

HINDRANCE TO THE APPLICATION OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD UNDER JUVENILE JUSTICE: MAIN FOCUS TANZANIA MAINLAND

ANNE MALIPULA¹

¹(PhD Candidate, Faculty Of Law, The Open University of Tanzania, Dar Es Salaam, United Republic Of Tanzania)

Abstract: *In Tanzania, the supremacy of the principle of the best interests of the child is provided under section 4(2) of the Law of the Child Act¹. The statute upholds what is enshrined in the United Nations Convention on the Rights of the Child (UN-CRC)² and The African Charter on the Rights and Welfare of the Child ACRWC.³ All the three principal documents in matters related to children stress that: In all actions concerning the child undertaken by any person or authority the best interests of a/the child shall be the primary consideration....Amazingly neither the UN-CRC, ACRWC, LCA and it is Juvenile Court Rules of May 2016 explain what entails to the principle of the best interests of the child. That means there is no clear understanding of the standards and elements constituting the best interests of the child especially when the child has conflicted with the law. Neither do they clearly state what those best interests are? Since the adherence of the principle of the best interests of the child is a mandatory requirement imposed to every person purporting to deal with children matters and considering that no scholarly work reviewed has for instance expounded and packed together the legal analysis of the best interests principle, the guiding principles of best interests determinations, what exactly amounts to the best interests of the child, elements of the best interests' assessment and determination processes in transnational cases, what kind of 'interests' are at stake? The interests of the child versus the interests of others, elements when assessing the child's best interests and balancing the elements in the best-interests assessment together in one document for the usage of those dealing with children matters, especially stakeholders of juvenile justice. this article, therefore, addresses all the hindrances to the adherence of the principle of the best interests of the child for children in conflict with the law and suggests the way forward.*

Keywords: Principle of the best interests of the child, children in conflict with the law, juvenile justice personnel.

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1. INTRODUCTION

The best interests principle in juvenile justice calls for understanding its historical analysis and the extent to which it has been accepted and applied in matters involving children offenders in addition how it co-relates to the human rights principles. It is the responsibility of countries, to make suitable legal and other provisions to ensure compliance with the best interests principle. The importance of the principle is paramount noting its wide acceptance and historical underpinnings.

Importantly, the formulation of any juvenile justice system integrates the police service, the prosecution, social welfare officers, the courts of law and after service care or correctional, through which the legal procedure of juvenile justice is managed.

2. ORIGIN AND EVOLUTION OF BEST INTERESTS PRINCIPLE

The best interests principle concept is not an unfamiliar concept; indeed, its existence can be traced, to before the United Nations - Convention on the Rights of the Child abbreviated as UN-CRC⁴, this is because it was set down already in other conventions. This includes the 1959 Declaration of the Rights of the Child (Article 2),⁵ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Articles. 5 (b)⁶, also in other national, regional and international legal instruments.⁷⁸ At the conclusion of the First World War, states had to come to terms with the effects of the war, which included willful destruction of property and loss of human life.

The most affected groups were ethnic and religious minorities and vulnerable groups of children and women.⁹ It was realized then that children, needed special protection to safeguard their survival and development; their best interests had to be considered in all matters. The first statement on the best interests principle of the child was found in the Declaration of Geneva of 1924. Although it was most limited in its scope, in its Preamble, among other things, the Declaration stated that 'mankind owes to the child the best it has to give. There was no way this Declaration could be ignored in that it laid down the foundation of later adopting the UN- CRC, of which almost all countries of the world have ratified, with the exception of United States of America, South Sudan and Somalia. Under the UN- CRC, the best interests' principle is set out in article 3(1).

The best interests principle is continuously applied as a guiding principle, notwithstanding their being other general principles such as survival and development, non-discrimination and participation. This is because of the appreciation, of the fact that it acts as a basis, for effective application of the other principles, with regard to children matters. This principle enables the child's interests, to continuously remain as a primary focus where decisions must be taken with regard to their welfare. It is for this reason that the principle is to be applied to all actions dealt with by the courts, state, administrative and legislative bodies, all welfare institutions and even within the family¹⁰. The importance of a child and the finding, of best solutions, is what the best interests' principle is concerned with.

2.2.The Concept of Best Interests

The child's best interest's means to consider the child's interests before any finding affecting his/her life is made.¹¹ There are certain questions that confront the decision-makers in making this consideration, these questions including but not limited to; a) Which particular interests are at issue? (b) What is the nature of such interests? (c) The duration of that interests; long, medium or short-term duration? (d) The objectivity of the criteria for determining such interests or are the basis of the same, are they on the child's subjective wishes?¹²

The child's interests do refer to the considerations, legal and administrative that decision-makers, take before arriving at any finding concerning a child. These considerations occur when making a decision on what orders and actions, will best serve a child, as well as how the orders will be implemented, to take care of a child offender.¹³ It therefore, follows that best interest's determinations are arrived at, after considering a number of interests that are in relation to the child's circumstances and that of the parent, including capacity to rehabilitate and redeem the child from criminal behaviours with the child's ideal comfort the paramount concern.

The United Nations Committee to the UN-CRC emphasizes that the best interests of a child area threefold concept:¹⁴ Firstly, a substantive right whereby a child has a right to have

his or her best interests appraised and taken as a primary consideration when competing interests are under consideration at any particular time.¹⁵ Secondly, as a necessary interpretation of legal principle in that: if any provision is open to a variety of interpretations, the one which most efficiently serves the best interests of the child should be selected.¹⁶ Thirdly, as a procedural rule to ensure whenever a finding is to be reached, which will affect a child or an identified grouping of children, the process of decision-making should include an evaluation of the possible impact whether positive or negative on the children concerned. Furthermore, the justification of the finding must show that the child's best interests were taken into account.

Therefore the juvenile justice system is supposed to take into account the legal and administrative obligations imposed by the principle and effectively ensures implementation of the same. The best interests concept, places a heavy responsibility, in terms of legal, administrative and budgetary allocations on states to ensure and redesign their justice system, especially those that deal with children in conflict with the law.

1.3. Definition of the Best Interests of the child

As discussed above when discussing the concept of best interests, the child's best interests' means to consider the child's interests before any finding affecting his/her life is made.¹⁷ Therefore, there are certain questions that confront the decision-makers in making this consideration, these questions including but not limited to; (a) Which particular interests are at issue? (b) What is the nature of such interests? (c) The duration of that interests; long, medium or short-term duration? (d) The objectivity of the criteria for determining such interests or are the basis of such interests, are they on the child's subjective wishes?¹⁸

Notably, the definition of the concept, it does refer to the considerations, legal and administrative that decision-makers, taken before arriving at any finding concerning a child. These considerations occur when making a decision on what orders and actions, will best serve a child, as well as how the orders will be implemented, to take care of a child offender.¹⁹ The word court is to be construed to mean, the trial processes up to sentencing this is to ensure it is not interpreted in a wider scope. It therefore, follows that best interest's determinations are arrived at, after considering a number of interests that are in relation to the child's circumstances and that of the parent, including the capacity to parent, with the child's ideal comfort the paramount concern.

3. LEGAL ANALYSIS OF THE BEST INTERESTS PRINCIPLE

The most important global legal basis for the child's best interests is the United Nations Convention on the Rights of the Child (UN- CRC). It is important because it cuts across almost all nations except U.S, Somalia and South Sudan. It is a global instrument unlike the ACWRC though it is also very important but it is only an African regional instrument. The LCA affords the child, the right to have his or her best interests evaluated, and thought about as a primary consideration in actions or findings that interests him or her, both in the public and private capacity this is provided under section 4(2) of the LCA.²⁰ Below is the detailed analysis of the above provision of the law.

2.1 In all actions Concerning Children

The phrase "in all actions" seeks to make sure that the right is affirmed in all findings and actions concerning children. The word "action" is construed widely to include not only findings but also all conduct, actions, services, procedures and other measures. Therefore, failure to act and omissions are under "actions", for example, when courts fail to act in

shielding children from abuse or neglect because the neglect, is not brought to its attention.²¹

2.2 By public or private social welfare institutions, courts of law, administrative authorities or legislative bodies

The term public and private is to be construed widely, to encompass all institutions, whose functions and findings have an impact on the child and the attainment of the rights under UN CRC. As stated earlier, the word court is to be associated with all proceedings especially judicial, in all instances whether staffed by professional officials or laymen and all incidental procedures concerning children, without placing any restriction.

This includes the arbitration processes which are conciliatory, mediatory and others. In juvenile cases, as is the focus of this work the best interests' principle applies to child offenders who find themselves under the system of juvenile justice either as alleged or accused persons. The Committee on the Rights of the Child underscores that protecting the child's best interests means that the traditional directives and objectives of criminal justice, such as repression or retribution, must pave way to rehabilitation and restorative justice objectives when dealing with a child who has conflicted the law.²²

An administrative authority otherwise is used to emphasize that the scope of decisions made by other bodies acting on behalf of the state in children matters at all levels is to be very broad. This ensures all bodies, covering findings touching on general care, education, health, the environment, protection; among others in relation to the child apply this principle. Individual findings taken by these bodies must be evaluated, and guided by the child's best interests, as for all implementation measures.²³

The term legislative bodies is a clear indication that the principle, relates to children in general, either as an individual or in groups. The bodies mandated to adopt any rule or regulation as well as collective decisions in relation to trade or peace treaties, which affect children, should be governed by the best interests of the child.

2.3. Shall be a primary consideration

In relation to primary consideration expression, this is to imply that the child's best interests should not be placed on an equal level as other considerations. This assertion is justified by the special circumstance that the child finds himself or herself in, with regard to dependency and legal standing. It follows therefore that the principle of best interests is to be seen as the paramount consideration. It was a task of this study, to employ an analytical approach in relation to the description above.

2.4 Elements when assessing the child's best interests

Yvette McGee²⁴ observed that there is a framework used by courts, to confirm that the child's best interests are effectively applied. She noted that despite competing, yet equally important values at play, the criminal justice questions involving children facing state supreme courts are often the most difficult issues they tackle. Therefore, the adoption of an effective framework, to balance these interests has been developed to aid in the application of the best interests principle. The elements to be taken into account are discussed below;²⁵

Firstly, the child's views; any finding should consider the child's opinion and give it, due weight while placing attention to their age and maturity. This will ensure upholding and respect of their best interests. The fact that the child is seen as being immature or in a vulnerable circumstance should not deprive him or her of the right of expression of views since this will be going against their human rights.²⁶

Secondly, the identity of the child which includes; characteristics such as age, religion, and beliefs must be taken into account when evaluating their best interests. This diversity is key to ensuring their individual best interests is considered. Thirdly, noting the family structure, the preservation of the same in terms of the environment and relations; plays an important part in actualizing the best interests.²⁷

Thirdly, as rightly observed, by the Committee to UN-CRC it is important, to carry out the evaluation and determination of the best interests of the child, in the context of eventual separation of a child from her guardians.²⁸ The structure of the family remains the fundamental unit of the environment, and society to foster the growth and well-being of its inhabitants, children in particular as described in the preamble of the UN-CRC.

Fourthly, the child's safety; when carrying out the evaluation to determine the best interests, in general, remains a state obligation. The state has a duty, to confirm that the child has protection and care as prescribed by law and that it necessitates their well-being to develop fully.

Fifthly, as noted during the First World War; it is important to appreciate the child's situation of vulnerability, noting that they belong to a minority group, which also includes women. This enables the legal systems to ensure the child is brought to some level to be able to enjoy his or her rights. Lastly, though not least in its importance, it is in the child's best interests, to be afforded access to education, emphasis being on the quality, at an affordable fee, in most cases free of charge.²⁹

The impact any decision will have on education should be considered broadly to uphold the principle. It follows that the decision-making process is guided by these elements to achieve the objectives of UN-CRC and protect the child.

4. BALANCING THE ELEMENTS IN THE BEST-INTERESTS ASSESSMENT

It should be stressed that the fundamental best interests' determination, is a general evaluation of all pertinent elements of the best interests of the child. The weight of each element depends on the others, this is because not all the factors will be important to each case, and this depends on individual cases or circumstances.³⁰ An example, family unit or structure preservation, may conflict with the need to safeguard the child, from any risk of violence and abuse by guardians. In these situations, the factors will have to be weighed against each other and find the best result that upholds the child's best interests. In balancing through measuring the elements, the purpose of ascertaining the best interests of the child remains key. This is to make certain effective enjoyment of the rights as recognized, in the UN- CRC and its optional protocols, and the holistic development of the child³¹

5. THEORETICAL FRAMING OF BEST INTERESTS PRINCIPLE

The UN-CRC requires that all child rights, be addressed in a comprehensive approach.³² This is in recognition of the child as a person like other human beings, with developing capacity and responsibility in findings affecting his or her life. It is within an approach based on rights that the child's best interests are primary. This rights-based approach, which has been adopted widely, means describing situations in terms of the obligation to respond to the rights of individuals, and not only in terms of human needs and areas for development. This leads to empowerment of the society, to ask and make the demand for justice as a right, this realization is what informs the justice system of a state.³³ The obligations associated with the best interests principle appreciate this phenomenon. It is within this confine that human rights should not be seen as merely a form of attachment

rather, as a basis to develop and guide policies when formulating a framework for any criminal justice system. Moreover, the human is constructed, to ensure the attainment of human rights.³⁴ Thus, the treatment of child offenders has a huge impact on recidivism, as well as the fact that children are at a developmental stage and must, therefore, be dealt with utmost care.

4.1. What kind of 'interests' are at stake?

Despite all these references, neither the UN- CRC nor the travaux préparatoires³⁵ for this Convention clearly define or demarcate the 'best interests' principle. This limitation has been feeding recurrent discussions about the meaning and content of this concept. Dolgin in his book "why Has the Best Interests Standard Survived; The Historic and Social Context, 1996"³⁶ says, children's interests are to be read in conjunction with the global spirit of the UN-CRC. He acknowledges a difference between short -, medium and long- term interests of the child as a developing human being. Eekelaar³⁷ in his article refers to 'basic interests' for example to physical, emotional and intellectual care, 'developmental interests' to enter adulthood without disadvantage, and 'autonomy interests', especially the freedom to choose a lifestyle of their own.

Eekelaar³⁸ has discussed, 'current' as well as 'future' interests. To the extent that actual interests may not only differ from the future interests of children; they can even conflict with each other. According to the 1959 Declaration of the rights of the child,³⁹ interests refer to all aspects of the child's personality (physical, mental, moral, spiritual, and social) to develop in a healthy, 'normal' manner, in conditions of freedom and dignity.⁴⁰ The UNHCR Guidelines on Determining the Best Interests of the Child (May 2008) initiative under 'Best interests determination' in the matrix in annex describe 'best interests' as broadly referring to the well-being of a child: Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences.⁴¹ In sum, the child best interests principle appears to be strongly embedded in international guidelines and legislation. As well, the elaborate descriptions by different authors offer an important framework for the interpretation of this concept. Nonetheless, a margin of appreciation remains—due to the indeterminate and vague nature of this concept as well as its dependence on culture and time-related contexts raising a number of questions on how to apply this principle in practice (Freeman, 2007).⁴²

Freeman is asking how can 'the best interests' of an individual child be defined. Do different groups of children, for example, unaccompanied migrant minors (UMA's) have similar interests? To what extent does the child himself have a say and what is the role of adults in the process of defining a particular child's interests? To address these questions, not only theory is important, indeed, existing practices can also be utilized as a source of information, as they offer a bottom-up approach towards a more solid interpretation of the best interests principle. Consequently, the legal consolidation of the child best interests concept is not scrutinized.⁴³

6. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD UNDER THE TANZANIAN LAW OF THE CHILD ACT NO. 21 OF 2009

The efforts and motive of the Law of the Child Act No. 21 of 2009 known with its acronym as 'LCA' to accommodate the principle of the best interests of the child in every action touching a child is seen from its preamble and thereafter in almost every part of the law notably part iii to part ix.

The preamble clearly states that:

An Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.⁴⁴

As indicated earlier section 4 (2) calls for the best interests of the child to be maintained in every sphere when dealing with a child.⁴⁵ Surprisingly, the said best interests of the child is not defined in the interpretation section what exactly it means.

5.1. Best interests for a child in conflict with the law

The LCA calls for all stakeholders of juvenile justice to adhere to the Principle of the best interests of the child when purporting to deal with children in conflict with the law. The procedure for handling a child who has conflicted with the law starts from bail condition point when the child has been arrested and is under police custody, what follows is the possibility of bailing out the child. The LCA at its Section 101 requires the child while under police custody to be removed from the association of any undesirable person, the wording of the said section is to the effect that:

Where a child is apprehended with or without a warrant and cannot be brought immediately before a Juvenile Court, the officer in charge of the police station to which he is brought shall-

(b) unless it is necessary in the interests of that child remove him from association with any undesirable person; or

Consequently, the law provides a procedure of dealing with a child upon conviction, the said section states that;

Where the child admits the offence and the juvenile court accepts its plea or after hearing the witnesses the juvenile court is satisfied that the offence is proved, the juvenile court is mandatorily required to convict the child and then, except in cases where the circumstances are so trivial as not to justify such a procedure, obtain such information as to his character, antecedents, home life, occupation and health as may enable it to deal with the case in the best interests of the child, and may put to him any question arising out of that information. What this Section is calling for is the procurement of the social inquiry report of a child, which statutorily is done by the social welfare officer upon request by the court.⁴⁶

Consequently, the law empowers the court to order parent to pay fine where a child is convicted for infringing the penal law, of which a fine, compensation or costs may be imposed, and when the court is of opinion that the case would be best disposed of, in the best interests of the child by the imposition of a fine, compensation or costs, whether with or without any other punishment, the court may in any case, order that the fine, compensation or costs awarded to be paid by the parent, guardian or relative of the child instead of by the child.^{47,48}

The LCA also allows the child who has been convicted for infringing the penal law and placed in approved residential home/institution to be adopted if it is in the best interests of that child.⁴⁹ This indicates that the best interests of the child are primary to every situation. The question remains what are those best interests of the child. Part VI of the Juvenile Court

(Procedure) rules abbreviated as JCR at rule 49 (1) on matters of sentencing procedure among other requirement impose a mandatory duty to the court before reaching a decision on the appropriate sentence for a convicted child, to have regard to some principles which include and not limited to:

b) the importance of rehabilitating and reintegrating a child offender;(c) the need to maintain and strengthen family relationship whenever possible;(d) the desirability of imposing the least restriction consistent with the legitimate aim of protecting victims and the community; f) the need to take into account factors that have contributed to the child's offending behaviour, including any mental health problem or learning disability, poverty, low educational achievement and lack of parental care: and (g) the need to take into account the special circumstances of particular groups of children offender, especially children living in difficult circumstances.⁵⁰To any trained eye in this field may think probably it was the contemplation of the law that the above-selected elements form part of what it is said to be the best interests of the child.

7. WHAT EXACTLY AMOUNTS TO THE BEST INTERESTS OF THE CHILD

The best interests of the child is a child rights principle, which derives from article 3 of the UN CRC, which provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

Assessing the best interests of a child means to evaluate and balance “all the elements necessary to make a decision in a specific situation for a specific individual child or group of children”. According to the UN-CRC, assessing the best interests of a child means to evaluate and balance “all the elements necessary to make a decision in a specific situation for a specific individual child or group of children”. Due to the diversity of factors to consider, usually more than one profession or institution is involved in the assessment process, bringing together various perspectives and areas of expertise from all stakeholders of juvenile justice, in particular, the perspective of the child.⁵¹

Notably, the following aspects are relevant for the best interests of the child: The child's views and aspirations; the identity of the child, including age and gender, personal history and background; the care, protection and safety of the child; the child's well-being; the family environment, family relations and contact; social contacts of the child with peers and adults; situations of vulnerability, i.e. the risks that the child is facing and the sources of protection, resiliency and empowerment; the child's skills and evolving capacities; the rights and needs with regard to health and education; the development of the child and her or his gradual transition into adulthood and an independent life and any other specific needs of the child.⁵²

6.1. Best interests' Assessments and Determinations

Best interests' assessments can be conducted informally and ad hoc or as formalized processes. Assessments look at everyday matters and decisions with more or less severe implications for the child. The best interests of a child may change significantly over time as children grow and their situations and capacities evolve, so their best interests' may need to be reassessed periodically.⁵³ Best interests' determinations are formal processes conducted with the involvement of public authorities and professional decision-makers. The objective of the best interests' determination is to reach a decision based on national law that safeguards the rights of the child and promotes her or his well-being, safety and development. Decision-

makers weigh and balance all the relevant factors of the case, giving due consideration to all the rights of the child and the obligations of public authorities and service providers towards the child. The objective of the best interests' determination process is the identification of a durable solution. Best interests' determinations are carried out when the issues at stake are expected to have significant implications on the child's present and future life.⁵⁴

6.2. Elements of a best interests' assessment and determination processes in transnational cases

Best interests' assessments aim to gather all the facts needed to arrive at a conclusion about the impact of any action, measure or decision on the child and her or his future. The central perspective is that of the girl or boy concerned. A trust-based relationship and communicating effectively in the child's main language enables the child to exercise his or her right to be heard. Comprehensive assessments involve a multi-disciplinary team of qualified professionals.⁵⁵

A comprehensive best interests' assessment and determination process addresses all of the following; (i) establishing the child's identity and the identity of the child guardian and the quality of their relations, and any accompanying persons in transnational cases. and (ii) case assessment, including and not limited to the following components: Hearing the child, assessment of the child's situation, background and needs, social situation and family assessment, gathering evidence including through forensic examinations and interviews with the child, risk and security assessments. Others include mapping sources of support, skills, potentials and resources for empowerment; developing a life project, comprehensive child impact assessment of any potential decisions and identification of a durable solution in transnational cases and continued assessments during the implementation of the durable solution with due follow-up, review and monitoring, and adjustments to the durable solution arrangements, if and as required, according to the best interests of the child⁵⁶

6.3 Procedural safeguards in best interests' determinations

Procedural safeguards and documentations in best interests' determinations include The right of the child to express her or his views and to have them taken into account; Guardianship and representation; Legal representation and Legal reasoning. In a judicial or administrative procedure, children have the right to be heard and to have their views taken into account. The process of hearing the child needs to be documented, with a clear description of how the child's views are balanced against other views and other information sources. The communication with the child has to be effective and child-sensitive and might require quality interpretation and cultural mediation. In cases of unaccompanied or separated children, the role of the guardian or representative is essential to facilitate the communication between the child and the authorities⁵⁷. The child has a right to a hearing when the decision making body is a court. The hearing should be held without delay in a child-sensitive way and prevent secondary victimization of child victims and witnesses in judicial proceedings.⁵⁸

In the main, the child's age, gender and background, the child's level of development and evolving capacities should be considered. Importantly must be in place a child-friendly information in a language that the child understands, enabling the child to form an opinion and to express her or his views should be provided.⁵⁹ In transnational cases, children who do not speak the language of the country of destination have a right to translation and interpretation. Interpretation should be made available free of charge and with a neutral bearing when interpreters are directly involved.^{60,61}

Under guardianship and representation: Children have a right to an independent representative or guardian who is competent and equipped to represent and promote the best interests of the child.⁶² Most countries and states have laws that provide that the parents of a minor child are the legal guardians of that child and that the parents may designate who shall become the child's legal guardian in the event of death, typically subject to the approval of the court. Where a minor child's parents are disabled or deceased, it may be necessary for a court to appoint a guardian.⁶³ Whereas under legal representation: when the best interests of a child are formally decided by a court or other competent body, the child is entitled to legal representation, legal information and defence, including for children applying for asylum or special protection as victims of crime.⁶⁴⁶⁵ Considering legal reasoning decisions need to be documented, motivated in detail, justified and explained, including how the decision is considered to relate to the best interests of the child and how the underlying considerations have been balanced to arrive at the decision.⁶⁶

6.4. Mechanisms to review or revise decisions and Right to appeal

Formal mechanisms have to be in place to reopen or review decisions on the best interests of a child. Children need access to support in accessing and using these mechanisms. It has to be clearly established when a case or decision can be reopened or reviewed, as for instance when there is new evidence or when the authorities have not been able to implement the first decision.⁶⁷⁶⁸ Best interests' determinations are subject to legal remedies. Children need to have access and support, such as legal assistance and representation, to appeal a decision. During the appeal procedure, the implementation is suspended.⁶⁹ For decisions concerning transfer or return of a child to another county, sufficient time must be available between the decision and the execution of the decision, to enable the child to hand in an appeal or request a review of the decision.⁷⁰⁷¹⁷²

8. CONCLUSION AND RECOMMENDATIONS

This article has thoroughly discussed what exactly amounts to the best interests of the child. This includes best interests' assessments, best interests' determinations, Elements of a best interests' assessment and determination process in transnational cases, procedural safeguards in best interests' determinations which include the right of the child to express her or his views and to have them taken into account, guardianship and representation, legal representation, legal reasoning, mechanisms to review or revise decisions, and right to appeal. Notably, the LCA and its JCR do not clearly state what those best interests are. But with very difficult construction by a trained eye in this field, some few elements can be seen under section 137 of the LCA and rule 49(1) of the JCR.⁷³ It is trite that the law should be unequivocal that is unlike the other forms of social control, the law should be enacted in clear and explicit terms.⁷⁴

It is, therefore, recommended that the LCA be amended to accommodate the clear definition of what amounts to the best interests of the child under juvenile justice processes. In addition, there should be a clear list enumerating the standards and elements constituting the best interests of the child for juvenile justice personnel to adhere to.

REFERENCES

¹The Law of the Child Act No. 21 of 2009

²The United Nations Convention on the Rights of the Child (commonly abbreviated as the CRC or UN-CRC) which was ratified by Tanzania on 10th June, 1991, two years after it was opened for signature is an international human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children

³The African Charter on the Rights and Welfare of the Child was adopted in 1990, it came into force in 1999. Tanzania ratified this regional guidance of the rights and welfare of the child on 16th March, 2003. As of August 2012, it had been ratified by 46 AU Member States out of 53.

⁴ The United Nations Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

⁵ See article 2 (1) of the United Nations Convention on the Rights of the Child (n1) provides that States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

⁶ Article 5 (b) of UN-CRC provides for the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

⁷ United Nations Committee on the Rights of the Children, 'General comment No. 14 (2013) on the child's right to have his or her best interests taken as a primary consideration (article. 3, paragraph. 1) (2013) United Nations 3.

⁸ UN CRC, article 3; at the international level this principle has been included in the 1959 Declaration of the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and the Declaration on Social and the Legal Principles relating to the Protection and Welfare of Children, 1986, with Special Reference to the Foster Placement and Adoption Nationally and Internationally. Article 4 of the Protocol to the African Charter on the Rights of the Child provides provision for the best interest of the child as a matter of primary consideration

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¹⁴ Purdy, L. M. In their Best Interests The Care against Equal Rights for Children (Cornell University Press 1992) 3-26; See also Wouters J., 'The World Bank Legal Review;

Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability' (2015 Volume 6) World Bank Group p.. 40-45.

¹⁵ See United Nations Convention on the Rights of the Child (n3)

¹⁶ Ibid

¹⁷ The Law of the Child Act No. 21 of 2009

¹⁸ Otieno (n12) p 51

¹⁹ Ibid

²⁰ This section upholds section 4 of the United Nations Convention on the Rights of the Child (n1) and section 3 of the African Charter on the Rights and Welfare of the child (ACRWC)(n6). The only difference is that the UN CRC uses 'a' primary consideration and ACRWC uses 'the ' primary consideration which makes the application of the principle to be mandatory.

²¹ Ibid

²² Committee (n7) p2

²³ Otieno (n12) p3

²⁴ See Yvette McGee , 'Chief Justice O'Connor's Juvenile Justice Jurisprudence A Consistent Approach to Inconsistent Interests' (2015) Akron Law Review p. 17-18. Yvette McGee Brown became the first African-American female justice on the Ohio Supreme Court when she took office on January 1, 2011. She was the founding president of the Center for Child and Family Advocacy at Nationwide Children's Hospital, and was a judge of the Franklin County Court of Common Pleas for nine years.

²⁵ Ibid

²⁶ See Yvette McGee (n24)

²⁷ Ibid

²⁸ See Article 9, 18 and 20 of UN CRC

²⁹ Ibid

³⁰ See article 9, 18 and 20 of the UN-CRC(n2)

³¹ Otieno (n12) p4

³² The UN Convention on the Rights of the Child (n2).

³³ Marta Santos Pais (n10)p25

³⁴ Scholastica (n9) p56.

³⁵ The Travaux Préparatoires are official documents recording the negotiations, drafting, and discussions during the process of creating a treaty. These documents may be consulted and taken into consideration when interpreting treaties. Travaux Préparatoires of a specific treaty are often unpublished or inaccessible, and difficult to locate even when these documents have been published in a collated volume.

³⁶ Dolgin, J.L., why Has the Best Interests Standard Survived; The Historic and Social Context, 1996 p.90 See also Hanne Beeck, H., Herbots K., Lembrechts, S., and Willems, N., ' A study of the Children's Rights Knowledge Centre Commissioned by the Flemish Government Division for Youth Martyrs' square, Brussels, Belgium, August 2014 p4

³⁷ Eekelaars's, J, Parental responsibility: State of nature or nature of the state? **Article** in Journal of Social Welfare and Family Law January 1991 p. 37-50 .

³⁸ Ibid

³⁹ [Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959. This was the basis of the basis of the Convention of the Rights of the Child adopted by the UN General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990.]

⁴⁰ Ibid

⁴¹ The United Nations Human Rights Committee The Committee is one of ten UN human rights treaty bodies, each responsible for overseeing the implementation of a particular treaty

⁴² See (Freeman, 2007). https://en.wikipedia.org/wiki/Morgan_Freeman accessed on 28/5/2018

⁴³ Coppins, V. and Casey, S. (2000). *The Child's Best Interest; A Review of Australian Juvenile*

Justice Legislation, University of South Australia and Deaken University – Australia p42

⁴⁴ See the Preamble of the LCA (n1)

⁴⁵ See Section 4 (2) of the LCA (n1)

⁴⁶ LCA (n1) section 111

⁴⁷ LCA (1n)section 37 (2), (3) and (4)

⁴⁸ LCA (n1) section 118

⁴⁹ LCA (n1) section 143

⁵⁰ See Juvenile Court Rules of May, 2016 rule 49 (1) (b) (c) (d) (f) and (g)

⁵¹ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 47.

⁵² Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44.

⁵³ Committee on the Rights of the Child, General Comment No. 14 (2013) (n7)

⁵⁴ Ibid

⁵⁵ United Nations High Commissioner for Refugees, United Nations Children's Fund, Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, 2014

⁵⁶ Committee on the Rights of the Child, General Comment No. 14 par 51 on the right of the child to have his or her best interests taken as a primary consideration, 2013.

⁵⁷ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 90.

⁵⁸ Committee on the Rights of the Child, The Rights of All Children in the Context of International Migration, Background Paper, Day of General Discussion, 2012, pp. 22–23

⁵⁹ Committee on the Rights of the Child, The Rights of All Children in the Context of International Migration, Background Paper, Day of General Discussion, 2012, pp. 22–23. of the Child, General Comment No. 14 (, par. 90.

⁶⁰ CBSS Guidelines Promoting the Human Rights and the Best Interests of the Child in Transnational Child Protection Cases

⁶¹ Committee on the Rights of the Child, The Rights of All Children in the Context of International Migration, Background Paper, Day of General Discussion, 2012

⁶² Committee on the Rights of the Child, The Rights of All Children in the Context of International Migration, Background Paper, Day of General Discussion, 2012, pp. 22–23

⁶³ https://en.wikipedia.org/wiki/Legal_guardian visited on 15/11/2018

⁶⁴ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 96.

⁶⁵ European Council of Refugees and Exiles, Right to Justice: Quality Legal Assistance for Unaccompanied Children, Annex 1: Guiding principles for quality legal assistance for unaccompanied children, 2014.

⁶⁶ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 97

⁶⁷ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 98

⁶⁸ United Nations High Commissioner for Refugees, UNHCR Guidelines on Determining the Best Interests of the Child, 2008, p. 79.

⁶⁹ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 98.

⁷⁰United Nations High Commissioner for Refugees, United Nations Children's Fund, Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, 2014.

⁷¹Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 2013.

⁷² United Nations High Commissioner for Refugees, UNHCR Guidelines on Formal Determination of the Best Interests of the Child, 2006.

⁷³ See Section 137 of the Law of the Child Act (n8), and Rule 49(1) of the Juvenile Court Rules (n288)

⁷⁴ Unequivocal law means the law should not be ambiguous, cloudy, confusing, controversial, debatable, deceptive, dim, disputable, doubtful, dubious, enigmatic, enigmatical, equivocating, equivocal, hard to understand, hazy, indeterminate, misleading, moot, nebulous, obscure, of doubtful meaning, of uncertain significance, open, open to question, perplexing, possessing double meaning, puzzling, questionable, recondite, shadowy, unclear, undecided, undefined, unexplained, unintelligible, unplain, unresolved, unsolved, unsure, vague, veiled etc.