

# Chapter 3

## Article 3: The Best Interest of the Child

Roberta Ruggiero

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.

### What Did Children Say?

‘When parents make decisions or something related to their children, they should discuss with their children and make decisions based on best interests of their children.’ (*Eastern Europe*)

(continued)

---

R. Ruggiero (✉)

Centre for Children’s Rights Studies, University of Geneva, Geneva, Switzerland

e-mail: [roberta.ruggiero@unige.ch](mailto:roberta.ruggiero@unige.ch)

© The Author(s) 2022

Z. Vaghri et al. (eds.), *Monitoring State Compliance with the UN Convention on the Rights of the Child*, Children’s Well-Being: Indicators and Research 25, [https://doi.org/10.1007/978-3-030-84647-3\\_3](https://doi.org/10.1007/978-3-030-84647-3_3)

‘An independent inspector can visit schools, hospitals and institutions, ask questions and observe the situation there.’ (*Eastern Europe*)

‘Specialised psychologists in schools, institutions and courts should help to understand what the best interest for children in every case.’ (*Eastern Europe*)

## Overview

Article 3(1) introduces a fundamental principle into international human rights treaties’ provisions. It attributes to the child ‘the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere’ (UN Committee on the Rights of the Child, 2013, para. 1).

At the international level, this principle made its first appearance in the 1959 Declaration of the Rights of the Child (Principle 2), but its inclusion in national legislation pre-dates the adoption of the Declaration. However, in the 1959 Declaration, the child’s best interests are to be ‘*the paramount* consideration,’ so they are determinant in the decision process, whereas in Article 3(1) they are only ‘*a primary* consideration,’ so one of the possible determinant factors (Freeman, 2007, pp. 25–26).

The first draft of this article reproduced the same wording as Principle 2 of the 1959 Declaration, but some delegations were uncomfortable about it and an alternative draft was submitted in 1980. In it, *the* was replaced with *a* in qualifying the *primary consideration*. However, considering the complexity of the concept of best interests, it did not give rise to lengthy debate at the drafting stage and only in 1988 a second and last amendment was agreed to integrate a reference to ‘legislative bodies’ after ‘administrative authorities.’ This intervention broadened the scope of the article implying that legislative measures should also be ‘accompanied by “child impact” statements’ (Freeman, 2007, p. 26).

It has been argued that Article 3 underpins all the other provisions of the Convention (UN Committee on the Rights of the Child, 2003, para. 12, 2009, para. 2). Best interests is one of the most complicated concepts to pin down, and the Committee defines it as ‘a dynamic concept that requires an assessment appropriate to the specific context.’ What is encompassed by best interests depends on how the concept is understood. For example, different cultural approaches will inevitably outline different understandings of what is in a child’s best interests (Freeman, 2007, p. 1). However, the Committee has frequently addressed such structural problems by maintaining that the obligation to consider the children’s best interest requires the assessment of the impact of the decision on the child and that its implementation should always lead to the respect of other Convention rights. The ‘adult’s judgment of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention’ (UN Committee on the Rights of the Child, 2011, para. 61). In other words, ‘the rights of the child precede the best

interests standard’ and the implementation cannot be done without reference to the rights of the child (Freeman, 2007, p. 5). Furthermore, as clarified by the Committee in General Comment no. 14 in 2013, ‘no right could be compromised by a negative interpretation of the child’s best interests’ (2013, para. 4).

The other two paragraphs of Article 3 ensure the child’s best interests and well-being within their daily ecosystem. Article 3(2) pertains to the well-being of the child in all circumstances while respecting the rights and duties of parents. Article 3 (3) concerns the obligation of States Parties to ensure that institutions, services, and facilities for children ‘comply with the established standards,’ and that mechanisms are in place to ensure that the standards are respected.

## General Principles

**Article 2** The ‘right to non-discrimination is not a passive obligation’ (Besson & Kleber, 2019, p. 51) Therefore, the simple prohibition of all forms of discrimination is not enough for the article’s full implementation. It also requires ‘appropriate proactive measures’ to ensure effective equal opportunities for all children to enjoy their rights under the Convention. These passive and active measures need to be undertaken in compliance with Article 3 (UN Committee on the Rights of the Child, 2013, para. 41).

**Article 6** ‘In the assessment and determination of the child’s best interests, the State must ensure full respect for his or her inherent right to life, survival, and development’ (UN Committee on the Rights of the Child, 2013, para. 42).

**Article 12** There is an inextricable link between Article 3(1) and Article 12. They have complementary roles: Article 3 is meant to realise the child’s best interests, and Article 12 provides the methodology for hearing the views of the child in the assessment of their best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of Article 12 are not met (UN Committee on the Rights of the Child, 2009, paras. 70–74, 2013, para. 43).

## Articles Related or Linked to Article 3

Article 3 is a General Principle. Its application needs to be considered in relation to the implementation of all the other Convention rights. However, rights that require specific consideration of the child’s best interests are:

- **Article 9(1) and (3)**, separation from parents
- **Article 18(1)**, parental responsibilities for their children
- **Article 20**, deprivation of family environment
- **Article 21**, adoption

- **Article 37(c)**, separation from adults in detention
- **Article 40(2)(b)(iii)**, presence of parents at court hearings of penal matters involving a juvenile.

## Relevant Instruments

UN Declaration of the Rights of the Child (1959), Principle 2, ‘In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.’

UN Convention on the Elimination of All Forms of Discrimination against Women (1979), Article 5(b), on the exercise of parental responsibility and Article 16(1)(d) in relation to marriage and family responsibility.

UN Convention on the Rights of Persons with Disabilities (2006), Article 7(2), requires that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980), Article 10(1) (b), refers to the ‘welfare of the child’ in the decision-making process.

African Charter on the Rights and Welfare of the Child (1990), Article 4(1), ‘the best interests of the child shall be the primary consideration’ in all actions ‘by any person,’ so parents are included.

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993), Article 1(a), ‘to ensure that intercountry adoptions take place in the best interests of the child.’

European Convention on the Exercise of Children’s Rights (1996), Article 2 (1) states that the ‘object of the present Convention is, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights.’

## Attributes

### *Attribute One: The Best Interests of the Child as a Primary Consideration*

Interpretation of the best interests of the child has been elaborated by the Committee in its concluding observations to States Parties’ reports and in General Comment no. 14. In the latter, the Committee underlines that the ‘child’s best interests’ is a threefold concept:

- **A substantive right:** It is an individual and collective right, which guarantees that the ‘best interests’ of the child/children involved is ‘assessed and taken as a

primary consideration. . .in order to reach a decision on the issue at stake’, and the guarantee that the Convention rights will be implemented

- **A fundamental, interpretative legal principle:** ‘If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen’
- **A rule of procedure:** Whenever a decision is to be made, ‘the decision-making process must include an evaluation of the possible impact, positive or negative, of the decision on the child or children concerned.’ The assessment and determination of the best interests of the child require procedural guarantees (2013, para. 6).

General Comment no. 14 also provides a legal analysis of 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.’

With the word action, the Committee includes all the ‘decisions, but also all acts, conduct, proposals, services, procedures and other measures’ undertaken by public and private bodies and which directly or indirectly impact children as a group or a single child (2006, para. 13(b)). Therefore, Article 3(1) sets a very wide obligation on States Parties to ‘duly consider the child’s best interests.’ ‘It is a comprehensive obligation encompassing all public and private social welfare institutions, courts of law, administrative authorities, and legislative bodies involving or concerning children’ (UN Committee on the Rights of the Child, 2013, para. 25).

Assessing the child’s best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general, including individual characteristics, as well as the social and cultural context in which the child or children find themselves. General Comment no. 14, in order to provide concrete guidance on how to assess the best interests of the child, draws up ‘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’ (UN Committee on the Rights of the Child, 2013, paras. 48–84). Furthermore, the Committee recommends that the assessment of the best interests of the child or of a group of children must comprise both short and long-term considerations for the child involved (2007, para. 26). This demands a continuous process of child rights impact assessment to foresee the impact that any proposed law, policy, or budgetary allocation may have on children, and child rights impact evaluation, to evaluate the actual impact of implementation (UN Committee on the Rights of the Child, 2013, para. 35).

**The Best Interests of the Child** There is no clear definition of best interests, but in its General Comment no. 14, the Committee sets out a detailed explanation of this principle. It is a complex and adaptable concept, which needs to be determined on a case-by-case basis. The judge, administrative, social, or educational authority ‘will be able to clarify the concept and make concrete use thereof’, only if the assessment is done on an individual basis, according to the specific situation of the child or children concerned, and taking into consideration their personal context, situation and needs (Freeman, 2007, pp. 50–60; UN Committee on the Rights of the Child, 2013, paras. 32–34).

Furthermore, the assessment of a child's best interests must include respect for the child's right to express their views freely, and due weight given to said views in all matters affecting the child (UN Committee on the Rights of the Child, 2009). Article 3(1), 'cannot be correctly applied if the requirements of Article 12 are not met' (UN Committee on the Rights of the Child, 2009, paras. 70–74, 2013, paras. 43–45).

**A Primary Consideration** States Parties need to incorporate a full and formal process of assessing and determining the best interests of the child in all cases in which a decision will have a major impact on a child or children. In these cases, a greater level of protection and detailed procedures to consider their best interests is appropriate (UN Committee on the Rights of the Child, 2002, para. 10, 2005, paras. 19–21, 2013, para. 20). The expression 'primary consideration' attributes to the children's best interests a stronger position in comparison with other considerations. This is justified on the basis of the 'special situation of the child: dependency, maturity, legal status and, often, voicelessness' and the fact that if the interests of children 'are not highlighted, they tend to be overlooked' (UN Committee on the Rights of the Child, 2013, para. 37).

However, since Article 3(1) covers a wide range of situations, the Committee acknowledges the need for flexibility in its implementation. Once assessed, the best interests of the child might conflict with other interests or rights, for example, that of other children, public authorities, parents, caregivers, etc. For the Committee, the balancing of the contrasting interests can be operated only on a case-by-case basis evaluation. In the search for suitable compromise, authorities and decision-makers must weigh the rights of all those concerned, bearing in mind that the best interests of the child have high priority and are not just one of several considerations (Freeman, 2007, pp. 60–64). This cannot be overruled 'when an action has an undeniable impact on the children concerned (UN Committee on the Rights of the Child, 2013, paras. 39–40).'

Conversely, in the case of adoption, this balancing of contrasting interests is not needed. In Article 21, the principle of 'best interests' is further strengthened. 'It is not simply to be a primary consideration' but 'the paramount consideration.' Thus, it is the 'determining factor' (UN Committee on the Rights of the Child, 2013, para. 38).

### *Attribute Two: Care and Protection—Safety Net*

Article 3(2) focuses on the States Parties' obligation to ensure necessary protection and care for the child, considering the rights and duties of parents and others legally responsible for the child. It reiterates a general obligation of the States Parties, which is linked to their obligations under the other General Principles (Articles 2, 6, and 12) and to other Convention specific obligations, for example:

- Provide 'appropriate assistance to parents and legal guardians' in their child-rearing responsibilities (Article 18(2))

- Provide ‘special protection and assistance’ to children deprived of their family environment (Article 20(1))
- Recognise the rights of children to benefit from social security (Article 26)
- Provide an adequate standard of living (Articles 27)
- Protect children from all forms of violence and exploitation (Articles 19, 32, 33, 34, 35, 36 and 37) (Hodgkin et al., 2007, p. 41).

However, Article 3(2) also states a backstop or umbrella provision, which fills eventual lacunae present in the Convention, by imposing on States Parties the responsibility to take ‘all appropriate legislative and administrative measures’ necessary for the child’s well-being. Therefore, this article imposes on States Parties the responsibility of last resort to ensure the well-being of all those most vulnerable children that are neglected by its provisions (Freeman, 2007, pp. 66–67; Hodgkin et al., 2007, p. 40). The appropriate legislative and administrative measures to be undertaken must comply with Article 3(1) and Article 4 of the Convention.

### ***Attribute Three: Adequate Standards for Institutions, Services, and Facilities Dedicated to the Care and Protection of the Child***

Article 3(3) requires the establishment of appropriate standards for institutions, services, and facilities responsible for the care or protection of children. Other provisions of the Convention deal with particular services that the States Parties should create, for example:

- ‘Those dedicated to the care of children’ (Article 18(2) and (3))
- Alternative care for children out of their family environment (Article 20)
- Care for children with disabilities (Article 23)
- Rehabilitative care (Article 39)
- Institutional and other care related to the juvenile justice system (Article 40).

Article 3(3) provides no 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.’ Therefore, it is correct to affirm that it requires the determination of appropriate standards for all services already identified in the Convention and for all of those not specifically mentioned in it. This is in line with the increasing range of alternative care services that States Parties are requested to set up to ensure childcare and protection (Freeman, 2007, pp. 71–72; Hodgkin et al., 2007, p. 41).

Article 3(3) equally applies to state institutions and non-state institutions. For its implementation, it requires the reviewing of the national legal framework dedicated to these institutions and services, the adoption of appropriate standards, and the creation of adequate inspection institutions with the mandate of monitoring of the respect of those quality standards, which applies not only to the quality of the service

provided but also to the staff involved (Hodgkin et al., 2007, pp. 41–42; UN Committee on the Rights of the Child, 2006, paras. 23, 32).

## References

- Besson, S., & Kleber, E. (2019). Article 2: The right to non-discrimination. In J. Tobin (Ed.), *The UN Convention on the Rights of the Child: A commentary*. Oxford University Press.
- Freeman, M. (2007). *A commentary on the United Nations Convention on the Rights of the Child, Article 3: The best interests of the child*. Brill Nijhoff.
- Hodgkin, R., Newell, P., & UNICEF. (2007). *Implementation handbook for the Convention on the Rights of the Child* (3rd ed.). UNICEF. Accessed September 21, 2020, from <https://digitallibrary.un.org/record/620060?ln=en>
- UN Committee on the Rights of the Child. (2002, November 15). *General comment no. 2 (2002) The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/490983?ln=en>.
- UN Committee on the Rights of the Child. (2003, November 27). *General comment no. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/513415?ln=en>.
- UN Committee on the Rights of the Child. (2005, September 1). *General comment no. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/566055?ln=en>.
- UN Committee on the Rights of the Child. (2006, September 20). *General comment no. 7 (2005) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/584854?ln=en>.
- UN Committee on the Rights of the Child. (2007, March 2). *General comment no. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), CRC/C/GC/8*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/583961?ln=en>.
- UN Committee on the Rights of the Child. (2009, February 12). *General comment no. 11 (2009), Indigenous children and their rights under the Convention, CRC/C/GC/11*. Accessed October 24, 2020, from <https://digitallibrary.un.org/record/648790?ln=en>.
- UN Committee on the Rights of the Child. (2011, April 18). *General comment no. 13 (2011) The right of the child to freedom from all forms of violence, CRC/C/GC/13*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/711722?ln=en>.
- UN Committee on the Rights of the Child. (2013, May 29). *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*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/778523?ln=en>.



**Open Access** This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

