

WORKING PAPER

Best Interests of the Child in Relation to the Digital Environment

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Synopsis

In today's interconnected world, children's rights must be protected at all times. A key aspect of this is making children's best interests a primary consideration in relation to the digital environment. This imperative was underscored by the UN's Summit of the Future in 2024, where member states adopted the Global Digital Compact,¹ a framework for international cooperation on digital technology that aims to create an open, fair and safe digital world for all, particularly children. This global framework calls for strengthened laws and policies to uphold and protect the rights of children in the digital space, particularly as debates around social media and smartphone bans for children highlight the growing concerns about their online safety and wellbeing.² The Committee on the Rights of the Child (the "Committee") emphasizes that all laws and regulations affecting children must be guided by the best interests of the child principle (the "Principle").³ This applies to all laws and regulations in the digital age.⁴ However, it remains difficult for companies and states to determine what this means in practice and how to best go about it.

In several jurisdictions, a growing number of legal instruments address children's best interests in relation to the digital environment, such as the EU's Digital Services Act⁵ and the California Age-Appropriate Design Code Act.⁶ Other examples include: privacy and data protection legislations such as the Brazilian General Data Protection Law (LGPD)⁷ and Kenya's Data Protection Act;⁸ statutory codes of practice for privacy and data protection such as the UK's Age Appropriate Design Code (or, the UK Children's Code)⁹ and Ireland's Fundamentals for a Child-Oriented Approach to Data Processing;¹⁰ and those for designing digital services such as the Dutch Code voor Kinderrechten.¹¹ These provisions offer valuable starting points for making children's best interests a primary consideration in relation to the digital environment.

These legal instruments differ in scope, application and enforcement, which inevitably creates loopholes and challenges in implementation for digital products and services that work across borders.¹² Additionally, the question of who bears the final responsibility for determining a child's best interests, and the criteria upon which such a determination should be based, remains unresolved on a global scale.¹³ This lack of harmonization, coupled with the absence of meaningful child participation in discussions about the best interests of the child in relation to the digital environment, highlights the urgent need for clear, comprehensive and practical guidance on upholding children's best interests in relation to the digital environment.

There is often a critical gap between the formulation of policies and their actual implementation, which can render them ineffective. Rooting policies in the best interests of the child principle calls for a holistic approach, as outlined in the General Commentⁱ No. 25 on Children's Rights in Relation to the Digital Environment.¹⁴ This involves thoroughly assessing what it means to grow up in a digital world, including for those children who do not have internet access, and the multi-faceted impacts of digital technologies and policies on children's rights, while ensuring that children's evolving capacities (Article 5)¹⁵ and their right to be heard (Article 12)¹⁶ are respected. In practice, this requires actively involving children in policymaking, and in the design and development of digital technologies in meaningful ways – such as child consultations¹⁷ – ensuring that their inputs lead to safer, more inclusive and empowering digital experiences for all children.

ⁱ General Comments are non-binding norms that interpret and add detail to the rights and obligations set out, for example, in the UN Convention on the Rights of the Child.

While the best interests of the child principle provides a clear, rights-based directive, its application in practice in the rapidly changing digital world is far from simple. Upholding best interests of the child in relation to the digital environment must account for:

- diverse needs of children;
- evolving capacities of children;
- inequalities in access, skills and literacy, and the diverse contexts of children;
- safeguarding children's rights against potential manipulations and misinterpretations of the best interests of the child;
- rapid technological advancements; and
- the relationship between different rights and interests, which can sometimes be a source of tension, such as between the interests of children and technology companies, participation and protection, and wellbeing and autonomy.

This is further complicated by the need to consider children not only individually but also collectively and as specific groups, and the responsibilities of parents, which can sometimes diverge from or be incompatible with children's interests.

Given the rapid advancements in AI and other technologies, policies that concern the digital environment and their impacts on children and society must be designed as far as possible to be future-proof and technology-agnostic. This means that they should be flexible, adaptable and regularly reviewed and updated to ensure they remain relevant and effective in upholding children's rights amidst technological change. Achieving this necessitates ongoing research, international cooperation among multiple stakeholders and a steadfast dedication to prioritizing children's best interests, even as new technologies emerge.

This report reviews the current landscape of thinking on the best interests of the child principle, particularly in relation to the digital environment. It is the first output of UNICEF's project on upholding children's best interests in relation to the digital environment and serves to inform the following phases of the project: child consultations, expert consultations and high-level recommendations for governments and companies. As such, the paper does not provide recommendations, but offers a contribution towards them by unpacking the challenges, approaches and opportunities to do so.

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I. Introduction: Why is it important to consider the best interests of the child in relation to the digital environment?

The ‘digital environment’, as referred to by the Committee, is an important part of children’s lives.¹⁸ Today’s children spend more time in digital spaces than ever before,¹⁹ and while digital technologies offer multiple opportunities and benefits when designed and used with children’s best interests in mind, they also pose significant risks of harm.²⁰ Digital platforms and applications can support children’s right to education,²¹ neurotechnology can support children’s right to health and help children with neural disabilities as assistive technologies,²² and digital experiences can support children’s right to play and foster creativity and imagination.²³ However, children face significant risks of harm online such as cyberbullying, exposure to harmful content, privacy violations and exploitation.²⁴ Moreover, the digital environment is also a “highly commercialized context”²⁵ where existing inequalities are amplified, and not all children benefit equally. A UNICEF and International Telecommunication Union (ITU) joint report on global digital connectivity for children during the COVID-19 pandemic highlights the stark divide: two thirds of school-age children (ages 3 to 17 years old) lack internet access at home,²⁶ with significant gaps between high-income and low-income countries, urban and rural settings, and the Global North and Global South.

This complex landscape operates across national borders, multiple legal and regulatory jurisdictions, and various socio-cultural settings. While global efforts to address both the positive and negative impacts of digital experiences are burgeoning, there is a critical gap in attention paid to children’s best interests in relation to the digital environment.²⁷

The United Nations Convention on the Rights of the Child (UNCRC; the “Convention”) sets out “best interests of the child” (Article 3) as one its four foundation principles that underpin all other articles:

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.²⁸

The notion of “best interests” has a long history pre-dating the development of human rights instruments.²⁹ It has consistently been applied to justify decisions made on behalf of those considered unable to make sound choices for themselves, including actions aimed at safeguarding them or enhancing their wellbeing.³⁰ Children have been one of the groups subject to this approach, especially in the cases of protection,³¹ custody and adoption.³² It is imperative that all adults have a role in upholding children’s rights. “Best interests of the child” was enshrined in the 1959 Declaration of the Rights of the Child to guide the way adults make decisions on behalf of children,³³ “where a choice must be made across a range of options that comply with the rights of the child”.³⁴

The UNICEF Guidelines for Human Rights-based Programming Approach argue that best interests of the child is applicable in three main ways:

- First, it supports a child-centered approach. When read in conjunction with the other articles of the UNCRC, the best interests principle is meant to guide the interpretation in a particular direction.

- Second, serving as a mediating principle, it can help to resolve confusion between different rights.
- Third, the best interests principle provides a basis for evaluating the laws and practices of States parties with regard to the protection provided to children [...].³⁵

There is no standard definition of best interests of the child. In its General Comment No. 8, the Committee states that “the interpretation of a child’s best interests must be consistent with the whole Convention”.³⁶ General Comment No. 14 describes best interests of the child as a “dynamic concept that requires an assessment appropriate to the specific context”.³⁷ This flexibility enables its application across various settings, including the digital environment.³⁸ However, the Committee acknowledges the risk of misinterpreting or manipulating the concept to serve interests other than those of children.³⁹ For example, prioritizing commercial interests over children’s online safety or using “protection” as a justification for excessive surveillance could undermine children’s best interests. Therefore, applying this principle in practice is often challenging.

Although today’s children grow up in a digital age, the best interests of the child in relation to the digital environment received very little attention until General Comment No. 25 in 2021. Acknowledging the digital environment’s importance in children’s lives, the Committee formulated the best interests of every child as a primary consideration: “in all actions regarding the provision, design, management and use of the digital environment”.⁴⁰ This applies to all digital products and services developed for children, to which children may have access,⁴¹ or which may directly or indirectly impact children,⁴² including the governance of children’s data.⁴³

Recently, digital services and technologies used by or accessible to children have been at the center of much debate and action, with a surge in legislation, public inquiries⁴⁴ and even proposals for outright bans for social media.⁴⁵ Legislations like the Digital Services Act (DSA) in Europe increasingly refer to the best interests principle in relation to privacy, safety and security, and health and wellbeing of children.⁴⁶ Amidst this flurry of activity, one crucial element is often overlooked: the voices of children themselves. This raises two critical questions:

How can the best interests of the child be upheld in a digital age?

How can it be ensured that children are actively involved in leading decisions about their best interests in a digital age?

Upholding the best interests of the child in relation to the digital environment requires a commitment to respecting all of children’s rights, as articulated in General Comment No. 25, “including their rights to seek, receive and impart information, to be protected from harm and to have their views given due weight”, while also ensuring “transparency in the assessment of the best interests of the child and the criteria that have been applied”.⁴⁷ While policies and regulations concerning digital products, services and technologies increasingly mention children as rights bearers who deserve special protection,⁴⁸ they tend to call out particular issues, such as protection of personal data or privacy, rather than taking a holistic view of all children’s rights. This illustrates a gap in relation to other contexts that determine children’s best interests – such as intercountry adoption, protection of refugee children, divorce and child custody disputes, urban and spatial planning and design, and justice deliberations – where children’s voices are relatively more integrated into policymaking.⁴⁹

This lack of child participation in policymaking concerning the digital environment is at odds with Article 12 of the UNCRC, which guarantees children the right to express their views and have them given due weight. Filling this gap, the Committee consulted 709 children from 28 countries while drafting General Comment No. 25. Although there have been child consultations on topics such as children’s right to privacy,⁵⁰ non-

discrimination⁵¹ and play⁵² in relation to the digital environment, or on specific digital technologies such as AI,⁵³ there haven't been any published child consultations solely dedicated to the best interests of the child in relation to the digital environment.⁵⁴ This represents a notable gap in the application of the Principle, especially as it is increasingly included in legislative frameworks concerning digital technologies. Children's perspectives on what constitutes their best interests in the digital age are key to upholding their rights. There is an urgent need for ongoing, formalized and rights-respecting consultations with children on this topic.

In response, UNICEF's Best Interests of the Child in Relation to the Digital Environment project seeks to capture the views of a diverse group of children on how they understand the best interests of the child in relation to the digital environment, what they think is in their best interests or is not, and how they envision their best interests in a future digital age. Their views would offer insights for policymaking, regulation and design of the digital environment, as well as the business models and operations of technology companies concerning digital products and services.

As part of the project, UNICEF will also consult multi-sectoral experts, practitioners, policymakers and technology developers to understand their views and any challenges and needs they identify for upholding the Principle in a digital age. To guide both children and expert consultations, and the project as a whole, this report addresses the following questions:

- What does the best interests of the child mean in relation to the digital environment?
- What is the relationship between the best interests of the child principle and other principles of the UNCRC?
- How to consider the best interests of the child in relation to the digital environment?
- What are the main points of tension when considering the best interests of the child in relation to the digital environment?
- How do existing frameworks and guidelines apply best interests of the child in digital provision?

II. What does the best interests of the child mean in relation to the digital environment?

The UNCRC does not provide a precise definition of the best interests of the child. However, in its concluding observations on the reports submitted by different states, the Committee makes it clear that the best interests of the child should not be conflated with other related concepts⁵⁵ such as wellbeing,⁵⁶ development,⁵⁷ needs and views,⁵⁸ or rights⁵⁹ of children. This distinction is crucial as it prevents a narrow or simplistic interpretation of the best interests of the child, particularly in decisions about children's digital experiences, where access to information, development, education, equality, freedom of expression, health and wellbeing, participation, play, privacy and safety converge. This highlights the need for a rights-based approach avoiding simplistic solutions or generalizations. This approach should also take the evolving capacities of the child (Article 5) into consideration, where “parents should guide children in the exercise of their rights [...] but as he or she grows and matures, [children] should become more directly responsible for decisions on how to exercise rights”.⁶⁰

Although in the UNCRC, Article 3(1) “does not contain the word ‘right’”,⁶¹ in General Comment No. 14, which focuses on the Principle and its implementation, the best interests of the child principle is set out by three dimensions, including a substantive right, a fundamental interpretive legal principle, and a rule of procedure.⁶² As a substantive right, any individual child, group of identified or unidentified children, or children in general have the right to have their 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”, as there is a “guarantee that this right will be implemented whenever a decision is to be made concerning [children]”.⁶³ As a fundamental interpretive legal principle, the Committee mandates that any legal ambiguity should be resolved in favour of the option that best serves the child's interests.⁶⁴ As a rule of procedure, any decision-making process that will affect a specific child, an identified group or children in general, must include assessing its potential positive or negative impact on the child or children concerned.⁶⁵ General Comment No.14 stipulates that:

Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.⁶⁶

The Committee directs Child Rights Impacts Assessment (CRIA) as a procedural safeguard.⁶⁷

Children's digital experiences change depending on their maturity and stages of development.⁶⁸ So, as noted in a forthcoming UNICEF report, “levels and nature of protection will change as children move through childhood”.⁶⁹ In its General Comments No. 7, No. 14, No. 20 and No. 25, the Committee emphasizes the need to consider children's development and respect their evolving capacities as an enabling principle,⁷⁰ together with the best interests of the child principle when making decisions that affect children. This is particularly important in upholding the best interests of the child in relation to the digital environment. A case in point is General Comment No. 25, where the Committee recommends applying the best interests of the child together with the consideration of children's evolving capacities as guiding principles, especially in relation to maintaining a balance between parental responsibilities and children's rights⁷¹ – which can sometimes be at odds with each other. For example, online safety and protective measures like parental supervision tools could

hinder children's right to privacy and access to information if they are not proportionate with respect to their evolving capacities.

Upholding best interests in the digital age is a shared responsibility. According to the UN Guiding Principles on Business and Human Rights (UNGPs), while states are the primary duty bearers for upholding human rights,⁷² "[s]tates and businesses have distinct but complementary responsibilities".⁷³ The Children's Rights and Business Principles (CRBPs) set out business actions to respect and support children's rights, including children's best interests.⁷⁴ While it is states' primary duty to uphold children's best interests,⁷⁵ this obligation also applies to other bodies – including those from civil society and the private sector – whose decisions can significantly impact children.⁷⁶ This concerns any business that designs, develops and delivers digital products and services, including but not limited to technologies that make use of data such as generative AI, smart home appliances, assistive technologies, games and social media applications. In its General Comment No. 16 on state obligations regarding the impact of the business sector on children's rights, the Committee emphasizes that "[...] states must ensure that the best interests of the child are central to the development of legislation and policies that shape business activities and operations [...]".⁷⁷ Additionally, the Committee highlights that states should be able to explain how the Principle is upheld, including how it has been assessed and determined.⁷⁸

This is especially pertinent to the digital environment; because the Principle's scope is broad, extending beyond the specific areas of adoption (Article 21)⁷⁹ and separation of a child from parents against their will (Article 9). Consequently, this wider application presents both opportunities to uphold children's rights in the digital environment and challenges, as discussed below.

III. What is the relationship between the best interests of the child principle and other principles of the UNCRC?

All four general principles of the Convention – the right to non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6); and the right to be heard (Article 12) – are overarching requirements for the implementation of its provisions.⁸⁰ Yet, the Committee recognizes the best interests of the child as underpinning all provisions of the Convention:⁸¹

The concept of the child's best interests is *aimed at ensuring both the full and effective enjoyment of all the rights* recognized in the Convention and the holistic development of the child [General Comment No. 5, para. 12]. The Committee has already pointed out [General Comment No. 13, para 61] that "*an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights* under the Convention." It recalls that *there is no hierarchy of rights* in the Convention; all the rights provided for therein are in the "child's best interests" and *no right could be compromised by a negative interpretation of the child's best interests*.^{ii,82}

In the context of digital technologies, best interests of the child involves creating a digital environment that is safe, fair, accessible, inclusive and empowering for all children whether or not they are affected in direct or indirect ways. Unfortunately, the current digital environment falls short of upholding children's rights.

Right to non-discrimination (Article 2)

Best interests of the child is closely related to the right to non-discrimination. The right to non-discrimination is not a passive obligation; it requires proactive, positive measures to create "equal opportunities for all children to enjoy the rights under the Convention".⁸³ The emphasis on proactive measures is particularly relevant in the digital environment. All children should have equal opportunities to benefit from digital technologies regardless of background, abilities, or circumstances. In the digital environment itself – where algorithms may amplify existing inequalities through discriminatory stereotypes or biases, or amplify hate speech – upholding best interests of the child would call for a commitment to promoting inclusive spaces where all children feel safe, respected and empowered. This involves removing the barriers that impede access for children, for example, children with disabilities who face challenges in relation to both hardware design and software.

The right to life, survival and development (Article 6)

States are obliged to create an environment where every child's dignity is respected and their right to survival, life and development is fully realized. This is vital to uphold children's best interests.⁸⁴ In the digital age, this means ensuring that children have access to the opportunities that digital technologies offer while also

ⁱⁱ Added emphasis.

protecting them from their potential harms without restricting any benefits. As some researchers have noted, “a narrow focus on risk and safety can negatively impact children’s right to participation and undermine their ability to access the benefits of digital media”.⁸⁵ Therefore, a holistic approach to child development in the digital environment would require balancing these two imperatives proportionately. This includes recognizing and upholding children’s rights, such as their right to access information, express themselves freely and participate in the digital world. To uphold the best interests of children, states must ensure that these rights are protected alongside their right to safety and wellbeing, and the measures to protect children should be proportionate. Attempts to exclude children from social media, for example, could be seen as infringing on other rights and therefore not being in their best interest.

The right to be heard (Article 12)

In the Convention, the best interests of the child (Article 3) and the right to be heard (Article 12) are set out as complementary to each other. General Comment No. 12 notes that the “[right to be heard] establishes the objective of achieving the best interests of the child and [best interests of the child] provides the methodology for reaching the goal of hearing either the child or the children”.⁸⁶ While doing so, the Committee also demands measures to be taken for very young and vulnerable children (e.g., those who have a disability, belong to a minority group, or are migrants) to uphold their right to be heard in determining their best interests.⁸⁷

The right to be heard is usually addressed together with the right to privacy (Article 16) while discussing best interests in the digital environment, especially in relation to online protection and data processing (especially profiling and age verification). In some cases, children’s right to participate is argued to be in tension with their right to privacy, or right to protection (Article 19).⁸⁸ The interests of children are intrinsically linked to their right to participate in the digital environment.⁸⁹ This includes having a say in how their data is used, what content they access and how they engage with digital technologies. Upholding their best interests means empowering children to actively shape their digital experiences, rather than treating them as passive recipients in need of protection.

IV. How to consider the best interests of the child in relation to the digital environment?

The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child while promoting their human dignity.⁹⁰ Therefore, implementation of the Principle in relation to the digital environment should take a rights-based approach, which conforms with the Convention and follows the guidance provided by the Committee.⁹¹ In its General Comment No. 14, the Committee provides a framework on how to apply the Principle.⁹²

Many factors can influence how the best interests principle is understood and applied, particularly in the digital environment, and these factors can be in conflict with one another. The Committee highlights this complexity by distinguishing between best interests assessment and best interests determination as two distinct steps in the decision-making process:

The 'best-interests assessment' consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team – and requires the participation of the child. The 'best-interests determination' describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment.⁹³

In short, while best interests assessment involves a comprehensive evaluation of all relevant factors impacting a child or a group of children in a specific situation, best interests determination is the formal process of reaching a decision based on the assessment. Any decision that concerns or impacts children should aim to uphold all their rights in full, ruling out any element that contradicts these rights in the process of assessing or determining what is in their best interests.⁹⁴ To that end, General Comment No. 14 provides a list of specific elements that are relevant to its implementation. While not exhaustive, this list includes the child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education.⁹⁵ As the Committee asserts:

Every case warrants determination of relevant elements, their content and significance compared to other elements. [...] Every element must be analysed against other elements to ensure balance, especially if some elements are in conflict.⁹⁶

Here, it is important to note that this is not a one-size-fits-all approach. Assessing a child's best interests requires a tailored approach that takes into account their specific situation and needs. According to the guidelinesⁱⁱⁱ for professionals for assessing and determining best interests of the child as part of the UNICEF project Justice for Every Child, not all factors will be equally relevant in every case, and the weight given to

ⁱⁱⁱ Please note that these guidelines do not include assessment and determination of best interests of the child in relation to the digital environment.

different considerations may vary: “A major challenge is to determine what constitutes the ‘best interests’ in a particular socio-cultural context”.⁹⁷

General Comment No. 14 also offers guidance on how assessment or determination should be carried out. When assessing best interests, firstly, it's crucial to consider children's specific situation and identify the key elements involved. Each element should be carefully examined and weighed against the others.⁹⁸ Secondly, this process must “follow a procedure that ensures legal guarantees and proper application of the right”.⁹⁹

In relation to the digital environment, best interests assessment and determination concerns individual children, a particular group of children and children collectively. Therefore, the procedure set out in General Comment No. 14 should be adopted. For digital technologies, “[g]overnment institutions must find ways to hear the views of a representative sample of children and give due consideration to their opinions”.¹⁰⁰ However, the digital environment raises particular challenges as the determination is primarily undertaken on behalf of children collectively. There are millions of children using the internet around the world in widely different contexts with differing abilities, levels of support, knowledge and capacities. It is impractical to make individual determinations of the best interests of each of those individual children. Therefore, the assessment of best interests in relation to the digital environment has to be made on behalf of all children regardless of circumstance.

To ensure that children's best interests are a primary consideration, the Committee proposes a continuous process of child rights impact assessment¹⁰¹ as a procedural safeguard.¹⁰² Although there is no single formula¹⁰³ for assessing a child's best interests, this process is widespread in areas like immigration and custody cases.¹⁰⁴ However, in those contexts the procedures are generally applied to individual children. Existing guidelines for best interests assessment and determination cover many facets of children's life, but not the digital.¹⁰⁵ Best interests of the child as a primary consideration in the digital age is not something that should be considered only during a digital product or service design, but runs through the entire product cycle including remedy and redress.

Despite the Committee advocating for the conducting of CRIAs,¹⁰⁶ this hasn't been widely adopted for digital products and services. There are several reasons for this. The dominant focus on data privacy, online safety, or algorithmic bias in policy may result in a less holistic view of all the unique needs and rights of children. This leads to an approach where legislation requires technology companies to undertake Data Protection Impact Assessments (DPIAs)¹⁰⁷ or Fundamental Rights Impact Assessments (FRIAs)¹⁰⁸, but not necessarily CRIAs.¹⁰⁹ Some technology companies¹¹⁰ undertake Human Rights Impact Assessments (HRIAs) as part of human rights due diligence and mention best interests of the child as a salient human right,¹¹¹ especially in relation to risks to privacy and freedom of opinion and expression under child and youth safety. States that have ratified the UNCRC have an obligation to respect, protect and fulfil the rights of children set out in the Convention.¹¹² However, CRIAs^{iv} have not yet been widely undertaken by technology companies, despite the Committee's suggestion.¹¹³

According to a recent report by UNICEF, “businesses face challenges in identifying and assessing child rights impacts associated with the digital environment”.¹¹⁴ This is due to several factors, including rapid technological change, the difficulty of gathering accurate data about children's online presence and vulnerability to online risks, varying forms and levels of impacts, and the “lack of guidance on how to systematically assess and address the full spectrum of child rights in the context of the digital environment”.¹¹⁵ These challenges

^{iv} UNICEF is currently working on a tool for companies to undertake CRIA.

highlight the critical importance of procedural safeguards and guidance for upholding children's rights in the digital environment.

According to General Comment No. 14, decisions cannot be made in a child's best interests if the outcome contradicts another right under the Convention.¹¹⁶ The digital environment presents dilemmas where children's rights might compete. For instance, a design feature that aims to safeguard children's right to privacy may inadvertently restrict their freedom of expression by limiting their audience reach or causing children to self-censor content. In such cases, the principle of proportionality is crucial. In human rights law, any decision by a state to interfere with a right can only be justified where they meet three conditions: a lawful basis for interference; necessity of the interference to achieve a legitimate aim; and proportionality of the measures taken to achieve the legitimate aim.¹¹⁷ There is a robust methodology behind proportionality, and proportionality is not just weighing of interests, or balancing whichever decision is proportionate.^v

The best interests of the child principle and the proportionality principle are two fundamental concepts, particularly when making decisions that affect children. These principles, while seemingly distinct, often intersect and inform each other in various legal contexts. The proportionality principle serves as a crucial tool for resolving conflicts between competing interests, particularly when a state seeks to limit or interfere with human rights that are related to those competing interests.¹¹⁸ Best interests of the child is one of the rights within a proportionality test.¹¹⁹ States have the duty to protect children online and businesses have the responsibility to respect children's rights. However, a policy aimed at enhancing child safety online such as blanket bans on social media access, for example, can be a measure that may simultaneously infringe on other rights, such as right of access to information or right to participation. As the Committee explains,

[A]ny decision concerning the child or children must be ... justified and explained ... If the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were [treated as] a primary consideration despite the result.¹²⁰

Therefore, finding fair and balanced solutions that uphold all of children's rights in the digital environment is essential. Given the challenges and lack of guidance, this is an area that needs urgent attention. This project aims to contribute towards such guidance by bringing in children's voices, as well as those of policymakers and companies.

^v Given the scope of this working paper, we did not look into case law on how the Court of Justice of the European Union, the European Court of Human Rights and the Committee apply these principles in their cases.

V. What are the main points of tension when implementing the best interests of the child principle in relation to the digital environment?

There are a number of points of tension when implementing the best interests of the child principle in relation to the digital environment. Below the key ones are highlighted to illustrate the challenges in the digital age, which should be overcome to uphold children's rights in full.

The 'balancing exercise'

The interests of children are not static; they evolve as children grow and their life circumstances change. Assessing and determining the best interests of children requires carefully balancing competing interests, safeguarding children and empowering them to exercise their agency.¹²¹ The digital environment adds new dimensions to this balancing act, which is inherent in Article 3. The rapid pace of technological change, the evolving nature of online risks and the blurring of boundaries between online and offline experiences necessitate careful consideration of this balancing act. This is evident in debates around screen time, where concerns about excessive use and potential harms must be balanced against the educational, social and creative benefits of digital engagement.¹²² Similarly, protecting children from potentially harmful online content needs to be balanced with respecting their right to access information and participate in online communities. Problematically in relation to the digital environment, harm from children's online activity is often assumed rather than assessed, leading to policy proposals that are not grounded in children's lived experiences. For example, the notion that all screen time is detrimental overlooks the diverse ways children utilize technology and the potential benefits associated with digital participation. As suggested by leading researchers, instead of focusing solely on the duration of screen time, a more nuanced approach would consider the quality of children's digital engagement, the context of their interactions and the potential for fostering social connection and learning.¹²³

As children develop their digital literacy skills, the balance shifts towards greater autonomy and participation.¹²⁴ This requires providing age-appropriate support and guidance, empowering children to make informed choices and navigate online risks responsibly. However, implementing the best interests of the child in relation to the digital environment can be a complex process for various other reasons, as discussed below.

Competing interests and rights

As highlighted by the Committee in its General Comment No. 14, conflicts can arise between the best interests of a child and those of others – such as other children, the public, or parents.¹²⁵ The Committee emphasizes that while the best interests of the child should be a primary consideration, not just one among many, these interests must sometimes be balanced against those of others.¹²⁶ This necessitates case-by-case resolution to ensure that a child's interests are given high priority and that appropriate compromises are reached when necessary.¹²⁷

Conflicts of interest may occur between children, between children and adults, or among various adult stakeholders (e.g., parents, technology companies and governments).¹²⁸ Adults and children may hold different views on what constitutes the best interests of the child, how these interests should be prioritized and how they should be applied, particularly in a digital environment dominated by private, for-profit entities.

An illustrative case of competing interests is the current approach to end-to-end encryption: when applied it upholds children's right to privacy, but also impedes efforts to monitor and remove child sexual abuse material, thus undermining children's right to protection.¹²⁹ Another context with differing views is profiling, which impacts children's rights to privacy and protection from [commercial] exploitation. UNICEF's Industry Toolkit addresses this issue, noting that decisions about profiling, including for personalized services or advertising, must prioritize children's best interests.¹³⁰ Opinions vary widely: one regulator insists that marketing to those under 18 must consider children's best interests as paramount,¹³¹ while an NGO argues that commercial profiling for advertising is never in a child's best interests.¹³² Others contend that excluding children from services funded by targeted advertising might prevent access to beneficial educational and creative resources.¹³³ Crucially, children's perspectives on issues such as profiling and personalized advertising often diverge significantly from those of regulators, technology companies and NGOs. For instance, during consultations in Ireland,¹³⁴ children expressed concerns about personalized ads, describing them as intrusive or akin to being tracked, with remarks such as, "It feels like they're stalking you", and "Young people use social media as quiet time for themselves, so they don't want to be distracted by advertisements". Despite these concerns, some acknowledged, "We think ads are creepy but at the same time we wouldn't pay to join these sites", indicating a complex relationship with free services. Meanwhile, technology companies, whose revenues often depend heavily on user profiling for advertising, hold contrasting views and might claim that unless ads exist, there would be no service at all provided to children.

This variance in perspectives complicates efforts, even among stakeholders like parents, technology companies and regulatory bodies, who may all aim to create a safe digital environment for children. Thus, strategies to achieve this safety often vary widely and can sometimes be at odds with each other.

Children are not a homogenous group

Appreciating children's diverse needs and developmental stages

Children have a diverse range of needs and abilities, necessitating a nuanced application of the best interests principle in the digital environment. The Principle should consider children individually, as identified or unidentified groups, and as children in general. However, focusing on them collectively, as is necessary in the digital environment, sometimes risks overlooking their individual differences. Moreover, individual children can hold multiple, conflicting views on a single issue. For instance, during consultations for the UK Information Commissioner's Office's (ICO) Children's Code,¹³⁵ a 16-17 year old expressed mixed feelings about profiling for targeted advertising, initially describing it as "a bit freaky" but also acknowledging its usefulness as a "time-saver".

From the perspective of regulators, conflicts may also arise between the best interests of different children. For example, prioritizing the best interests of one child may inadvertently infringe upon the rights of another. Despite these complexities, it is generally accepted that the commercial interests of an organization should not supersede a child's right to privacy.¹³⁶

Appreciating children's diverse contexts and inequalities

Another challenge originates from the different social, economic, cultural and political backgrounds of children. For example, some children are reported to raise unaffordability as a barrier to online access. Others have “highlighted that their obligations to contribute to household chores and study conflicted with their desire to go online or connect with friends”.¹³⁷ Such factors limit the possibility of upholding children's best interest equally in the digital environment.¹³⁸ While the digital environment offers incredible opportunities for children, access, skills and experiences are not equal. This even applies to their family context, with differing levels of parental guidance for children's digital activities. Further, children's lives and online experiences vary greatly depending on their broader circumstances, from those living through war, displacement, or other crises, to those facing different cultural, linguistic, socioeconomic and political situations. Social exclusion and marginalization also play a significant role. These do not only have implications for children's best interests, but also for their rights, including but not limited to, the right to non-discrimination, the right to be heard, the right to education, the right to health, the right to protection from abuse and neglect and the right to play.

Divergence of current and future interests

As outlined in General Comment No. 14, fully realizing the child's best interests requires considering the short-, medium-, and long-term impacts of decisions on a child's development over time.¹³⁹ While the challenge of forecasting the future complicates best interests assessments in many fields,¹⁴⁰ making them reliant on existing facts and circumstances,¹⁴¹ the digital environment is unique due to its rapid evolution. This creates a different dynamic when applying the Principle in such a fast-paced environment where legislations and regulations need to be future-proof, and where research needs to follow the technological changes rapidly.

The full impacts of emerging technologies are not known or well understood. Consequently, it can be challenging to weigh up future-oriented interests in a dynamic digital environment. That is why it's important to engage children in foresight exercises – to get their views on the digital future that would uphold their rights.

Manipulation and exploitation of ‘best interests’

The Committee observes that a child's best interests can sometimes be exploited. In General Comment No. 14, it points out that governments and state authorities have misused this concept to justify discriminatory policies; parents have twisted it to serve their own ends in custody battles; and professionals have neglected it, dismissing these crucial assessments as irrelevant or trivial.¹⁴² In the context of the digital environment, some scholars have argued that “‘best interests’ is being misunderstood, or even misused or abused” to prioritize commercial interests.¹⁴³ While these concerns echo the ones pertinent to the above conflicts due to competing interests, the digital environment poses a risk of manipulating the Principle. This is due to the technical, operational and legislative complexities of the digital environment. Also, given the sheer number of children online whose interests and rights are at stake, potential manipulations of the best interests of the child at the expense of other(s) interests would significantly undermine children's rights.

VI. How do existing frameworks and guidelines apply the Principle in digital provision?

A number of frameworks, guidelines and approaches have been developed to apply the Principle in the digital age. These are explored below through the lenses of legislations and regulations; approaches by international organizations; and those by industry, academia and civil society.

Legislations and regulations

Legislations and regulatory frameworks from around the world are increasingly incorporating the Principle into their digital provisions.¹⁴⁴ These legislations and frameworks propose a child-centred approach, which prioritizes children's rights and wellbeing in the digital world, emphasizing the need to protect them from harm while enabling their participation and development. In terms of scope, those we reviewed address data privacy concerns, particularly regarding the collection, use and disclosure of children's personal data. This includes provisions for parental consent, data minimization and security measures. Many emphasize the importance of designing digital products and services with children's developmental needs and abilities in mind, ensuring accessibility and safety for different age groups. Several recognize the need to empower children to exercise their rights and participate meaningfully in the digital environment, including providing them with the knowledge and skills to navigate the online world safely and responsibly.

For example, the ICO Best Interests Framework¹⁴⁵ offers comprehensive guidance on assessing and mitigating risks to children's rights across various digital contexts, emphasizing a holistic approach to their wellbeing. The Irish Data Protection Commission (DPC) Fundamentals¹⁴⁶ focuses on data protection principles and child-oriented approaches to data processing, promoting ethical and responsible data practices concerning children. The EU's DSA¹⁴⁷ sets a high standard for digital service providers to respect the rights of the child. According to the DSA, all online platforms¹⁴⁸ must “put in place appropriate and proportionate measures to ensure a high level of privacy, safety and security of minors, on their service”,¹⁴⁹ including specific provisions for processing data to assess whether the recipient of a service is a child and showing advertisements to children based on profiling. The California Age-Appropriate Design Code Act (CAADCA)¹⁵⁰ introduces requirements for age-appropriate design in online services accessed by children, aiming to protect them from manipulative design practices. Kenya's Data Protection Act¹⁵¹ establishes a comprehensive framework for data protection, including provisions for children's data and the regulation of online service providers. The South African Human Rights Commission (SAHRC) Social Media Charter¹⁵² provides guidelines for responsible social media use, emphasizing the protection of children's rights and safety in the context of social media platforms.

Some are legally binding regulations (e.g., DSA, CAADCA, Kenya's Data Protection Act), while others are guidelines or frameworks^{vi} (e.g., ICO Best Interests Framework, Irish DPC Fundamentals, SAHRC's Social Media

^{vi} It is worth noting, as pointed out by Michael Murray (ICO), that the ICO and the DPC examples are also underpinned with legislative backing from the GDPR. These frameworks help industry understand ‘how to’ comply with the GDPR while

Charter). This affects their enforceability and the consequences of non-compliance. Additionally, they vary in their focus and scope. Some are specific to data protection (e.g., EU GDPR, Kenya's Data Protection Act), while others address a broader range of online risks and opportunities (e.g., ICO Best Interests Framework, SAHRC Social Media Charter). Some are tailored to specific sectors or platforms (e.g., SAHRC Social Media Charter focuses on social media). They also differ in their specific requirements and recommendations. For instance, the age of consent for data processing varies across jurisdictions, and the level of detail regarding age-appropriate design and child participation also differs.

These legislations and regulatory guidelines collectively demonstrate a growing global commitment to protecting and promoting children's best interests in the digital environment. They reflect a shift towards a more child-centred approach to digital policy and design, recognizing children as active participants in the digital environment with rights that need to be safeguarded. However, variations in their legal weight, scope and specific provisions highlight the need for greater collaboration and implementation guidance to ensure consistent and effective protection of children's rights globally. They offer valuable starting points for making children's best interests a primary consideration in relation to the digital environment. However, these legal instruments differ in scope, application and enforcement, which inevitably creates loopholes and challenges in implementation for digital products and services that work across borders. There is also often a critical gap between the formulation of policies and their actual implementation, which can render them ineffective.

Recommendations and guidelines by international organizations

In addition, as a response to the recent momentum in digital policy and legislation, some international organizations¹⁵³ – including the Council of Europe, UN, the Organisation for Economic Co-operation and Development (OECD) and the Institute of Electrical and Electronics Engineers (IEEE) – have started to publish non-binding recommendations and guidelines that refer to the best interests of the child principle in the digital environment. While they prioritize children's rights and wellbeing in the digital environment, their emphasis is more at a principle-level, mainly focusing on the need to balance opportunities with protection from potential harms. Many go beyond data protection to consider a wider range of children's rights, including participation, education and protection from harmful content. They recognize the shared responsibility of governments, technology companies, educators and parents in creating a safe and empowering digital environment for children.

These recommendations and guidelines represent a significant step towards a more coordinated and comprehensive approach to protecting and promoting children's rights in the digital environment. They demonstrate a growing awareness of the unique challenges and opportunities that the digital environment presents for children and a commitment to ensuring that children's best interests are at the forefront of digital policy and design. However, they are non-binding recommendations that are left to the discretion of individual states and technology companies. This underscores the need for ongoing dialogue amongst multiple stakeholders and international collaboration for digital legislation and regulations as also highlighted in the UN Global Digital Compact.

providing services to children. Failure to conform to the frameworks would make it difficult for services to demonstrate compliance with the underlying data protection law.

Industry, academia and civil society

Industry, academia and civil society¹⁵⁴ have also outlined both corporate and policy approaches to balancing digital engagement, safety and child rights in the digital environment with a focus on best interests of the child. While they all refer to the UNCRC as a foundational convention and emphasize children's safety, privacy, autonomy and wellbeing in the digital environment, there are inherent differences in their scope and approaches.

For example, while Meta's framework focuses on practical guidelines for product design and development, Google outlines public policy recommendations for digital technologies for children. Reports from the Digital Futures for Children centre (academia) and Defend Digital Me (civil society) delve into policy implications, while the Reset Australia (civil society) report discusses broader policy frameworks of the best interests of the child in the digital environment.

There is an increase in safety and privacy tools developed by technology companies that design protections by default as a result of regulation that emphasizes children's best interests in relation to the digital environment.¹⁵⁵ Some of these include content filtering and moderation (e.g., Google's Content Safety API and TikTok's Restricted Mode); user and content reporting and blocking tools (e.g., by Roblox); parental supervision (e.g., Meta's Family Centre and Google's Family Link); privacy-by-default settings (e.g., Instagram's default settings for teen users); age assurance; limits on screen time management tools (e.g., Apple's Screen Time feature in iOS); education resources; and support tools (e.g., Google's Be Awesome program that teaches children about online safety).

These initial efforts aim to realize children's rights in the digital age. However, none of them collectively overcome the challenges in relation to the digital environment. For instance, finding solutions that work worldwide is still a major hurdle, and evidence and transparency on how well safety and privacy tools work to protect or empower children is lacking. In this project's next stages, we aim to contribute towards the establishment of guidelines that would support the implementation of the Principle in relation to the digital environment for all children with all their diverse needs, situations and contexts, while upholding their rights in full.

VII. Conclusion

While some companies call for policy and regulation to define “what” and “allow the ‘how’ to be decided by each individual organization”,¹⁵⁶ best interests assessment and determination should not be left entirely to individual organizations. Implementing this principle in the digital environment is multifaceted and requires a balanced approach that considers children's rights to participation, protection and provision. A rights-based approach is essential for upholding best interests of the child in the digital age. This requires a holistic view of children's rights, ensuring that digital policies and technologies promote their wellbeing, safety and development. To uphold children's right at full range, and their best interests in particular, technology companies should undertake CRIA at various levels¹⁵⁷ – enterprise-wide, product-specific, market-specific, to name a few – that would have implications on children's rights. This would involve regulators systematically evaluating the CRIAs conducted by companies. Further, as noted above, the best interests of the child should not only be considered during a digital product or service design, but should run through the entire product cycle and business operation, including remedy and redress.

Conflicts and tensions arise in applying the Principle, particularly when balancing competing interests and rights. For instance, protecting children's privacy might inadvertently limit their freedom of expression, requiring careful consideration and compromise. Children's voices are crucial in determining their best interests, yet they are often overlooked in policy and design decisions. This underscores the need for meaningful child participation and consultation in shaping digital policies and technologies, to ensure they reflect children's needs and perspectives. This requires creating platforms and mechanisms for children to express their views and influence decision-making processes.

Existing legal and regulatory frameworks are increasingly incorporating the Principle, but challenges remain in its consistent and effective implementation, including the need for greater clarity, comprehensive guidance and robust mechanisms for assessing and addressing impacts of digital technologies on children's rights. Enhanced collaboration and coordination among stakeholders are needed, including with governments, technology companies and civil society organizations, to effectively implement the best interests of the child principle in the digital environment.

VIII. Next Steps

This review is the first output of UNICEF's Best Interests of the Child in Relation to the Digital Environment project. It serves as a review of academic literature, policies and legislations, sharing insights that could inform the next phases of this project, and support others working in this area. The next phases of the project include:

- **Child consultations:** UNICEF will consult children in a number of countries to understand what they think of the best interests of the child and how they interpret it in relation to the digital environment in practice. The consultations will also explore how children envision a digital future that fully upholds their rights and their best interests in the digital age, including what duties and responsibilities they think states, companies and parents have in this, going beyond the current digital landscape.
- **Multi-sectoral consultations:** UNICEF will conduct international consultations with policymakers, regulators, members of the private sector, civil society and academia through a series of online workshops. These consultations, informed by the findings from our child consultations, will identify key areas where more detailed guidance on implementing the Principle in the digital environment would be beneficial to policymakers, regulators and industry actors.
- **Publishing the final report:** The final report will incorporate findings from both child and multi-sectoral consultations. This comprehensive report will provide insights and high-level recommendations to support the implementation of the best interests of the child principle in the digital environment.

Endnotes

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The word ‘primary’ implies that other considerations, although not deemed primary, may nevertheless be taken into account. The article ‘a’ indicates that there may be several considerations, each of which is primary. The issue which arises by virtue of standards incorporated in other widely accepted human rights instruments is whether a single qualification is not sufficient. If this were considered to be the case, the wording could be changed to indicate that the child’s best interests would be ‘the primary consideration’.

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The use of the article ‘a’ rather than ‘the’ is significant. Best interest is identified as ‘the’ primary consideration only in relation to adoption. The use of the article ‘a’ implies that the best interests of the child are relative to the best interests of others in the society and that the child’s autonomy rights need to be balanced with a child’s need for protection. This principle cannot be used to justify actions that would contradict other provisions of the CRC.

[...]

Saying that the best interest of the child is a primary consideration also means that certain factors should be taken into consideration in determining outcomes and guarantees, and that other interests such as those of the state, parents or other, will not automatically prevail. This principle also emphasizes the right of each child to express his or her views in all matters related to his or her life, in accordance with age and maturity. The CRC encourages appropriate participation of children in making decisions.

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34 Cantwell, 'The Best Interests of the Child in Intercountry Adoption', p. 19.

35 'Guidelines for Human Rights-Based Programming Approach. A Human Rights Approach for Children and Women', UNICEF, p. 9.

36 CRC/C/GC8, para. 26.

37 CRC/C/GC/14, para 1.

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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".

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The Fundamentals: "The core message of these Fundamentals is that the best interests of the child must always be the primary consideration in all decisions relating to the processing of their personal data. The DPC [Data Protection Commission] recognizes that embedding this principle into services directed at, intended for, or likely to be accessed by children will require additional resourcing and will require specialists in areas such as child development, children's rights, and child's psychology, to name a few. However, this is the price of doing business with children. The needs and rights of children have been overlooked in the online world for too long now, and organizations which count children amongst their users must take steps to rectify this": 'Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing', Irish Data Protection Commission, Dublin, December 2021, <https://www.dataprotection.ie/sites/default/files/uploads/2021-12/Fundamentals%20for%20a%20Child-Oriented%20Approach%20to%20Data%20Processing_FINAL_EN.pdf>, accessed 1 October 2024, p. 3.

DSA: "Providers of very large online platforms and of very large online search engines should take into account the best interests of minors in taking measures such as adapting the design of their service and their online interface, especially when their services are aimed at minors or predominantly used by them": 'Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)', Council of the European Union, European Parliament, 19 October 2022, <<https://op.europa.eu/en/web/eu-law-in-force/bibliographic-details/-/elif-publication/3ff67256-55c4-11ed-92ed-01aa75ed71a1>>, accessed 1 October 2024, para. 89.

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98 CRC/C/GC/14, para. 46(a).

99 CRC/C/GC/14, para. 46(b).

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104 CRC/C/GC/14, 'UNHCR Guidelines on Determining the Best Interests of the Child', UNHCR and '2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child', UNHCR, 2021, <https://www.refworld.org/policy/opguidance/unhcr/2021/en/122648>, accessed 12 September 2024. See also Freeman, 'Article 3. The Best Interests of the Child'.

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110 Examples include: 'Tech Coalition Human Rights Impact Assessment of the Lantern Program', Business for Social Responsibility (BSR, 2023), <<https://www.bsr.org/reports/BSR-Tech-Coalition-HRIA-Report.pdf>> and <<https://humanrights.fb.com/wp-content/uploads/2024/09/2023-Meta-Human-Rights-Report.pdf>>, accessed 18 August 2024.

111 'Human Rights Report', Meta, 2023, <<https://humanrights.fb.com/wp-content/uploads/2024/09/2023-Meta-Human-Rights-Report.pdf>>, p. 34.

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134 Children's opinions about personalized ads: An Coimisiún um Chosaint Sonraí (Data Protection Commission), 'The Fundamentals for a Child-Oriented Approach to Data Processing'.

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142 CRC/C/GC/14, para. 34.

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UNICEF works in the world's toughest places to reach the most disadvantaged children and adolescents — and to protect the rights of every child, everywhere. Across 190 countries and territories, we do whatever it takes to help children survive, thrive and fulfill their potential, from early childhood through adolescence. And we never give up.

UNICEF Innocenti – Global Office of Research and Foresight tackles the questions of greatest importance for children, both current and emerging. It drives change through research and foresight on a wide range of child rights issues, sparking global discourse and actively engaging young people in its work.

UNICEF Innocenti equips thought leaders and decision-makers with the evidence they need to build a better, safer world for children. The office undertakes research on unresolved and emerging issues, using primary and secondary data that represents the voices of children and families themselves. It uses foresight to set the agenda for children, including horizon scanning, trends analysis and scenario development. The office produces a diverse and dynamic library of high-level reports, analyses and policy papers, and provides a platform for debate and advocacy on a wide range of child rights issues.

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