

## The Substance of the Best Interests of the Child

*Primary consideration of the best interests of the child is a guiding principle in terms of construing legislation, collision among specific rights and the assessment of juvenile justice, in general. Legal analysis of the principle provided in the paper evidences that main issue is the absence of definition of and the vagueness of the concept of best interests, giving rise to the risk of misinterpretation. Furthermore, it is extremely important that relevant entities analyze the standard of “primary” consideration of the mentioned principle, and duly apply it. Hence, in-depth analysis of the substance and purpose of the principle is of decisive importance.*

**Key Words:** juveniles, justice, best interests, primary consideration, international standards, the Convention on the Rights of the Child, Juvenile Justice Code, the role, importance, substance of the principle.

### 1. Introduction

The principle of the best interests of the child is a novelty in Georgia criminal law. The Parliament of Georgia passed the Law of Georgia on Juvenile Justice on June 12, 2015, making a step towards the liberalization of criminal legislation. Prior to the adoption of the mentioned Code, the norms governing juvenile justice were stipulated in substantive, as well as procedural legislation of the Criminal Law of Georgia. The legislation recognized the necessity of special approach to juveniles, and set forth for them different regime than for adults, but juvenile justice did not take account of best interests of the child, which is a key pillar of the Convention on the Rights of the Child. Although Georgia joined the mentioned Convention back in 1994, the principle was included in Georgia legislation only in 2015.

The concept of best interests of the child obligates not only the parties administering the justice process and those participating in the proceedings to give primary consideration to best interest of the child, but legislation governing juvenile justice should itself be in line with the mentioned principle; since, first and foremost, legislation should ensure establishing solid safeguards for juvenile rights, constraining decision makers to act according to the norms of the law that are adapted to best interests of the child.

Since the best interests of the child is a novelty for juvenile legislation of Georgia, also, considering the great importance of the principle, its substance should be analyzed and examined in a full-fledged manner, in order to avoid incorrect interpretation.

The goal of the paper is to present the history of establishing and development of the best interests of the child in international or regional acts, as well as review the scale of its reflection in Georgia legislation, the essence and importance of the principle according to the Convention on the Rights of the Child, and the Juvenile Justice Code of Georgia, relation and link with other general principles of juvenile justice, main role and functions.

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## 2. Origin

The concept of best interests of the child has emerged relatively recently. Its application started mainly from 1800's, for resolving child custody matters. Specifically, child welfare or best interests of a child was a key pillar in the decision-making process.<sup>1</sup>

It should be noted that, historically, the principle of the best interests of the child was absolutely alien for the Western world. Society and legislation did not recognize children as individuals independent from parents, with independent rights and interests.<sup>2</sup> In general, the concept of the rights of the child, promoting development of and the protection of this right, did not exist in families or in the society; rather, a child was considered as property of their parents, who enjoyed unlimited authority over them.<sup>3</sup> Similarly, British Customary Law gave minimal attention to child rights and there were no legal safeguards for the protection of child rights, among them, the duty of parents to attend to their children.<sup>4</sup> In ancient Roman law, there was the so-called "father's power" (*Patria Potestas*) principle, according to which, fathers held absolute power over their children.<sup>5</sup>

From mid and late 1800's, as well as early 1900's, foundations for significant change of perceiving a child as an object of property have been laid. Main goal of reformers was the development of laws and policy focused on child interests and needs. Subsequent to their efforts, Western countries developed legislation governing child labor, adopted legislative regulations for the protection of children against domestic violence, a new system of juvenile justice was developed. The mentioned change also involved the expansion of the legal doctrine so called "paternalistic state (*Parents Partie*).<sup>6</sup>

In late 1800's, the principle of the best interests of the child was formed based on the very *Parents Partie* doctrine. As has been mentioned, initially it was used for resolving custody matters. In the US, its emergence is related to the state of Dakota, where, in 1877, the court applied the principle, as a decisive factor when reviewing the custody case. This was a precedent-setting decision in the Dakota State, from which the principle gradually spread out across Americas, as well as in the Western states.<sup>7</sup> Not only the principle of the best interests of the child, but in general, juvenile justice has originated in the United States of America.<sup>8</sup> In Great Britain, gradual development of juvenile well-being focused justice started from the 20th century, from about 1960's.<sup>9</sup> Well-being of minors was regarded as the only factor to be reckoned with in custody cases, which was regulated at the legislation level as well.<sup>10</sup>

It should be noted that the application of the best interests of the child is not related to just family law. The principle spread widely in other fields of law as well, including in criminal law. It has also been reflected in international law.

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<sup>1</sup> *Howe R.B., Covell K.*, Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013,16.

<sup>2</sup> *Ibid*, 17.

<sup>3</sup> *Van Deusen Ch.R.*, The Best Interests of the Child and the Law, Journal "Pepperdine Law Review", Vol. 18, 1991, 418.

<sup>4</sup> *Alston P., Gilmour-Walsh B.*, The Best Interests of The Child-Towards a Synthesis of Children's Rights and Cultural Values, UNICEF, 1996, 3.

<sup>5</sup> *Howe R.B., Covell K.*, Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 17.

<sup>6</sup> *Ibid*, 17-18.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Bokhashvili I., Benidze M.*, Juvenile Justice Matters, Law Journal, № 2, TSU Press, 2009, 35.

<sup>9</sup> *Maguire M., Morgan R., Reiner R.*, The Oxford Handbook of Criminology (5th ed., Oxford, 2012, 506.

<sup>10</sup> *Alston P., Gilmour-Walsh B.*, The Best Interests of The Child-Towards a Synthesis of Children's Rights and Cultural Values, UNICEF, 1996, 3.

### **3. Normative Basis for the Best Interests of the Child**

#### **3.1. International acts**

1924 Geneva Declaration on the Rights of the Child, which recognized the necessity of special approach towards minors, is considered the primary source for the best interests of the child in international law.<sup>11</sup> Since 1924, until the passing of the 1989 United Nations Convention on the Rights of the Child, numerous international acts had recognized the necessity of the best interests of the child, through focusing on well-being of the child. 1948 Universal Declaration on Human Rights, as well as International Pacts on Civil and Political Rights, and on Economic, Social and Cultural Rights should also be mentioned.<sup>12</sup>

The level of consideration of the best interests of the child in the above-mentioned international acts is not extensive. Unlike them, the first international document, where best interests of the child is indicated explicitly, as one of the key principles, is the 1959 Declaration on the Rights of the Child, which set forth a fairly high standard. Specifically, it took account of best interests of minors as the only circumstance to take into account, which, in turn, excludes the consideration of other interests.

The reinforcement of the concept of the best interests of the child was due to the passing of the 1979 Convention on the Elimination of All Forms of Discrimination against Women by the UN General Assembly.

UN standard minimum rules, the so-called Beijing Rules, for the administration of juvenile justice, is an important international document, passed by the UN General Assembly in 1985. It is underscored in the mentioned document that the juvenile justice system should be directed at the welfare of minors in conflict with the law, and additionally calls for adequate attention to full mobilization of all resources to promote welfare of juveniles.<sup>13</sup> Unlike UN standard minimum rules for the administration of juvenile justice, UN Guidelines for the Prevention of Juvenile offences, the so-called Riyadh guidelines, envision the term Well-being of Young Persons, as well as Best Interests of the Young Person. Specifically, it provides that institutionalization of young persons should be used as a measure of last resort, for the minimum necessary period, and best interests of the young person should be of paramount importance.<sup>14</sup>

The UN 1989 Convention on the Rights of the Child stipulates firm legal safeguard for reinforcing the best interests of the child; Georgia joined the Convention in 1994 and Article 3 of this convention envisages primary consideration of best interests as one of the key principles. All rights in the Convention on the Rights of the Child demonstrate the effect of the best interests of the child.<sup>15</sup> According to the UN Committee on the Rights of the Child, best interests of the child is a guiding principle that has considerable effect in terms of the application and construing of the Convention. Moreover, it agrees that the mentioned principle is a key means for taking a decision, whenever there is a collision between the rights enshrined in the Convention.<sup>16</sup>

In addition to Article 3, best interests of the child are also found in other articles of the Convention on the Rights of the Child. Among them, Articles 37 and 40, that govern the matters of criminal proceedings in relation to juveniles, and consider best interests of the child as primary guiding principle.

<sup>11</sup> Draft Law of Georgia Juvenile Justice Code, Explanatory Note, 55, <<http://info.parliament.ge/#law-drafting/8688>>, [25.09.2016].

<sup>12</sup> See International Pact on Economic, Social and Cultural Rights, UN General Assembly, 1966, Art. 10 (3). International Pact on Civil and Political Rights, UN General Assembly, 1966, Art. 10 (2,3), 14(1,4), 24.

<sup>13</sup> Guideline 1.3.

<sup>14</sup> Guideline 46.

<sup>15</sup> *Alston P., Gilmour-Walsh B.*, The Best Interests of The Child-Towards a Synthesis of Children's Rights and Cultural Values, UNICEF, 1996, 3.

<sup>16</sup> *Ibid.*

### 3.2. Regional Acts

International legal acts on the rights of the child have had considerable influence on reinforcing the best interests of the child at the regional level.

1950 European Convention on Human Rights and Fundamental Freedoms should be noted; it does not explicitly envisage best interests of minors; still, European Court on Human Rights demands from national courts that they maximally consider the rights and interests of juveniles. Specifically, court explains: “national authorities should direct best efforts so that the interests, rights and freedom of all stakeholders are considered, especially, best interests of a child. Fair balance has to be established. Best interests of a child should be the primary matter and, based on its nature, seriousness, may supersede the interests of others.”<sup>17</sup>

Out of regional legal acts, the African Charter on the Rights and Well-being of the Child should also be noted; this Charter, as compared to the Convention on the Rights of the Child, envisages a considerably broader, general and comprehensive definition of best interests of the child. According to the Charter, best interests is the only circumstance to be taken into account, which has a “superseding effect” and effectively excludes other circumstances, while the Convention on the Rights of the Child, during the decision-making process, along with best interests of a child, admits the possibility of considering other circumstances as well. Furthermore, a circle of individuals who are mandated to defend best interests of minors, is not specified; this creates a firmer guarantee for the protection of the rights and interests of children. Notably, the principle of best interests of the child is included in the Constitution of South Africa, following the influence of the Charter.<sup>18</sup>

## 4. The Role of the Best Interests of the Child

### 4.1. Best Interests, as a Guiding Principle for Construing Specific Articles

The Committee on the Rights of the Child, in communications to states, rarely focuses on the breach of a specific article of the Convention. It regards the Convention as a set of interrelated rules, where the principle of the best interests is superior.<sup>19</sup>

Consideration in relation to best interests sheds more light on the rights stipulated in the Convention. The principle also provides guidance to problems and situations not specifically mentioned in the Convention. For instance, although Article 40(3) of the Convention mandates the states to establish a minimum age for criminal responsibility, it makes no mention of what exactly that should be. Hence, in this case, when setting minimum age, best interests of the child should primarily be envisaged.<sup>20</sup> Stephen Parker is of the same opinion, where constitution does not comprehensively regulate a specific issue, he regards that the best interests is main source for the assessment of legislation and practice of states.<sup>21</sup> Similarly, in the presence of vagueness or a gap in national legislation, decision-maker should be guided by the principle of best interests.

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<sup>17</sup> N.Ts. et al vs Georgia, [2016], ECHR, 34.

<sup>18</sup> Dausab Y., *The Best Interests of the Child, Children’s Rights in Namibia*, Edited By Ruppel C.O., Namibia, 2009, 152.

<sup>19</sup> Hammarberg T., *The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults*, Strasbourg, 2008, 3.

<sup>20</sup> Ibid.

<sup>21</sup> Freeman M., *A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child*, Leiden, Boston, 2007, 32.

## **4.2. Best Interests of the Child, as a Guiding Principle in the Presence of Collision Between Specific Rights**

In case of collision between several rights, best interests of a minor should supersede. Specifically, there may be a collision between a child's right to have contact with their parents and their protection against any violence. In such case, the only solution is acting according to the best interests of the child.<sup>22</sup> Philip Alston develops the same view; he thinks that the principle of best interests serves as a mediator in the presence of collision among rights; although, explains that, in such case, an individual who applies such principle plays significant role, since such person has to determine importance of the rights and their superiority.<sup>23</sup>

## **4.3. Guiding Principle for the Evaluation of Juvenile Justice**

The principle of best interests has impact on law-making activity, decisions taken by state bodies, or any other action performed in relation to a minor. Furthermore, the principle is a basic tool in the process of evaluation of legislation and policy related to juveniles. Particularly, how the principle is reflected in legislation and policy documents, whether there is practice that ensures the consideration of best interests in the process of decision making.<sup>24</sup>

# **5. Best Interests of the Child as a Right, Principle and Procedural Norm**

## **5.1. Best Interests as an Entitlement of a Minor**

The Convention on the Rights of the Child considers juvenile justice as an integral part of child rights and introduces relevant standards for juvenile justice. Furthermore, it mandates states to establish solid safeguards for children in conflict with the law, and use criminal proceedings in relation to children in conflict with the law, as a last resort measure.<sup>25</sup>

According to the Committee on the Rights of the Child, primary consideration of the best interests of a child is an entitlement of a child to have his/her best interests evaluated and be granted priority in the decision making process, above other interests. Best interests, first of all, is an entitlement, not a principle.<sup>26</sup> Such interpretation of best interests envisages also creating safeguards, so that the rights are exercised in cases of decisions related to child/children.<sup>27</sup>

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<sup>22</sup> *Hammarberg T.*, The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 3.

<sup>23</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 32.

<sup>24</sup> *Hammarberg T.*, The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 3.

<sup>25</sup> *Emelonye U.*, Proportionality and Best Interests: Calibrating the Twin Pillars of Child Justice in Nigeria, Helsinki, 2014, 78.

<sup>26</sup> *Zermatten J.*, The Best Interests of The Child, Literal Analysis, Function and Implementation, The International Journal of Children's Rights, Vol. 18, Issue 4, 2010, 483.

<sup>27</sup> General Comment №.14, On the Rights of the Child to have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 4.

### **5.2. Primary Consideration of Best Interests, as a Fundamental Principle**

Best interests, as one of the important principles, implies the obligation of an authorized individual, to take decision in favor of a minor. Specifically, in case a norm of law allows interpretation, the interpretation that serves the protection of the interests of a minor the best should be favored.<sup>28</sup> Hence, best interests, as a right, bestows a minor with authority to require decision maker to consider his/her best interest in the priority order, while as a principle, mandates a decision maker to act according to best interests of a minor.

### **5.3. Primary Consideration of Best Interests, as a Procedural Norm**

In the process of taking decision in relation to a minor, it is necessary to evaluate possible positive, as well as negative impact of final decision on a minor. Evaluation of best interests and determination calls for the presence of a number of procedural safeguards. Furthermore, taken decision should demonstrate that the rights of the child have been fully considered. In this respect, it is the duty of the state to determine how well child rights have been respected in taken decision, what was considered as best interests of a child. Based on what criteria a decision was taken and how the interests of a child have outbalanced other interests.<sup>29</sup> Therefore, not only final decision should be in line with best interests of a child, but the process of decision-making should also be in line with best interests of a minor.

Hence, best interests of a child comprise the above-mentioned three dimensions. It is considered as a right of a child, as a key principle and as a procedural rule.

## **6. Legal Analysis of the Principle of Best Interests of a Minor**

### **6.1. Interpretation of the wording of Article 3(1) of the Convention on the Rights of a Child**

Draft of Article 3 of the Convention had been developed by Poland and was presented to the working group in 1979, while the revised text was discussed at a meeting in 1980, where, Australia and the United States of America brought forward their suggestions. Feedback and comments related to the text have always been the subject of ongoing review. Delegations of a number of countries expressed their views, while in 1988, technical adjustment of the text took place, while in 1988-1989 a second hearing was held, following which the text was adopted in its current wording.<sup>30</sup>

Article 3(1) of the Convention on the Rights of the Child reads as follows: “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.” For in-depth analysis of the principle, detailed interpretation and analysis of the mentioned text is necessary.

#### **6.1.1. “In all actions”**

Primary consideration of best interests is guaranteed in all actions concerning children, which, in turn, is an indication of a wide scope of the application of the principle.<sup>31</sup> The implied meaning of “action” is the

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<sup>28</sup> General Comment №.14, On the Rights of the Child to have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 4.

<sup>29</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 44.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Detrik S.*, A Commentary on the United Nations Convention on the Rights of the Child, The Hague, Boston, London, 1999, 90.

subject of interpretation. It was first reflected in the corrected text version suggested by Poland 1981; while, during the second hearing, a number of delegations raised questions whether primary consideration of best interests would be possible in all cases, given other competing interests. For instance, the interests of justice and society may often have value equal to best interests of a minor, if not superior to it.<sup>32</sup> According to the suggestion by the United Kingdom, which was supported by Norway as well, the word “all” was to be taken out of the text of the principle, otherwise, best interests would become one of the circumstances to be taken into account.<sup>33</sup> Following this very reasoning, best interests became a factor to be considered on a primary basis, instead of being just a factor to be considered.

Throughout all these discussions, no discussion was held about what was implied under the word “action”. Whether or not it also implied omission. Notably, the Convention should be construed in a purpose-specific manner.<sup>34</sup> Hence, elimination of omission from the principle of best interests would not be justified for the purposes of the Convention, since, in this case, for example, relevant offices working on social welfare would not have the duty to protect children against violence, separate them from offensive parents, which is explicitly best interests of the child. Respectively, for the purposes of Article 3 of the Convention, omission is also an action.<sup>35</sup> In other words, decision about refraining from an action is, also an action.<sup>36</sup>

### **6.1.2. “Towards Children”**

Primary consideration of the best interest in all actions performed in relation to children has wide, as well as narrow sense. Specifically, in a broad sense, absolutely all actions of the state may have certain impact on the interests of children. Such a broad interpretation is based on two arguments. First, it is advisable to use best interest maximally broadly and second, the word “children” is used in the text, i.e., plural sense, and not singular, which indicates to the goal of wide application of best interests.<sup>37</sup> It should be noted that wide interpretation might be applied to the extent that will not render the principle very general and comprehensive.

Legal obligation to adhere to the principle applies to a group (wider sense), as well as individual child (narrow sense) involved in the juvenile justice process.<sup>38</sup>

When considering a criminal case, best interests of a child are primary in relation to individuals in conflict with the law, witnesses and victims, as well as in relation to the children affected by crime committed by their parents.<sup>39</sup>

Thus, the term “in relation to children” is construed in wide sense and best interests should be considered in all cases when an action or decision has at least some, direct or indirect impact, on minors.

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<sup>32</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 45.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> General Comment №14, On the Rights of the Child to Have his or her best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 7.

<sup>36</sup> *Howe R.B., Covell K.*, Education in the Best Interests of the Child: A Children’s Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 16.

<sup>37</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 46.

<sup>38</sup> *Hamilton C.*, Guidance for Legislative Reform in Juvenile Justice, New York, 2011, 34.

<sup>39</sup> General Comment №14, On the Rights of the Child to have his or her best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 8.

### 6.1.3. “State or Public Institutions”

Article 3(1) of the Convention mandates not only state parties to respect and protect best interests of minors, but state and private institutions operating in social welfare also have such duty. Hence, relevant parties shall ensure the application of articles of the Convention in practice, for the protection of best interests of a minor.<sup>40</sup> In this respect, it is important to interpret the implied definition of state and private institutions.

The draft prepared by Poland in 1979 mandated parents, caregivers, social and state institutions, especially courts, legislative and administrative bodies to respect the principle.<sup>41</sup> While, an alternative version offered by the USA has limited the application of this principle to the following condition: “any official action related to the child, by state or public institutions working on social welfare, by courts or administrative bodies.” Notably, the suggested model was not accepted by either Poland or the USA. The word “official” was removed and a reference to a legislative body was added.<sup>42</sup> The final version of the text explicitly indicates that the duty does not apply to parents and caregivers; just the mandate to take official decisions in consideration of best interests.

Thus, the principle of best interests primarily applies to decisions and actions taken by public entities, while reference to private institutions working on social welfare issues indicates to the application of the scope of the principle only to the private sector institutions with the status of an institution working on social welfare issues.<sup>43</sup>

### 6.1.4. “Courts, Administrative and Legislative Bodies”

According to the Committee on the Rights of the Child, courts of all instance are implied under courts.<sup>44</sup> Respectively, the principle of best interests of minors should be upheld in court at any stage of consideration of the case, and a judge is required to base any decision taken in relation to a minor on his/her best interests. In general, court is the only body authorized to administer criminal justice and render a final decision.<sup>45</sup> Notably, court is the highest institution that protects best interests of a minor and when deciding on a child welfare issue, a judge has the final say.<sup>46</sup>

The committee explains that the protection of best interests of minors involve the replacement of traditional goals of criminal law, retaliation and punishment, with rehabilitation and restorative justice objectives. The above-mentioned can be achieved concurrently with the focus on public safety.<sup>47</sup>

The Committee on the Rights of the Child explains that decisions rendered by administrative bodies are wide and cover almost all areas. Specifically, education, care, health, living conditions, shelter, etc. Respectively, when taking decision about a minor, administrative bodies must be guided by the very best

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<sup>40</sup> *Guat T. Ng.*, The Rights of the Child and The Best Interests of the Child, “Asia Pacific Journal of Social Work and Development”, Vol. 15, № 2, 2005, 1.

<sup>41</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 47.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Detrik S.*, A Commentary on the United Nations Convention on the Rights of the Child, The Hague, Boston, London, 1999, 90.

<sup>44</sup> General Comment № 14, On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 8.

<sup>45</sup> *Tumanishvili G.*, Criminal Law Process: Overview of the General part, Tbilisi, 2014, 90.

<sup>46</sup> *Dausab Y.*, The Best Interests of the Child, Children’s Rights in Namibia, Edited By. Ruppel C.O., Namibia, 2009, 147.

<sup>47</sup> General Comment № 10, Rights of the Child in Juvenile Justice, UN Committee on the Rights of the Child, 2007, 5.



interests of a child.<sup>48</sup> As for legislatures, they are mandated to, in the process of discharging authority, when adopting any law, to primarily take into account best interests of a minor. The right of a child must be assessed and considered in a primary fashion, and his/her best interests must be clearly reflected in relevant legislation.<sup>49</sup>

Criminal legislation governing the matters of minors should be oriented at the welfare of youth and be aimed at their rehabilitation, not punishing.<sup>50</sup>

Thus, the principle of primary consideration of best interests of the child should be reflected in the legislation; and at the same time, juvenile legislation itself should be in line with the mentioned principle. Otherwise, it cannot be implemented adequately.

### **6.1.5. “Best Interests”**

The Convention on the Rights of a Child does not offer the definition of best interests of minors, nor refers to specific factors for its definition. Best interests should be interpreted in close relationship with the Convention on the Rights of the Child, and other international acts.<sup>51</sup>

First attempt to define best interest of minors was observed in the draft developed by Poland; this became a matter of debate among state delegations. New Zealand noted that best interests of a child should be defined by states, according to their laws and practice, which is accepted and established in their society.<sup>52</sup> Ultimately, agreement had not been reached and Article 3 of the Convention does not offer any indication as to what is implied under the best interests of minors. The above-mentioned may be due to the following: firstly, since very many countries were engaged in the drafting process, it was practically impossible to reach agreement and develop a concept; Secondly, the difficulties of assessment of best interests based on the complexity of the issue was taken into account, especially when the matter was still the matter of study. Therefore, a decision was reached not to define the concept and leave it flexible; thirdly, various cultural or religious traditions were taken into account. Therefore, the issue was left open and up to the interpretation of states.<sup>53</sup>

The term “best interests” describes welfare of a minor in a broad sense.<sup>54</sup> Welfare, in turn, is defined by considering such individual circumstances as: age, level of development of a child, relations with parents, environment and experience of a minor.<sup>55</sup> The very age, biological and psychological development is the peculiarity of criminal responsibility that distinguishes a minor from an adult. Hence, knowing these circumstances will significantly help a judge in deciding on a relevant punishment and achieve resocialization of a minor,<sup>56</sup> which, in turn, is aimed at the protection of best interests. Welfare test differs from primary consideration of best interest in that the former does not mandate decision maker to render a decision that

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<sup>48</sup> General Comment №.14, On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 8.

<sup>49</sup> Ibid.

<sup>50</sup> *Shalikashvili M., Mikanadze G., Khasia, M., Penal Law, Tb.*, 2014, 348.

<sup>51</sup> UNHCR Guidelines on Formal Determination of the best Interests of the Child, United Nations High Commissioner for Refugees, 2006, 6.

<sup>52</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 50.

<sup>53</sup> *Howe R.B., Covell K.*, Education in the Best Interests of the Child: A Children’s Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 23.

<sup>54</sup> UNHCR Guidelines on Determining the best Interests of the Child, United Nations High Commissioner for Refugees, 2008, 14.

<sup>55</sup> Ibid.

<sup>56</sup> *Shalikashvili M.*, Criminology, Tb., 2011, 156.

is best for the interests of a child. Decision taken in consideration of welfare does not mean that it is the only best choice.<sup>57</sup>

In literature, there is no unified approach for the interpretation of best interests, since it is impossible to precisely define best interests of a minor. In the opinion of some of the scientists, best interests can be broken down into basic (physical, emotional, intellectual), developmental (transfer into adult age without any obstacle), and autonomous (selection of the style of life independently) interests.<sup>58</sup> Moreover, according to another view, in terms of time, interest may be short, medium-term and long-term. Hence, future interest may not just differ, but it may collide with short-term interests or a present interest.<sup>59</sup> The concept of best interest of a minor or a true interest of a child combines two issues: control and the search for a solution. Control criterion implies ensuring duly exercising of child rights and obligations in relation thereof, while the solution search criteria implies finding and assessing all possible solutions, when taking decision in a specific case.<sup>60</sup>

The concept of best interests is not defined. Furthermore, it is quite complex, comprehensive, and must be interpreted in consideration of the circumstances of each specific case.<sup>61</sup> Defining it is the same as predicting the outcomes in the decision-making process.<sup>62</sup> The absence of the definition of the concept of best interests is due to the vagueness as to what is good for a minor.<sup>63</sup> Courts have had numerous attempts to define it, although all such attempts failed, since individual characteristics of every case differed and there were different evidences in all cases for the assessment of best interests. Hence, specific elements could not be determined.<sup>64</sup> The concept of best interests is quite flexible and should be adapted on a case-by-case basis, considering specific, concrete circumstances of a juvenile's case. When examining individual cases, the needs of just specific minor are taken into account, while a legislator should evaluate the interests of minors, or those of a certain group of minors. In both cases, best interests should be assessed in concurrently with the consideration of universally recognized child rights and freedoms.<sup>65</sup>

It should also be taken into consideration that the definition of best interests is quite closely linked to culture, and the perception of best interest of young persons varies from culture to culture.<sup>66</sup> Hence, the importance of best interests in different cultures remains the subject of debate.<sup>67</sup>

For some societies, best interests mean just satisfying material needs. Some pay attention to emotional feeling of safety, psychological well-being and development. While some, although, at present, less so, focus on moral and religious well-being. As for the decision, it depends on the view of a judge and a legislator in relation to best interests of a child. In other words, there is a system of values of each individual

<sup>57</sup> *Elliston S.*, *The Best Interests of the Child in Healthcare*, London, New-York, 2007, 14.

<sup>58</sup> *Freeman M.*, *A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child*, Leiden, Boston, 2007, 27.

<sup>59</sup> Children's Rights Knowledge Centre, *Children's Best Interests between Theory and Practice*, 2014, 2, <[http://www.keki.be/sites/default/files/Policy%20advice\\_Best%20interests%20of%20the%20child.pdf](http://www.keki.be/sites/default/files/Policy%20advice_Best%20interests%20of%20the%20child.pdf)>, [25.09.2016].

<sup>60</sup> *Shalikhvilil M., Mikanadze G.*, *Juvenile Justice*, Tb., 2016, 73.

<sup>61</sup> General Comment №14, *On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration*, Committee on the Rights of the Child, 2013, 9.

<sup>62</sup> *Skivenes M.*, *Judging the Child's Best Interests: Rational Reasoning of Subjective Presumptions?*, *Journal "Acta Sociologica"*, Vol. 53, №. 4, 2010, 340.

<sup>63</sup> *Elliston S.*, *The Best Interests of the Child in Healthcare*, London, New-York, 2007, 14.

<sup>64</sup> *Van Deusen Ch. R.*, *The best Interests of the Child and the Law*, *Journal "Pepperdine Law Review"*, Vol. 18, 1991. 420.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Freeman M.*, *A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child*, Leiden, Boston, 2007, 33.

<sup>67</sup> *Children and Transnational Justice: Truth-telling, Accountability and Reconciliation*, UNICEF, edited by Rarmar S., Roseman M.J., Siegrist S., Sowa T., 2010, 17.

and ensuing subjective attitude. Therefore, it is most important to justify taken decisions with relevant arguments, and minimize biased and/or wrong decisions.<sup>68</sup> Decision-makers are not granted unlimited discretion, which would enable them to base their decision on just subjective views; rather, when evaluating best interests, they are required to take into account view and opinions of a minor;<sup>69</sup> this, naturally, does not mean shifting responsibility to a minor.<sup>70</sup>

It should be underscored that the best interest test requires that decision makers decide on just best result for a young person. Such decision should not be one of the good or acceptable out of several alternatives, but the best one.<sup>71</sup> The doctrine of best interests sets forth highest standard, at the same time, it is a subjective, but the most credible and befitting test, given the absence of a better guideline in juvenile justice.<sup>72</sup>

### **6.1.6. “Best Interests Should be a Primary Consideration”**

According to the Principle Two of the Declaration on the Rights of the Child adopted by the UN General Assembly in 1959, “The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by 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.”<sup>73</sup>

Original draft of Article 3 of the Convention on the Rights of the Child envisaged the above-mentioned principle. A standard that was set forth by the mentioned principle is important. Specifically, best interests were not considered as one of the factors among others, or the factor to be considered in a priority order, or was the most important factor; rather, it had paramount importance. Representatives of some countries expressed discontent concerning the mentioned regulation, as a result of which, in 1980, the following alternative version was submitted to the Human Rights Committee Working Group: “in all actions in relation to children, irrespective of social welfare state or private institutions, courts, or administrative bodies, best interests of the child are given primary consideration.”<sup>74</sup>

The above-mentioned edited text was reviewed in 1981. Although additional comments were expressed, but ultimately the submitted version was adopted.<sup>75</sup> Thus, the best interests test enjoys prominence among other interests and it does not have absolute predominance.

The standard of priority consideration means that best interests of a minor may not be considered at the same level at which other interests are considered. Such approach is justified based on the condition of a minor. Unlike adults, children have fewer possibilities for defending their own interests.<sup>76</sup>

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<sup>68</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 28.

<sup>69</sup> *Howe R.B., Covell K.*, Education in the Best Interests of the Child: A Children’s Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013, 22.

<sup>70</sup> *Hammarberg T.*, The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults, Strasbourg, 2008, 5.

<sup>71</sup> *Elliston S.*, The Best Interests of the Child in Healthcare, London, New-York, 2007, 19.

<sup>72</sup> *Kohm L.M.*, Tracing the Foundations of the best interests of the Child Standard in American Jurisprudence, “Journal of Law and Family Studies”, Vol. 10, №2, 2008, 337.

<sup>73</sup> *Freeman M.*, A Commentary on the United Nations Convention on the Rights of the Child, Article 3, Best Interests of the Child, Leiden, Boston, 2007, 25.

<sup>74</sup> *Ibid.*, 26.

<sup>75</sup> *Ibid.*

<sup>76</sup> General Comment № 14, On the Rights of the Child to Have his or her best Interests taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 10.

Best interests of minors may conflict with other interests, such as the interests of other children, society, justice. While working on the text of the Convention, delegations of a number of countries expressed opinion that the interests of justice and society could have at least equal or higher value than those of best interests of a juvenile.<sup>77</sup> In such case, collision should be addressed on a case-by-case basis, taking into account specific circumstances of the case, and by maintaining balance among interests.<sup>78</sup>

## **6.2. The essence of Primary Consideration of Best Interests of a Child, According to Juvenile Justice Code of Georgia**

Article 1(2) of the Juvenile Justice Code of Georgia sets the protection of best interest of minors as one of the goals, which, naturally, indicates to great importance of the principle of best interests of the child in juvenile justice. At the same time, it indicates that it is not just the parties engaged in the process of justice that must ensure the protection of best interests, but the justice code itself should allow for such action. Specifically, each regulation envisaged under the Code should serve the protection of best interests of minors.

The principle of primary consideration of best interests of a child is enshrined in Article 4 of Juvenile Justice Code, according to which, “in the process of juvenile justice, best interests of a child are to be considered in a priority order.”

The above-mentioned principle is quite widely used in juvenile justice. Specifically, it comprises administrative or criminal proceedings with the involvement of a minor, among them, investigation of an offence, criminal prosecution, judicial review of the case, enforcement of a sentence or other measure, and rehabilitation and resocialization.<sup>79</sup> Respectively, all entities administering the juvenile justice process, or all individuals involved in the proceedings have the obligation to defend the principle of best interests of a child.

The principle of best interests is not applicable only to a minor in conflict with the law, but in the justice process best interests of a minor witness and a minor victim are also protected.<sup>80</sup>

The Juvenile Justice Code takes account of best interests of minors, as the subject of primary consideration. The term “primary” indicates to the possibility of considering other circumstances, interests as well. Hence, in the process of justice it is not just best interest of minors that are taken into account; rather, the desired goal is achieved in parallel to focusing on the interests of justice. Nevertheless, I believe, that although primary consideration of best interests does not preclude the possibility of focusing on other interests, and is not the only aspect to be taken into account, at the same time, it does, in a certain way, limit a decision maker’s options to consider other interests. Specifically, due to primary consideration of best interests, all other circumstances and interests, including the interest of justice, are secondary. Best interests of minors have great superiority over other interests and it is not merely one of the circumstances to be considered.

As for the concept of best interests, it should be noted that, unlike the Convention on the Rights of the Child, Article 3(4) of the Juvenile Justice Code does offer the definition of best interests. Specifically, “the interests of safety, well-fare, healthcare, education, development, resocialization-rehabilitation and other

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<sup>77</sup> *Detrik S.*, A Commentary on the United Nations Convention on the Rights of the Child, The Hague, Boston, London, 1999, 91.

<sup>78</sup> General Comment №14, On the Rights of the Child to Have his or her Best Interests Taken as a Primary Consideration, Committee on the Rights of the Child, 2013, 10.

<sup>79</sup> The Law of Georgia Juvenile Justice Code of Georgia, 3708-III, Legislative Bulletin of Georgia, Website, 24.06.2015, <<https://matsne.gov.ge/ka/document/view/2877281>>, [25.09.2016], Article 3.

<sup>80</sup> *Ibid.*

interests of juveniles, that are determined according to international standards and other individual characteristics, as well as considering his/her own opinion.” Apparently, the provided definition does not offer complete and comprehensive definition of best interests and provides just main directions. Respectively, it leaves broad discretion to decision makers to determine best interest of minors on a case-by-case basis. In this regard, review of several court decisions are important. Specifically, the vision of a judge in relation to best interests of minors is of interest. Out of the studied five decisions,<sup>81</sup> in all ones, judge is guided by international standards, specifically, Article 3 of the Convention on the Rights of the Child, Beijing Rules, and indicates that such traditional goal of criminal law as punishment is less priority and priority should be given to rehabilitation of minors and restorative justice. At the same time, it is explained that best interests of minor may not be regarded at an equal level with other interests. Based on the mentioned reasoning, in two cases<sup>82</sup>, judge regarded welfare, education, development of a minor in conflict with the law to be the best interest, and based on the above-mentioned reasoning, deemed it advisable to count the deprivation of liberty sentence conditional. In other case, under the same reasoning, plea bargain was applied.<sup>83</sup> Notably, in one of the cases, the judge, based on best interests of a minor, administered home arrest for a minimum period.<sup>84</sup> Out of five reviewed cases, deprivation of liberty was used in one case only; this was justified by the fact that loyal attitude towards a minor did not have corrective effect and the minor did not discontinue delinquency.<sup>85</sup> In the same judgment, it is noted that at the rehabilitation facility minor has the possibility to develop and get education. Hence, possibly, court deemed the deprivation of liberty of a minor to be his best interest. In such case, underage offender is given possibility to study, take upon responsibility and return to society. While, the possibility to get education, ensures minor to leave incarceration facility more educated, equipped with better skills and higher self-confidence,<sup>86</sup> which is one of the preconditions for his/her resocialization.

When reviewing the assessment of best interests of minor, the Supreme Court of Georgia June 29, 2015 Decision №26553-15 is important;<sup>87</sup> this decision was rendered prior to the entry of the Juvenile Justice Code into effect. The Cassation Chamber was guided by international standards, and explained that Article 63(5) of the applicable Criminal Code of Georgia, which prohibited the possibility of using conditional sentence in case a convict turned eighteen as of the rendering of judgement, irrespective of the crime committed while being underage, was contrary to international acts; while Article 316 of the applicable Criminal Procedure Code of Georgia envisaged full adherence to the above-mentioned acts. The Cassation Chamber, being guided by the best interests of the minor, according to the Constitution of Georgia, in relation to national legislation, gave preference to international standards and counted the deprivation of liberty sentence conditional.

Notably, the principle of best interests has been criticized because of its vagueness, which may give rise to wrong interpretation of the principle and be used to justify actions that are detrimental to the rights of a child.<sup>88</sup>

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<sup>81</sup> Tbilisi City Court 2016 Decisions: №1/181-16, №1/571-16, №1/313-16, №1/144-16, №1/184-16, Can be accessed in court archive.

<sup>82</sup> Case №1/181-16, 16.03.2016, Case №1/144-16, 28.01.2016.

<sup>83</sup> Case №1/184-16, 15.02.2016.

<sup>84</sup> Case №1/571-16, 22.03.2016.

<sup>85</sup> Case №1/313-16, 16.03.2016.

<sup>86</sup> *Kavtashvili E.*, Underage Offender and the Prevention of Delinquency, *Journal Justice and Law*, №3, 2013, 156.

<sup>87</sup> See <<http://prg.supremecourt.ge/DetailViewCrime.aspx>>, [25.09.2016].

<sup>88</sup> *Hammarberg T.*, *The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults*, Strasbourg, 2008, 4.

## **7. Conclusion**

The matters covered in the paper evidence that the principle of best interests of a minor plays significant role in juvenile justice and is a key safeguard for the protection of rights and interests of minors in conflict with law.

Similar to the Convention on the Rights of the Child, key achievement of the Juvenile Justice Code of Georgia is the very principle of best interests of the Child, without which, the justice system would not fully ensure the development of liberal approach towards minors in conflict with the law. This very principle is a watershed between the juvenile justice and traditional criminal law system. Furthermore, it clearly evidences the presence of a different regime for minors and for adults.

Best interests of the child plays significant role in terms of the interpretation of legislation, as well as in case of collision among specific rights, and at the same time, is used as a key tool for the assessment of legislation and policy governing juvenile justice. Furthermore, best interests has multiple importance. It is not just a principle, but also a right and a procedural norm.

Following the analysis of best interests of minors, the absence of the definition and vague nature of the concept of best interests has been identified as a key problem, raising the risk of its misinterpretation. Respectively, exceptional competence and due diligence is required on the part of decision-makers for the assessment of best interests.