

The best interests of the child – A dialogue between theory and practice



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Introduction

Everyone has heard about it, but we do not actually know what it means – or do we? The concept of the best interests of the child is essential, yet vague and indeterminate. It has existed for a long time, but its importance grew when it was included in the United Nations Convention on the Rights of the Child (UNCRC).¹ Article 3.1 of the UNCRC states that:

[i]n 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.

What does this mean in practice? How should the concept be interpreted and applied?

The Belgian authorities and the Council of Europe wished to emphasise the role of the best interests of the child and further develop the normative provisions concerning this concept, specifically the deontological, ethical and procedural rules related to it. The European Conference on the Best Interests of the Child, “a dialogue between theory and practice”, was thus organised within the framework of the Belgian Chairmanship of the Committee of Ministers of the Council of Europe in collaboration with the Council of Europe Children’s Rights Division in Brussels on 9 and 10 December 2014, linking the 25th anniversary of the UNCRC with the Human Rights Day.

The conference was one of the priorities set by the Belgian Chairmanship under the topic “Promotion and realisation of human rights”. The aim of the conference was to shed light on a vague, indeterminate, yet very central concept whose importance for children’s rights is unquestionable. By organising the conference, we wanted to initiate and encourage discussion in order to spread knowledge and enhance understanding of the concept of the child’s best interests.

Clarifying the concept of the best interests of the child and its implementation in practice is important for children’s human rights in general. One of the main challenges related to the best interests of the child is to mobilise decision makers around the concept so that it is genuinely seen as a primary consideration in their daily work. Judges, medical professionals, psychosocial workers, psychologists, educators and other professionals who work with children and youth must have the necessary tools at their disposal to assess and determine the child’s interests. They must also

1. The UN Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989. It entered into force 2 September 1990, in accordance with Article 49.

understand the concept of the child's best interests in order to make good decisions that respect their human rights.

The conference explored the challenges decision makers face when working to implement the best interests of the child. The target group of the conference included experts, policy makers and practitioners involved in decisions that have an impact on children's lives, as well as representatives of the major European institutions and non-governmental organisations protecting the rights of the child. Each member state of the Council of Europe was invited to send a delegation of two participants to the conference. For Belgium, as well as for the Council of Europe, it was essential that all partners, experts, decision makers and practitioners, but also children, had the chance to express their views and contribute to the discussion. Organising the conference was a way to bring together a diverse range of actors and combine theory and practice in an effective way.

This publication reflects the main ideas discussed in the conference and sheds light on different aspects of the concept of the best interests of the child. In so doing, it presents 21 texts that all offer their own viewpoint on the concept. Together, these texts provide a comprehensive view of the best interests of the child, wherein the different dimensions of the concept are articulated.

This publication is structured into four chapters discussing the best interest of the child from different points of view.

The first chapter introduces general reflections on the best interests of the child that will help in understanding the regulatory framework surrounding the concept and its application. Jorge Cardona Llorens, member of the UN Committee on the Rights of the Child, discusses the strengths and limitations of the committee's General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration. Nigel Cantwell offers a critical point of view and discusses whether the concept offers added value to children's human rights. Olga Khazova, also a member of the UN Committee on the Rights of the Child, discusses questions related to the legal framework where the concept applies. Gerison Lansdown analyses the connection between the best interests of the child and participation, and Jacques Fierens introduces an idea of the best interests of the child as a guiding light, rather like the North Star. A study by the Children's Rights Knowledge Centre (KeKi) on children's best interests is also presented by Eveline van Hooijdonk.

The second chapter focuses on the process of assessing, determining and monitoring the best interests of the child. What tools can we use to evaluate, determine and apply the concept of the best interests of the child? How can we involve the child in the process in order to fully respect the requirements of the UNCRC? Urszula Markowska-Manista discusses marginalised children and the legacy of Janusz Korczak. Margrite Kalverboer introduces a model for the best interests of the child as a tool that can be helpful in practical situations, and Carla van Os discusses that model in the context of recently arrived refugee children. Hanne Op de Beeck asks whether systems developed for return decisions could serve as an inspiration when developing other monitoring systems.

The third chapter sheds light on the workability of such an indeterminate concept as the best interests of the child, in practice, in different environments. Regína Jensdóttir, Head of the Children's Rights Division of the Council of Europe discusses the concept of the best interests from the perspective of the Council of Europe. The European Commission Coordinator for the rights of the child, Margaret Tuite, discusses the role of this concept in the work of the European Union, and Tam Baillie, Scotland's Commissioner for Children and Young People, presents the perspective of an ombudsperson. Johanna Nyman, President of the European Youth Forum, analyses the concept from the perspective of young people and their rights. Bernard De Vos, Ombudsman for Children's Rights of the Federation Wallonia-Brussels, Belgium, discusses conditions for decision making that respects the rights of the child, as well as his past experiences as an ombudsman. Jana Hainsworth, Secretary General of Eurochild, discusses the child's best interests and challenges to its implementation from the point of view of civil society.

The fourth chapter focuses on the best interests of the child in family affairs, a central theme of the conference. Aida Grgić, lawyer at the European Court of Human Rights, analyses the best interests of the child in the case law of the European Court of Human Rights related to family affairs. Cristina Martins, President of International Federation of Social Workers Europe (IFSW), discusses best interests in the context of social work, and Valeriu Ghilețchi, Chair of the Social Affairs Committee of the Parliamentary Assembly of the Council of Europe, presents problems that arise when separating children from their families. Astrid Hirschelmann presents research on children whose parents are in prison, and Géraldine Mathieu discusses best interests in the context of the right to know one's origins.

Finally, the Appendices in this publication offer the full text of the speeches given by three Belgian ministers and the Head of the Council of Europe Liaison Officer to the European Union, followed by the conclusions of the conference, and the Executive summaries of the contributions to the conference.

History has shown that periods of economic, financial, social and environmental crisis do not favour children and youth, or the defence and promotion of their rights. Yet, it is in these times more than any other that children must remain at the heart of decision makers' concerns. Whether we admit it or not, the concept of the best interests of the child is one of the most central in the field of children's rights. Whether we like the concept or not, it is an essential provision in a binding international convention and has to be taken into account. If we want to understand children's rights, we cannot neglect to give particular attention to the concept of the best interests of the child.

We hope you find this publication interesting and that it succeeds in continuing the dialogue between theory and practice that shaped the conference in such a fruitful way.

Belgium

Council of Europe

Chapter 1

The concept of the best interests of the child: general reflections

Presentation of General Comment No. 14: strengths and limitations, points of consensus and dissent emerging in its drafting

Jorge Cardona Llorens

*Professor of Public International Law, University of Valencia,
Member of the Committee on the Rights of the Child²*

Writing about the child's best interests is a comparatively easy task for me because I have already made presentations in numerous conferences pertaining to General Comment No. 14 of the UN Committee on the Rights of the Child. But this time, the challenge is quite different; the purpose of this text is to present current questions and concerns relating to the concept of the child's best interests and its interpretation by the Committee on the Rights of the Child in General Comment No. 14. In this article, I try to identify the strengths and weaknesses of the General Comment, the points of consensus and dissent which emerged in its drafting, and the difficulties of tangibly fulfilling the child's best interests in the decision-making process.

This is not an easy task, because I must uphold the confidentiality of the deliberations in the Committee, and because what I normally try to do is to emphasise the strong points of the General Comment and the benefits of its implementation, not the weak points.

I have decided to concentrate on four questions: firstly the child's best interests as an indeterminate but not discretionary legal concept, secondly the problems of assessing and determining children's best interests in the adoption of general measures, thirdly the relationship between the child's best interests and the other legitimate interests involved and lastly the consequences of maintaining the threefold legal nature of the child's best interests as a right, a legal principle and a procedural rule.

2. This text expresses the author's opinion and not necessarily the opinion of the United Nations Committee on the Rights of the Child.

The child's best interests as an indeterminate but not discretionary legal concept

Firstly I shall concentrate on the child's best interests as an indeterminate but not discretionary legal concept. When I joined the Committee in 2011, the chairperson asked me to choose the working groups to which I wished to belong. I chose three: the working group on the child's best interests, the working group on state obligations regarding the impact of the business sector on children's rights and the group on reform of the Committee's working methods. In principle, the last two were to begin their work in 2011 and the first, on best interests, was in the process of finishing its work.

The chairperson gave me the text which the Committee had already drawn up and asked me my frank opinion. After a first reading, and because frankness had been requested of me, I said that I disliked the text. "Why?" the chairperson enquired. "Because on reading the document I find no criteria for assessing and determining a child's interest in a given situation," was my reply. Having heard my answer, the chairperson said to me, "Very well, Jorge. Your opinion coincides with several which we have received in the last few weeks. Since you are the newcomer to the working group, you'll be the rapporteur for revising the text so that it answers the question you have raised."

What is the basic question? True, the concept of a child's best interests is adaptable to the situation of each child and to the evolution of knowledge about the child's development. But, as was emphasised in the General Comment, this flexibility:

may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant.³

So this was my first besetting concern: the idea of a child's best interests is indeed an adaptable concept embracing various, constantly evolving questions, an indeterminate legal concept to be determined case by case. However, it should be clearly established that it is on no account a discretionary concept.

The sentence which I wrote at the top of my blackboard in my office was the following: For the same decision, the assessment and determination of the best interests of five different children should prompt us to make five different determinations (given that no two children are alike in the same circumstances and in the same situation). But the assessment and determination of one child's best interests made by five adults individually in the adoption of a decision should arrive at the same result.

In other words, although the child's best interests are an indeterminate legal concept, their assessment and determination should be founded on objective criteria. The concept is intended to ensure both the full and effective realisation of all rights secured by the United Nations Convention on the Rights of the Child (UNCRC), and the child's overall development. Accordingly, the child's best interests are not what I consider best for a child but what, objectively, secures for the child both the full and effective realisation

3. Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3.1), paragraph 34.

of all the rights secured in the convention, and his or her overall development. This reasoning explains Part V of the General Comment entitled “Implementation: assessing and determining the child’s best interests”. The Committee was not content just to say that assessment of the child’s best interests should always be a single operation to be performed in each specific case having regard to the circumstances specific to each child, but also tried to show the proper path for this.

That is where the problems begin! What circumstances must be taken into account? Which elements should be considered in assessing them? Which procedural safety nets should be provided for assessing and determining the child’s best interests when decisions concerning him or her are taken?

The General Comment lists the circumstances, elements and safeguards which the Committee has decided to propose to states in every case. But, as explicitly stated in the General Comment, it is a:

non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision maker having to determine a child’s best interests. The non-exhaustive nature of the elements in the list implies that it is possible to go beyond those and consider other factors relevant in the specific circumstances of the individual child or group of children. All the elements of the list must be taken into consideration and balanced in light of each situation. The list should provide concrete guidance, yet flexibility.⁴

Among the elements to be taken into account are the child’s views; the child’s identity; preservation of the family environment and maintaining family relations; the child’s care, protection and safety; situations of vulnerability; the child’s right to health or the child’s right to education. In the Committee’s opinion:

the basic best-interests assessment is a general assessment of all relevant elements of the child’s best interests, the weight of each element depending on the others. ... The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment.⁵

Concerning balance between these different elements, the Committee has identified three situations to take into account:

- a) Firstly, where the various elements taken into consideration for assessing best interests in a given case conflict with the circumstances peculiar to it (for example, concern to preserve the family environment conflicts with the imperative of protecting the child from the risk of violence or abuse by parents). That is, balance between the elements, circumstances and factors to be taken into account.
- b) Secondly, the problems which arise when factors linked with concern to protect the child (possibly involving limitation or restriction of rights) need to be assessed in relation to measures of “empowerment” (which implies full exercise of rights without restriction). That is, balance between the child’s protection and empowerment.
- c) Thirdly, the connected question of the evolving character of the child’s capacities and the need for decision makers to envisage measures which can be reviewed or adjusted accordingly rather than take final, irreversible decisions. And simultaneously,

4. General Comment No. 14 (2013), paragraph 50.

5. General Comment No. 14 (2013), paragraph 80.