**ENSURING THE BEST INTERESTS OF THE CHILD: A SPECIAL CROSS-BORDER CHALLENGE**

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**Assessing and determining the best interests of the child, with due regard for the child’s opinions and for international human rights standards, is in itself a delicate task requiring special skills. Where children cross borders – for whatever reason – that task is typically all the more problematic since, among other things, it has to take account of differing socio-cultural approaches. There are unfortunately few reliable data on the consequences of decision-making in this context, and this paper argues for the need for an evidence-based yet pragmatic foundation for such decisions if the human rights of children are to be upheld.**

Efforts to safeguard the best interests of children who have moved across borders face numerous difficulties.

These difficulties comprise issues that are generic to best interests assessment (BIA) and determination (BID) exercises and others that are more especially posed in cross-border situations.

We set great store by adhering to the principle of best interests in decision-making concerning children. There have been more and more initiatives to develop procedures and criteria for carrying out fully-fledged BIA and BID exercises. That said, they are neither universally accepted nor compulsory, and the conditions needed for putting them in place and ensuring appropriate follow-up often prove to be unrealistic in practice. Furthermore, we are all too rarely aware of how well or badly the outcomes of these exercises help to improve or resolve the situations in which children find themselves.

This paper sets out to take a dispassionate look at policy and practice from the standpoint of defending the best interests and human rights of the children concerned.

The starting point for this analysis has to be a review of how the notion of the best interests of the child (BIC) became such a pivotal factor in, notably, the Convention on the Rights of the Child (CRC). This provides necessary background against which to understand how those “best interests” might be operationalised as a means of promoting and protecting children’s human rights – in general and with special reference to cross-border movement.

**Best interests in a human rights context**

The concept of the best interests of the child is of course long-established at both national and international levels, well before it became consecrated in the CRC. It was seen as something apart from the human rights discourse, however, linked far more to good intentions than to accountable actions. It has notably been referenced by both administrative and judicial authorities, as well as private actors, to justify decisions made regarding the most appropriate care arrangements for a child.

But it has also been used in support of general policy measures regarding children, such as programmes to forcibly separate indigenous children from their parents, forced adoptions of babies of single mothers and, importantly, forced migration (e.g. British children from families in poverty being sent to Australia up to the mid-20th century). And it is many of these “collective” decisions in particular that produced outcomes that we now consider to be egregious violations of children’s human rights.

It is instructive to note that in international human rights law and private international law, children are the only rights-holders whose (best) interests are considered to require explicit mention as a means to realising those rights appropriately. No other ostensibly “vulnerable” group is deemed to need such a protection – indeed, any potential “best interests” consideration in relation to vulnerable adults has been regularly quashed during treaty negotiations as being at best paternalistic. Vitally in the context of this discussion, international humanitarian and refugee law quite simply make no mention whatsoever of best interests for anyone.

Consequently, against this overall background, we need to examine how the ‘’best interests’’ notion fits within a human rights framework and might add value specifically to the protection of the rights of children moving across borders.

**How “best interests” came to figure large in the CRC...**

The initial Polish proposal for a Convention (1978) was based on the text of the 1959 Declaration on the Rights of the Child which had simply established BIC as ‘’the paramount consideration’’ for lawmakers as well as the ‘’guiding principle’’ for parents, but went no further.

Requested to submit a revised proposal, however, Poland in 1979 took the drafting group by surprise on the question of BIC, drastically widening the scope of the draft provision to include “all actions concerning children” and by a far broader range of actors (parents, guardians, social or State institutions, courts of law and administrative authorities – though strangely excluding lawmakers!) with BIC to be their ‘paramount consideration’.

As negotiations on the text proceeded, the list of actors was progressively modified, producing the final text we have today (CRC Art. 3.1): ‘’public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies’’ for whom, significantly, BIC is to be a ‘’primary consideration”, no longer the “paramount” determining factor. The basically unenforceable injunction that parents be guided by BIC, being a somewhat distinct issue from the accountability of entities, was logically moved to a separate provision (CRC Art 18.1).

Most importantly, however, a paragraph on the child’s “right to be heard” that had been an integral part of the Polish proposal on BIC was transformed into an article in its own right (CRC Art 12). That said, the UN Committee on the Rights of the Child (CRC Committee) has subsequently emphasised the reciprocal relationship between the two provisions: best interests cannot be determined without taking due account of the child’s opinion, and the child’s opinion should not be acted upon without considering the implications for his or her best interests. It is vital to keep this in mind.

All this happened, however, without any in-depth discussion during drafting about the ramifications of broadening the applicability of BIC. Very few States – Venezuela was one, but almost at the end of the process – questioned this quantum leap from the terms of the 1959 Declaration to what was to become a key provision in the CRC. One obvious problem – especially in a treaty supposed to set out precise State obligations towards children – was the lack of criteria against which best interests might be assessed. While there was agreement on the need for flexibility to take account notably of socio-cultural context and individual situations, it was not without cause that Venezuela questioned the potential subjectivity of judgements on BIC in the absence of a clear definition. But Venezuela did so at a very late stage and, failing to gain immediate support, did not pursue its concern. It has indeed been up to others ever since to try to set a clearer framework for decision-making on BIC.

**… and then became a ‘’fundamental value’’**

Despite the lack of serious debate, during drafting, on the implications of incorporating such a broadly applicable yet deliberately vague notion in a human rights treaty, the “best interests” principle was quickly to become a key focus of attention for implementation. Its special status was sealed at the first meeting of the CRC Committee in 1991, which designated BIC as one of four “General Principles” underlying the treaty. This designation was in fact made in the context of drawing up an outline of the Initial Report that States Parties to the CRC would have to submit to the Committee. However, it very rapidly took on a far wider significance, being perceived – in my view wrongly – as a kind of super-right to which reference had to be made in virtually all circumstances where the “rights of the child” were at stake.

Although the application of BIC was the cause of much confusion – particularly over responsibilities and the criteria to be employed – it took over 20 years for the Committee to try to clarify the issues. It did so in 2013 through its General Comment # 14.[[1]](#footnote-1) Therein it reemphasised its view of best interests as one of the “fundamental values” of the CRC to be used “for interpreting and implementing all the rights of the child”. It qualified BIC as “a right, a principle and a rule of procedure”, and formally established its vital linkage to the child’s right to be heard (see above). The General Comment not only sets out criteria to be considered but also requires, among many other things, a rights-inspired multi-professional assessment and the avoidance of irrevocable decisions based on a one-off determination. These requirements should of course be borne in mind in the context of the present discussion.

In the meantime, the UNHCR had already acknowledged the usefulness of enacting a “best interests” procedure in its efforts to protect unaccompanied and separated children within its mandate. Five years previously, in 2008, it had published its Guidelines on Determining the Best Interests of the Child, followed in 2011 by the Field Handbook for the Implementation of UNHCR BID Guidelines. These documents, both now supplanted by the organisation’s 2021 Best Interests Procedure Guidelines, have since inspired practice in favour of other groups of children not covered by UNHCR’s specific mandate.

Thus it is clear that the question of best interests determination is seen as particularly important when it comes to children moving across borders.

**When BIC is to be the determining factor**

Under international law, determining the best interests of a child does not mean that those interests will uniquely underpin the decision reached. There are two facets to implementing BIC: not just decision-making on the most appropriate measure to pursue, but also the status of the child’s best interests vis-à-vis those of other parties concerned – who may range from parents to the State itself.

In the great majority of cases, BIC is a “primary consideration” in decision-making but not the only one. On certain issues, however – mainly involving family and care questions – it is the determining factor.

While it is explicitly “***the paramount*** consideration” only in decisions concerning domestic and intercountry adoption (CRC Art 21), it is also implicitly determinant in relation to other care measures. Thus, for example, alternative care must be ensured in cases where children “in [their] own best interests cannot be allowed to remain” in their family environment (CRC Art 20). The deliberate separation of a child from their parents may only take place when “necessary for the best interests of the child” (CRC Art. 9.1), and a child separated from their parents has the right to maintain contact with both “except if it is contrary to the child’s best interests” (CRC Art. 9.3).

Two other general requirements – the separation of children from adults in detention (CRC Art. 37.c) and the presence of parents in court (CRC Art. 40.2.b.iii) – are also subject to exceptions based on the best interests of the child concerned.

But in all other circumstances explicitly dealt with in the CRC – thus including children moving across borders, save in the context of intercountry adoption – the treaty looks on BIC in principle as “a primary consideration”, not the deciding factor as such.

**BIC in diverse cross-border situations…**

It is against this background that we have to approach the implementation of children’s right to have their best interests duly considered when they move across borders.

There are two main types of cross-border circumstances in which an assessment of BIC is required.

The first is ***prior to*** a planned placement of the child abroad. That placement may take the form of intercountry adoption or other long-term alternative care arrangements including, for example, *kafalah* of Islamic law. In such cases, those responsible for carrying out the assessment and coming to a decision on that basis will invariably be located in the child’s country of origin. To establish the adoptability (or similar) of a child abroad, they will have to evaluate the likelihood of the child’s best interests potentially being best served by removal from a known situation to an untested and usually unfamiliar environment about which only generalities may be known at that stage. This can clearly be a highly delicate task.

The second type of circumstance – and obviously the essential focus of the above-mentioned UNHCR Guidelines – concerns a BIC assessment ***following*** the child’s movement across borders. In addition to child refugees, asylum seekers and migrants, these situations include child victims of trafficking or smuggling and the breakdown of adoption or other alternative care arrangements abroad, as well as family reunification claims. In these cases, assessment and decision-making fall to those responsible in the country of destination (or, sometimes, transit). As far as possible and desirable – unfortunately not always the case – this should take place in consultation with competent authorities in the child’s country of origin. This is indeed foreseen under the 1996 Hague Convention on Protection of Children but to date this treaty has only 55 Contracting States.

**…and the particular case of abduction**

But there is also a third type of circumstance, particularly complex, which demands a best interests assessment both ***after*** a cross-border move and then ***again after*** a further such move. That of course applies in the specific case of the international parental abduction and non-return of children.

Under the 1980 Hague Abduction Convention (HAC), the assumption is that the best interests of an abducted child are generally best served by their return to their country of habitual residence before any definitive decision is made as to their custody and to the terms of contact with their parents (access). This assumption is grounded in particular in the fact that their removal to, or retention in, the country where they find themselves is in principle due to an illicit act and is designed to dissuade potential abducting parents as much as to uphold children’s best interests. It is an ostensibly logical stance.

That logic is enhanced by the fact that the child’s return is conditional on a number of factors. Thus, the competent judicial or administrative authorities should establish that return would not run counter to the best interests of the child as a result of: i) a grave risk of harm (HAC Art 13.b), ii) the child’s refusal (HAC Art 13), and/or iii) under certain circumstances the child being deemed to be already ‘’settled’’ in their new environment (HAC Art 12).

The BID that these caveats imply is itself a logical consequence of the preambular affirmation of the HAC that “the interests of children are *of paramount importance* in matters relating to their custody”. It is a moot point whether children’s “interests” are to be seen as equivalent to their “best interests” – I would certainly argue that they are – but the reference to paramountcy leaves no doubt as to the way in which these situations are to be broached.

Over and above other considerations, discussed below under “Key Challenges”, this assessment and determination exercise, by competent services in the country where the child is present, requires at least well-founded knowledge of the situation in the child’s country of habitual residence as well as securing the child’s freely-expressed opinion in what may well be a stressful situation.

In practice, where the two countries involved are parties to the HAC, it seems that the child’s return is usually ordered and effected. In line with the thinking behind the treaty, this re-establishes the *status quo ante* which will enable a fresh BID to be conducted from scratch. This time, however, the BID will naturally be carried out by competent services in the country of habitual residence.

The problem then arises that, depending on the two countries concerned, the premises on which those first and second BIDs are undertaken may diverge markedly. Indeed, it was in recognition of the fact that socio-cultural (not to say political) perceptions of what corresponds to a child’s best interests may vary widely – as well as the need to take account of the specifics of each case – that no attempt was made to define “best interests” as such in the CRC. When two back-to-back determinations are to be made in potentially very different socio-cultural contexts, this issue is brought to the fore in a particularly stark fashion.

The reasoning behind the unwillingness or outright refusal of many States to accede to the HAC – barely more than half (101) of the world’s States have signed up to that treaty – is largely grounded in this problem, moreover. At this point, it is worth recalling the debates during the drafting of CRC Art 11 in the 1980s.

Although this provision of the CRC is meant to cover intrafamilial child abduction, it does so without explicit reference to “abduction”. This depiction of the act in question was vetoed by several States, particularly those that had been criticised for not reacting appropriately in cases where their citizens (invariably fathers) had abducted their children to their country of origin. They were not prepared to concede that, as a general rule, an approach to best interests other than their own would be a valid basis for decision-making on children within their jurisdiction. As a result, their preference for determining BIC may lie, for example, in considerations of paternal authority or prevailing societal norms regarding responsibility for children at different ages. Hence the rather weak requirement of CRC Art 11.2 that States “promote […] accession to existing agreements” – an implicit reference to the HAC.

Strictly speaking, BIC under CRC Art 11 would be “a primary consideration” for decision-making on the child’s situation, since there is no stipulation in that provision that it be the determining factor. That said, the tenor of preceding articles 9 and 10 (regarding the rights of the child in cases of separation from one or both parents and to contact with both, explicitly subject to the child’s best interests) arguably sets the scene for paramountcy in abduction cases, as does, obviously, the above-mentioned pre-CRC reference to “the paramount importance” of the child’s interests in the HAC.

But the question of how, in practice, each of these processes is managed and what weight is given to BIC determination by the courts remains whole.

**Key challenges in cross-border situations**

As we have seen., there is no shortage of challenges for the assessment and determination of the best interests of children in cross-border situations. Some are generic (and even inherent) to BIA and BID in all circumstances, others more specific to cross-border movement. In both cases, many challenges are further enhanced where international abduction is concerned.

The fundamental challenge is ensuring that there is a professional BIC assessment and determination process carried out by a multi-disciplinary team. These are skilled, labour-intensive tasks and in no way “ticking the boxes” exercises. If they are not undertaken by well-prepared team members, there is a high risk that decisions will be made on the basis of subjective criteria and considerations, much as they were in pre-CRC days, which renders them at best questionable from a human rights standpoint. Many, if not most, countries find it difficult to put at disposal the human resources required, however, especially in emergency situations or in the face of mass movements. Even under “normal” circumstances, economically disadvantaged countries are hard-pressed to secure robust assessments. When there is one trained social worker for several thousand population, a common situation, it is well-nigh impossible to envisage that professional being able to devote the hours necessary to deal thoroughly with an individual assessment.

This means that another essential component of a BID-based decision may be severely jeopardised: ensuring the child’s voice is heard under appropriate conditions and then taken fully into account. Following a traumatic event and in situations where undue influence may be exerted on the child, it is particularly vital that the setting in which the child is invited to express their opinions and wishes generates a feeling of security and trust. This is by no means just a question of providing a confidential and reassuring space. The “setting” includes the attitude and preparedness of the persons conducting the exercise. Notably, as the CRC Committee has established[[2]](#footnote-2), the “right to be heard” applies to all children: a child’s wishes and opinion can potentially be gleaned from interaction with suitably qualified professionals regardless of that child’s age, ability or status (e.g. as a migrant or otherwise in a third country).

For this exercise to be meaningful with children who can interact verbally, at least two viable options must be available, and each must be communicated to the child in a way that they can understand and discuss its implications. For children in cross-border situations in particular, such options may be extremely limited due to legislation, policy or quite simply practical provision. In many cases, to all intents and purposes, their “best interests” will thus be settled before they are determined.

As mentioned, differing socio-cultural appreciations of best interests constitute a further difficulty. Even if clear criteria for decision-making were to be universally accepted and applied, socio-cultural bias would remain. In carrying out a BID, those responsible in some societies may place a very different emphasis on quality of care considerations as opposed to who does the caring.

A particularly delicate question to face is the CRC Committee’s injunction to avoid irrevocable decisions on the basis of a one-off BIA. This works well, for example, when there is a BID-based decision that a child should move into an alternative care setting which will automatically be the subject of regular review to ensure that the placement is still suitable and required. But trying to respect the spirit behind the Committee’s thinking when the outcomes proposed are themselves inherently long-term and not subject to compulsory constant review – such as custody issues, adoption and country of residence – creates dilemmas that are not easy to resolve. Perhaps we should simply decide that it cannot be applicable in such cases, which would mean taking very special care when carrying out a BID with quasi-permanent ramifications.

Whatever the results of the BID, the extent to which they are implemented will depend in good part not only on their ascribed status as either a primary or paramount consideration, but also on the competent authority’s familiarity with that standard and/or its willingness to respond accordingly.

**By way of conclusion: towards an evidence base and case-by-case review**

In implementing human rights, there is room – indeed, often a crying need – for pragmatic decision-making. Agreed norms are the bedrock for promotion and protection, but a blinkered, purist approach to implementation that puts absolute respect for the letter of international standards above the consequences for the rights-holder is indefensible.

While it is vital to remain vigilant in every case, we have few reliable data on the effects and outcomes of BIC decisions made in line with or, conversely, in defiance of standards.

Thus, in light of standards as well as on principle, we do not want children to be deprived of their liberty, all the more so when – like those crossing borders – they have not committed a criminal offence. At the same time, we have little solid evidence as to what happens in the short or longer term to child migrants who “disappear under the radar” when their movements are not initially restricted. Similarly, the actual short- or longer-term outcomes of “returns” to the country of origin or habitual residence, be it as a child migrant or an abducted child, are insufficiently known.

All this means that the inherent challenges of reaching and implementing sound BIC decisions, already increased in cross-border situations, are further enhanced by two factors.

One is an ideological approach to the issue where solutions are labelled as intrinsically “bad” (closed residential placements, return of child migrants, non-return of abducted children…) or “good” (family-based care, integration of child migrants, return of abducted children…) for all children, whatever their individual situation.

The second, closely linked to this, is “groupthink” based on supposedly conventional wisdom that dissuades professionals from raising questions with their peers and others about the justification and consequences of such approaches from a rights and best interests standpoint, in both collective and individual cases.

So some questions posed in this paper are deliberately at odds with sweeping preconceptions often sustained by groupthink. They need to be posed if we seek to meet some of the challenges for respecting the best interests and rights of children moving across borders. Hopefully, the eventual answers can rely above all on both improved evidence and case-by-case review.

1. General Comment on the right of a child to have his or her best interests taken as a primary consideration, UN doc CRC/C/GC/14 [↑](#footnote-ref-1)
2. *Ibid*., para. 54. [↑](#footnote-ref-2)