

CRC on best interest of the child¹

Article 3

1. 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.
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.
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.

1. Comment on article 3

The concept of the “best interests” of children has been the subject of more academic analysis than any other concept included in the Convention on the Rights of the Child. In many cases, its inclusion in national legislation pre-dates ratification of the Convention, and the concept is by no means new to international human rights instruments.

The Committee on the Rights of the Child has highlighted in the article 3(1), that the best interest of the child shall be a primary consideration in all actions concerning children, as one of the general principles of the Convention on the Rights of the Child, alongside articles 2, 6 and 12. The principle was first seen in the 1959 Declaration of the Rights of the Child, which uses it in Principle 2: “The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”

Interpretations of the best interests of children cannot trump or override any of the other rights guaranteed by other articles in the Convention. The concept acquires particular significance in situations where other more specific provisions of the Convention do not apply. Article 3(1) emphasizes that governments and public and private bodies must ascertain the impact on children of their actions, in order to ensure that the best interests of the child are a primary consideration, giving proper priority to children and building child-friendly societies.

Within the Convention itself, the concept is also evident in other articles, providing obligations to consider the best interests of individual children in particular situations in relation to:

- separation from parents: The child shall not be separated from his or her parents against his or her will “except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”; and States must respect the right of the child to maintain personal relations and direct contact with both parents on a regular basis “except if it is contrary to the child’s best interests” (article 9(1) and (3));

¹ Der Text stammt aus dem „Survey über die Abschließenden Beobachtungen des UN-Kinderrechtsausschusses der letzten Staatenberichte der EU-MS“, der vom ChildONEurope Sekretariat, Florenz, im Auftrag des BMSG anlässlich der Veranstaltung im Rahmen der österreichischen EU-Präsidentschaft „L’Europe de l’Enfance“, Mai 2006, im Auftrag des BMSG verfasst wurde.

- parental responsibilities: Both parents have primary responsibility for the upbringing of their child and “the best interests of the child will be their basic concern” (article 18(1));
- deprivation of family environment: Children temporarily or permanently deprived of their family environment “or in whose own best interests cannot be allowed to remain in that environment”, are entitled to special protection and assistance (article 20);
- adoption: States should ensure that “the best interests of the child shall be the paramount consideration” (article 21);
- restriction of liberty: Children who are deprived of liberty must be separated from adults “unless it is considered in the child’s best interest not to do so” (article 37(c));
- court hearings of penal matters involving a juvenile: Parents or legal guardians should be present “unless it is considered not to be in the best interest of the child” (article 40(2)(b)(iii)).

The Working Group drafting the Convention did not discuss any further definition of “best interests”, and the committee on the Rights of the Child has not as yet attempted to propose criteria by which the best interests of the child should be judged in general or in relation to particular circumstances, aside from emphasizing that the general values and principles of the Convention should be applied to the context in question.

The Committee has repeatedly stressed that the Convention should be considered as a whole and has emphasized its interrelationships, in particular between those articles it has elevated to the status of general principles (articles 2, 3, 6 and 12).

Thus, the principles of non-discrimination, maximum survival and development, and respect for the views of the child must all be relevant to determining what are the best interests of a child in a particular situation, as well as to determining the best interests of children as a group. And consideration of best interests must embrace both short and long-term considerations for the child. Any interpretation of best interests must be consistent with the spirit of the entire Convention – and in particular with its emphasis on the child as an individual with views and feelings of his or her own and the child as the subject of civil and political rights as well as special protections. States cannot interpret best interests in an overly culturally relativist way and cannot use their interpretation of “best interests” to deny rights now guaranteed to children by the Convention, for example to protection against traditional practices and violent punishments.

The wording of the first paragraph “... shall be a primary consideration” indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests, for example between individual children, between different groups of children and between children and adults. 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.

The wording of the principle indicates that its scope is very wide, going beyond State-initiated actions to cover private bodies too, and embracing all actions concerning children as a group. In its reporting Guidelines and in its examination of States Parties’ reports, the Committee on the Rights of the Child has emphasized that 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 governments, nationally and locally, including, in particular, in relation to budgeting and allocation of resources at all levels. The assessment of child impact and building the results into the development of law, policy and practice thus become an obligation (see article 4)

Where the phrase “best interests” is used elsewhere in the Convention (see above), the focus is on deciding appropriate action for individual children in particular circumstances and requires determination of the best interests of individual children. In such situations, the

child's interests are the paramount consideration (as stated explicitly in relation to adoption in article 21).

The Committee on the Rights of the Child has emphasized that article 3(1) is fundamental to the overall duty to undertake all appropriate measures to implement the Convention for all children in article 4. For example, where a plan of action for children is proposed, the "best interests" principle should be fully integrated.

Integration of the principle must imply the development of mechanisms to assess the impact of government actions on children and to incorporate the results of the assessment in policy development (see article 4).

In relation to the vital issue of resource allocation, the best interests principle demands first that within the overall central government budget, and regional and local budgets, there must be an adequate allocation for children (see article 4). There must therefore be sufficient analyses of relevant budgets to determine the proportion and amount allocated to children. In considering priorities in resource allocation, both between and within services at the national and local level, best interests must be a primary consideration. The non-discrimination principle is also important; but as emphasized in article 2, the non-discrimination principle allows for positive discrimination – that is, affirmative action – on behalf of particularly disadvantaged or vulnerable groups of children.

Thus, the setting of priorities and targeting within resource allocation is vital to reducing discrimination in overall implementation.

The Committee has paid increasing attention to the importance of budget analysis in its examination of reports and in its discussions with representatives of States Parties. Its Guidelines for Periodic Reports seeks information on: the proportion of the budget devoted to social expenditure for children at all levels; budget trends; the "arrangements for budgetary analysis enabling the amount and proportion spent on children to be clearly identified"; and "the steps taken to ensure that all competent national, regional and local authorities are guided by the best interests of the child in their budgetary decisions and evaluate the priority given to children in their policymaking".

Similarly, the impact on children of economic adjustment policies and budgetary cuts must be considered in the light of the best interests principle and other basic principles. This consideration is also highlighted in the Guidelines for Periodic Reports: "The measures taken to ensure that children, particularly those belonging to the most disadvantaged groups, are protected against the adverse effects of economic policies, including the reduction of budgetary allocations in the social sector" (para. 20).

The Committee looks for processes which ensure that the best interests of children are considered in policy formulation, and it has promoted the concept of child impact assessment (art. 4). The second and third paragraphs of article 3 are also of great significance. Article 3(2) outlines an active overall obligation of States, ensuring the necessary protection and care for the child's well-being in all circumstances, while respecting the rights and duties of parents. Together with article 2(1) and article 4, article 3(2) sets out the overall obligations of the State.

Article 3(3) requires that standards be established by "competent bodies" for all institutions, services and facilities for children, and that the State ensures that the standards are complied with. This paragraph demands that institutions, services and facilities be established for children, and that the State must ensure that the standards are complied with through appropriate monitoring. Other articles refer to particular services that States Parties should ensure are available; for example "for the care of children" (in article 18(2) and (3)), alternative care provided for children deprived of their family environment (article 20), care for disabled children (article 23), rehabilitative care (article 39) and institutional and other care related to the juvenile justice system (article 40).

The provision covers not only state-provided institutions, services and facilities but also all those "responsible" for the care or protection of children. In many countries, much of the non-

family care of children is provided by voluntary or private bodies, and in some States policies of privatization of services are taking more institutions out of direct State control. Article 3(3) requires standards to be established for all such institutions, services and facilities by competent bodies. Together with the non-discrimination principle in article 2, the standards must be consistent and conform to the rest of the Convention.

2. Comment on Committee concluding observation on article 3

The Committee has addressed the issue of the child's best interest in the Concluding observations on 11 EU countries and 2 acceding countries and 2 candidate countries.

The attention of the Committee in these concluding observations is mainly focused on the principle set down in article 3(1) and 3(3). While appreciating the fact that various initiatives have been developed in order to take into consideration the principles of the best interests of the child, that some Constitutional Courts have made a constitutional principle of the best interests of the child, that new legislative measures and programmes incorporating the principle of the best interests of the child have been adopted and that some national boards and institutions for the health and welfare of children and children's parliaments have been established, it has, first of all, expressed its concern about the fact that the principle of the best interest of the child is not appropriately analysed with regard to various situations and contexts for 6 EU countries. Thus, the Committee has requested a greater effort to appropriately analyse the principle of the best interests of the child in all those situations having an impact on children as single person or as a social group. In particular for 3 EU countries the Committee demands that appropriate and efficient measures be taken in order to ensure that the principle of the best interests of the child forms the basis of the process and decisions in asylum cases involving children and requests the State to adopt this principle as a paramount consideration in all legislation and policy affecting children in the juvenile justice system and in immigration practices.

The Committee has consistently emphasized, during its monitoring activity, that article 3, together with other identified general principles in the Convention, should be reflected in legislation and integrated into all relevant decision-making. For example, the Committee has indicated that it expects the best interests principle to be written into legislation in a way that enables it to be invoked before the courts. When a best interests principle is already reflected in national legislation, it is generally in relation to decision-making about individual children, in which the child is the primary, or a primary, subject or object – for example in family proceedings following separation or divorce of parents, in adoption and in state intervention to protect children from ill-treatment. It is much less common to find the principle in legislation covering other "actions" that concern groups of children or all children but may not be specifically directed at children. The principle should apply, for example, to policy-making on employment, planning, transport and so on. Even within services whose major purpose is children's development, for example education or health, the principle is often not written into the legislative framework.

Moreover in its General Comment no.5 of 2003 the Committee stresses that article 3(1) refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". Thus the principle requires active measures through 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".

From the concluding observations the Committee's concern also appears in relation to the integration into all the revisions made to legislation, judicial and administrative decisions and into projects, programmes and services which have an impact on all children for 4 EU countries, 1 acceding country and 2 candidate countries as provided by article 3 (3). Thus,

the Committee demands a stronger integration of these principles in all the mentioned revisions and services dedicated to children and in some cases calls for the reinforcement of the research and educational programs for professionals dealing with children and the strengthening of the efforts to be made by the State in order to ensure that the general principle of the best interest of the child is widely spread and understood.

The provision in article 3(3) does not contain an exhaustive list of the areas in which standards must be established but it does mention “particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

In addition, services and institutions providing care and protection must comply with all other provisions of the Convention, respecting, for example, the principles of non-discrimination and best interests and the right of children to have their views and other civil rights respected and to be protected from all forms of violence and exploitation (articles 2, 3, 12, 13, 14, 15, 16, 19, 32-37). In addition, article 25 sets out the right of a child who has been placed in care, under protection or treatment “to a periodic review of the treatment provided for the child and all other circumstances relevant to his or her placement.”

Concluding, the implementation of article 3(3) requires a comprehensive review of the legislative framework applying to all such institutions and services, whether run directly by the State, or by voluntary and private bodies. The review needs to cover all services – care, including foster care and day-care, health, education, penal institutions and so on. Consistent standards should be applied to all, with adequate independent inspection and monitoring.