

# The concept of the best interests of the child: what does it add to children's human rights?

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# The notion of 'best interests'

- ▶ Originally a 'standard' for decision-making in the absence of codified rights
- ▶ Often invoked to justify harmful initiatives
- ▶ Used uniquely in relation to children in international human rights law and private international law; does not figure at all in international humanitarian or refugee law
- ▶ Is it logical and desirable that best interests must now be seen as a primary or even the determining consideration for all actions affecting children in a human rights context?

# ‘Best interests’ in the CRC

- ▶ No mention in 1924 Declaration of Geneva
- ▶ 1959 Declaration: best interests concerned only law-makers and parents (‘enshrined’?)
- ▶ Idem in the initial Polish proposal for a convention text (1978)
- ▶ Revised proposal (1979): broadened to cover a far wider range of actors and matters...
- ▶ Final CRC Art. 3.1 reflects broad approach...
- ▶ ... despite absence of discussion on the implications of this move

# 'Best interests' and the Committee

- ▶ CRC Committee originally identified 'best interests' as an over-arching theme to be dealt with in States Parties' reports...
- ▶ ... then designated it (1991) as one of four General Principles of the CRC.
- ▶ Despite such importance given to a vague and often manipulated 'pre-rights' notion...
- ▶ ... the Committee took over 20 years to issue interpretative guidance (General Comment)...
- ▶ ... taking the notion uncritically at face value

# The big test: intercountry adoption

- ▶ Best interests originally used to justify private initiatives in a legal void, and continuously reaffirmed ('paramount') in international law
- ▶ A disturbing lack of international consensus:
  - 'Socio-cultural' differences between countries of origin and receiving countries
  - Receiving countries demonstrate fundamental disagreement as to when best interests are being upheld
  - In emergency situations, 'best interests' invoked to justify rights violations by side-stepping required procedures and undertaking 'evacuation' or 'forced migration'
- ▶ Determination process: the problem of scarce resources and hesitation over 'definitive, irreversible decisions'
- ▶ Is this really solid enough ground for deciding on what is supposed to be a permanent and life-changing measure?

# When best interests are a problem

- ▶ No need for ‘best interests’ considerations in most cases:
  - Promotion and protection of human rights in decision-making in general does not rely on ‘best interests’ (the basis of Art 3.1 was agreed too early and never reviewed...)
  - Determination of ‘best interests’ anyway grounded in review of rights impact (cf. CRC General Comment)
  - Many pointless references to ‘best interests’ instead of focus on the human rights in play
- ▶ Enhanced general status of ‘best interests’ vis-à-vis other rights can send the wrong message and be a distraction

# When best interests are useful

- ▶ If properly carried out, ‘best interests’ determination in the context of protecting human rights can be helpful in a limited number of circumstances, notably:
  - Deciding between two or more options that, *a priori*, are all compliant with human rights
  - Dealing with real or apparent conflicts between rights
  - Deciding on issues not clearly covered by other rights
  - Case-by-case decisions to proceed with foreseen derogations from a specific established right
  - Relativising the interests of other parties

# The case for a new look

- ▶ The role of best interests should come into play only when necessary, appropriate and feasible
- ▶ Look on recourse to ‘best interests’ as potentially useful more especially when children’s human rights alone do not provide sufficient guidance – a stance that corresponds well to **the original function** of the concept as a ‘standard’ on children’s issues in the absence of rights, with the added security now of a human rights framework within which that standard is to be applied...
- ▶ In every situation, ask if safeguarding the human rights of persons other than children would require a reference analagous to ‘best interests’, and **if not, why not?**