



## **Balancing the principle of the best interest of the child with the right to be heard: an ongoing challenge from an international perspective**

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### *Introduction*

On 20 November 2014, various initiatives took place all over the world to celebrate the 25<sup>th</sup> anniversary of the Convention on the Rights of the Child (hereinafter CRC Convention).

In Geneva, a high-level event was organized by a child rights coalition led by Plan International, gathering over 200 representatives from civil society, States' permanent missions and UN agencies in the beautiful premises of Palais Wilson, the current headquarter of the UN Office of the High Commissioner for Human Rights and previously historical seat of the UN League of Nations. For the occasion, the original copy of the "Déclaration de Genève", the first ever international child rights declaration and predecessor of the Convention on the Rights of the Child was displayed, 90 years after its ratification, in the very same building.

The focus of the celebratory event revolved around progress made and current challenges in the full realization and enjoyment of children's rights, 25 years after the adoption of the CRC Convention, the first UN human rights treaty to have almost acquired universal ratification.<sup>1</sup>

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<sup>1</sup> Somalia and South Sudan have recently ratified the treaty in 2015. At present, only United States of America is missing.



In her opening statement, Anne-Sophie Lois, Plan International Head of Office and at the time President of Child Rights Connect -the broadest NGO child rights coalition at an international level<sup>2</sup>-specifically focused on the challenge related to the effective implementation of the child's right to be heard. While she commended the inclusion of a vision of children as rights holders as one of the most revolutionary elements of the CRC Convention, she made clear that a recognized right is not necessarily a realized right. Drawing from her personal experience, she recalled that during the years of the drafting of the CRC Convention, together with her colleagues from the youth section of the Swedish Red Cross, she was appalled by the fact that no consultations were carried out with the main right holders of the CRC Convention, namely children and young people. At the time, she therefore made an appeal to youth organisations throughout the world, which contained key recommendations aimed at strengthening the drafted text and obtained support from over 100 million young people in 150 countries. However, when the appeal was presented at the UN in Geneva, the request was ignored, making clear that governments were ready to put the right to be heard on paper but not to act on it.

Stemming from this eloquent and intrinsic contradiction around the drafting and implementation of the CRC Convention, the present contribution aims at providing an overview of the sometimes difficult balance between child protection and child participation. More specifically, it will focus on the interaction between child's right to be heard and the often misinterpreted and manipulated principle of the best interest of the child, with a focus on their implementation. It will do so by analyzing these concepts according to the international legal framework, and by exploring the outcome of some discussions that have recently received the attention of the UN Human Rights Council (hereinafter HRC) in Geneva, namely that of child, early and forced marriage, intersex genital mutilations (IGMs) and the so called 'protection of the family agenda'.

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<sup>2</sup> Child Rights Connect is one of the world's largest child rights networks representing 82 organisations, reaching more than 270 million children in over 175 countries.



## **1. The principle of the best interest of the child and the child's right to be heard: an overview of the legal framework**

As eloquently expressed by Jean Zermatten, former Vice-Chairperson of the United Nations Committee for the Rights of the Child (hereinafter CRC Committee), one of the most revolutionary aspects introduced by the CRC Convention is the recognition of a new juridical position of the child, which goes beyond the traditional notion of child protection. Indeed, for the first time, it recognizes children as subjects of rights, which they can exercise directly, according to their age and level of maturity, or indirectly, through their legal representatives.<sup>3</sup> More specifically, Zermatten points out that “the bedrock of this new juridical position lies in article 3 and 12 of the CRC Convention”, spelling out respectively the principle of the best interest of the child and the right of the child to be heard, which are also strictly linked to the principle of the evolving capacities.<sup>4</sup>

As one of the four guiding principles, the principle of the best interest of the child reflects the protectionist approach of the CRC Convention and guides the implementation of all other rights.<sup>5</sup>

Article 3, paragraph 1, of the CRC Convention, in defining the principle of the best interest of the child states 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.<sup>6</sup>

The principle of the best interest of the child, rather than a right itself, is often considered as a superior and ideal principle, serving to guarantee the protection and well-being of the child and it does not have a clear and defined legal definition. According to CRC

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<sup>3</sup> Zermatten, ‘The Best Interests of the Child Principle: Literal Analysis and Function’, (2010) 18 *International Journal of Children’s Rights* 483-499, 483.

<sup>4</sup> *Ibid.* at 484.

<sup>5</sup> Parkes, *Children and International Human Rights Law: The Right of the Child to Be Heard*, (New York: Routledge, 2014) at 43.

<sup>6</sup> UN Convention on the Right of the Child, Article 3.



Committee's General Comment n. 14,<sup>7</sup> which serves as primary authoritative guidance for the interpretation of the CRC Convention, the principle of the child's best interest is a threefold concept. First, it is linked to a substantive right: it consists of the "right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake", given also that article 3, paragraph 1, "creates an intrinsic obligation for States" which "is directly applicable (self-executing) and can be invoked before a court". Second, it is a rule of procedure, meaning that whenever a decision is taken that affects children's rights, the decision-making process must include the impact of such decision on children.<sup>8</sup> Third, it has to be considered as a "fundamental interpretative legal principle" which was developed to limit "unchecked power over children by adults" and is based on the assumption that adults can only take decisions on behalf of children because they lack experience and judgement.<sup>9</sup> According to Zermatten, in order to give full effect to this principle, a few criteria need to be respected, namely: the consideration of the child as a human being with his/her own opinions, the general spirit of the CRC Convention and the fact that its interpretation cannot be "culturally relativist".<sup>10</sup> In short, the combination of "best interest" of the child – which does not necessarily mean that this represents the only interest to be considered – and that it "shall be a primary consideration" means that the ultimate goal is the well-being of the child, as defined in the preamble as well as throughout the CRC Convention.<sup>11</sup>

The other guiding principle to be examined here is that of the right of the child to be heard, enshrined in article 12 of the CRC Convention and commonly referred to as "participation", although this term cannot be found in the text of the treaty. Article 12, paragraph 1, spells out the core elements of this principle:

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<sup>7</sup> CRC Committee, General Comment No. 14 on 'The right of the child to have his or her best interests taken as a primary consideration' (2013).

<sup>8</sup> Zermatten, *supra note 3*, at 485.

<sup>9</sup> *Ibid.*

<sup>10</sup> Zermatten, *supra note 3*, at 485-486.

<sup>11</sup> *Ibid.* at 489.



States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.<sup>12</sup>

As stated by Marta Santos Pais, Special Representative of the Secretary-General on Violence Against Children, article 12 is a “visionary provision” with a very practical meaning.<sup>13</sup> The principle of the respect for the views of the child sets out not only a fundamental right but it is also the basis for the full implementation of all other rights enshrined in the CRC Convention. Moreover, it is both a substantive and a procedural right. It is substantive to the extent that it recognizes children as right holders, as actors of their own lives, with a say in the decisions affecting them: in this regard, this article challenges the traditionally protectionist approach, as children do not simply derive their rights from their vulnerability or from their dependency on adults.<sup>14</sup> Article 12 is also a procedural right, to the extent that it empowers children to take action in promoting and protecting all rights enshrined in the CRC Convention, by seeking justice in case of violations or abuses.<sup>15</sup>

The CRC Committee, through its General Comment n. 12, a soft law formally non-binding instrument which nonetheless provides authoritative guidance to States for the interpretation of the Convention, further explains the meaning of each element of this principle. First of all, it makes clear that States have a legal obligation to ensure the implementation of this principle by either directly guaranteeing this right or by adopting or revising laws in order for this right to become fully enjoyable by children.<sup>16</sup>

Article 12 puts an obligation upon States to assure the right to be heard to every child “capable of forming his or her own views”: the CRC Committee clarifies that such an expression should not be interpreted as a limitation as it is not up to the child to prove to be able to express his or her own views; rather States should presume that they are capable to do so.<sup>17</sup> In addition, children should be able to express their views “freely”, meaning both

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<sup>12</sup> CRC Convention, Article 12.

<sup>13</sup> Parkes, *supra note 5*, at 31.

<sup>14</sup> CRC Committee, General Comment n. 12 on ‘The right of the child to be heard’ (2009), at para 18.

<sup>15</sup> Parkes, *supra note 5*, at 31.

<sup>16</sup> CRC Committee, *supra note 14*, at para 15.

<sup>17</sup> *Ibid.* at para 17.



that they should be given the chance to choose whether or not to exercise this right and that their views should not be manipulated or reflect the perspective of others.<sup>18</sup>

In conclusion, both General Comment n.14 and General Comment n. 12 highlight the “complementary nature” of the principle of the best interest of the child and the child’s right to be heard: the former “establishes the objective” and “reinforces the functionality” of the latter and the latter “provides the methodology” for the correct application of the former.<sup>19</sup> In fact, article 12 would lose sight of its goal if not read in conjunction with article 3; likewise, article 3 could not be correctly applied if the requirements of article 12 are not met.<sup>20</sup> Hence, according to a textual interpretation of the treaty provisions, in view of this complementarity, it seems that there is no special need to balance the principle of the best interest of the child with the child’s right to be heard, as there should be no apparent tension between the two, at least from a purely theoretical point of view.

## **2. Superiority or manipulation? Towards a paternalistic implementation of the principle of best interest**

The interaction between the principle of the best interest of the child and the child’s right to be heard becomes more problematic when it comes to the implementation of these principles, due also to the vagueness and flexibility of these concepts. Hence, while, as expressed *supra*, in principle there is no tension between article 3 and article 12, questions arise in relation to their practical application. The Committee warns States of this risk in General Comment n. 12:

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<sup>18</sup> CRC Committee, *supra note 14*, at para 22.

<sup>19</sup> Zermatten, *supra note 3*, at 496-497.

<sup>20</sup> *Ibid.* at para 70-75; CRC Committee, *supra note 7*, at para 43.



The Committee notes that, in most societies around the world, implementation of the child's right to express her or his view on the wide range of issues that affect her or him, and to have those views duly taken into account, continues to be impeded by many long-standing practices and attitudes, as well as political and economic barriers.<sup>21</sup>

As well as in General Comment n. 14:

The flexibility of the concept of the child's best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant.<sup>22</sup>

The practical application of these core principles of the CRC Convention raises a series of questions: for instance, does the fact that the principle of the best interest of the child should be of "primary consideration" imply that, in case of contrast with other rights, it should always prevail? Or, instead, has the vagueness of this principle been misused and manipulated to impose conservative and moralistic agendas that either do not fully take into account the well-being of the child or even rule against children's views and best interest?

The present analysis leaves aside national debates, where, especially in the field of children's separation from their families and alternative care, there is evidence, by analyzing certain national laws and policies, that the principle of the best interest of the child has been largely manipulated and abused. It will instead focus on some of the most recent developments affecting the international debate at the UN Human Rights Council in Geneva, namely: child, early and forced marriage, intersex genital mutilations and the 'protection of the family agenda', with the aim to assess how such principle has been used – or misused – to advance political goals rather than protectionist approaches, at the expense of child participation.

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<sup>21</sup> CRC Committee, *supra note 14*, at para 4.

<sup>22</sup> CRC Committee, *supra note 7*, at para 34.



## 2.1. Child marriage and the minimum legal age: protectionist over participatory approach?

On 2 July 2015, the UN HRC unanimously adopted the first-ever substantive resolution on child, early and forced marriage, a practice that affects 15 million girls every year worldwide. The resolution was adopted without a vote, it was co-sponsored by over 80 member States and supported by a cross-regional group that also included highly affected countries. The text of the resolution is particularly noteworthy as, for the first time, it adopts a human rights-based approach to the issue, defining child, early and forced marriage as “a harmful practice that violates, abuses and impairs human rights and is linked to and perpetuates other harmful practices and human rights violations”,<sup>23</sup> such as the right to quality education, the right to live free from all forms of violence and the right to the highest attainable standard of health, including sexual and reproductive health. The resolution also contains a paragraph – which survived the challenging negotiation process – on the importance of children and youth’s participation in the decisions affecting them, including the negative impact of child, early and forced marriage.<sup>24</sup>

However, while such paragraph on participation was formally included in the UN resolution at the HRC, ironically it seemed to implicitly exclude that participation could be contemplated with regards to the core object of the resolution, namely the action of marriage itself, which, despite involving a decision directly affecting millions of girls – and, in a smaller percentage, boys – seems to be prohibited *ab origine* and without exceptions when it comes to children. Some could argue that such an approach may rule against the wording of article 12 of the CRC Convention, which clearly states that children have a right to participate in all decisions affecting them, under which marriage inevitably falls. Instead, the resolution seems to only include child participation in relation to the negative impact of child marriage and to willingly refrain from contemplating even the remote possibility that child marriage may, in

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<sup>23</sup> UN Human Rights Council, 29<sup>th</sup> session, *Resolution 29/8* (2 July 2015).

<sup>24</sup> *Ibid.* at para 9: “Calls upon States to promote the meaningful participation and active consultation of children and young people in all issues affecting them, and to create awareness about their rights, including the negative impact of child, early and forced marriage, through safe spaces, forums and support networks that provide girls and boys with information, life skill training and the opportunities to be empowered and become agents of change within their communities”.





some circumstances, not be forced, therefore amounting to a child's right, rather than a child's violation.

That the main aim of the UN resolution is to tackle what, in most cases, turns out to be a harmful practice, by internationally and universally committing towards its prevention and elimination, is uncontroversial. The alarming reality in many countries in the world is such to justify and commend even the most rigid of such approaches: from a symbolic and political point of view, a universal absolute refusal of child marriage, which underlines the prevalence of the protectionist over the participatory approach, was probably the wisest option to undertake in order to clearly guide States where child and forced marriage adversely impairs on the human rights of millions of women and girls. However, the author argues that the "complementary nature" of the principle of the best interest of the child and the child's right to be heard would have been better implemented if the issue of consent, as well as the minimum legal age of marriage, were included in the debate. Instead, their exclusion was not a coincidence, but rather a politically informed decision, since there was no international consensus on such a contested issue. During the negotiations for the UN resolutions on child marriage, both at the HRC in Geneva and at the General Assembly in New York, some States, like the USA, Canada and the UK, showed reluctance in setting a minimum age of marriage at an international level, since many national legislations - especially in western States – allow, under certain circumstance, marriage below the age of 18 (for instance, at the age of 16, with parental consent). This has also been echoed by some youth groups, especially from western countries, that claimed that they should be able to decide on these matters even before 18, depending on their maturity and evolving capacities.

A milder approach on this has been chosen by the CRC and CEDAW Committees through the adoption of Joint General Comment/General Recommendation n. 31 on harmful practices on 14 November 2014, which first prescribes a minimum age of 18 for marriage, but later provides an exception to it, stating that

in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions.<sup>25</sup>

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<sup>25</sup> Joint CRC and CEDAW General Comment/Recommendation n. 31 on harmful practices, at para 20.



On this basis, the interpretation of the legal age of marriage by the Joint General Comment/Recommendation n. 31 represents a sort of compromise, avoiding, on the one hand, to set an absolute international standard and, on the other hand, leaving a margin of discretion to States in the exercise of their legislative power on this particularly sensitive issue.

While it is true that the Universal Declaration of Human Rights stipulates that marriage should take place between spouses of ‘full age’ and with the ‘free and full’ consent of both parties, this is based on the old assumption that a child is unable to give full consent in all circumstances: hence, a marriage under this age lacks legality, as a child does not have the necessary maturity (physical, psychological and emotional) to enter into marriage. Such an approach, however, not only falls short to properly grasp the potential enshrined in children themselves and in the principle of participation – which is one of the four guiding principle of the CRC Convention - but it also fails to properly implement the principle of the best interest of the child, whose assessment needs to be carried out on a case-by-case basis and taking into account the child’s views on the basis of his/her evolving capacities. As eloquently stated in CRC Committee General Comment n. 14:

Assessing the child’s best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, *inter alia*, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers.<sup>26</sup>

In conclusion, while the UN resolution is remarkable for being the first to universally recognize child and forced marriage as a harmful practice likely to lead to human rights violations, it seems to conceal just another paternalistic attempt to blatantly condemn child marriage in its entirety as a ‘third world’s practice’ to be stopped. In doing so, the resolution

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<sup>26</sup> CRC Committee, *supra note 7*, at para 48.



misses an important opportunity to reflect on more nuanced approaches, such as that of balancing the principle of the best interest with the child's right to be heard, by explicitly allowing child marriage in exceptional circumstances (for instance, at the age of 16, with parental consent or judicial authorisation), therefore depriving highly affected States from enjoying the opportunity to have access to the same range of options and exceptions that western States themselves have and are currently benefitting from.

## **2.2. The consideration of the child's identity and child's right to health in assessing the principle of the best interest of the child: underrated criteria?**

As mentioned above, the principle of the best interest of the child, as spelled out in article 3 of the CRC Convention, does not entail a clear legal definition, but is rather a general guiding principle that needs to be understood in the light of the CRC Committee's interpretation. General Comment n. 14 offers a comprehensive guidance not only on the theoretical analysis of the principle of the best interest of the child but also on its practical implementation. Its assessment should be undertaken on a case-by-case basis, in the light of the specific circumstances of each child or group of children, which relate to the "individual characteristics of the children concerned, such as, *inter alia*, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves".<sup>27</sup>

More specifically, General Comment n. 14 provides a non-exhaustive non-hierarchical list of criteria to guide States in the practical assessment of the best interest of the child, of which respect and consideration for the child's identity and the child's right to health are of primary concern. As for the child's right to identity, not only it is separately enshrined in article 8 of the CRC Convention, but it also represents one of the assessment criteria in the determination of the best interest of the child, according to General Comment n. 14, which states that:

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<sup>27</sup> *Ibid.*



Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.<sup>28</sup>

While article 8 of the CRC Convention expressly spells out “nationality, name and family relations” as distinctive elements of the child’s identity, the Committee further elaborates on this concept, expanding the definition of the child’s identity and specifically encompassing other characteristics, such as sex – which is to be understood as referring to both to gender identity and biological sex characteristics - and sexual orientation. Such an inclusion is quite forward-thinking, since gender identity, sexual orientation and natural bodily variations do not only represent one of the most widespread grounds of discrimination but are also rarely taken into account in relation to children. This has to be partly ascribed to the rampant prejudice that sexual orientation and gender identity constitute a choice with no biological origin but rather merely motivated by the sexual preferences of an adult individual able to give ‘full consent’, therefore completely excluding children – under the age of 18, as per the CRC Convention’s definition - from the discussion.

Such an assumption is particularly false with regards to intersex children, namely those born with sexual characteristics (including genitals, gonads or chromosome patterns) that do not fit typical binary notions of male or female bodies. In some cases, intersex traits are visible at birth, in some other they are not apparent until puberty and in other cases chromosomal intersex variations may not be physically visible at all.<sup>29</sup>

What is relevant for the present analysis is that such individuals, other than facing stigma and discrimination, are often subject to what has been defined as intersex genital

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<sup>28</sup> CRC Committee, *supra note 7*, at para 55.

<sup>29</sup> Office of the High Commissioner for Human Rights, *Factsheet on Intersex People, Free and Equal Campaign* (2016): “*Intersex is an umbrella term used to describe a wide range of natural body variations. (...) According to experts, between 0,5% and 1,7% of the population is born with intersex traits – the upper estimate is similar to the number of red haired people. Being intersex relates to biological sex characteristics and is distinct from a person’s sexual orientation or gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual and may identify as female, male, both or neither.*”



mutilations (IGMs) – better known as ‘correction’ - namely medically unnecessary surgeries and other invasive treatment of intersex babies and children for the purpose of trying to make their appearance conform with binary sex stereotypes, which are undertaken at a very early age and without children’s consent and participation in such a life-changing decision.

It was only in recent years that the situation of intersex people was brought to the attention of the international community: the first side event on intersex genital mutilations took place during the HRC in March 2014 and saw the participation of about five intersex activists, whose experiences showed that in most of the cases the IGMs performed were wrong, since their biological sex did not match with their sexual identity when they grew up, with irreversible consequences and enormous health and psychological problems also related to their sexual and reproductive rights. During the panel discussion, they pointed out that, out of 20 years of activism at an international level, in 2014, only two international bodies had addressed the issue: the Council of Europe and the Special Rapporteur on torture, pointing out, *inter alia*, the inadmissible silence on this topic by the CRC Committee. Notwithstanding this initial reluctance, in the last two years, IGMs have increasingly been recognized by various UN bodies as human rights violations primarily affecting the right to physical integrity and amounting to harmful practices and ill-treatment leading to widespread and life-long discrimination, including in education, employment, health, sports, accessing public services, birth registration and obtaining identity documents.

In September 2015, for the first time intersex rights were addressed in the context of the UN HRC in Geneva in a landmark expert meeting that highlighted the lack of awareness around issues faced by the intersex community around the world. In this context, the UN High Commissioner for Human Rights, when referring to IGMs, mentioned that such violations are not only rarely discussed but they are even more rarely investigated and prosecuted, resulting in impunity for perpetrators, lack of remedy for victims and perpetuation of the cycle of ignorance and abuse.<sup>30</sup>

In March 2016, the Special Rapporteur on torture presented his latest thematic report on ‘Gender Perspectives on Torture and Other Cruel, Inhuman and Degrading Treatment’

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<sup>30</sup> UN Office of the High Commissioner for Human Rights, *A step forward for intersex visibility and human rights* (2015), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/Astepforwardforintersexvisibility.aspx>



where he assessed the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment to the unique experiences of women, girls and LGBTI persons, recognizing that historically the torture and ill-treatment framework failed to employ a gendered and intersectional lens or to adequately assess the negative impact of entrenched discriminatory, patriarchal and heteronormative power structures and gender stereotypes affecting all societies in general, and LGBTI persons in particular. His report is pioneering in specifically targeting torture and ill-treatment against LGBTI persons in health-care settings, with a focus on IGMs:

Lesbian, gay, bisexual, transgender and intersex persons are frequently denied medical treatment and subjected to verbal abuse and public humiliation, psychiatric evaluations, forced procedures such as sterilization, “conversion” therapy, hormone therapy and genital-normalizing surgeries under the guise of “reparative therapies”. These procedures are rarely, if ever, medically necessary, lead to severe and life-long physical and mental pain and suffering and can amount to torture and ill-treatment.<sup>31</sup>

In many States, children born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization and genital normalizing surgery, which are performed without their informed consent or that of their parents, leaving them with permanent, irreversible infertility, causing severe mental suffering and contributing to stigmatization. In some cases, taboo and stigma lead to killing of intersex infants.<sup>32</sup>

As part of his recommendations with regards to health-care settings, the Special Rapporteur called on States to:

Repeal laws that allow intrusive and irreversible treatments of lesbian, gay, bisexual, transgender and intersex persons, including, inter alia, genital-normalizing surgeries and “reparative” or “conversion” therapies, whenever they are enforced or administered without the free and informed consent of the person concerned.<sup>33</sup>

In June 2016, the UN Human Rights Council in Geneva unanimously adopted the first substantial resolution on elimination of female genital mutilations as a form of

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<sup>31</sup> Special Rapporteur on Torture, ‘Gender Perspectives on Torture and Other Cruel Inhuman and Degrading Treatment’ (2016), at para 48.

<sup>32</sup> *Ibid.*, at para 50.

<sup>33</sup> Special Rapporteur on Torture, *supra note 31*, at para 72 (i).



discrimination, an act of violence against women and girls and a harmful practice, omitting, however, any reference to intersex genital mutilations, despite it being similarly perpetrated and leading to analogous human rights violations. As for child marriage, the UN resolution on FGM seems to reflect a Western-centred paternalistic approach, which simply aims at condemning traditional practices of developing countries, blindly overlooking that similar practices are widely performed against the LGBTI community, including in the Western world.<sup>34</sup>

All this considered, for the purpose of the present analysis, it is clear that the underlying rationale justifying genital-normalizing surgeries and other invasive medical treatment on children is based on the assumption that, from the point of view of a health professional, parents know better what is the best interest of their child, despite sometimes blatantly failing to take into account both the child's right to identity and the child's right to health. In cases like the ones stated above, such rights are not only overlooked but also extensively violated.

Instead, both child's right to identity and child's right to health are central in the determination of the child's best interest, including in the context of intersex children. According to General Comment n. 14 of the CRC Committee, the child's right to health constitutes one of the criteria that should be taken into account for the determination of the child's best interest:

The child's right to health (art. 24) and his or her health condition are central in assessing the child's best interest. However, if there is more than one possible treatment for a health condition or if the outcome of a treatment is uncertain, the advantages of all possible treatments must be weighed against all possible risks and side effects, and the views of the child must also be given due weight based on his or her age and maturity. In this respect, children should be provided with adequate and appropriate information in order to understand the situation and all the relevant aspects in relation to their interests, and be allowed, when possible, to give their consent in an informed manner.<sup>35</sup>

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<sup>34</sup> It is estimated that there are around 30.000 intersex people living in the UK, out of which 90% have been forced to undertake IGMs.

<sup>35</sup> CRC Committee, *supra note 7*, at para 77; CRC Committee, General comment No. 15 (2013) on 'The right of the child to the enjoyment of the highest attainable standard of health (art. 24)', at para. 31.





Ideally, children's healthcare requires a 'triadic' relationship between the child, his or her parents and the medical practitioner. In order for children capable of forming views to make informed decisions concerning their healthcare, they should be provided with sufficient information in accordance with article 13 and 17 of the CRC Convention. To incorporate child's participation in health care decisions, researchers have identified best practices including the following elements: (1) involving children in health care decisions, having regard to their capacity to understand and their willingness to be involved; (2) contextually involving parents or those with parental responsibility in the health care decision; (3) actively seeking and considering children's views; (4) basing the relationship between the child and the medical practitioner on honesty and transparency, as well as awareness of the child's health and maturity; (5) listening to children and answering clearly and truthfully to their questions; (6) consistently and continuously communicating with children about their health conditions; (7) considering adequate skill training in the curriculum of the health care profession's education programme.<sup>36</sup>

Similarly to the issue of child marriage, the legal minimum age of consent for medical treatment represents an important and sensitive element of the debate, also in consideration of the lack of guidance from the CRC Committee in establishing a minimum age limit. However, it is important to distinguish the child's right to consent to medical treatment – which means that children over that age have the right to fully decide for themselves – and article 12 of the CRC Convention, which envisages for all children capable of forming views to have the right to express them and given consideration for the decisions affecting them. Adopting a fixed age of consent, hence, does not mean that the views of younger children should be disregarded, since children's level of understanding cannot automatically be linked to their biological age and consideration of the child's views should be carried out on a case-by-case basis.<sup>37</sup>

In conclusion, despite the CRC Committee has attempted, through its interpretations of the CRC Convention, to provide authoritative guidance in relation to criteria for the assessment of the best interest of the child, in practice such elements are rarely and fully

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<sup>36</sup> Parkes, *supra note 5*, at 80-81.

<sup>37</sup> *Ibid.* at 82-83.





considered, leading to a compression of the child's right to be heard as well as to a misinterpretation of the principle of the best interest of the child.

### **2.3. The protection of the family agenda as the ultimate paternalistic manipulation of the best interest of the child**

The so called 'protection of the family agenda' refers to a series of initiatives undertaken at the UN HRC in Geneva by a wide group of States, as well as some representatives of civil society organizations,<sup>38</sup> leading to the adoption of the first UN resolution on the "Protection of the family" in 2014,<sup>39</sup> which paved the way for an expert panel discussion, followed by a second substantial HRC resolution in 2015 on "Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development"<sup>40</sup> and a report by the United Nations High Commissioner for Human Rights, bearing the same title of the 2015 substantive resolution.<sup>41</sup>

At first sight, such an initiative may appear difficult to oppose, and, on the contrary, quite commendable: family environment is universally recognized as central in children's well-being and development and States' obligation to support parents in their nurturing and caring roles, by investing in families, is crucial for poverty eradication and creation of social welfare for vulnerable children.

However, the 'protection of the family agenda' has been defined by several human rights organizations and child rights' networks as harmful: not so much for the edulcorated text of the resolutions, which is the result of a compromise that survived the negotiation process, but rather for the more or less visible political agenda it attempted to bring forward. Indeed, the "protection of the family" resolution of 2014 represents just the first concrete

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<sup>38</sup> Some include Family Watch, Family Policy.ru Advocacy Group and Global Helping to Advance Women and Children, and others.

<sup>39</sup> UN Human Rights Council, Resolution 26/11 (2014)

<sup>40</sup> UN Human Rights Council, Resolution 29/22 (2015)

<sup>41</sup> UN Report of the High Commissioner for Human Rights, 'Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development' (A/HRC/31/37), (2015).



outcome of a broader political strategy aiming at imposing a narrow, 'traditional' definition of family and at subverting the protection of individual members, including children, within family environments.

Such strategy became first evident in 2013, when a first draft of the resolution was proposed at the March session of the UN HRC but later withdrawn, also thanks to extensive pressure from civil society, especially coming from feminist and LGBTI groups. During the March session of the UN HRC in 2014, efforts to mainstream the notion of strengthening the family came up again and, within the context of celebrating the 20<sup>th</sup> anniversary of the International Year of the Family, Namibia delivered a statement on behalf of 97 delegations from 6 regions of the world, asking the Council to pay more attention to States' international obligations to protect the family. This initiative further prepared the ground for a new attempt to put forward a resolution – the text being almost identical to the one from the previous year. The permanent mission of Egypt took the lead and, with the support of a cross-regional core group of States,<sup>42</sup> it carried out three informal consultations,<sup>43</sup> during which civil society had no possibility to intervene. The text of the resolution revolved around the notion of family as 'natural and fundamental group unit of society' – where the emphasis of the natural element responded to the clear uncontested aim to impose one standardized model of family, stigmatizing all the unconventional ones that are not composed of 'a man, a woman and their children'. Despite attempts from a progressive group of States led by the European Union<sup>44</sup> to adapt the resolution to the existing human rights framework, none of their requests were taken on board by the core group. Such requests included, among others, to pay attention to individual rights of the family members – that remain the only right-holders before the HRC - as well as the violations they often suffer within family settings and to take into account the plurality of family environments.

The political agenda lying behind the resolution became even more evident during the voting process: Chile, Uruguay, Ireland and France proposed an amendment to the

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<sup>42</sup> The core group included Bangladesh, China, Côte d'Ivoire, El Salvador, Mauritania, Morocco, Namibia, Qatar, the Russian Federation, Sierra Leone, Tunisia and Uganda.

<sup>43</sup> Informal consultations are informal meetings where representatives of permanent missions are invited to discuss the drafting process of a resolution and to provide and negotiate appropriate language to be included in the final draft.

<sup>44</sup> The group included also Switzerland, Australia, Uruguay, Argentina and Mexico.



resolution in order to recognise that diverse forms of the family exist and ensure that the text complied with international human rights standards, including the right to non-discrimination and the rights of the child. This amendment was not considered, however, as Russia brought a “no-action motion” - a procedural tactic designed to prevent the issue from even being discussed.<sup>45</sup> In addition, Saudi Arabia and Pakistan also proposed an amendment to the text that sought to restrict the definition of marriage to “a union between a man and a woman”, which was also dismissed. The first resolution on ‘protection of the family’ eventually passed with 26 votes in favour.<sup>46</sup>

Similarly, the 2015 substantial resolution on the protection of the family replicates, in certain passages, the political aim of the 2014 procedural resolution:

The family plays a crucial role in the preservation of cultural identity, traditions, morals, heritage and the values system of society<sup>47</sup>

The aim, once again, was to develop family-centred policies incentivizing certain types of family formation to comply with a certain vision of society and to perpetuate a rhetoric that clearly sets up a hierarchy of what deserves to be called a family and what does not. Families that uphold traditions and preserve ‘social’ and ‘cultural’ values – regardless of whether such traditions are harmful or not – as long as they entail a traditional patriarchal composition are better placed to serve societal needs and, most of all, are by default successfully implementing the principle of the best interest of the child. It is not surprising that, during the voting of the first resolution on the protection of the family, some NGOs supporting the resolution used children during side-events with the purpose of fostering a biased, univocal and discriminatory vision of what a family is, justifying such a restrictive approach in the name of the so much invoked and abused principle of the best interest of the child.

The UN High Commissioner for Human Rights, in its 2016 report, attempted to mitigate the adverse impact of the ‘protection of the family’ resolutions, by refusing to

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<sup>45</sup> The no action motion was only used once before at the Council, during a special session on Sri Lanka. The no action motion proposed by Russia was supported by 22 member States, while 20 voted against and 6 abstained.

<sup>46</sup> The remaining countries voted as follows: 14 votes against and 6 abstentions.

<sup>47</sup> UN Human Rights Council, *supra note 40*, at para 6.



provide a standard definition of what a family should be and by encouraging to interpret it in a wider sense.

### **Conclusion**

The present contribution aims at reaffirming the complementary nature of the principle of the best interest of the child and of that of child's participation, highlighting three main areas of concern at an international level, where it is argued that the principle of the best interest of the child has been misused in a paternalistic way.

After having reviewed the legal framework on the matter, the author identified the first area of concern in the first-ever UN resolution on prevention and elimination of child marriage, noticing the missed opportunity of balancing the two principles, by, *inter alia*, excluding the minimum legal age of marriage from the debate.

The second area of concern revolved around the inherent contradiction between the child's right to be heard and its presumed best interest, in relation to children's right to health and ability to freely choose medical intervention on their body, as in the case of IGMs, performed without children's informed consent and in violation of children's right to health and gender identity, which are central in the determination of their best interest.

The third area of concern tackled the 'protection of the family' debate at the UN HRC, where the principle of the best interest of the child has been misused to foster a biased and restricted definition of family.

In sum, the heated political debate stemming from the 'protection of the family agenda' at the HRC, as well as the debate over child marriage and IGMs, represent just some of the most recent reflections of the difficult balance between child protection and child participation and on the manipulation of the former to restrict the latter. The act of adults of making decisions on behalf of children is highly at risk of leading to paternalism, which has been defined by doctrine as:



Interference with a person's liberty of action... by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being concerned.<sup>48</sup>

Children are generally perceived as either innocent or corrupt on the basis of whether they conform or fail to conform to adult perceptions of appropriate child-like behavior, based on the supposed adult ability to differentiate between wrong and right. Societies have generally sought to adopt the notion of the child as innocent and subsequently have succeeded in creating a tradition of best interests based on the myth of the innocent child.<sup>49</sup> While it is undebatable that the principle of the best interest of the child encompasses a tradition of protection, it is doubtful whether such legal and social tradition truly protects the best interest of the child or rather the interests and views of adults.

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<sup>48</sup> Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law*, Springer (Netherlands: Springer, 2002), at 68.

<sup>49</sup> *Ibid.*, at 4.