

THE BEST INTERESTS OF THE CHILD: STATE PRACTICE

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ABSTRACT

The principle of best interests of the child is a basic rule in the protection of children. Its application in all matters concerning children is required under the United Nations Convention on the Rights of the Child. The rule is said to have crystallised into customary international law but to prove the claim is an arduous task. This is a qualitative study that aims to show that there are sufficient evidence to substantiate the element of state practice in the formation of international custom. The study argues that state practices are diverse and can be found in various forms. Data collected for this study demonstrate consistent and uniform practice but some challenges are inevitable.

Keywords: best interests of the child, proof of custom, state practice.

Introduction

This study examines the principle of the best interest of the child, a useful rule that can be used as an argument to enhance the protection of children in general and in specific situation such as forced migrant children. The application of the principle of the best interests of the child (BIC) is specific to children in any circumstances, anytime, anywhere, as long as they involve the elements of actions and decisions impacting on children. The application of the rule in any situation can benefit children and enhance the enjoyment of their rights. The focus of this study is to establish that the principle of the BIC is a realistic basis to improve the protection of children by holding that all states are bound to protect children under the principle, regardless of their background, immigration and social status or economic conditions.

For this purpose, this study begins with a discussion on the reason why the BIC principle is being seen as an appropriate framework to confer better protection for children. Next, it analyses whether or not the rule of the BIC has satisfied the requirements of state practice required to prove the custom. It specifically looks at state practice relating to immigration matters.

General meaning of the bic rule

The principle of the BIC means considering the child before a decision affecting a child's life is made (Dausab, 2009). The term is also known as the wellbeing of a child (UNHCR, 2008) and 'tender years' doctrine (Kohm, 2008; Fitzgibbon & Campbell, 1993). Today, the rule has become a principle that must be followed by all organs of state and stakeholders even when courts are not involved. The rule becomes more significant since its adoption by the in Article 3 that impose the duty to act in accordance with the principle on all organs of states.

Article 3 of the UNCRC reads as follows:

- "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 to 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."*

In giving meaning to the BIC, firstly, the rule is regarded as a substantive right so that every child has right to have his/ her best interests assessed and given primary consideration in the decision-making (CRC Committee, 2013). This is a guarantee that the principle will be applied whenever a decision is to be taken concerning a child or a group of children' (Zermatten, 2010). A decision-maker has to decide what constitutes the best interests of a specific child and must then hold those best interests as a primary consideration along with other competing interests. In every situation, if a decision is likely to have a greater impact on a child, greater emphasis should be placed on the requirement to make the BIC a primary consideration for instance as decided in the case of *Baker v Canada* (Minister of Citizenship and Immigration) 1999 2 S.C.R. 817 in which the Supreme Court stated that, to ensure procedural fairness in cases involving a parent's deportation, decision-makers should have regard to the human rights of the appellant's children as the decision will have a huge impact on the life of the children. Therefore, any proposal to adopt a different approach that contradicts the principle or does not hold the BIC as a primary consideration will require solid and concrete reasoning (Tobin, 2009).

Secondly, the principle is to be used as a fundamental and interpretative legal principle to allow interpretation of legal provisions that serve the BIC effectively (CRC Committee, 2013). Thirdly, as a rule of procedure, a decision that affect children must make evaluation of its impact on children as part of the decision making process (CRC Committee, 2013). It is a requirement in which procedures involving determination or action affecting a child must make the BIC a primary consideration, and "...give them substantial weight, and be alert, alive and be sensitive to them." The 'best interests' rule is not about the outcome but about the process of reaching the conclusion or decision. The interests of the child are to be assessed and weighed as part of a process in applying a rule or procedure. This principle however, does not command a decision-maker to decide everything in complete agreement with a child's best interests (Tobin, 2009).

The expansion of the principle as it appears in Article 3 demands its application in every action and decision taken by public and private providers of welfare services and by all organs of states; the judiciary, executive and legislature (CRC Committee, 2013; CRC Committee, 2006). The rule places the duty to 'consider the child's best interests' on the adjudicator, administrator and legislator. This can be done by integrating the general principles of the BIC rule into legislative measures, budgets, judicial and administrative decisions (CRC Committee, 2003). The provision proposes to ensure that the BIC are not compromised by state actions and decisions that might contradict each other. A decision-maker has a duty to give a child's interests primary consideration together with other interests when deciding on any child-related issue or taking actions affecting children (Thronson, 2002). In undertakings by adjudicatory bodies external to the courts such as conciliation, mediation and arbitration the rule also applies (CRC Committee, 2013).

The scope of action and decision of administrative authorities is broad encompassing education, healthcare, immigration and asylum matters (CRC Committee, 2013). The consideration of the rule is also required when legislative bodies adopt laws, regulations, bilateral and multilateral agreement, treaties, and budget approval (CRC Committee, 2013). The primacy of the principle has to be explicitly mentioned, adequately defined and reflected in all relevant domestic legislations and policies (CRC Committee, 2005) including laws affecting juvenile justice, immigration, freedom of movement and peaceful assembly (CRC Committee, 2008). Laws that provide for capital punishment and life imprisonment is contrary to the BIC and shall not be imposed on children for crimes committed below the age of 18 (CRC Committee, 2006).

Generally, determining the best interests of a child is not easy as a child's best interests may differ from one situation to another, and a group of children's interests may vary from those of another group depending on their circumstances, and culture and religion have some influence on what constitutes the BIC (An-Na'im, 1994). As a standard of international law, the concept is a form of protection beyond the traditional precept and it can further develop as the result of states' practices in implementing and applying the principle in their jurisdictions (Freeman & Veerman, 1992).

The duty to apply the BIC rule also requires that the child's views and opinions be sought and given due weight according to his/her age and maturity (CRC Committee, 2012). This requirement shows that the right to be heard and to participate is an important component in making sure that the BIC are effectively and sufficiently considered. Children of all ages including babies have the right to have their best interests assessed and given primary consideration (CRC Committee, 2013). Other important elements that must be taken into account in the assessment of BIC are the child's identity such as gender, country of origin, religion and culture; preservation of family life and relations by preventing separation unless it is necessary (CRC Committee, 2013). Child's protection and care including basic material, physical, educational, emotional, affection and safety needs must be taken into account (CRC Committee, 2013). Vulnerabilities of the child such as victims of abuse, disability, belonging to minority group, or being a refugee and asylum seekers are important too and each vulnerability give rise to different best interests (CRC Committee, 2013). Health condition and the right to health are assessed by considering available treatment and risks, and the right to education involves evaluation of access to quality education (CRC Committee, 2013).

State practice as a proof of custom of the bic rule

The benefit of the BIC principle has made it an intrinsic norm in many aspects of child-related matters, especially in custody and family relations, the most relevant subject of a child's life. It has been suggested that the rule has become a customary international law. State practice relating to the principle of BIC can be found in both verbal and physical form. Each of the state practice is discussed below.

i. Best Interests Provisions in State/National Legislation Indicate Widespread and Representative Practice

States from all over the world have incorporated the principle in their national legislation, and 182 state parties to the UNCRC have incorporated the provisions of BIC in their local legislation with 35 countries explicitly give a constitutional guarantee to the rule (Supaat, 2013). These provisions require the court to give the BIC 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 (Supaat, 2013). 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.

From the periodic reports submitted by state parties to the Committee on the Rights of the Child, it is clear that states are not only embodying the principle in legislation but are also striving to implement the provisions of the UNCRC, including the need

to ensure that the BIC are not affected by its actions and decisions. The reports also demonstrate that the principle as provided under the UNCRC has been judicially applied by domestic courts (Supaat, 2013).

ii. The Requirement to Give the BIC 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 where it requires the principle of the BIC a primary consideration. 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 none of the ratifying states have made reservations to Article 3 of the UNCRC.

iii. Judicial Decisions Relating to BIC

Several cases decided by state court are referred to in this part to show state actual practice in this matter. A close look at a UK case can clarify on how to appreciate the application of the BIC rule in judicial determination of asylum cases that benefit children who will otherwise be adversely affected. Section 55 of the Borders, Citizenship and Immigration Act 2009 imposed the duty to safeguard and promote the welfare of the child on the Secretary of State in discharging the immigration function.

The case referred to is the case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. The appellant, ZH is a Tanzanian citizen who has made three unsuccessful asylum applications since 1995. She had a relationship with a UK citizen and they had two children born in 1998 and 2001 both having UK citizenship. The children live with ZH and maintain regular contact with the father after their separation. When the father was diagnosed with HIV in 2007 ZH made a fresh asylum application to the tribunal but was rejected on the basis that she . The case went for reconsideration but was dismissed on the basis that it would not be unreasonable for the children to live in the UK with their father or in Tanzania with mother if she is to be returned. The case went to the Court of Appeal where the finding of the tribunal that it is reasonable to expect that the children would follow the mother back to Tanzania was upheld. ZH then appealed to the Supreme Court and argued that in the light of the obligations of the UK under the UNCRC, the removal order is incompatible with their right to respect for their family and private lives when it is the obligations of the Secretary of State to safeguard the welfare of the child under section 55 of the Borders, Citizenship and Immigration Act 2009. The interference with this right is only permissible in accordance with law and in the interests of national security, public safety, economic wellbeing of the country, for the protection of health or morals; or rights and freedom of others. It was also argued that insufficient weight is given to the welfare of all children who are British citizens who will be affected by the removal of the mother.

The court needs to consider whether it is proportionate to remove ZH and in doing so referred to the case of *Uner v The Netherlands* (App. No. 46410/99 (2007) 45 Eur. H. R. Rep. 14. In *Uner*, the father was convicted for serious criminal offence resulting in his exclusion from Netherlands for 10 years and his permanent resident status being revoked. He argued that this interfere with his right in Article 8 of the ECHR. While recognising the need to give particular consideration to the BIC, in assessing the proportionality in interfering with the right in Article 8, the court however was of the view that in the light of the applicant's current serious convictions, and multiple previous convictions, it is fair and justified to remove the applicant to maintain public order and safety thus, the interests of the state to maintain immigration control outright the BIC. No reference is made to Article 3 of the UNCRC but the substantive right of the BIC however was applied in a manner consistent with the requirement of the BIC rule in the UNCRC.

The court also refers to *Rodrigues da Silva, Hoogkamer v. The Netherlands* (App. No. 50435/99, (2007) 44 Eur. H. R. Rep. 729). Here, the removal of a mother who failed to get a resident permit was held to be in violation of Article 8 because it is in the best interests of the daughter that the mother remains in the Netherlands. In *Rodrigues* the best interests of the child prevails over the interests in maintaining Dutch Immigration rules and the mother's bad immigration background did not affect the child's right to enjoy family life. It is acknowledged that the European Court of Human Rights requires the consideration of the best interests of the child as a primary consideration. In the present case, the court found that UK has an obligation under Article 3 of the UNCRC to give the principle of BIC a primary consideration. In *Rodrigues*, two Australian cases, *Wan v. Minister for Immigration & Multi-cultural Affairs* [2001] 107 FCR 133 and *Minister for Immigration & Ethnic Affairs v. Teoh* [1995] 183 CLR 273, that applied the BIC as primary consideration were referred to in defining the obligation. The court acknowledges that Article 3 of the UNCRC must be observed and further noted that the rule of BIC does not demand decision to be made in conformity with the interests of the child. By virtue of Article 12 of the UNCRC, the child views are an important element in the determination of the BIC and should not be neglected. The court went on to state on how the competing interests should be treated:

'...in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result. [Emphasis added] (ZH (Tanzania) v Secretary of State for the Home Department)

In the assessment of the BIC, the court has analysed the level of the child's integration in the UK and the length of their absence in Tanzania; arrangement for the care of the child in Tanzania and the level of the child relationship with the parents and other family members that will be severely affected if they were to move to Tanzania. It also takes into account the status of the children as British citizen, whose rights exercisable in the UK may not be able to be enjoyed in other country. Apart from the BIC, the court also considers the public interests in maintaining immigration control, the appellant's appalling immigration history, the establishment of family life between ZH and her partner despite ZH's precarious immigration status. The court found that it could not devalue the BIC for the fault of the parent, and the mother should not be removed because in doing so would coerce the children to go with her to Tanzania, a decision that is not justified and disproportionate to the preservation of her right in article 8. Thus, the BIC has dwarf the public interest to maintain a fair and firm border control. This case provides a clear guide on how the immigration and asylum cases should be considered in the light of the BIC rule (Wallace & Janecko, 2011).

Prior to ZH (Tanzania), the court was of the view that the BIC cannot be given primacy (Christie, 2013) and before the enforcement of Section 55 of the Borders, Citizenship and Immigration Act 2009, the rights of the child were often demoted (Christie, 2013). Due to the general reservation of Article 22 of the UNCRC, the UK authority can exempt the application any of the UNCRC provisions including the BIC rule in immigration matters (Christie, 2013). The reservation was removed in 2008 and thereafter Section 55 was introduced and come into force in November 2009 (Christie, 2013).

In the case of *R (On the Application of SG and Others (Previous JS and Others)) v Secretary of State for Work and Pension* [2015] UKSC 16 the Supreme Court of England was posed with a question of whether it was lawful for the Secretary of State to make a regulation that impose a cap on the amount of welfare benefits on non- working households. It was argued that the Secretary of State has an obligation under section 6 of the Human Rights Act to treat the BIC as a primary consideration in making the regulation, as required under Article 3 of the UNCRC. The court is of the view that the cap has the effect of causing children of non- working household to lose the benefit and affect his/ her family life including the right to and thus is incompatible with the obligation to treat the BIC as primary consideration.

In an Australian case, *Minister of State for Immigration and Ethnic Affairs v. Teoh* the respondent had entered Australia from Malaysia, on a temporary permit, and subsequently married his deceased brother's *de facto* wife. She had four children - including three fathered by his deceased brother - and a child was born of the marriage. Respondent's applied for a grant of resident status but pending the decision he was charged and convicted of a number of offences in connection to heroin, and was sentenced to six years imprisonment. As a result, the application for the grant of resident status was refused on the basis that the applicant was not of good character. On application for review the Immigration Review Panel recommended against allowing the respondent's application because the "compassionate grounds" based on his relation with the wife and the children and the family life as there were insufficient reason to oust his conviction for a serious crime of illegal possession of heroin. Thereafter, a deportation order was made against the respondent. The respondent applied to the Federal Court for an order of review of the deportation order. It was initially dismissed. Nevertheless, the Full Court of the Federal Court allowed the respondent's appeal on grounds of the delegate's failure to give proper consideration of the effect of the respondent's deportation on his family. It is in the best interests of the child that he should not be deported. The court also acknowledged that Australia's accession to the UNCRC had given rise to a legitimate expectation in the respondent's children that the application for resident status of their father would be treated in accordance with the principles of the UNCRC. The Minister's decision to refuse resident status was set aside so the minister appealed to the High Court of Australia. The High Court refers to Article 3(1) of the UNCRC declaring that, in all actions concerning children by all the organs of the states including the administrative bodies, "the best interests of the child shall be the primary consideration and thus the appeal was dismissed for the failure of the delegates to take the interests of the child as a primary consideration.

In *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, the Supreme Court of Canada held that the principle of the BIC must be taken into consideration in the immigration application based on humanitarian and compassionate leave to remain. In another case, *Duka v Canada* (2010) FC 1071, the court reiterated that the BIC must be actively and seriously considered by decision makers. Explanation of the principle is also carried out in *Jiminez v Canada (Citizenship and Immigration)* (2012) FC 1407, in which the court recognised that immigration officer must pay a great deal of attention in considering application affecting refugee children but it is up to the immigration officer to decide the weight to be given to the consideration. The weight given to BIC in immigration application in Canada does not amount to primary consideration and this is a lower standard than imposed by the customary rule of best interests of the child. However these cases have helped to illustrate how the principle could be applied and its influence on the outcome of the trial. Meanwhile in *Mangru v. Canada (Minister of Citizenship and Immigration)* [2011] FC 779, the court found that the officer in charge of the applicant's application for a pre-removal risk assessment has failed to adequately assess the best interests of the applicant's children. It was wrong for the officer to incorporate her finding that "even though the children would experience hardship in starting a new life in Guyana, the hardship did not rise to the level of unusual and undeserved hardship" in the analysis of the best interests of the children. Furthermore no full assessment of the effect on the children of being removed from Canada to Guyana was made. This error has led to the wrong conclusion that the best interests of the child is in favour of the applicant's removal from Canada.

An example of the application of the BIC can also be seen when the court considers the question of sterilisation over mentally retarded child. In *Secretary, Department Of Health And Community Services v JWB and Another* - (1992) 106 ALR 385, the Australian Court emphasised on the principle of best interests of child and decided that sterilisation is only permitted with Court's order.

The same has been considered in a New Zealand case, *Re X* [1991] 2 NZLR 365. The BIC is a primary consideration in New Zealand's cases relating to adoption as in *Re Georgina Kennedy; an application to adopt a child* [2014] NZFLR 367, in medical

treatment, as shown in the case of *Re C; Hutt District Health Board v B [Guardianship: life support]* [2011] NZFLR 873, and in immigration related matters, such as in *Ye v Minister of Immigration* [2009] 2 NZLR 596.

The same assessment is made in Singapore's case, where the BIC become the crux of the reasoning for custody in *AZB v AYZ* [2012] SGHC 108, and *BG v BF* [2007] SGCA 32. Meanwhile in Canada, the Canadian Supreme Court in *Re Eve* [1986] 2 SCR 388, held that non-therapeutic sterilisation can never safely be said to be in the best interests of a person and so can never be authorised by a court. In West India's case of *Naidike (Robert), Naidike (Timi) and Naidike (Faith) v Attorney-General* [2004] UKPC 49 relating to deportation of parents, the court viewed the need to balance reason for deportation against the BIC.

In addition, Sri Lanka' Court of Appeal in *Jeyarajan v. Jeyarajan* (1999) 1 SLR 113 has also recognised the principle of best interests of child (CRC Committee, 2003). In a Uruguay's case of *La Justicia Uruguay Judgment No. 152 of the Second Rota Court of Appeals of 3 October 2001*, the BIC were protected by the judge's refusal to authorize the child's departure with the mother, and thus separation from the father, because of the potential psychological damage.

The case of European Court of Human Rights is referred to illustrate the position of BIC in its jurisdiction: *Hokkanen v. Finland*, 23 September 1994, Series A no. 299-A. This is a long battle for custody and access rights between a father and the maternal grandparents who have been looking after the child when she was 2 after the mother's death. After two years the grandparents inform the father that they do not intend to return the child. What follows after that is a series of arrangement to reconcile the father and the grandparents, application of custody, and right to have access with the child. During the period of about 6-7 years of the conflict, the grandparents persistently refused to follow court orders to allow the father to meet the child out of the their home, or order to return the child to the father denying the father the access while the authority has failed to enforce court order to compel the grandparents to comply or risk a fine. After a long period of absence and denied access, in the best interests of the child, the custody was transferred to the grandparents. The views of the child were sought and she is capable of forming her own views and chose not to see her father. Thus taking into consideration the length of the duration of the child's care with the grandparents and the views of the child, the custody was transferred to the grandparents and the access cannot be imposed on her. The case went to the European Courts of Human Rights when the father claim damages against the authority for their delay in making administrative decision relating to the case and failure to enforce the court order against the grandparents thus violated his right to respect for family life under Article 8 of the European Convention of Human Rights. Despite the illegal conduct of the grandparents who kept the child away from the father, the custody was granted to them because it is in the BIC to remain with the grandparents. The father's interest was outweighed by the interests of the child.

The ECHR in *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07, ECHR 2010 pronounced a detailed consideration given to the principle of BIC. A child was abducted by the mother from Tel Aviv and secretly went to Switzerland fearing that the son will be brought to Lubavitch movement that she opposed to. The Lausanne District Justice of the Peace was of the view that there was a grave risk that the child's return to Israel would expose him to physical or psychological harm or otherwise place him in an intolerable situation. On appeal, the Vaud Cantonal Court it dismissed and finding of the earlier was affirmed.. The case went to the Swiss Federal Court which decided that the protection under Article 13 (b) of the Hague Convention was wrongly applied in the earlier court and thus ordered the child to be returned to Israel. An application to the ECHR was denied as the court found no violation of Article 8 if the child is returned to Israel. Hence the mother appealed to the Grand Chamber. To strike a balance between interests of the child, of the parents, and of public order, the court has made the BIC as the primary consideration. These interests are to maintain the relation with family and his development in a sound environment. The Hague Convention provides for the prompt return of the abducted child on the basis of BIC except where there is grave risk of exposing the physical or psychological harm. The Grand Chamber refers to the experts' reports that acknowledge the risk of the child's there would be a risk for return to Israel, and to avoid trauma, his return must be accompanied by his mother to avoid significant trauma. The Court also noted that the under the Hague Convention, a child cannot be returned if he has already settled in the new environment, in the present case the child has been living in Switzerland when he was 2 years old, he has Swiss nationality, attended municipal secular day nursery and a Jewish day nursery. During the hearing when he was 7, he attended a Swiss and spoke French. The court is aware of the possibilities of serious consequences if he is forced to move back to Israel. It was also made known to the court that the father's right of access was being restricted by the Israeli court and was unable to maintain his new family that lead to another divorce. If the mother is to return to Israel with the child, there is a possibility of being charged and imprisonment for violating the Israeli court order and this is not in the best interests of the child. Taking into account that the mother is also a Swiss national and the father's doubtful capacity to care for the child in the event that the mother is detained, his past behaviour and constrained financial capacity, it is justified to refuse the return of the child to Israel as it is not in the best interests of the child.

The case of *Uner and Rodrigues Da Silva, Hoogkamer v Netherlands* discussed earlier are relevant example of the consideration of the BIC. Cases brought to the Inter-American Commission on Human Rights also show the application of the BIC rule. In *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995), the Committee accepts that the interests and the welfare of the children are given priority in the proceedings which are initiated by the children of a divorced parent. In *Buckle v. New Zealand* (858/1999), ICCPR, A/56/40 vol. II (25 October 2000), the Committee identified that, the State may decide on children removal from their parents' care entirely if that removal is in the BIC. The case of *Wayne Smith, Hugo Armendariz al. v. United States*, Case 12.562, Report No. 81/10 (July 12, 2010) recorded that the Committee decides that, in case of deportation, it must consider the BIC involved.

v. State Legislation as Recognition of the Rule

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 BIC 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 BIC is actually an *opinio juris*. States consider themselves bound by the principle of the BIC (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.

Furthermore, to fortify the argument, a number of international committees and organisations 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.

Conclusion

The example of state practice above have provided clear and strong support for the assertion that the principle of BIC has reached customary status. There is enough evidence to conclude that the principle of the BIC 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. As a customary rule established from the provision of Article 3 of the UNCRC, the principle of the BIC should be observed by all state agencies as well as by private sectors. Its application as a custom extends to all matters concerning children. This study believes that, if states were to apply the standards in dealing with all groups of children, more children would be protected and would thus be able to get on with their lives and survive in an environment that was safe and suitable for their development.

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