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## The Best Interests of the Child Principle

**ABSTRACT:** *The best interest of the child principle, a pillar of international family law and children's rights, is enshrined in the UN Convention on the Rights of the Child and serves as a guiding framework for decision-making affecting children. This article explores the evolution, interpretation, and application of the best interest principle, with a particular focus on the role of the Committee on the Rights of the Child. Additionally, the article highlights historical misapplications of the best interest principle, such as forced adoptions and child migrations, and underscores the risks of vague or biased interpretations. Drawing on Eekelaar's conceptualisation of children's basic, developmental and autonomy interests, the article emphasises the need for a child-centred approach.*

**KEYWORDS:** *best interest of the child, UN Convention on the Rights of the Child, children's rights, Committee on the Rights of the Child, General Comment No. 14, child protection, family law, child welfare*

### 1.

## Introduction

The best interest of the child principle stands as a pillar of international family law and children's rights, serving as a guiding framework for ensuring the welfare and protection of children in a wide range of legal contexts. Recognised across various international treaties, most notably the UN Convention on the Rights of the Child (UNCRC), this principle mandates that in all actions concerning children, their best interests must be a primary consideration. The Committee on the Rights of the Child, tasked with interpreting and overseeing the implementation of the UNCRC, plays a crucial role in shaping the application of this principle. However, its interpretation

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often evolves to address the complexities of contemporary issues affecting children globally.

This article aims to explore how the UNCRC Committee interprets and applies the best interest principle, particularly in the face of emerging challenges such as migration, child protection and the evolving nature of family structures. While the principle is well-established, its application is often challenging and must adapt to the realities of varying national contexts, societal changes and the specific vulnerabilities children face today.

By examining the Committee's General Comments, concluding observations and case law, this article will provide a detailed analysis of the evolving interpretation of the best interest principle. In particular, it will focus on how the Committee balances competing rights and interests, such as parental rights, State interests and the specific needs of children, to ensure that their welfare remains at the forefront of legal and policy considerations. By providing a comprehensive analysis of how the best interest principle is applied in diverse contexts, this article seeks to contribute to the ongoing discourse on international child protection and the evolving role of the UNCRC Committee in shaping its interpretation.

## 2.

### **The Best Interest of the Child Principle**

The term 'best interest of the child' is widely recognised, yet its precise definition remains somewhat ambiguous. The concept of the best interest of the child, a cornerstone of child protection, is deeply rooted in legal and social frameworks. Its prominence was greatly enhanced with its formal inclusion in the United Nations Convention on the Rights of the Child. However, despite its broad application, there remains considerable ambiguity surrounding what this principle entails across various circumstances. This lack of a clear, operational definition points to the need for a more precise framework that can be effectively applied in both legal and practical settings. Although widely regarded as essential, the principle often suffers from a degree of vagueness, complicating its consistent application, particularly as new societal challenges and technological innovations, such as assisted reproductive technologies, create unprecedented legal and ethical dilemmas.

The Convention on the Rights of the Child (UNCRC) is more than just a list of children's rights. While it certainly outlines these rights in detail, its impact is much broader. The UNCRC has introduced a significant shift in how children are viewed legally and socially. In earlier times, as seen in documents like the Geneva

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Declaration of 1924<sup>1</sup> and the Declaration on the Rights of the Child of 1959,<sup>2</sup> children were mainly seen as beings who needed protection and care – they were more like objects of concern than individuals with their own rights.

However, since the UNCRC was adopted in 1989, this perspective has changed dramatically. Children are now recognised as individuals with their own rights. This is not merely a symbolic change. The UNCRC, which has been ratified by almost every country in the world, legally enforces this view by establishing clear principles and rights for children. This broad acceptance underscores the strength and seriousness of the UNCRC's approach, firmly placing children as rights-holders in the international legal landscape. This evolution marks a critical advancement in how children's rights are understood and protected globally.

The new legal status of children as active rights-holders is primarily grounded in two interconnected articles of the Convention on the Rights of the Child – Article 3, which focuses on the best interests of the child, and Article 12, which emphasises the child's right to express opinions on all matters affecting them. Together, these Articles not only uphold the right of children to have a say in decisions impacting their lives but also ensure that their best interests are always considered in such decisions. These Articles serve dual roles within the UNCRC. They are recognised as two of the four foundational principles of the Convention, underscoring their importance to the overall framework. However, they are also distinct rights in their own right:

1. The right for a child's best interests to be assessed in any decision or action that affects them. (Article 3)
2. The right for a child to be heard, ensuring that their opinions are not only expressed but also given due consideration. (Article 12)

This dual recognition emphasises not only the procedural aspect of involving children in decisions affecting them but also the substantive right of having their best interests as a primary consideration. This approach represents a significant shift towards acknowledging and respecting children as individuals with agency and rights, aligning legal practices with the evolving understanding of children's roles within society. These rights, as outlined in Articles 3 and 12 of the Convention on the Rights of the Child, are granted not only to individual children but also collectively to all children defined by their age, as those under 18.

Despite the adoption of the UNCRC by the United Nations 35 years ago, numerous questions persist about the real-world impact of those rights. Specifically, it remains unclear how this recognition of children as rights-holders has influenced national

1 General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924

2 UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959

legislation, relevant legal frameworks and various other contexts. There is ongoing debate and inquiry into whether these rights are fully integrated and respected at the national level, and how these legal principles are applied in practical settings affecting children. The effectiveness of the UNCRC in bringing about substantive change in the treatment and rights of children across different countries continues to be a critical area of research and discussion.

A more in-depth analysis of the concept of what is best for children in legal terms, reveals that the phrase 'best interest' is relatively new to our legal systems. Previously, the focus was on 'the well-being of the child', but this has evolved into what is currently known as the 'best interest' principle, which is enshrined in Article 3 of the Convention on the Rights of the Child. This marks it as a thoroughly modern concept within legal discussions – a concept that, despite its importance, has not been fully explored in academic circles yet.

The definition of 'best interest' is still somewhat unclear and can be applied in many different ways, making it a flexible yet complex tool in legal contexts. It is particularly useful when addressing specific legal challenges or when being refined and expanded through court decisions. However, its broad and adaptable nature means that it requires careful interpretation to ensure it effectively protects children's welfare.

### ***2.1. The Evolution of the Principle of the Best Interest of the Child***

The concept of the 'best interest of the child' predates the formal recognition of children's specific human rights. Initially, it served as a general standard for guiding decisions concerning children, particularly in contexts where explicit legal rights had not yet been established. Although broad and somewhat ambiguous, this principle provided an essential framework for assessing decisions and actions that affected children.

Historically, the best interest principle has been invoked to justify a wide range of actions, from routine decisions to those that significantly altered the lives of children. A notable example is Dr Barnardo's late 19th-century advocacy in England where he championed the shift from institutional care to foster care, reflecting the application of this principle in transforming child welfare practices.<sup>3</sup> This shift, considered progressive at the time, was driven by the belief that foster care environments would better meet the developmental and emotional needs of children than institutional settings, marking an early application of the best interest principle to

3 Barnardo's UK. (2012). The history of Barnardo's. (Accessed 10.5.2024.) Retrieved from [http://www.barnardos.org.uk:80/what\\_we\\_do/who\\_we\\_are/history.htm](http://www.barnardos.org.uk:80/what_we_do/who_we_are/history.htm)

promote child welfare. Such historical examples underscore the enduring reliance on this principle in shaping child welfare policies, even before the formal recognition of children's rights.

However, the application of the best interest principle has not always aligned with what would today be considered acceptable under human rights standards. In the mid-20th century, actions such as forced adoptions and forced migrations were often justified under the pretext of serving children's best interests. These measures, now recognised as severe violations of human rights, reveal the potential dangers of how broadly and ambiguously this principle can be interpreted. The notion of acting in the 'best interest' of the child has, at times, been used to legitimise actions that are now widely condemned. This is particularly evident in historical policies involving the large-scale removal of children from their families – both domestically and across borders – under the rationale of providing them with 'better opportunities'. These practices, once seen as beneficial, are now universally regarded as abuses, reminding us of the complexities and risks inherent in the flexible interpretation of this principle.

A striking example of these misguided practices is the history of forced adoption in Australia, as documented in a 2012 Senate committee report.<sup>4</sup> This report preceded a national apology for these practices issued by the then Prime Minister Julia Gillard in 2013.<sup>5</sup> Between the late 1940s and early 1980s, approximately 150,000 babies born to unmarried mothers were forcibly adopted in Australia. This policy, backed by the Government and supported by churches and charities, was justified under the belief that it was in the children's best interests. The prevailing rationale was that children born to mothers deemed to be of low moral standing or living in poverty would lead better lives if adopted by infertile couples of higher social and economic status. This policy reflected deeply ingrained societal prejudices and assumptions about morality, class and family structure, prioritising the perceived well-being of children over the rights and dignity of their biological mothers. The forced adoptions, now recognised as grave violations of human rights, reveal how the principle of the best interest of the child can be dangerously misinterpreted when shaped by discriminatory social values rather than a genuine commitment to the child's welfare.<sup>6</sup>

The Senate report highlights how the principle of the best interest of the child was exploited to justify these practices, showing how social and moral judgments were

4 Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

5 Gillard, J. (2013). National Apology for Forced Adoptions. Parliament House, Canberra. Retrieved from <http://resources.news.com.au/files/2013/03/21/1226602/365475-aus-file-forced-adoptions-apology.pdf>

6 Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

used to manipulate decisions that had lasting, devastating consequences for both the children and their biological families. Beliefs about social standing and morality were central to these decisions, reinforcing discriminatory attitudes and enabling the forced removal of children under the guise of providing them a better future. An adoptee quoted in the report poignantly encapsulates the tragic misuse of this principle, stating, “*My true mother was told to give me away because it was in the best interests of the child*”.<sup>7</sup> This testimony underscores how the best interest principle, when applied without clear safeguards or an understanding of its broader implications, can be twisted to serve harmful and unjust purposes, inflicting deep emotional and psychological harm on those involved.

The concept of acting in the ‘best interest’ of children has historically been invoked to justify the systematic removal of indigenous children from their families in both Australia and the United States. Framed as an effort to provide these children with education and opportunities for a ‘better’ life, this practice was deeply embedded in broader governmental policies focused on assimilation in the United States and absorption in Australia. Throughout the nineteenth and twentieth centuries, these policies facilitated the large-scale removal of indigenous children from their communities, effectively severing their cultural ties under the pretext of offering protection and improvement. In reality, these policies were aimed at erasing indigenous identities, contributing to profound and lasting trauma for the children and their families. The use of the best interest principle in these cases reveals the danger of applying the concept without sufficient cultural sensitivity or regard for the rights and heritage of indigenous populations.<sup>8</sup>

In the United States, the post-World War II assimilation agenda transitioned into policies known as *termination* and *relocation*. While the era of Indian boarding schools persisted, child removal increasingly occurred with the intervention of social workers who deemed Native American homes ‘unfit’ by prevailing social standards. These children were often placed into white foster care systems, where they were separated from their families and stripped of their cultural identities. This practice was rationalised as a necessary step to integrate Native American children into mainstream society, but in reality, it perpetuated a systemic erasure of indigenous culture and family bonds. The justification of these removals as being in the children’s best

7 Para 4.7. Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

8 Haskins, V., Jacobs, M. D. (2002). *Stolen Generations and Vanishing Indians: The removal of indigenous children as a weapon of war in the United States and Australia, 1870–1940*. New York: New York University Press.

interests masked the deeper goal of cultural assimilation and resulted in profound, long-lasting harm to Native American communities.<sup>9</sup>

In Australia, similar child removal practices targeted Aboriginal children, a tragedy now infamously known as the Stolen Generations. These removals were officially presented as welfare initiatives aimed at transforming Aboriginal children into 'decent and useful members of the community'. Under this policy, organisations like the New South Wales Aborigines Protection Board were granted the power to take custody of Aboriginal children if it was believed to be in the child's best interest, particularly regarding their moral or physical welfare. The language of benevolence, however, concealed the deep cultural dislocation and emotional trauma inflicted on those children and their communities. In both Australia and the United States, these policies, which were ostensibly designed for the children's benefit, have since been widely acknowledged as acts of cultural genocide. The lasting impact of these practices continues to resonate within indigenous communities today, leading to ongoing calls for justice, reconciliation and a critical re-evaluation of what truly constitutes the 'best interest' of a child, particularly in contexts shaped by historical and cultural complexities.

A similar strategy was adopted in Switzerland where the Jenisch traveling communities experienced systematic child removals from their families from the late 1920s until the early 1970s.<sup>10</sup> This practice was rationalised as serving the children's own good. In 1926, the *Œuvre des enfants de la grand-route* (Action for traveling children), in collaboration with various charitable organisations and backed by the Confederation, initiated the forced removal of approximately 800 Jenisch children. These children were placed with foster families or confined in psychiatric hospitals and even prisons, with the stated objective of assimilating them into a sedentary lifestyle. This policy continued unchecked until 1973 when the affected individuals, through media exposure, successfully brought these practices to an end.

The underlying belief that such drastic measures were in the best interests of the children justified not only the forced removals within Switzerland but also set a precedent that such forced migration could be deemed acceptable. This mindset underscores a broader historical pattern where State and societal interventions, claimed to benefit children, often resulted in severe disruptions to their lives and cultural identities. The case of the Jenisch children in Switzerland is a poignant example of how the notion of best interest can be manipulated to support harmful policies that, in retrospect, are recognised as grave injustices.

9 Marten, J. (2002). *Children and War: A historical anthology* (pp. 227–229). New York: New York University Press.

10 Cantwell, N. (2014). *The Best Interests of the Child in Intercountry Adoption*. UNICEF Office of Research, Florence, pp. 7-9.

The United Kingdom has a particularly troubling history of forced child migration, serving as the origin for some of the most severe cases of long-term displacement of children to other countries. According to an in-depth examination by a Parliamentary Committee, it is estimated that around 150,000 children were subjected to this practice during the nineteenth and twentieth centuries.<sup>11</sup> The majority, about two-thirds, were sent to Canada, while the rest were relocated to Australia, New Zealand and other British dominions or colonies. Notably, child migration to Canada ceased after the Second World War, but between 1947 and 1967, between 7,000 and 10,000 children were sent to Australia and 549 to New Zealand.<sup>12</sup>

The Committee's report acknowledges that the best interest principle was sometimes invoked as a justification for child migration policies, though it likely served to obscure more questionable motivations. The report emphasises that the rationale behind these policies was complex and not purely humanitarian. While there was a philanthropic intent to rescue children from poverty and neglect in Britain and protect them from perceived moral dangers – such as having mothers who were prostitutes – economic considerations were also significant. Child migration provided Britain with a means to reduce the financial burden of child welfare, while the receiving countries viewed the children as potential members of a trained workforce. In reality, many of these children were exploited as cheap labour, highlighting the disparity between the stated objectives of the policy and the harsh realities the children faced. This misuse of the best interest principle underscores how economic and political motivations can sometimes distort policies intended to protect vulnerable children.

The report further reveals that charitable and religious organisations were the main driving forces behind sustaining the child migration policy, often motivated by the financial necessity to keep their institutions viable in the colonies. While various justifications were offered for these practices, the report ultimately characterises the forced child migration policy as “a bad and, in human terms, costly mistake”. It also draws unsettling parallels between these historical practices and modern-day intercountry adoptions, highlighting the continued need to critically examine the motives and outcomes of child relocation policies. This comparison underscores the importance of ensuring that such policies genuinely prioritise the best interests of the children, rather than repeating past mistakes that served the interests of others.

These historical examples demonstrate the potential dangers of misusing the best interest principle as a blanket justification for drastic interventions in children's lives. They stress the importance of vigilance and of adopting a more nuanced,

11 UK Parliament Select Committee on Health. (1998). Third Report, para. 11. Retrieved from <http://www.publications.parliament.uk/pa/cm199798/cmselect/cmhealth/755/75502.htm>

12 Ibid.



context-specific approach to ensure that the principle genuinely protects children's welfare, rather than reflecting societal prejudices or advancing the interests of more powerful groups.

Conversely, the 'best interest' principle has also been applied constructively in legal contexts, particularly in family law. Courts in many countries have long used this principle as a critical criterion in deciding custody and access arrangements during parental divorce proceedings. This usage underscores the principle's intended role in safeguarding children's welfare, ensuring that their needs and well-being are prioritised in legal decisions that profoundly affect their lives.

The significant emphasis placed on the best interest principle in the UNCRC is both undeniable and deeply fascinating. It is somewhat challenging to account for how Article 3 of the UNCRC came to be framed in such a comprehensive manner. To understand this, it is essential to look back at the historical texts on children's rights. The 1924 Declaration of the Rights of the Child,<sup>13</sup> also known as the Geneva Declaration, which is often regarded as the foundational international text concerning children's rights, does not mention the best interest of the child at all.

However, the situation began to evolve with the subsequent 1959 Declaration on the Rights of the Child,<sup>14</sup> which is considered to have enshrined the concept, though in reality, it only explicitly mentions best interests in two specific and relatively narrow contexts. Firstly, the best interests of the child are given "the paramount consideration" in elaborating laws designed to enable the child's development across various dimensions – physical, mental, moral, spiritual, and social (Principle 2). Secondly, the declaration advises parents and other caregivers to regard the child's best interests as "the guiding principle" in their upbringing efforts (Principle 7). The introduction of this essential principle marked a significant milestone in international law-making. However, since the UN Declaration was adopted as a General Assembly Resolution, it carried no binding legal force. As a soft law instrument, its implementation relied solely on the willingness of States to adhere to its provisions. Additionally, it is important to note that in this document, the child was still largely viewed as an object in need of protection and assistance, rather than as an autonomous individual. It was only during the drafting of the Convention on the Rights of the Child that a paradigm shift occurred, recognising the child as an independent rights-holder, capable of exercising rights in their own capacity. This transformation laid the foundation for a more enforceable framework for protecting children's rights under international law.

13 General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924

14 UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959

This perspective, focusing primarily on lawmakers and primary caretakers, shaped the initial proposal for a convention made by Poland in 1978, which later influenced the development of the UNCRC. This historical context highlights the evolution of the best interest principle from non-existent in early declarations to a cornerstone of contemporary international child rights law, as encapsulated in the UNCRC. The broad, all-encompassing phrasing of Article 3 in the UNCRC marks a significant expansion from these earlier, more limited references, reflecting a growing global consensus on the importance of prioritising children's welfare in all aspects of society.

The initial draft proposed by Poland for the UNCRC was ultimately rejected as a foundation for the treaty, leading to a significant revision the following year. This revised proposal unexpectedly set the stage for a substantial expansion of the best interest principle within the UNCRC.<sup>15</sup> It now proposed that the best interests of the child should govern “all actions concerning children”, whether these actions were undertaken by parents, guardians, social or State institutions, especially by courts of law and administrative authorities, and it maintained that these interests should be “the paramount consideration”.

During the drafting process, this formulation underwent some changes – most notably, the references to parents and guardians were relocated, legislators were explicitly included among the actors responsible for considering children’s best interests, and “the paramount” was moderated to “a primary consideration”. However, the discussions around the profound shift in perspective that this expanded scope represented were surprisingly limited. The drafters came closest to addressing these issues in response to a last-ditch, unsuccessful effort by the Venezuelan delegate who sought clearer guidelines for implementing this principle in practice.<sup>16</sup> As a result, the comprehensive scope of Article 3 as it stands today was established with little debate about its broader implications.

The definitive formulation of the principle was consolidated in the 1989 United Nations Convention on the Rights of the Child, specifically within Article 3. This Article lays down a foundational principle that has come to define modern approaches to child welfare and legal standards: the principle of the best interests of the child. According to this principle:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities,*

15 United Nations Commission on Human Rights (UNCHR), Working Papers of the 34th Session (7 February 1978) E/CN.4/L.1366

16 OHCHR, Legislative History of the Convention on the Rights of the Child (OHCHR/Save the Children, 2007).

*or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>17</sup>*

This wording not only mandates that children’s best interests be prioritised in all decisions affecting them, but it also broadens the scope of this consideration to include a variety of entities that might influence a child’s life. Whether it is through the actions of courts, the policies of social welfare institutions, or the laws passed by legislative bodies, this principle requires that all such actions uphold the child’s best interests as a central concern. By explicitly including both public and private sectors, Article 3 ensures that the protective umbrella it casts over children is comprehensive, leaving no area where the best interests of the child are not to be considered. As reflected in the *travaux préparatoires* of the CRC, the drafting process involved extensive debates surrounding the precise wording of the best interest principle. A key discussion focused on whether the best interests of the child should be defined as “a” or “the” primary consideration, or, as in the 1959 Declaration, “the paramount” consideration. Ultimately, the decision was made to adopt the phrasing “a” primary consideration, allowing flexibility to balance conflicting interests in various contexts. This choice underscores that the best interest of the child is not an absolute right and may be overridden by other factors, such as the protection of public order, the interests of another child, or, in rare cases, the interests of the parents. Nevertheless, the principle maintains a particularly high level of importance; it must be given substantial weight, especially when an action directly affects the child involved. This prioritisation signals that, although not absolute, the best interest of the child should be treated as a matter of highest priority in decision-making.

The principle of the best interests of the child is a central theme throughout the United Nations Convention on the Rights of the Child, imposing numerous obligations on States Parties to prioritise this principle in decision-making processes, particularly in the realm of family law. This principle not only guides broad legislative frameworks but also affects specific legal stipulations directly impacting children’s lives:

- Article 9 addresses the conditions under which children may be separated from their parents, ensuring that such decisions prioritise the child’s best interests.
- Article 18 reinforces the responsibilities of parents towards their children, laying down that parental duties be performed in ways that serve the child’s best interests.
- Article 20 concerns children deprived of a family environment, stipulating that alternative care must be provided with the child’s best interests as a primary consideration.

17 UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989

- Article 21 deals with adoption, specifying that all aspects of the adoption process must safeguard and prioritise the child's best interests.

The principle also plays a critical role in the context of juvenile justice,<sup>18</sup> providing specific protections to ensure that the justice system serves the welfare of children:

- Article 37(c) lays down the separation of juvenile detainees from adults, a provision that acknowledges the vulnerability of young people in detention and aims to protect them from harmful influences and ensure their safety.
- Article 40(2)(b)(iii) requires that parents be present at court hearings involving juvenile penal matters, emphasising the importance of parental support and advocacy in the legal processes affecting their children.

These Articles collectively underscore the UNCRC's comprehensive approach to embedding the best interests of the child in all legal actions and decisions affecting children, whether in the context of family stability, alternative care, adoption, or the juvenile justice system. This pervasive inclusion ensures that children's welfare is consistently considered and protected across various legal and administrative contexts, promoting a holistic approach to child rights that aligns with the core objectives of the Convention.

The principle of the best interest of the child is not only a cornerstone of the United Nations Convention on the Rights of the Child, but it has also been incorporated into other significant international legal frameworks. Notably, this principle is articulated in the UN Convention on the Rights of Persons with Disabilities (Article 23(2)),<sup>19</sup> which underscores the importance of considering children's best interests in contexts involving persons with disabilities. Similarly, The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Article 4(b))<sup>20</sup> emphasises that the best interest of the child should be a primary consideration in intercountry adoption processes.

This concept is a fundamental legal principle used to moderate the extent of authority that adults – whether parents, professionals, teachers, medical doctors or judges – have over children. It is predicated on the understanding that adults are tasked with making decisions on behalf of children primarily because children lack

18 Váradi-Csema, E. (2022) 'Children's Rights and the Criminal Protection of Minors' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century*. Miskolc-Budapest: Central European Academic Publishing, pp. 413–435.

19 UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, A/RES/61/106, 24 January 2007

20 Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 33, Hague Conference on Private International Law, 29 May 1993

the experience and judgment needed to make such decisions themselves. This principle serves as a crucial check on adult authority, ensuring that decisions impacting children prioritise their welfare and rights above everything else. By mandating that children's best interests be at the forefront of all relevant decision-making, this principle advocates for a protective and respectful approach to handling matters that affect the most vulnerable population.

### 3.

#### The Best Interest Principle and its Interpretation by the Committee on the Rights of the Child

The term *best interest of the child* embodies the overall well-being of a child and is a fluid concept influenced by a range of individual and environmental factors. These factors include the child's age, gender, maturity level, personal experiences and the availability or lack of parental care. Other important considerations are the quality of the child's relationships with their family or caregivers, their physical and psychosocial well-being and the need for protection from risks. Together, these elements help determine what serves the child's best interests in any given situation.

Although the United Nations Convention on the Rights of the Child does not explicitly define the best interest of the child, this principle is fundamental in interpreting and applying the UNCRC and other international legal frameworks. The Committee on the Rights of the Child provides further guidance on this principle, emphasising that it ensures "*both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child*".<sup>21</sup> This interpretation underscores that the best interests of the child must guide all actions and decisions that affect them, ensuring these choices foster their overall development and enable them to fully exercise their rights under the Convention on the Rights of the Child. In practice, this means that the application of the best interest principle must be adaptable to each child's unique situation, ensuring that their specific needs and rights are prioritised in any decision made concerning their welfare.

Following the UNCRC's entry into force in September 1990, the establishment of the Committee on the Rights of the Child was instrumental in ensuring the effective implementation of the Convention. One of the Committee's first tasks was to outline the key areas of focus for States Parties in their initial reports, which detailed the measures taken to implement the Convention's provisions.

21 UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, 29 May 2013

In structuring these reports, the Committee emphasised four core principles as essential for the comprehensive application of the UNCRC. These included: (1) non-discrimination, ensuring that all children have equal access to their rights without prejudice; (2) the right to life, survival and development, which highlights the fundamental importance of nurturing a child's capacity to grow and thrive; (3) the right to be heard, affirming that children's views must be considered in all matters affecting them; and (4) the assurance that the best interests of the child will be a primary consideration in all decision-making processes. These guiding principles continue to shape how States and other actors interpret and apply the UNCRC in practice, ensuring a holistic approach to child welfare and rights.

The Committee subsequently designated these four critical areas as the General Principles of the UNCRC. This designation not only emphasised their importance but also established them as the foundation for all future reports from States Parties. This strategic move originated from the deliberations of a 10-person group, focused on developing a standardised questionnaire for States Parties. This group unilaterally decided to elevate the best interests of the child to a status of special importance, highlighting it as a pivotal principle throughout the applications and evaluations of the Convention. This decision has significantly shaped how the UNCRC has been implemented and monitored globally, ensuring that these principles guide the actions and policies affecting children worldwide.

It is notable that no other treaty body has given such prominence to specific provisions within an international instrument as the Committee on the Rights of the Child has with the best interest principle. This principle has been almost universally and unquestioningly accepted as a fundamental aspect of the UNCRC. Without adherence to this principle, effective implementation of the treaty could be significantly hindered or even rendered impossible.

Despite its critical importance, the best interest principle is not without its complications. Historically, its flexibility has occasionally led to misuse, leaving a legacy that continues to challenge its application. This flexibility, while making the principle highly relevant to addressing the unique needs of children within a human rights framework, also adds to its complexity. Surprisingly, it took over 20 years for the Committee to issue a General Comment that specifically interprets and clarifies the application of the best interest principle, highlighting the intricate nature of this concept.

The Committee has made numerous efforts through its General Comment to address the conceptual and practical challenges associated with the best interest principle. Their work underscores the revered status of best interests within the UNCRC as a fundamental value, embodying a right, a principle and a rule of procedure. This delineation ensures that the best interests of the child are consistently

prioritised and implemented across all levels and in all situations, affirming the principle's pivotal role in promoting and protecting children's rights globally.

The Committee on the Rights of the Child articulates the principle of the best interests of the child in UNCRC General Comment No. 14 as encompassing three distinct yet interconnected aspects:

1. A substantive right: This component emphasises that every child possesses the right to have their best interests thoroughly assessed and prioritised as a fundamental consideration in all actions affecting them. This right ensures that the child's welfare is at the forefront of all decisions. This substantive right guarantees that every child has the legal right to have their best interests thoroughly assessed and prioritised in all actions and decisions affecting them. The Committee emphasised that this right is not merely a guiding principle but a self-executing norm, meaning that it can be directly invoked and enforced without requiring domestic transformation, even in legal systems with dualist approaches to international law. This self-executing character makes the principle of the best interests of the child a particularly powerful tool, as it imposes a direct and enforceable obligation on States. In practice, this allows the principle to be invoked before national courts in proceedings involving children, regardless of whether it has been formally integrated into domestic legal frameworks. While the Convention on the Rights of the Child has been ratified by almost every country in the world, this feature adds significant legal weight to the best interest principle by ensuring that it can be applied directly in legal disputes concerning children.
2. A legal principle: As a legal principle, the best interests of the child serve as a fundamental interpretative tool in legal decision-making. When a legal provision can be interpreted in multiple ways, this principle mandates that the interpretation which most effectively safeguards and promotes the child's welfare must be chosen. In this context, the best interests of the child function as a guiding standard, ensuring that laws are applied in a manner that prioritises the child's needs and rights. This principle is particularly important in situations where legal ambiguity exists, requiring courts and decision-makers to adopt an approach that most accurately serves the child's interests. By placing the child's welfare at the forefront of legal interpretation, this principle reinforces the commitment to children's rights as a central concern in judicial and administrative processes.
3. A rule of procedure: As a rule of procedure, the best interests of the child require decision-makers to conduct a comprehensive impact assessment of any action or decision that affects a child, a group of children, or children at large. This procedural obligation ensures that children's interests are thoroughly considered and integrated throughout the decision-making process.

Authorities are required to justify how the best interests of the child were taken into account, making it a crucial element in validating the decision. The decision must explicitly outline how the child's best interests were identified, which criteria were used to evaluate them, and how those interests were balanced against other considerations. This procedural safeguard demands transparency, ensuring that children's welfare remains a central factor in decisions impacting their lives. By embedding the child's best interests into every stage of the process, this rule ensures that authorities prioritise children's rights and provide clear, reasoned explanations for the outcomes of their decisions.

The best interest principle is universally applicable to all children, irrespective of their nationality, immigration status, including asylum seekers, refugees, or statelessness, and regardless of whether children are accompanied by family members or are unaccompanied or separated. This wide-ranging application underscores the principle's importance not only in personal circumstances but also in broader actions such as the drafting of legislation, policy-making, and resource allocation by States. It mandates that public institutions consider the best interests of the child in all actions that could impact them, thereby embedding children's welfare deeply within the fabric of societal structures and legal frameworks.

The necessity to formalise a method for applying the best interest principle is rooted in Article 3, paragraph 1 of the UNCRC. The Committee on the Rights of the Child clarifies that not all State actions require an exhaustive and formal assessment of a child's best interests. However, for decisions that will significantly affect a child or children, there is a need for enhanced protection and detailed procedural guidelines. The Committee emphasises that the magnitude of the decision's impact on a child's present and future well-being correlates directly with the level of procedural safeguards required during the decision-making process.

To assist States, civil society, the private sector and individuals working directly with and for children, including parents and caregivers, the Committee on the Rights of the Child has drawn up a comprehensive, though non-exhaustive and non-hierarchical, list of factors to be considered when assessing a child's best interests. These factors aim to ensure that all decisions reflect a holistic view of the child's needs and rights. Key elements to be considered include:

- The child's views: Prioritising the child's own opinions and feelings in matters affecting them.
- The identity of the child: This encompasses a wide array of attributes such as gender, sexual orientation, national origin, religion, cultural identity and personality, ensuring that these factors are respected and reflected in decisions.



## The Best Interests of the Child Principle

- The family environment and relationships: The quality of familial relationships and the nature of the child's current home environment play a crucial role in determining what will serve the child's best interests.
- Care, protection and safety of the child: This includes evaluating the child's general welfare, safety and overall development.
- Situations of vulnerability: Identifying risks to the child and assessing the sources of resilience, protection and empowerment available to them.
- The child's rights and needs concerning health and education: Ensuring that the child has access to adequate healthcare and educational opportunities as fundamental components of their development.<sup>22</sup>

By establishing these guidelines, the Committee aims to provide a clear framework for decision-makers to follow, ensuring that all considerations are made systematically and with the child's best interests as the focal point of decisions. This approach is intended to uphold the rights and welfare of children consistently and effectively across various contexts.

## 4. Conclusion

In conclusion, the best interest of the child principle, as enshrined in the UN Convention on the Rights of the Child, is a foundational element of international child protection and family law. It offers a flexible yet essential framework to ensure that children's welfare remains central to all decision-making processes that impact their lives. Over time, the principle's interpretation has evolved, particularly through the work of the Committee on the Rights of the Child, reflecting the growing complexities of contemporary legal and societal issues, including migration, family dynamics and child protection.

While the principle has acted as a protective shield globally, historical misapplications—such as forced adoptions and child migrations—underscore the risks of vague or biased interpretations. These examples remind us of the dangers posed when children's rights are compromised by political, social or economic interests. The ongoing challenge is to maintain a nuanced approach that carefully balances competing rights and interests, ensuring the best interest principle genuinely serves children's welfare.

22 UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, 29 May 2013

The Committee's efforts, especially through General Comment No. 14, provide valuable guidance on how to apply this principle effectively in practice. By establishing a structured framework for evaluating children's best interests in diverse contexts, the Committee has strengthened the legal and procedural safeguards that protect children's rights. This evolving understanding aligns with Eekelaar's definition of children's basic, developmental, and autonomy interests, which encompasses physical, emotional and intellectual care, preparation for adulthood and the freedom to choose one's own path. His insight reinforces the idea that children are not merely objects of protection but active rights-holders who deserve respect and fulfilment from birth into adulthood. As Eekelaar rightly points out, framing the CRC in terms of children's rights, rather than merely the duties of adults, reflects a progressive view of human development.<sup>23</sup> This perspective emphasises that respecting and fulfilling children's rights not only benefits them but also fosters a society where individuals can contribute positively to others. Thus, as the application of the best interest principle continues to evolve, vigilance, cultural sensitivity and a child-centred focus remain essential in safeguarding the welfare and rights of all children.

23 Eekelaar, J. (1992). The importance of thinking that children have rights. *International Journal of Law and the Family*, 6(2), 230-231.

## Bibliography

- Australian Senate, Community Affairs References Committee. (2012). *Commonwealth contribution to former forced adoption policies and practices*. Canberra: Commonwealth of Australia.
- Barnardo's UK. (2012). *The history of Barnardo's* [Online]. Available at: [http://www.barnardos.org.uk:80/what\\_we\\_do/who\\_we\\_are/history.htm](http://www.barnardos.org.uk:80/what_we_do/who_we_are/history.htm) (Accessed: 10 May 2024).
- Cantwell, N. (2014). *The Best Interests of the Child in Intercountry Adoption*. Florence: UNICEF Office of Research, pp. 7–9.
- Eekelaar, J. (1992). The importance of thinking that children have rights. *International Journal of Law and the Family*, 6(2), 230–231.
- General Assembly of the League of Nations (1924). *Declaration of the Rights of the Child*, 26 September 1924.
- Gillard, J. (2013). *National Apology for Forced Adoptions*. Parliament House, Canberra. Available at: <http://resources.news.com.au/files/2013/03/21/1226602/365475-aus-file-forced-adoptions-apology.pdf> (Accessed: 10 May 2024).
- Hague Conference on Private International Law (1993). *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33. Hague: Hague Conference on Private International Law, 29 May 1993.
- Haskins, V., & Jacobs, M. D. (2002). *Stolen Generations and Vanishing Indians: The removal of indigenous children as a weapon of war in the United States and Australia, 1870–1940*. New York: New York University Press.
- Marten, J. (2002). *Children and War: A historical anthology* (pp. 227–229). New York: New York University Press.
- OHCHR (2007). *Legislative History of the Convention on the Rights of the Child*. Geneva: OHCHR/Save the Children.
- UK Parliament Select Committee on Health. (1998). *Third Report, para. 11* [Online]. Available at: <http://www.publications.parliament.uk/pa/cm199798/cmselect/cmhealth/755/75502.htm> (Accessed: 10 May 2024).
- UN Committee on the Rights of the Child (CRC) (2013). *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, 29 May 2013.
- UN General Assembly (1989). *Convention on the Rights of the Child*, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.
- UN General Assembly (1959). *Declaration of the Rights of the Child*, A/RES/1386(XIV), 20 November 1959.
- UN General Assembly (2007). *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, A/RES/61/106, 24 January 2007.

- United Nations Commission on Human Rights (UNCHR) (1978). *Working Papers of the 34th Session*, E/CN.4/L.1366, 7 February 1978.
- Váradi-Csema, E. (2022). 'Children's Rights and the Criminal Protection of Minors' in Váradi-Csema, E. (ed.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century*. Miskolc–Budapest: Central European Academic Publishing, pp. 413–43.