

ESTABLISHING THE BEST INTERESTS OF THE CHILD RULE AS AN INTERNATIONAL CUSTOM

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ABSTRACT

The rule of the best interests of the child is commonly applied in judicial matters affecting children. It becomes more significant after the adoption of the United Nations Convention on the Rights of the Child in 1989. This study is focused on establishing the customary status of the principle in international sphere to show that states are bound by the principle and that they have extended obligation towards children in their territories. Discussion begins with the definition of the principle and its usual application before the codification of the rule in the UNCRC. The next discussion is on the formation of the principle as customary rule, its scope and contents, and state general duty under the rule. Finding of this study demonstrate that reliance on the principle of the best interests of the child as an international custom grants children a better chance to exercise and enjoy their rights.

Key words: best interests of the child, international custom, UNCRC.

Introduction

The principle of the best interests of the child is a significant rule associated with children. The doctrine is introduced in the twentieth century and has become widely used in various common law and civil law jurisdictions. Other principles, such as the 'tender years' doctrine, were also used in determination of custody (Kohm, 2008; Fitzgibbon & Campbell, 1993). Due to its clear benefit in safeguarding children's welfare and interests, states and international organizations have been quick to grasp and apply the principle that the usage has reached a universal level in various subject matters concerning children. The principle has become an intrinsic norm in many aspects of child-related matters.

Discussion on the principle often involves issues of ambiguity, inconclusiveness, how it should operate and how it has evolved from sole duty of the courts to a larger stakeholder. Today, the realisation of the rule requires the effort of the courts, parents, authority and the community. Before the adoption of the United Nations Convention on the Rights of the Child (UNCRC), the application of the principle of the best interests of the child is limited to adjudication of family related matters such as custody and adoption; and in the administration of criminal justice when children come into conflict with the law.

Prior to its codification in the UNCRC, the rule was provided in the 1959 Declaration of the Rights of the Child in Principle 2 which stated that:

"... the child shall enjoy special protection and shall be given opportunities and facilities, by law and 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."

Another instrument, the 1979 Convention on the Elimination of All Forms of Discrimination against Women in Article 16 (1) (d) (f) stated that best interests of the child shall be the paramount consideration in ensuring that man and women have the same rights and responsibilities as parents in matters relating to their children, irrespective of their marital status; and the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children.

With the adoption of the UNCRC, the paramountcy concept was reduced to primary consideration but with the inclusion of the whole organs of the state. Article 3 of the UNCRC provides that:

"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."

Since its adoption in 1989, all states but two have ratified the UNCRC. This has inspired commentators to suggest that the Convention has become customary international law and therefore binds states which have not ratified the UNCRC. For dualist states, the UNCRC must be adopted by a domestic statute before it can have a legal force and this could take many years while denying children what is due to them. Nevertheless, to prove that the UNCRC as a whole has become a custom is a huge and time consuming task, and it is impossible to compel states to incorporate UNCRC into their legal framework. Hence, this

study is arguing that BIC principle as codified in the UNCRC has become an international custom and it can will automatic binding effect on states.

The aim of this study is to prove that the principle of the best interests of the child has become an international custom. For this purpose, it begins with a discussion on the definition of the principle and the application of the principle in some situations, to the adoption of the principle in the United Nations Convention on the Rights of the Child (UNCRC) in an expanded form. Next, it analyses legal impediment in the adoption of the UNCRC in some states, which prompted the need to apply the principle of the BIC as universal norms so that children protection can be enhanced and strengthened. Thus, the study moves to analyse whether the rule of the BIC has crystallised into an international custom. Then, the content of the principle and the duties of states towards children under the principle is examined. Finally, the study discuss the application of the principle in some situation to show how a customary international law would improve the protection of children.

Definition Of The Bic And Its Codification In The UNCRC

There is no universally accepted definition of the term 'best interests of the child' and so is in the UNCRC itself (Barratt and Burman, 2001). The term is subjective and can be generally referred to as the wellbeing of the child (UNHCR, 2006) or deliberation undertaken by the courts in deciding what orders might best serve the child (Children's Bureau, 2012). This is also stated by the court in *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4*. In doing so, the court had to consider a number of factors related to the circumstances of the child (Dausab, 2009). In practice, due to normative and cultural norms, states adopt different definitions and approaches of the rule (An-Naim, 1994) though the common attribute is the making of the best interests of the child at the very least, a primary consideration in decision-making (Hansen & Ainsworth, 2009; Walton, 1976). Proposers of children's rights argues that the determination of a child's best interests should be guided by the norms of the UNCRC and thus, the rights of the child should be taken into consideration (UNCRC, Article 3 (2)).

Most importantly, Article 3 of the UNCRC declares the involvement of more players other than the judiciary. The executive, administrative, legislative and other judicial personnel and quasi-judicial bodies involved in actions and decisions are required to make the BIC as a primary consideration. Such provision is an effort to guarantee that the BIC will not jeopardise actions and decisions of the agencies. Article 3 of the UNCRC expressly provides that the deliberation of the best interests of the child should take into account the rights and duties of parents, legal guardians or other legally responsible persons. In this regard, state parties are encouraged to take appropriate legislative and administrative measures to ensure that these requirements are fulfilled (Thronson, 2002).

Under Article 3, a decision-maker has a duty to make a child's interests a primary consideration along with other interests (Thronson, 2002). The determination of the best interests of a child requires the determination of some relevant aspects including the specific interests in question and the nature of the interests, the duration of the interests, and whether the interests are determined by subjective or objective element (Dausab, 2009); for example what is best for the child now and its effect to the future. Even though the rule is labelled as vague and unrestricted (SCR, 1996) the ambiguity of the principle has been reduced by referring to guidelines to support the decision-making process (UNHCR, 2008).

As the BIC varies depending on a child's situation (Zermatten, 2010) the determination will rely on not only the law but also culture and religion (An-Naim, 1994). The subjective element that exists is only in determining what is in the best interests of the child but not in making the rule as a substantive right that guarantees the application of the principle whenever a decision concerning children is to be taken (Zermatten, 2010). The BIC rule is not about the outcome per se but concerns with the process of reaching the decision and it does not require a decision-maker to be in complete agreement with the child's interests (Tobin, 2009). Thus, greater emphasis should be placed on the requirement to make the best interests of the child a primary consideration when greater impact and implication is expected from a decision (S.C.R, 1999).

Article 3 of the UNCRC provides the following:

*"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."

Note that Article 3 of the UNCRC requires the application of the rule in every action and decision all organs of states, i.e. the judiciary, executive and legislature. It also requires states to put their effort in taking coordinated actions and decisions (Zermatten, 2010). States are responsible to ensure that all decisions and action affecting children are made based on the

principle of BIC. The provision shows that children need special care and usually have unique needs and that is why adults have to be careful in handling matters affecting children. Due to their immaturity, lack of experience and ability (Woolf, 2003) the special needs is justified and they should be protected at all times. To guarantee that children will not be victimised, states are responsible to ensure that their decision and conduct are guided by the principle of the BIC as provided under Article 3 of the UNCRC that has become more prominent and extensive in terms of responsibility or duty laid down.

Even though the UNCRC was dubbed as a comprehensive protection for children of all background/ group/ society, it will not have any power unless states give it legal power domestically but the power will be affected by the reservations, and by the incorporation and transformation of the UNCRC as part of national laws. States accession and ratification will be meaningful after they take effort to implement the UNCRC and remove legal obstacles to such implementation. This study believes that customary international law is a functional instrument for improving the protection of children when states failed to give effect to the UNCRC. As such, it will argue that the principle of BIC as enshrined in Article 3 has become an international custom. By proving that the principle of the best interests of the child has attained customary status, this study hopes to convince states of their obligation under the rule.

Fundamentally Norm Creating Character.

In order to prove that Article 3 of the UNCRC has become a customary international law, this study shows that the article has satisfied the three conditions: i) a fundamentally norm-creating character; ii) widespread and representative state support including affected states; and iii) consistent state practice and general acceptance and recognition of the rule as specified by the International Court of Justice in the *North Sea Continental Shelf Cases* (ICJ, 1969). In that case the court was posed with a question of which law should apply in the determination of the continental shelf of the competing parties ie the Germany, Netherlands and Denmark. Here the court deliberates on the possibility of an article in the 1958 Geneva Convention on the Continental Shelf, specifically on the equidistance principle by looking at whether the convention has expressed the equidistance principle “..in such a form as to manifest the convention’s intent to have the principle generate a rule of customary law..?” (D’Amato, 1970).

To be ‘of a fundamentally norm-creating character’, the provision of Article 3 must be capable of forming the basis of a general rule of law. This means that state parties and non-state parties must demonstrate compatible behaviour with the provision and *opinio juris* of its obligation under the provision. This element ‘of a fundamentally norm-creating character’ can be proved as follows:i. The expression of the principle in Article 3 is in a form that manifest the intention of the legislators of the UNCRC for the principle to form a customary rule or the basis of general rule of law.

Here, this study relies on the rule called manifest intent, as Professor D’Amato (1970) called it. According to D’Amato, the court in the *North Sea Continental Shelf Cases* has pronounced a new methodology in deciding which treaty provision can become an international custom. In that case, the parties disagreed on the principles to be applied in the delimitation of the continental shelf areas in the North Sea. Netherlands and Denmark relies on the equidistance principle provided under Article 6 of the 1958 Geneva Convention to which both countries are party to, while Germany argues that the delimitation should be governed by the just and equitable principle where each coastal state is entitled to a just and equitable share. Germany will lose more continental shelf if the equidistance principle is applied.

Article 6 of the 1958 Geneva Convention provides that:

“2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.”

In its deliberation the courts discusses the whether the equidistance principle has become a customary international law that binds Germany who had not ratified the 1958 Geneva Convention. The court decided that the language of the Geneva Convention did not make the equidistance principle as *a priori* rule but merely as a secondary measure.

On the contrary, when compared, the wording of Article 3 of the UNCRC clearly indicates the intention of the legislator to make the provision *a priori* rule. It requires all state organs to make the BIC as a primary consideration without imposing any qualifying requirement. Not only it requires all state organs to make the BIC principle a primary consideration in all their actions and decision but it also impose further duty to take necessary measures relating to legislation and administration in ensuring that children’s well-being protected and cared for.

Widespread And Representative State Support Including Affected States.

Article 3 should be regarded as a rule of the customary international law because, the UNCRC has had a history of coming into force less than a year after its adoption. The signing and the ratification of the UNCRC by almost all states except the USA and Somalia contributes to the argument that the principle is being widely practised and accepted universally by states as a general rule. The generality of the practice can be seen from the ratification, acceptance, accession and succession of the UNCRC (UN, n. d). The fact that state’s ratified the UNCRC without reservation of Article 3 and its incorporation into domestic laws, are clear signals of acceptance and approval of a custom.

The best interests provisions in state/national legislation indicates widespread and representative practice. States from all over the world have incorporated the use of the principle in their national legislation. Periodic reports submitted by state parties to the Committee on the Rights of the Child, shows that states are not only embodying the principle in their legislation but are also take effort to implement the provisions of the UNCRC, including the need to ensure that the best interests of the child shall be made a primary consideration. The reports also demonstrate that the principle as provided under the UNCRC has been judicially applied by domestic courts.

The BIC principle is also enshrined in international treaties and documents. Several other international treaties provide rules of similar effect. The Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption approved in 1993 provides that:

Article 1

"The objects of the present Convention are –

*a) to establish safeguards to ensure that intercountry adoptions take place in the **best interests of the child** and with respect for his or her fundamental rights as recognised in international law;"*

Article 4

"An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

*b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in **the child's best interests**;"*

This Convention regulates the manner in which inter-country adoption can be carried out and imposes the duty and responsibility on states and their agencies to allow inter-country adoption when such a move is in the best interests of the child.

Meanwhile, the UN Convention on the Rights of a Person with Disabilities 2006, provides for the best interests of the child in the following manner:

Article 7

*"2. In all actions concerning children with disabilities, **the best interests of the child** shall be a primary consideration."*

Article 12

*"4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect **the person's rights and interests**."*

Article 23

*"2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases **the best interests of the child** shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities."*

Here, a different group of children is covered and protected under as the Convention give disabled children similar protection to their best interests as that enjoyed by able-bodied children. However, a special emphasis is made due to their exceptional circumstances of vulnerability, especially actions and decisions are made by other persons on behalf of the disabled children.

The Committee on the Rights of the Child asserted that the provisions of the UNCRC must be given effect in harmony with the principle of the best interests and the other three guiding principles: non- discrimination, the right to life and right to participate. The text of Article 3 UNCRC suggests that the article is merely enforcing a specific method to be followed by a decision-maker. Hence, the outcome should only be reached after the best interests of the child have been given due consideration (Zermatten, 2010). The provision is also a source of substantive right as it guarantees that the rule will be applied each time a decision-maker is deliberating to reach a decision that will affect children (Zermatten, 2010). Article 3 also connotes the interaction between child, the parent or guardian, and state organs.

The concept of the BIC also appears in six other articles of the UNCRC: Articles 9, 18, 20, 21, 37 and 40. It can be said that the BIC rule is the guiding principle of the UNCRC as it sets the norm on which other provisions shall be construed, and it influences the interpretation, application and implementation of the provisions of the Convention. Again, this supports the requirement of a fundamentally norm-creating character.

In general, all the provisions quoted above share some common features: firstly, the rule has to be applied only when a decision is to be made or during a procedure involving children, the outcome of which will have an effect on the children's interests; and, secondly, the best interest of the child is to be the primary consideration at the very minimum.

Consistent State Practice And General Acceptance And Recognition Of The Rule.

First, state practices all over the world are displaying a uniform practice of requiring the court to give the best interests of the child either primary or paramount consideration when making custody decisions. The practice is common in the arrangement of alternative care, adoption, rehabilitation, juvenile justice and in the treatment of alien children, especially children seeking refuge. These practices can be deduced from a variety of resources including, but not limited to, the following: enactment of state legislation; state ratification of international treaties; state conduct in dealing with children; publication of state policies regarding the use of the principle; statement made by governments of states or their representatives and the application of the principle in national and international courts. In terms of actual practice, a multitude of state practices can be presented to support this first requirement of customary law creation, including judicial application and administrative practice.

Second, the requirement to give the best interests of the child primary consideration in international treaties has not been objected to. Thus far, no objection or opposition has been published, aired, recorded or written on the rule. Indeed, the rule has emerged from a lower obligation, that is, a 'welfare' standard, a narrower term than the principle in question, to become a broader legal obligation. The current standard has been developed due to states' recognition and acknowledgement that it is a duty and responsibility of states to do so to protect children. The lack of objections is also reflected in the fact that most ratifying states have not made reservations to Article 3 of the UNCRC.

Furthermore, no reservations have been made by any of the 186 state parties to Article 5 (b) and Article 16 (1) (d) of the Convention on the Elimination of Discrimination Against Women (CEDAW), both of which contain references to the principle of best interests of the child as a primordial and paramount consideration.

Article 5 of CEDAW stated that:

"States Parties shall take all appropriate measures:

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

Article 16. 1. provides that:

"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount."

State recognition of the rule and its sense of legal obligation are found in State Legislation. When a state makes laws and regulations pertaining to certain matters, those actions may have resulted from its international obligation or its independent perception that it ought to practise certain things as such because it has a natural obligation to do so as, according to natural law, it is only fair to do it. The implementation and application of the principle of the best interests of the child to be given primary consideration in state practice and national law has been taking place for many years, and this should be sufficient to support the conclusion that states take such actions because they feel obliged to do so. The fact that none of the ratifying states have made reservations to Article 3, and its status as a guiding principle of the Convention as admitted by many commentators, conveys a clear message that states acknowledge its legal status and feel obliged not to reserve the provision even though it will place a duty on the organs of the state as a whole.

It is also argued that state practice in enacting statutes containing the rule or principle of the best interests of the child is actually an *opinio juris*. States consider themselves bound by the principle of the best interests of the child (whether or not it follows the ratification of the CRC); thus, its inclusion in state law displays the state's sense of obligation because the state makes laws for everyone to follow, including its agencies. A number of international committees and organizations lend support to the cause. For example, the Committee on the Rights of the Child supports the view that the principle has acquired the customary status. Its concluding observation and General Comment clearly reflect its stand on this matter. To the Committee, because of its almost universal ratification by 192 states the UNCRC has acquired the status of customary international law. Amnesty International also asserted that the Convention and its provisions have reached customary status.

Analysis Of The Customary Status Of The Principle Of Best Interests Of The Child

The debates above have provided support for the claim that the principle of BIC has reached customary status. The examination of the three elements involved in determining whether a principle has become a customary international law shows that the principle is commonly found in national laws of various nations, embodied in international treaties ratified by a majority of states, included in 'soft laws' and generally practised by states domestically and in intergovernmental relations.

There is enough evidence to conclude that the principle of the best interests of the child should be treated as a customary international law and should thus be binding on all states. States' practices in terms of legislation and administrative action constitute universal acceptance of the principle. It is also clear that the principle has been applied in a multitude of children-related issues including custody, family relations, alternative care, healthcare, criminal justice, disabled children, education, and survival. This study takes the view that it is safe to conclude that the principle has satisfied the requirement

outlined in the North Sea Continental Shelf case. Hence, the principle shall be treated as an international custom and can be applied domestically.

State Obligation Under The Customary Rule Of The Principle Of The Best Interests Of The Child.

As a customary rule developed from a treaty provision, the principle can only impose duties as imposed by Article 3 of the UNCRC. The duty that arises is the duty to make the best interests of the child a primary consideration in the conduct of all the state's organs in all areas affecting children. The authorities are bound to ensure that a child's interests are evaluated together with other competing interests in matters affecting a child or group of children (Zermatten, 2010). The principle should be applied to all individual children and any group of children including mass groups of children, but it should not be used to justify any act that is violent, inhumane or in contravention of children's rights. For example, a state cannot claim that it is in the best interests of the child to be prevented from going to school, receive corporal punishment, or be detained. The principle applies to all actions and decisions that affect children either directly or indirectly.

An important element of that duty is to give children the opportunity to express their views in order that their interests may be ascertained. It also means that the state must stop any current practice and amend laws if such practice and laws violate the rule. In relation to refugee and asylum-seeking children in Malaysia, the authorities are required to guarantee that the best interests of the child are considered in any refugee-related matters.

Conclusion

The principle of the best interest of the child (BIC) is a useful rule that can enhance the protection of children in general and children with specific needs such as disabled children, indigenous children and stateless children. The principle of the BIC should be applied to all children in any circumstances, anytime, anywhere, as long as they involve the elements of actions and decisions impacting on children.

This study has presented the argument that provision of the principle of BIC in Article 3 of the UNCRC has evolved into a customary international law and its binding effect on states regardless of their ratification or the status of the UNCRC in their national legal frameworks. In particular, the discussion in this chapter has shown that the provision of Article 3 is not only an endorsement and verification of the principle in general but, most importantly, has also extended the application of the principle beyond the judicial platform.

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