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CONTACT INFORMATION

Editoriale Scientifica, Via San Biagio dei Librai 39 – 80138 Napoli.

E-mail:

info@editorialescientifica.com

info@qil-qdi.org

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ZOOM IN

The Question:

Looking for the best interests of the child (BIC) in the least expected places: Can it really make a difference?

*Introduced by Francesca Capone**

In the decades following the adoption of the Convention on the Rights of the Child (CRC) we have seen the ‘best interests of the child’ principle (BIC) become entrenched as a prominent children’s rights principle.¹ Put it simply, BIC is to be ‘a primary consideration’² in all actions concerning children, regardless of who the actor in charge is (public or private social welfare institutions, courts of law, administrative authorities or legislative bodies) and across different areas, such as family law, adoption, migration, and socio-economic policymaking. The versatile, and often volatile, nature of the BIC principle on the one hand has made any attempt to define it *stricto sensu* doomed to fail; on the other legitimised it as the ultimate ‘mainstreaming principle’, crosscutting in all children’s rights interventions.

In order to provide some guidance on how to interpret and apply the best interests of the child principle, in 2013 the Committee on the Rights of Children has issued a much awaited General Comment,³ shedding

* Associate Professor of International Law, Sant’Anna School of Advanced Studies.

¹ W Vandenhoe, GE Türkelli, ‘The Best Interests of the Child’ in J Todres, SM King (eds) *The Oxford Handbook on Children’s Rights* (OUP 2020). On the human rights instruments that make express reference to the BIC principle see Ippolito in this Zoom-in.

² On the drafting process of the CRC and how the BIC was downgraded from being ‘the primary consideration’ to ‘a primary consideration’ see Vargiu in this Zoom-in.

³ United Nations, ‘Committee on the Rights of Children, 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)’ (29 May 2013) UN Doc CRC/C/GC/14.



light on the BIC's multifaceted nature. According to the CRC Committee, the BIC principle should be read in a threefold fashion: as 'a substantive right', 'a fundamental, interpretative legal principle', and a 'rule of procedure'.⁴ The threefold concept has been unpacked by the Committee as follows: the right of the child 'to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general'; the principle that, anytime a legal provision is open 'to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'; and the rule that any decision-making process affecting a specific child or a group of children 'must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.'⁵

Moreover, one key passage of the General Comment deserves to be highlighted:

'The best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving. The present general comment provides framework for assessing and determining the child's best interests; it does not attempt to prescribe what is best for the child in any given situation at any point in time.'⁶

By describing BIC as an ever-evolving principle the Committee explicitly recognises the need to adopt a malleable case-by-case approach in determining its content, noting that 'not all the elements will be relevant to every case, and different elements can be used in different ways in different cases [...] depending on the type of decision and the concrete circumstances'.⁷

Furthermore, being the BIC such a flexible principle, its assessment and application vary across different areas of law. So far, research on the topic has mainly focused on an array of well known situations, eg child

⁴ *ibid* para 6.

⁵ *ibid*.

⁶ *ibid* para 11 (emphasis added).

⁷ *ibid* para 80.



abduction, adoptions, the right to know one's own biological origins,⁸ and/or on specific fields, such as refugee law,⁹ migration law,¹⁰ and more recently international criminal law.¹¹

Apart from the scenarios commonly associated with the best interests of the child principle, many contexts in which the BIC can play an important role still remain underexplored. The present zoom-in aims at filling the gap in the existing literature, by analysing how and to what degree the BIC unfolds in some of 'the least expected places'.

The article by Francesca Ippolito focuses on the role of the best interests of the child in relation to environmental issues and in particular climate change. Moving from the understanding of the BIC as a threefold concept, the contribution leaves aside the right dimension, tackling the BIC as a rule of procedure and as an interpretative legal principle. Concerning the BIC as a rule of procedure, the article stresses especially its impact as a regulatory due diligence obligation that finds application both in the sphere of States' actions, requiring *inter alia* that the State regulatory power should be exercised 'adequately' regarding children's health, and with regard to the business sector. In the latter scenario, the author refers to the resort to the BIC principle by States to promulgate, implement and enforce a regulatory framework which ensures that the business sector complies with children's rights in general, or with more

⁸ JM Pobjoy, 'The Best Interests of the Child Principles as an Independent Source of International Protection' (2015) 64 ICLQ 327; J Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 Melbourne U L Rev 579; S Bartolini 'In the Name of the Best Interests of the Child: The Principle of Mutual Trust in Child Abduction Cases' (2019) 56 CMLR 91.

⁹ On the case law of the European Court of Human Rights concerning the application of the BIC principle in migration law and refugee law see M Sormunen, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights' (2020)20 Human Rights L Rev 745; M Leloup, 'The Principle of the Best Interests of the Child in the Expulsion Case Law of the European Court of Human Rights: Procedural Rationality as a Remedy for Inconsistency' (2019) 37 Netherlands Quarterly of Human Rights 50.

¹⁰ M Kalverboer et al 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 Intl J of Children's Rights 114.

¹¹ United Nations, 'Committee on the Rights of Children, 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)' (29 May 2013) UN Doc CRC/C/GC/14.



specific obligations, eg in the case of climate change, with international climate mitigation standards.

Considering the best interests of the child principle as an interpretative legal tool, Ippolito looks at it as an amplifier of other rights. In the field of climate change the author argues that the BIC plays a prominent role in interpreting the right to life and the right to development. It does so by guiding States in their exercise of legislative and administrative powers to choose the interpretation that advances the child's right to [a dignified] life and the child's right to development.

The second contribution by Paolo Vargiu reflects on the significance of the 'best interests of the child' principle in international investment law. In particular, the article questions whether children's rights, and especially the obligation to take into account the best interests of the child, should be amongst the factors to be considered in the interpretation of the scope and purpose of the rules of international law that protect the rights of investors and limit the states' power to regulate matters domestically. Although, as stressed by the author, the current makeup of investment arbitration and the dominant approaches to the interpretation of investment treaties make it quite unlikely that the BIC will appear amongst the reasons of an arbitral award anytime soon; the issues tackled are far from being purely theoretical and they can carry some relevant practical implications. In fact, as convincingly argued by the author, investment law, properly interpreted, requires arbitrators to consider the various international law obligations of States when assessing their conduct towards foreign investors. Consistently, the almost universal ratification of the CRC leads to consider that virtually every State is under an obligation to primarily consider the best interests of the child in a significant number of actions affecting the enjoyment of investment by foreign corporations.

The last contribution, authored by Stefano Saluzzo, addresses the relationship between child labour and trade law from the perspective of children's rights, and in particular the BIC principle. The article reflects on the use of unilateral trade measures and of trade agreements as tool to enforce labour obligations, including the abolition of child labour. After shedding light on the limited role that WTO law can play in relation to the enforcement of children's rights, the author explains why free trade agreements (FTAs) of new generation are better suited in this domain. In particular, Saluzzo argues that while substantive labour standards have



become a common feature of FTAs, enforcement mechanisms still differ greatly depending on the contracting Parties. In the author's view, there is certainly space for the best interests of the child to play a role in this context. More in detail, the BIC principle could not only be of guidance for States in designing their internal and external policies, but it could also constitute an interpretative principle for dispute settlement mechanisms.

What emerges from the analyses carried out in the three contributions is that the full potential of the BIC principle has not been disclosed yet. Obviously, challenges around the best interests can be traced to the vagueness of the norm, but the work carried out at various levels, and by different bodies, has contributed to better shape this concept and address its significance outside its usual field(s) of application. The goal, thus, is to make sure that considerations of children's rights should never seem out of place and the BIC principle can certainly play an important part towards its realisation.