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CRC General Comment 14 on the Right of the Child to have his or her Best Interests taken as a Primary Consideration

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Introduction

In May 2013, the UN Committee on the Rights of the Child ("CRC") published General Comment 14 which had been adopted at its 62nd session. General Comment 14 relates to the right of the child to have his or her best interests taken as a primary consideration.¹ It is proposed in this article to give attention to this the most recent General Comment to emerge from the CRC.²

General Comments are, in effect, statements of how the CRC believes particular matters—such as the meaning to be given to a concept or key provision of the Convention on the Rights of the Child (the "Convention")³—should be interpreted. For instance, General Comment 14 relates specifically to the right conferred in art.3, para.1 of the Convention, i.e. the right of the child to have his or her best interests taken as a primary consideration (the "article 3 right").⁴

Although General Comments are not thought to be legally binding, they are nonetheless considered to supplement, or to offer a steer on, significant provisions of the Convention. They are regarded as constituting authoritative interpretations of the substantive rights conferred by the Convention and therefore represent one of a number of interpretive resources available to states parties in informing their understanding of their Convention obligations. General Comments are often used as a means of resolving the ambiguities and uncertainties that inevitably attend the interpretation of international human rights instruments. Despite their authoritative legal status, however, General Comments are not always perceived as being entirely conclusive or decisive in relation to their subject matter. There is a view that General Comments merely have the status of Advisory Opinions which are to be accorded recognition but no more than that. There is also a perception that General Comments are broad and unsystematic statements which need not be accorded any special legal significance. Ultimately, this spectrum of opinion is reflected in the diverse ways in which states have responded to General Comments. Some regard them as an attempt to place interpretations upon Convention provisions that they simply do not possess. In the final analysis, though, General Comments should at least be recognised as serving as a

useful interpretive benchmark, not only for states directly concerned with meeting their obligations under the Convention, but for anyone involved in the task of interpreting the Convention.

General Comments from the CRC have been issued on a wide variety of subjects, including the right of the child to enjoy the highest attainable standard of health; the treatment of unaccompanied and separated children outside their country of origin; the right of the child to rest, leisure, play, recreational activities, cultural life and the arts; and the child's right to be heard.

General Comment 14, among other things, examines the article 3 right as a substantive right, a legal principle and a rule of procedure. It considers the nature and scope of the obligations of states parties to the Convention; it undertakes a legal analysis of the article 3 right (including links with other rights conferred under the Convention, such as the right to be heard); and it outlines measures for the implementation of the article 3 right (including the introduction of procedural safeguards to guarantee implementation of the article 3 right).

The article 3 right—art.3, para.1 of the Convention

As mentioned above, General Comment 14 focuses upon the article 3 right, which is the right of the child to have his or her best interests taken as a primary consideration:

...[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁵

In recent years the concept of the best interests of the child has become all-pervasive in the vocabulary of children's rights⁶ and this is probably due in no small measure to the influence of the Convention. General Comment 14 makes it clear that the article 3 right applies in the context of all actions or decisions concerning the child, whether in the public or private sphere. The General Comment also emphasises that the article 3 right gives expression to one of the fundamental values of the Convention. This is especially noteworthy because, as the author has pointed out elsewhere,⁷ legal rights that necessitate consideration of the best interests of the child imply not only what is obvious—that children can be regarded as actually *having* interests which particular rights are designed to protect—but that the relevant interests are a reference point that is both integral, and at the same time external, to the rights in question. Thus, the recognition that children have interests that underpin their rights connects the concept of the best interests of the child with theories that view rights, at the most fundamental level, as protected interests,⁸ thereby

strengthening the grounds upon which it is possible to argue for the existence of the rights of the child as an independent category as against those who might, for instance, give primacy to parental rights.⁹ At the same time, where interests are both integral and external to a particular right—such as in the case of the article 3 right—the consideration of a child's best interests is an aspect of the article 3 right that the child is in a position *directly* to assert and insist upon. (This is the substantive right to consideration of the best interests of the child commented upon in more detail below.) Additionally, the fact that such a right inevitably calls for reference to be made to external criteria or sources in defining and determining what is to be recognised as constituting the best interests of the child in a given situation may serve to establish important legal and moral benchmarks for the treatment of children by individuals and public and private institutions and bodies.

At the most general level, General Comment 14 emphasises that the concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights conferred in the Convention and the holistic development of the child. The General Comment emphasises that there is no hierarchy of rights in the Convention, with all the Convention rights being considered to be in the child's best interests. As such, no Convention right may be considered *not* to be in a child's best interests. It follows from this that an adult's judgment of a child's best interests cannot override the obligation to respect *all* the Convention rights of the child.¹⁰

Scope and application of General Comment 14

The overall aim of General Comment 14 is to ensure respect for the interests of the child by the states parties to the Convention, by strengthening understanding of the right of children to have their best interests assessed and taken as a primary consideration. The General Comment defines requirements for giving consideration to the best interests of the child in judicial and administrative decision-making and in the context of other actions concerning the child as an individual, including the enactment of laws and adoption of policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines concerning children generally or as a distinct group.¹¹ The intention of the CRC is that General Comment 14 will guide decisions by all those concerned with children, including parents and caregivers. To that end, it provides only a framework for assessing and determining the child's best interests. It does not actually attempt to *prescribe* what is best for the child in any given situation at any particular time.

Through General Comment 14 the CRC emphasises the tripartite structure of the article 3 right: it is a *substantive right*, an *interpretive legal principle* and a *rule of procedure*.¹² In the first place, the substantive right of children to have

their best interests assessed and taken as a primary consideration may be directly invoked before a court and may be of most relevance in a situation where, for instance, a range of competing or conflicting interests is being considered in order to reach a decision on the issues under discussion.¹³ Secondly, as an interpretive legal principle, the article 3 right is to be applied towards the interpretation of *other* rules and principles that establish children's rights. Thus, if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests must be given priority.¹⁴ Finally, the article 3 right, as General Comment 14 recognises, has an important function as a rule of procedure. Inevitably, the assessment and determination of the best interests of the child calls for procedural guarantees. When a decision is being made that affects a child—whether in a judicial context or otherwise—the decision-making *process* must include an evaluation of the possible impact (positive or negative) of the decision on the child concerned. What this means, more specifically, is that the child has a right that decision-makers demonstrate that the child's best interests have been taken into account as a primary consideration. In fulfilling their obligations, states parties must explain how the article 3 right has been observed in decision-making processes—in other words, what has been considered to be in the child's best interests. They must also make clear the criteria upon which any decision as to best interests has been based. In addition, they must show how the child's interests have been weighed against other considerations, whether broad issues of policy or individual cases.¹⁵

Key obligations of states parties

Chapter III of General Comment 14 focuses upon the nature and scope of the obligations of states parties to the Convention. At the most general level, states parties must respect the article 3 right and take all necessary, deliberate and concrete measures for its full implementation.¹⁶

The General Comment elaborates upon the article 3 right, identifying three distinct obligations requiring to be undertaken by states parties in giving effect to the right.¹⁷ First, there is an obligation to ensure that the child's best interests are appropriately integrated and consistently applied in every action taken by a public institution (such as judicial proceedings) which has a direct or indirect impact upon a child. Second, there is an obligation to ensure that all judicial and administrative decisions—including policies and legislation relating to children—demonstrate that the child's best interests have been a primary consideration. (In particular, a state has to show how the child's best interests have been considered and assessed and what weight has been accorded to them in any decision.) In the third place, states parties must ensure that the interests of the child have been assessed and taken as a primary consideration

in decisions and actions taken within the *private sector*. This requirement extends to service-providers or other private sector organisations which make decisions involving a child.

General Comment 14 identifies a number of implementation measures which states parties must undertake.¹⁸ These include reviewing and amending domestic legislation and other sources of law to incorporate the article 3 right. In particular, the requirement to consider the child's best interests must be reflected in all national laws and legislation governing the operation of private or public institutions so far as impacting upon children. States parties must also establish mechanisms for complaints and other forms of redress in order to ensure the integration and consistent application of the article 3 right in administrative and judicial proceedings impacting upon the child and in all other implementation measures. From the point of view of the allocation of national resources, the child's best interests must be upheld in programmes and measures implementing children's rights and in activities receiving international assistance or development aid. In terms of raising awareness of the article 3 right, appropriate information must be provided to children and their families and caregivers in a language they can understand. At the same time, the conditions must be fostered for children to express their point of view and for ensuring that their opinions are given due weight.¹⁹

Legal analysis—general

The legal analysis in ch.IV of General Comment 14 largely focuses on clarifying definitions of key terminology used in the article 3 right; but it also includes consideration of linkages between the article 3 right and other important Convention rights, such as the right to non-discrimination and the right to be heard.

General Comment 14 acknowledges that all actions taken by a state will inevitably affect children in one way or another. But that is not to suggest a requirement for states to put in place an exhaustive process for assessing and determining the best interests of the child unless the actions are likely to have a *significant* impact on children. Clearly, in that situation a higher level of attention to the demands of the best interests of the child will be called for.²⁰

The discussion in ch.IV emphasises the commonly accepted definition of "children" as persons under the age of 18. The reference in the article 3 right to "children" implies what appears at first sight to be obvious—namely, that the right applies to children not only as individuals but as a class or group. The General Comment, however, draws attention to something slightly less obvious, which is that when the article 3 right is viewed as both an individual *and* collective right, i.e. a right applying to individual children and children as members of particular groups, it becomes necessary, for purposes of giving effect to the article 3 right,

to take account of special factors such as ethnicity and the cultural differences assignable to, for instance, indigenous children as a group.²¹

The legal analysis of key phrases and expressions in ch.IV touches upon the types of public and private institutions and other bodies whose actions may be affected by art.3, para.1. In this context, social welfare institutions include those whose functions relate not only to economic, social and cultural rights (such as healthcare, education, business and leisure) but to institutions whose remit includes civil rights and freedoms (such as birth registration and protection against violence).²² The actions of courts of law, according to the General Comment, extend to all judicial proceedings in all instances. This is taken to include courts staffed by both professional and lay judges and to extend to all relevant procedures concerning children, even those of a less formal nature such as conciliation, mediation and arbitration.²³ The best-interests principle is taken to apply not only to situations where children are alleged to have committed offences but where they are witnesses in criminal proceedings, e.g. where they have been victims of crimes. The CRC emphasises that, in order to promote the best interests of a child, traditional retributive approaches to criminal justice must give way to rehabilitative and restorative approaches.²⁴ General Comment 14 also makes clear that where children are involved in civil law proceedings their best interests must be addressed both at the level of substantive rights and procedural rights.²⁵

Legal analysis—the concept of best interests

In ch.IV there is consideration of the concept of the best interests of the child, but this is in the form of an exploration of issues attending the interpretation of the concept rather than any kind of elaboration of its content or listing of instances of its appropriate use.²⁶ The General Comment makes clear that the content of the best interest's concept must be determined on a case-by-case basis. It is only through the interpretation and implementation of the article 3 right in individual cases that a clear idea of the substance and content of the best interest's concept can emerge. Moreover, the contextual dependency of the concept implies that in given instances a child's personal situation and needs will influence the determination of his or her best interests. In the case of collective decisions—such as those made by legislators and policymakers—the particular circumstances of the groups of children affected by the decisions must be factored into any assessment of best interests.²⁷

So far as the implementation of the article 3 right is concerned, the CRC takes the view that ongoing impact assessments are an effective means of ensuring that the best interests of the child are a primary consideration in (for example) legislative programmes and policy development.²⁸ The aim is to predict the impact of any proposed law, policy

or budgetary allocation on children and on the exercise by children of their rights; and to assess the actual impact once effect has been given to the relevant measures.

Chapter IV also emphasises that the task of ensuring that the best interests of the child are a primary consideration is not simply a matter for the *discretion* of states parties to the Convention.²⁹ States have an obligation to ensure the implementation of all elements of the article 3 right. It is not merely an option. As the General Comment notes:

“The expression ‘primary consideration’ means that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.”³⁰

In problematic situations where there is perceived to be a conflict between the best interests of a child as an individual and those of an identifiable group of children (e.g. indigenous children), or children generally, the CRC suggests that the solution may lie in a case-by-case assessment of the situation where the interests of all parties are carefully balanced so as to reach a suitable compromise. A similar approach could be adopted where a child’s rights are in conflict with the rights of other persons.³¹

As previously mentioned, the legal analysis undertaken in chapter IV also highlights connections between the Article 3 right and other provisions of the Convention.³² General Comment 14 focuses in particular on linkages between the best interest’s concept and important rights such as the right to non-discrimination (art.2), the right to life, survival and development (art.6) and the right to be heard (art.12). Needless to say, any assessment of a child’s best interests must include respect for all of those rights. It is worth noting, though, that the extent of “infiltration” of the best interest’s concept within the Convention is significantly wider than this. For example, explicit references to the concept can be found in: art.9 (separation from parents); art.10 (family reunification); art.18 (parental responsibilities); art.20 (deprivation of family environment and alternative care); art.21 (adoption); art.37 (separation from adults in detention); and art.40 (procedural guarantees).

Measures for the implementation of the article 3 right

Arguably the most practically and professionally useful part of General Comment 14 is ch.V, which focuses on measures that may be appropriate for the implementation of the article

3 right. Chapter V opens with a piece of practical advice for anyone involved in assessing and determining the best interests of a child. The first step is to find out—within the specific factual context of the situation in hand— what are the relevant elements in a best-interests assessment; then give those elements concrete content, and assign a weight to each in relation to the other. The second step involves following a procedure that ensures the proper application of the article 3 right and the provision of appropriate legal guarantees and safeguards.³³

Chapter V also usefully proposes elements to be taken into consideration when assessing and determining the child’s best interests. These elements, which are set out in paras 52 to 79, are wide-ranging and include taking account of the views of the child and the child’s identity; preserving the family environment; considering the safety of the child; and taking account of particular vulnerabilities of the child.

Briefly, the task of taking account of, and giving due weight to, the views of the child has its origins in art.12 of the Convention which provides for the right of children to express their views in every decision that affects them.³⁴ The age of children, the presence of disabilities or the situation that they find themselves in—such as a situation of special vulnerability, e.g. as a refugee—neither deprives them of the right to express their views nor reduces the weight to be given to their views.³⁵ According to General Comment 14 the adoption of measures that ensure the exercise of equal rights for children in such situations must be subject to an individual assessment which assures a role to the children themselves in determining their best interests.³⁶

The right of the child to preserve his or her identity is enshrined in art.8 of the Convention. A child’s identity includes sex, sexual orientation, national origin, religion and beliefs, cultural identity and personality. Chapter V of the General Comment emphasises that diversity, as part of identity, must be taken into account when assessing a child’s best interests. In the case of religious or cultural identity, for instance, a decision such as the placement of a child in a foster home should ideally have regard to preserving the continuity of a child’s previous religious, ethnic, cultural and linguistic upbringing and background. The General Comment, however, warns that cultural identity would not justify the perpetuation by decision-makers of traditions and cultural values that, for example, deny a child important rights (beyond the article 8 right) guaranteed by the Convention.³⁷

The task of taking account of particular vulnerabilities of the child in determining his or her best interests calls for an assessment that encompasses matters such as whether the child has a disability, whether he or she is a member of a minority group, or is a refugee or asylum seeker or a victim of abuse. From a practical standpoint, decision-makers are urged to take account of the different kinds and degrees of vulnerability of each child, assessing each situation

according to the uniqueness of each child. General Comment 14 therefore recommends that an individualised assessment of each child's history from birth should be undertaken and regularly reviewed.³⁸

Chapter V concludes with a practical outline of procedural safeguards necessary to guarantee the implementation of the child's best interests. The discussion ranges from the right of the child to express his or her views, through legal representation, to the requirement, where appropriate, to carry out child-rights impact assessments ("CRIAs").³⁹

Conclusion

General Comment 14 seems to have been a long time in coming, particularly given the pivotal and all-pervasive nature of the best-interests principle in the jurisprudence of children's rights. This General Comment, therefore, represents a valuable and welcome addition to the interpretive resources available not only to those most

immediately subject to the Convention (i.e. states parties), but basically to anyone with a professional or other interest in ensuring that the best-interests principle is observed in every situation touching the rights of the child.

Ultimately the question of what is or is not in a child's best interests is not something to which there is ever a ready or straightforward answer. From situations involving a single child to those involving distinct groupings of children (and indeed "all children", in some settings) the question is dependent upon a wide variety of elements – of which no single element necessarily predominates – and many subtle balancing acts and judgment calls. The unique achievement of General Comment 14 is to identify the most critical issues, factors and elements involved in the assessment of a child's best interests and to provide a useful and practical framework for key decisions and actions made pursuant to such assessments.

¹ CRC/C/GC/14. General Comment 14 was published on May 29, 2013 following the CRC's 62nd session (January 14 – February 1, 2013). At the same session General Comments 15 (right to enjoy highest attainable standard of health), 16 (state obligations regarding the impact of the business sector on children's rights) and 17 (right to rest, leisure, play, recreational activities, cultural life and the arts) (respectively, CRC/C/GC/15, CRC/C/GC/16, and CRC/C/GC/17) were also adopted, and were published on April 17, 2013.

² The CRC comprises 18 independent experts selected on account of their recognised expertise in the area of children's human rights. Elected members of the CRC serve for a period of four years, not as representatives of any state, but in their personal capacity. Elections are held on a staggered basis every two years and members can be re-elected if re-nominated in accordance with art.23 of the Convention on the Rights of the Child.

³ United Nations, Treaty Series, Vol. 1577, p. 3.

⁴ General Comment 14 is limited to art.3, para.1 of the Convention and does not cover art.3, para.2, (well-being of the child), nor art.3, para.3 (obligation of states parties to ensure compliance with established standards). Note that references in this article to "the article 3 right" are restricted to the right conferred by art.3, para.1.

⁵ Article 3, para.1 of the Convention.

⁶ See M. Freeman, "The Best Interests of The Child? Is *The Best Interests of the Child* in the Best Interests of Children?" (1997) *International Journal of Law, Policy and the Family* 360–388.

⁷ See the author's "Children's Rights and Theories of Rights" (forthcoming in the *International Journal of Children's Rights*).

⁸ See D. N. MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982), pp.154–166. There is a perception that the theory which is regarded as a direct "rival" to the interest theory—the so-called "will theory"—is inimical to the notion that children have rights at all. As Tom Campbell, an advocate of children's rights, puts it: "[I]f rights are defined (as they are on the 'will theory' of rights) as normative powers to determine the obligations of others by the exercise of the will of the right holder, and if it is assumed, as it must be, that children do not have the relevant volitional capacities to claim rights, then children cannot properly be said to have any rights whatsoever. In this case, the distinctive thing about children's rights is that there are none". See Tom Campbell, "The

Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult" (1992) 6 *International Journal of Law and the Family* 1–23 at 2.

⁹ See, for instance, Harry Brighouse and Adam Swift, "Parents' Rights and the Value of the Family" (2006) 117 *Ethics* 80–108. See also, Harry Brighouse, "What Rights (If Any) Do Children Have?" in D. Archard and C. M. Macleod (eds), *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2002).

¹⁰ General Comment 14, para.4.

¹¹ General Comment 14, para.10.

¹² General Comment 14, para.6.

¹³ General Comment 14, para.6(a).

¹⁴ General Comment 14, para.6(b).

¹⁵ General Comment 14, para.6(c).

¹⁶ General Comment 14, para.13.

¹⁷ General Comment 14, para.14.

¹⁸ General Comment 14, para.15.

¹⁹ General Comment 14, paras 15(a), (c), (d) and (g).

²⁰ General Comment 14, para.20.

²¹ General Comment 14, para.23.

²² General Comment 14, para.26.

²³ General Comment 14, para.27.

²⁴ General Comment 14, para.28.

²⁵ General Comment 14, para.29.

²⁶ General Comment 14, paras 32–35.

²⁷ General Comment 14, para.32.

²⁸ General Comment 14, para.35.

²⁹ General Comment 14, para.36.

³⁰ General Comment 14, para.37.

³¹ General Comment 14, para.39.

³² General Comment 14, paras 41–45.

³³ General Comment 14, para.46.

³⁴ General Comment 14, para.53.

³⁵ General Comment 14, para.54.

³⁶ General Comment 14, para.54.

³⁷ General Comment 14, paras 55–57.

³⁸ General Comment 14, paras 75–76.

³⁹ General Comment 14, paras 85–99.