
CHAPTER 10

THE BEST INTERESTS OF THE CHILD

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Article 3(1)

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

U.S. ratification of the Convention on the Rights of the Child has been delayed because of opposition from domestic constituencies that fear it may erode U.S. sovereignty and the long-recognized power of parents and guardians to decide what is best for their children. Yet the central principle of the Convention—that the “best interests of the child” should be the guiding force behind actions that affect children¹—may perhaps represent a revolution in thinking in some countries about children’s rights that was first articulated in the United States itself. That revolution in thought is today universally recognized across the country as the core concept of laws relating to children. In at least this respect, therefore, U.S. opposition to the Convention would seem ill-conceived.

The Convention enshrines the principle that the best interests of the child should guide decisions in respect of children’s rights and welfare in several places. Article 9, concerning a child’s relationship with separated parents, confirms the child’s right to maintain ties with both parents, unless this would be “contrary to the child’s best interests.” Article 18 highlights the primacy of parents’ roles in rearing children, in accordance with those children’s best interests. Article 20 provides that children should not be removed from the bosom of the family unless it would be in a child’s best interests to do so. Article 40 allows for the presence of parents or legal guardians at criminal proceedings against a child, unless such presence “is considered not to be in the best interest of the child.”

¹ See, e.g., Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Caselaw*, 30 COLUM. HUM. RTS. L. REV. 159, 171 (1998).

Undergirding and overarching these specific provisions is the general principle set forth in Article 3 of the Convention. Specifically, Article 3(1) provides that: “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.”

Several factors in interpretation of the provision are apparent from its plain text. First, the provision refers to actions “concerning children,” not a child. Commentators have opined that the reference to children in the plural indicates that this provision is to apply broadly, on a general policy level rather than a specific case-by-case basis.² This interpretation is bolstered by the juxtaposition of the word “concerning;” taken together, it has been contended that these words impart to the provision, as a whole, a sweep that goes beyond the strict examination of matters directly affecting the rights of a child.³ In other words, the choice of the term “concerning children” admonishes the entities, mentioned in the remainder of the provision, that they ought to consider the best interests of the child in any decisions they take that may implicate the status of children.

The next clause of the provision, delineating the entities that need bear in mind “actions concerning children,” reflects a series of compromises among the drafters of the Convention. These entities in the final version are “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” The original clause, according to the *travaux préparatoires*, included “parents, guardians, social or state institutions, and in particular by courts of law and administrative authorities.”⁴ The U.S. representative offered a different formulation, dispensing with the reference to parents and guardians, and offered, in addition, the qualification that these entities be taking “official actions concerning children.”⁵ This formulation thus removed individuals from the equation. The explanation given for the use of the word “official” was to exclude purely private decisions from the ambit of the provision.⁶ The same goal, of course, was served by the removal of parents and legal guardians from the clause.

² Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* 14 (Philip Alston, ed., 1994); SHARON DETRICK, *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 90 (1999).

³ Alston, *supra* note 2, at 14; DETRICK, *supra* note 4, at 90.

⁴ DETRICK, *supra* note 2, at 90; *Travaux Préparatoires of the United Nations Convention on the Rights of the Child* ([hereinafter *Travaux*]), U.N. Doc. E/CN.4/1349, at. 2–3 (1980) (art. 3).

⁵ DETRICK, *supra* note 2, at 90; *Travaux*, *supra* note 4, L. 1575, ¶ 20 (1981).

⁶ DETRICK, *supra* note 2, at 90; *Travaux*, *supra* note 4, L. 1575, ¶ 24 (1981).