccompanied children: how 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 to the professionals in the field a practical framework that will help them “operationalize” the best interests rule. “This 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 the identification of the most appropriate durable solution for unaccompanied and separated refugee children, temporary care decisions for unaccompanied and separate in certain exceptional circumstances and decisions which may involve the separation of a child from parents against their will”²² .

For more specific information on the procedure for a formal Best Interests Determination (BID), please read : the UNHCR Guidelines on Determining the Best interest of the Child, May 20

d) The links with article 12 CRC

It seems me clear that there various similarities between art. 3 and art 12, which is the right to be heard and to have his/her

²² UNHCR Guidelines on Determining the Best interest of the Child, May 20o8, p. 9

opinion given due weight²³, to such an extent, that I use the word “the duo “ Actually, we have the same structure of the two provisions and the same competencies recognized to the authorities in charge of making a decision towards a child or a group of children, either for the best interests principle, or for the possibility to express an opinion,.

The same structure

Art. 3 and art 12 are built on the same model

- They give a subjective right to a child /or children to express their views in all decisions that affect them (art. 12) as well as to ensure that the best interests’ principle will be examine in all decisions affecting a child /children (art. 3),
- They force the 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,
- This impose to use the principle of individualization (or case by case) which so crucial in children rights, where every child is different and can’t be treat on a systematic manner ,
- They conduct the decision maker to give due weight both to the opinion of the child and to thee best interests’ of the child and to consider these two elements as determinant factors in the decision making process,
- They oblige the State parties to legislate in this field and to install specific mechanisms in order to collect and interpret the view of the child and to look for solutions which have to respect the best interests of the child/children,
- Together they conduct to consider the child as a person with its entire rights, person who have enough capacities, despite its you age, to participate in the decisions affecting him/her and to express his/her own opinion, for his/her interest.

²³ See the last General Comment of the CRC Committee, The Right of the child to be heard, , 2009, CRC/C/GC/12

- **They put the emphasis on the child, even if other interests have to be considered. .**

Opposition or complementarity ?

It's common to consider art. 3 CRC as the expression of a protective model, in the understanding that the decision maker will take the decision with a view to ensure the well-being of the child ; this is the traditional concept born from the Welfare System, that prevailed during the most part of the XXth century. In my opinion, it's impossible to consider the art. 3 only, in this straight meaning ; it will be disregarding the necessity to hear the child in all decisions affecting him/her.

The link between art. 3 and 12 is obvious. How could a decision maker determine the best interests of a child, without asking the child what is his/her opinion on the object of the decision ?

To my opinion, the right of the child contained in art 12 CRC is to be understood to the extent that in all situations where the best interests' principle must be applied, the child must have the right to express his/her views. The contrary would be very strange ! The child must be consulted in all this decisions, as far as he/she is capable of forming his or her own views, the views of the child being given due weight in accordance with the age and maturity of the child.

The best interest principle of art. 3 par. 1 is used is principally to determine the BI of individual cases ; but one cannot imagine that the best interests of children as a group are not 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”²⁴.

For me, there is no tension, nor singular, nor plural, between art 3 and art 12. CRC or better said between a protective approach contained in art 3, and a participative approach of art 12. If it's true that par. 2 and 3 of art 3 are « protective principles », it's clear that par. 1 as analysed above, is the fundament of the concept of the child, subject of right and the basis of the “rights base approach”, along with art. 12. The child is no more a human being to assist and protect, but a child who has something to say and who can influence the decision to be taken in his/her interest.

Art. 3 and art 4 are complementary . If art. 3 represents a sort of « ideal » to reach (the well-being of the child), art. 12 has a method to help the determination of the best interests : allow the child affected by the decisions to express his/her opinion on this ideal. In concrete cases and following the case by case process, there will be no contradiction in the action, since the decision maker (it can be the same person) has to

- First hear the opinion of the child/children on the case and on the possible solutions
- Give due weight to the child's opinion in determining the

²⁴ GC no 12, par 72 + 73

- best interests of the child/children in this specific situation
- At the end, take the decision after having given due weight to the opinion of the child and to his/her best interests.

To summarize:

The Convention does not indicate how the decision-maker must proceed to determine the best interests of the child. One thing is clear the decision-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. The views of the child are not the only competing elements when attempting to establish the best interests of the child, but represent an important factor in reaching a decision. In accordance with the age and maturity of the child (their competence or capacity), the views of the child will be of crucial importance and will have an influence on the decision. This approach is confirmed by the European Court of Human Rights in a case *Hokkaen vs Finland*, quoted by 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”^{25 26}.

There is no tension between article 3 and article 12 CRC, only a complementary role of the two general principles: one establishes the objective for achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing the child/children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected.

Likewise, article 3 reinforces the functionality of article 12, facilitating the participative role of children in all decisions

²⁵ Van Bueren, op. Cit. P. 35

²⁶ *Hokkanen vs Finland* (1993) EHRR, 19, 139, par. 61

affecting their lives. In this way, article 3 needs article 12 and article 12 serves the interests of article

IV The child's best interest : political dimension and measures of implementation

What is highly interesting in Art 3 par. 1 CRC is the part of the sentence reading »*or legislative bodies*«; this addition, which was absent in the draft text of 1981²⁷ is of capital importance: it means that whenever the national, regional, cantonal, municipal governments draw up a law, they must verify that the children are taken into account and that their interest is preserved. It is therefore by these two words (*legislative bodies*) that the political or macro-social dimension is introduced into the Convention. The best interest of the child takes on a new function: *it serves to establish what is good for the child and what is not in any legislative program*. The best interest of the child is enlightening politics!

In its General Comment no 5, on the general measure 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.”*²⁸

Isn't that also a revolution?

For the Committee, it goes without saying that the best interests 'principle obliges the State parties to take action in order to

²⁷ Quoted by Philip ALSTON, *The best interest principle: towards a reconciliation of culture and human rights*, in Philip ALSTON, *The best interest of the Child*, Clarendon Press Oxford, 1944, p.10

²⁸ General Comment No. 5 on “General measures of implementation for the Convention on the Rights of the Child, par. 47 (CRC/GC/2003/5)

implement this concept and to transform it, from rhetoric into social reality. As said before, the scope of the principle is very wide, going beyond state-initiated actions to cover private bodies too, and embracing all actions concerning children as a group. This is very crucial to underline, because there is a common belief that the principle is mostly for individual cases.

It is worth to mention that the Committee has stressed the obligation of the State parties to take the usual measures of implementation.

Since the Best interest is a rule of procedure and a “passage obligé” for the decision maker, the Committee in its GC no 5 has emphasised the necessity to legislate and the role of the judiciary, in this regards. SO, the CRC Committee states that the best interests’ principle

“... requires active measures throughout Government, parliament 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 – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.”²⁹ ,

But the legislation is not enough, the State parties has other obligations, in particular in the fields of data collection, budget allocations, monitoring, dissemination and training, as art. 4 CRC and the GC no 5 order to do.

Here the Committee refers to the necessity to build strategies, national plan of action and to allocate the essential financial, technical and human resources.

²⁹ General Comment No. 5 on “General measures of implementation for the Convention on the Rights of the Child, par. 12 (CRC/GC/2003/5)

“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 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”³⁰

A step further, the Committee explains child impact assessment and evaluation:

. “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....”³¹

The Committee has also examines the implementation of the best interests’ principle in its different General comments. I will mention here:

In the GC no 7 on early Childhood:, the Committee stresses the necessary measures of implementation and the two situations : the child and the children, as below :

*“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,*

³⁰ Idem, par. 45

³¹ Idem, par. 46

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; (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).³² (

In the General Comment no 8, the CRC Committee issues a very important statement on corporal punishment and the respect of art 3 par 1 CRC :

“When the Committee on the Rights of the Child has raised eliminating 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 (art. 3, para. 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

³² GC no 7, Implementing child rights in early childhood, par. 13 (CRC/C/GC/7/Rev.1)

*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.*³³

In the General comment on the rights of children with disabilities (no 9):

*"...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.*³⁴

*"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.*³⁵

In the 2007 General comment on Juvenile Justice (no 10), par 1 of art. 3 is the justification for a 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

³³ GC no 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment , par26 (CRC/C/GC/8)

³⁴ GC no 9, The rights of children with disabilities, par. 29 (CRC/C/GC/9)

³⁵ Idem. Par. 20

*in dealing with child offenders. This can be done in concert with attention to effective public safety”.*³⁶

And, in 2009, for the indigenous children remarks that :

*« 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 “.*³⁷

IV. Conclusion

The principle of the best interests of the child is one of the most important provisions of the CRC ; one of the most difficult to explain too.. But it seems impossible to work with the CRC without having any idea of this principle of interpretation or of this rule of procedure, or having just the impression that everybody is acting for the best interests of the child /children.

Actually we need a more objective knowledge of this concept, because there exists a risk to justify, with the same notion, very different decisions, all in the interest of the child...depending of the person who “interprets” with all his/her subjectivity what he/her thinks to be in the best interests of this individual child / or group of children.

Another important aspect is the political dimension of this principle, which must conduct the legislator to ask basic questions on the impacts of any law, ordinance, rule...

³⁶ GC no 10 Children’s rights in Juvenile Justice, par. 10 (CRC/C/GC/10)

³⁷ GC no 11, Indigenous children and their rights under the Convention, par.33 (CRC/C/GC/11)

whenever the children will be affected by this juridical instrument. Does it exist laws, ordinances, rules where the children aren't affected ? In the totality of the State parties to the CRC, we are very far from the fulfilment of this obligation.

I hope that in this 20th Anniversary, this article will help to better understands art 3 of the CRC and above all, that it will help the decision makers to take decisions which are respecting the demands of the best interest's principles, in the interest of the children waiting for decisions, or expecting that politicians will take seriously their commitments !

JZe, 28.10.2009