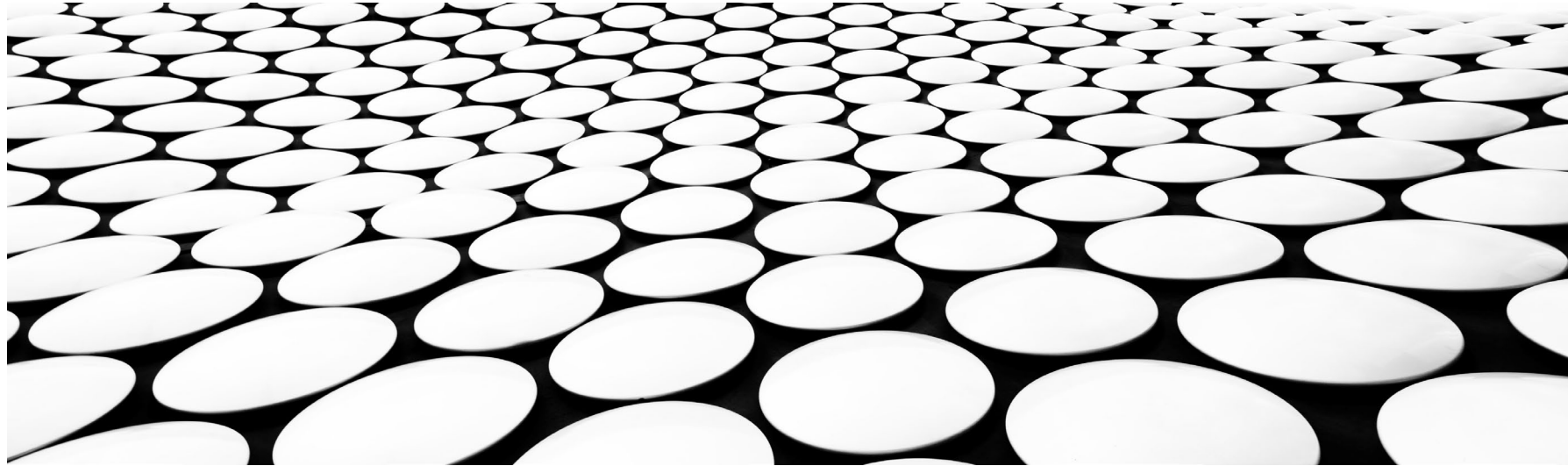


## Fachforum 1.11

# Eröffnung und Begrüßung „Kinder im Fokus – Kindeswohl und Kinderrechte in der grenzüberschreitenden Sozialen Arbeit“



# BEST INTERESTS OF THE CHILD: THE CROSS-BORDER CHALLENGE

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# THE DISCUSSION

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BIC in the human rights context

Inherent challenges of BIC

Special challenges in cross-border situations

# HUMAN RIGHTS AND BEST INTERESTS

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BIC – a long-standing concept used in particular in the context of family affairs, by both administrative and judicial authorities

Decisions led to outcomes now considered to violate children's human rights (e.g. forced separations, forced adoptions, **forced migration...**)

1959 Declaration on the Rights of the Child: BIC to be “the paramount consideration” of lawmakers and the “guiding principle” for parents

In international human rights law and private international law, the only rights-holders whose (best) interests are considered essential to realising those rights are children.

No mention at all of best interests in international humanitarian and refugee law.

So, how does “best interests” fit with a human rights framework and “add value” to rights protection?

# HOW BIC CAME TO FIGURE LARGE IN THE CRC...

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Initial Polish proposal for CRC (1978) reiterated the 1959 Declaration

Revised Polish proposal (1979): suddenly “in all actions concerning children” by a far broader range of actors (parents, guardians, social or State institutions, courts of law and administrative authorities – but strangely excluding lawmakers) with BIC to be “the paramount consideration”

First reading (review) of draft CRC: actors described as “public or private social welfare institutions, courts of law or administrative authorities” but BIC to be just “a primary consideration” + paragraph on the child’s right to be heard

Second (final) reading: reintroduction of reference to “legislative bodies”, BIC maintained as “a primary consideration” + “right to be heard” becomes Art 12

# ... AND THEN BECAME A “FUNDAMENTAL VALUE”

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Reminder: no in-depth discussion of ramifications of broadened BIC during drafting

Lack of definition: flexibility to take account of individual situations and socio-cultural context – Venezuela questioned the potential subjectivity of judgements on BIC, but joined consensus

1991: Designation of BIC as a General Principle by the CRC Committee

2008: UNHCR produced first Guidelines for BIC assessment/determination procedure for unaccompanied/separated children => wider application

2013: CRC General Comment on BIC – requires inter alia a rights-inspired professional assessment, avoiding irrevocable decisions on basis of one-off determination + link with Art 12

# WHEN BIC IS THE DETERMINING FACTOR

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Reminder: the two facets of implementing BIC:

- Decisions on most appropriate measure
- The status of BIC vis-à-vis the interests of other parties

**BIC determinant mainly on family and care issues:**

Adoption – explicitly “the paramount consideration”

Other care measures by implication:

- Alternative care (“cannot be allowed” to remain with family on BIC grounds)
- Deliberate separation from parents (“if necessary” to ensure BIC) or contact with parents (“except if contrary to” BIC)

**Also on measures concerning the justice system** – separation from adults in detention + presence of parents in court, unless contrary to BIC

In all other circumstances (including cross-border), in principle “a primary consideration”

# BIC IN CROSS-BORDER SITUATIONS...

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BIC determination **prior to cross-border movement** (from the known to the unknown)

- Intercountry adoption
- Other long-term care arrangements abroad

BIC determination **after cross-border movement**

- Family reunification
- Migration /asylum-seeking
- Placement breakdown

NB: “Irrevocable decisions” and the prospect of return...



# ...AND THE SPECIAL CASE OF ABDUCTION

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BIC determination required both **before and after** cross-border movement

- Hague Abduction Convention, 1980: “the interests of children are *of paramount importance* in matters relating to their custody” (preamble):
- assumption that (implicitly) BIC are generally best served by return ***unless*** i) grave risk of harm, ii) child’s refusal, iii) child “settled” in new environment (cf. ECtHR)
- Renewed BIC determination process upon return
- In practice, how are each of these processes managed and what weight is given to BIC determination by the courts?

# KEY CHALLENGES IN CROSS-BORDER SITUATIONS

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Ensuring a professional BIC assessment and determination process by a multi-disciplinary team (skills, not just a checklist)

Ensuring the child's voice is heard under appropriate conditions and taken into account:

- Having in place a series of viable options
- Enabling the child to understand the implications of those options

Taking account of socio-cultural factors

Securing respect for the results of the determination (rights v policies)

Bearing in mind the injunction to avoid irrevocable decisions (CRC Committee)

Monitoring the effects and outcomes of decisions made (including returns)

Beware of ideological approaches and groupthink!