

GUIDANCE FOR  
THE PROTECTION,  
CARE AND ASSISTANCE OF  
VULNERABLE CHILD MIGRANTS



PART 6



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## INTRODUCTION

Child migrants – whether accompanied (by family members, trusted adults, or a group of teenagers and young people with whom they have allied themselves along the way) or unaccompanied or separated from family and friends – are regarded as vulnerable. This vulnerability can be both situational – arising from their dependence on irregular migration routes, smugglers, etc. – and/or inherent in their status as children. At the same time, however, it is important for those responding to the needs of child migrants to recognize their agency and listen to them, as the children will often have clearly defined ideas of where they want to go and how they intend to travel.

While acknowledging the vulnerability of all child migrants, this Part recognizes that unaccompanied or separated children are especially vulnerable and that the challenges they face require particular responses. It is difficult to obtain accurate global figures regarding the number of children who are travelling independently, but their numbers are increasing. Many unaccompanied or separated children do not register with the authorities, either because they are unable or afraid to do so or because they have been advised by family, peers or smugglers to keep on the move to another destination. Still others are not permitted to contact the authorities, as they are controlled by traffickers and are destined for sexual, labour or other exploitation.

The motives of child migrants for leaving their countries of origin vary and may be multiple. They may be fleeing persecution, armed conflict, exploitation or poverty, or a combination thereof. They may have left or been sent by members of their family to ensure their survival or to obtain an education and employment. Alternatively, they may have been separated from their family during flight and be trying to join parents or other family members, or moving to join family that initially left the country of origin many years previously.

All child migrants nevertheless share certain fundamental characteristics. They are children, and therefore often lack legal capacity and are likely to be economically and socially vulnerable. Consequently, they should be treated first and foremost as children and not as irregular migrants. If they are travelling alone, they should also be regarded as children temporarily or permanently deprived of their supportive family environment and as such entitled to special protection and assistance. Yet there are still no harmonized standards for the reception, care and protection of such children.

Additionally, many countries do not have any formal procedures for listening to children and ascertaining what would be in their best interests or what solutions would be most appropriate for them. Some countries admit migrant children on a temporary basis, until they reach the age of 18 – but this is not a sustainable solution, especially if the adult family members they are travelling with are denied similar treatment, nor necessarily in their best interests, as it leaves them in uncertainty about their future. Some children may leave reception centres, thus becoming homeless and destitute, and potentially vulnerable to exploitation and trafficking networks. There are also instances where children are referred – whether they ask for asylum or not – to a process to determine their international protection needs, resulting in a longer processing time of applications generally and consequently longer waiting periods for the child. Some children are also channelled into procedures that do not give appropriate weight to their age and their rights under the Convention on the Rights of the Child.

Despite recent steps in many countries to embed the best interests principle in policy and legislation, huge differences remain in the way countries recognize the rights of migrant children, with some – but not all – placing them in the charge of a wide array of officials, courts or NGOs. Additionally, the application and use of the best interests principle often varies greatly depending on whether the migrant children are accompanied by family or travelling alone. This can lead to critical child protection gaps within and between different States, and, in some cases, even within States. As a result, unaccompanied or separated children can go missing or be exploited in receiving countries, or end up moving from country to country, finding themselves at risk of abuse, trauma and destitution.

This Part has been designed for use by any stakeholder implementing, or supporting the implementation of, the application of the best interests principle for a vulnerable migrant child. Depending on the national context, different entities may find themselves responsible for implementation of the best interests process, which consists of best interests assessments (BIAs), process planning and the best interests determination (BID) (see [sections 6.2](#) and [6.3](#) of this Part). However, it must be noted from the onset that the best interests principle set out in Article 3 of the Convention on the Rights of the Child applies to any State that has ratified the Convention.

## Objectives

This Part aims to provide guidance on how the best interests principle can be applied in practice to identify appropriate care, protection and long-term solutions for migrant children who are outside their countries of origin or habitual residence (in the case of stateless children) and are either travelling with their families and/or trusted adults or are unaccompanied or separated from their parents or those who previously cared for them.

It draws on authoritative legal and policy frameworks within which the BID can be linked to existing national child protection, asylum and immigration procedures, and aims to help develop a best interests process for such children, in order to ensure a solution is found for each individual child. It thus seeks to assist States and others to meet their obligations under the Convention on the Rights of the Child, other international human rights instruments and relevant regional and national legislation and policies.

This Part includes practical tools such as diagrams explaining the best interests principle, which applies to vulnerable migrant children from the moment they are identified until a solution is found. It acknowledges that each country has different legal traditions, service provision capacities and experiences with migrant children. It therefore posits a process that will help each State meet its obligations under the Convention, but which can be tailored to fit in with its own child protection and asylum and immigration systems.

Given the broad understanding of the vulnerability of children engaged in migration, the underlying principles of the guidance should be applied to *all* children who are outside their country of origin or habitual residence, whether they have applied for international protection or not, and where certain risk factors are present. For example, in cases where the child may need international protection on grounds other than those relative to his/her parents, or where the child has developed strong ties to the receiving country, consideration should be given to which solution would be in the child's best interests. Based on the Convention and depending on the circumstances of the case, States and others should apply the procedural proposals set out here, such as child-friendly interviewing, to children who are in families but whose right to reside is not yet determined. These proposals may also be relevant for children born on the territory to parents who do not have regular status.

It is hoped that the guidance will be of assistance to the full range of professionals who encounter migrant children. These may include:

- *Policymakers*, who are responsible for developing and adopting the legislation, policies and procedures needed to ensure that BIAs and BIDs can be undertaken and a sustainable solution arrived at for any migrant child in the State;
- *Practitioners*, including but not limited to social workers, guardians, reception centre staff, designated caregivers, medical professionals, legal aid providers, persons responsible for family tracing and legal representatives, all of whom share responsibility for implementing the best interests process leading to a BID;
- *The judiciary*, members of which may find the guidance useful in interpreting the law as it applies to unaccompanied or separated children, including in the light of the Convention on the Rights of the Child and other relevant instruments;
- *Civil society and national human rights institutions*, which may play a role in monitoring and advocating for improvements in the treatment of migrant children.

## Structure

The Part is divided into three sections. The first contains the legal framework underpinning “best interests” as a legal concept. It also reviews the interrelationship of the concept with other international conventions and regional and national legislation and case law. The second explores the “best interests” principle in more detail, discussing both its substantive and its procedural implications. It also explains why a “best interests” process is necessary. Section 3 outlines key features of the BID and discusses the practical steps that may have to be taken and the structures that may have to be created to ensure that the BID will lead to a realistic and appropriate solution for each individual child.

## 6.1 THE LEGAL FRAMEWORK CREATED BY THE BEST INTERESTS PRINCIPLE

### Summary: The legal framework created by the best interests principle

- States have sovereign power to control their own borders and devise their own immigration policies. However, they also have obligations under national, regional and international law to respect and protect the human rights of children when enacting and implementing national asylum and immigration legislation and policy.
- All States (except the United States of America) have signed and ratified the Convention on the Rights of the Child and are therefore obliged under international law to implement it, in line with its Article 4.
- The “best interests of the child” (BID) is a complex concept that is not defined in the Convention on the Rights of the Child.
- The Committee on the Rights of the Child has adopted general comment No. 14, on the right of the child to have his/her best interests taken as a primary consideration (Art. 3(1)), which explains the concept and related State obligations in more detail.
- The Committee underlines that it is through the interpretation and implementation of Article 3(1), in line with the Convention’s other provisions, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof.
- Full application of the concept of the child’s best interests involves the development of a rights-based approach engaging all stakeholders to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his/her human dignity.

### Introduction

States have the sovereign power to control their own borders and devise their own immigration policies. However, they also have obligations under regional and international law to respect and protect the human rights of unaccompanied or separated children when enacting and implementing national asylum and immigration law and policy.

The Convention on the Rights of the Child, which was adopted by the United Nations General Assembly on 20 November 1989, has been ratified by all but one<sup>1</sup> United Nations Member State. This underscores its authority as a source of international norms that the States must respect when taking any action in relation to children in their territory. The Convention is unique in that it is the only binding human rights treaty protecting the full range of rights enshrined in the Universal Declaration of Human Rights, with the exception of freedom of movement.<sup>2</sup> It also incorporates the rights from which children benefit under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, it sets out certain rights included in other international treaties, such as the right to an identity, to foster care and to adoption.

The Committee on the Rights of the Child issues general comments to assist States in the implementation of the Convention. Those of greatest relevance to vulnerable migrant children are general comments No. 6, on the treatment of unaccompanied or separated children outside their country of origin, No. 12, on the right of the child to be heard, and No. 14, on the best interests of the child.<sup>3</sup> Additionally, the Committee on the Rights of the Child and the Committee on the Rights of All Migrant Workers and Members of Their Families (Committee on Migrant Workers) jointly adopted two general comments on the human rights of children in situations of international migration in September 2017: joint general comment No. 3 (2017) of the Committee on Migrant Workers and No. 22 (2017) of the Committee on the Rights of the Child, on the general principles regarding the human rights of

1 The United States of America.

2 “The United Nations Convention on the Rights of the Child: Implications for Change and Protection of Refugee Children”, *International Journal of Refugee Law*, 1992, 4(4):680.

3 The full texts of the general comments can be downloaded from [www.refworld.org](http://www.refworld.org).

children in the context of international migration;<sup>4</sup> and joint general comment No. 4 (2017) of the Committee on Migrant Workers and No. 23 (2017) of the Committee on the Rights of the Child, on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.<sup>5</sup>

The Convention does not permit derogation from any of its provisions at any time. This means that children may be entitled to a wider range of rights than adults, since the International Convention on Civil and Political Rights contains a derogation clause permitting the suspension of certain obligations in times of officially proclaimed emergency threatening the life of the nation. This consideration is important when dealing with migrant children who travel with their families, as the de facto presumption of States is often to treat the family as a single case, which may mean that the particular and special rights of children are overlooked or downplayed.

## Challenges to implementation in a national context

This guidance aims to support the creation of a national framework that reflects the obligations under Article 3 of the Convention on the Rights of the Child. Its utility is contingent on individual States creating or strengthening their own national structures to ensure that all those encountering an unaccompanied or separated child in their own State comply with the Convention and ensure that they treat the best interests of these children as a primary consideration, in line with the recommendations of the Committee on the Rights of the Child.

Countries in which very few of the constituent elements of the recommended procedures are in place may need time to plan and develop or integrate them into existing structures and procedures and to provide the necessary training to the participants; in such cases, other entities may be designated to implement elements of the BID process on behalf of the State.

### The BID as part of a national child protection system

It is recommended that where this is not in place already, States ensure that they develop a comprehensive child protection and welfare system designed to meet their national and international obligations towards children, irrespective of their nationality, statelessness or immigration status. The system should coordinate the actions of any State official or employee of any organization who has a role to play in meeting the protection and welfare needs of any child within the State's jurisdiction. To prevent, respond to and counter the wide variety of risks a child may face, it is recommended that States develop:

- A national legal and policy framework for the system;
- A national database about children and their needs and circumstances;
- A national coordinating body for meeting the best interests of children;
- Capacity-building initiatives in relation to human and financial resources;
- Prevention and rapid response services; and
- Advocacy and awareness-raising projects.

Within this framework, States should recognize that unaccompanied or separated children may be at increased risk of abuse and ill-treatment and may have additional welfare needs because of the trauma they may have experienced in their country of origin or habitual residence and/or when leaving that country. All State agents working with or on matters pertaining to unaccompanied or separated children should undergo training and awareness-raising to ensure such recognition, which should also be reflected in organizational culture and messaging.

Countries should also ensure that they address any public misperceptions and stigmatization of migrant children that can lead to them being socially ostracized, discriminated against or targeted by racist and xenophobic abuse and attacks.

<sup>4</sup> Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/22&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/22&Lang=en).

<sup>5</sup> Ibid.

## A child rights-based approach to international protection

The Committee on the Rights of the Child recommends the development of a comprehensive normative and institutional framework for protecting children's rights that effectively takes priority over immigration legislation and policy and is applied irrespective of a child's asylum or immigration status.<sup>6</sup>

Furthermore, in a refugee and protection context, human rights law can fill gaps and indicate directions. Some scholars have noted that correct implementation of the Convention on the Rights of the Child would require a realignment of protection for children, moving away from the formalities of a refugee status determination process, towards an approach guided by child's rights. Such an approach would suggest that countries should provide protection to vulnerable migrant children who are in need of protection for reasons related to them being children, which are not provided for in traditional international and regional human rights instruments but are contained in the Convention. This may mean that, even in cases in which a child is not found to be in need of traditional international protection, it may be appropriate for the child to be granted formal permission or leave to remain in the receiving country on a permanent basis.

## Strengthening institutional accountability and capacity

Compliance with the requirements of Article 3 of the Convention on the Rights of the Child may be more successful and sustainable if countries ensure that a designated body, created at national level, carries responsibility for the Convention's implementation. The tasks of this body, or an existing institution fulfilling this role, with regard to Article 3 could include:

- Overseeing the drafting and dissemination of standard operating procedures for all those encountering vulnerable migrant children as part of their day-to-day employment, or as volunteers, after discussion and consultation with relevant departments or ministries;
- Establishing benchmarks to ensure that the procedures adopted conform with the due process principle;
- Designing and providing appropriate training courses on how BIAs and BIDs should be conducted;
- Recruiting, training and monitoring legal guardians for all unaccompanied or separated children;
- Recruiting, training and monitoring participants for BIDs;
- Collecting data on individual unaccompanied or separated children in the best interests process;
- Recording the outcomes of BIDs and keeping track of how BIDs affect (further) decision-making, including the implementation and sustainability of a solution;
- Establishing a dedicated monitoring system for BIDs;
- Coordinating the monitoring of BIAs with the departments or ministries employing the officials responsible for the relevant part of the best interests process;
- Liaising with children's ombudspersons, children's commissioners or others charged with protecting children's rights about any complaints, steps or actions undertaken in the BID process;
- Analysing the outcomes of its data-collection and monitoring processes (including the identification of gaps) and applying any lessons learned;
- Making recommendations for and designing or adjusting processes to ensure that a child's best interests are considered appropriately when a sustainable solution is identified for him/her.

## The “best interests” principle defined

Article 3(1) of the Convention on the Rights of the Child states: “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”.

The Convention does not define “best interests,” and the Committee has only recently adopted general comment No. 14 on the best interests of the child.

Article 3(1) is also a fundamental, interpretative legal principle: if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

<sup>6</sup> Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration*, background paper for the 2012 Day of General Discussion (Geneva, August 2012).

Full application of the concept of the child's best interests requires the development of a rights-based approach engaging all stakeholders to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his/her human dignity. The word "primary" indicates that this consideration is pre-eminent or more important, but not paramount or the sole consideration for all actions affecting children. The Convention uses the word "primary" in relation to Article 3 and most other articles. The best interests of the child are only said to be a paramount consideration in Article 21, relating to the establishment by the State of a system of adoption, which, by its very nature, will sever a child's legal connection with his/her birth parents and provide him/her with a new identity and where best interests will become the determining factor when considering decisions on adoption.<sup>7</sup>

## Identification and verification of unaccompanied or separated children

The discovery that a child is on the move alone or with someone who is not a family member or documented customary caregiver will normally raise questions about the child's safety. That said, not all children travelling alone meet the definition of an unaccompanied or separated child at risk, or raise any other child protection concerns. For example, teenagers travelling with verifiable documentation unaccompanied by their parents, and very obviously for holiday purposes or for documented study purposes, will very rarely raise protection concerns.

Such concerns are raised, however, when children arrive or are found at the border or within a State's territory alone or accompanied by someone who is not their parent or caregiver. A BIA will have to be rapidly conducted to ascertain whether there is cause for concern.

A BIA involves balancing the elements needed to decide in a specific situation for a specific child. At the point of entry, if a child exhibits indicators of risk factors, the main information required to make a simple assessment of whether it would be in the child's best interests to be referred to child protection services would normally be restricted to what is necessary to establish the child's identity, date of birth and/or age and, if relevant, nationality. At this point, lengthy interviews are normally not called for.

Identifying children who may be at risk can be highly challenging for those in first contact with the child. Some countries through which children transit will cite the tensions they face between providing access to their territory for the purpose of BIA/BID for children at risk and the need to provide effective border control. This applies especially when children are travelling as part of a larger group that contains adults who may or may not include their parents or customary caregivers.

Identifying and handling children at risk is difficult, but is critical for the children who find themselves in situations of vulnerability. Unaccompanied or separated children have probably already experienced trauma when crossing borders, and their encounters with border staff/law enforcement officials may in the best instance reassure the children, but in the worst, contribute to further traumatization. It is crucial to train border, law enforcement and migration staff in child-friendly interviewing techniques, and to provide the required back-up and access to child protection services, whether these are provided through State authorities or civil society, so as to ensure that vulnerable children are identified, but also that unaccompanied or separated children can be identified as soon as possible.

In many cases, no one in the group the child is travelling with will be able to provide documentation and/or proof that they are a family member or the child's caregiver. In such cases, professionals will need to rapidly assess the child's relationship to the individuals in question. In all such cases, immediate referral to child protection authorities is the preferred course of action. Where such a referral is not possible, provisions should be made for the child to be referred at the first possible instance to an agency or body specialized in dealing with children for assessment. In the meantime, the person who first identified the child will need to assess the quality of the relationship between the child and the adult(s) accompanying him/her, focusing on the safety of the child in gauging the need to provide alternative emergency placement if they believe that those adults are not the parent(s) or caregiver(s) and that the child is at risk.

<sup>7</sup> See Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) (29 May 2013, CRC /C/GC/14), para. 38. Available at [www.refworld.org/docid/51a84b5e4.html](http://www.refworld.org/docid/51a84b5e4.html).

## Age assessment procedures

Children arriving in a territory often have no valid documentation providing definitive proof of age. In the case of very young children, this usually presents no difficulties in terms of identifying that individual as a child and, as such, subject to special protection and assistance measures arising from that status. In the case of adolescents and older teenagers, however, it may prove difficult to ascertain who is or is not a child as legally defined in the Convention on the Rights of the Child, that is, a person below the age of 18. A simple visual assessment does not suffice to assess a person's probable age, and the difficulties are often compounded by the information that a child may have been instructed to give immigration authorities. Contrary to expectations, it is not always the case that older adolescents identify themselves as children; in many cases, older children apprehended or identified in transit will claim to be adults, in the belief that being identified as a child will impede their ability to move towards their intended destination.

Clearly, given the obligations that countries have to protect children – especially those who are without parental care, temporarily or permanently – under the Convention, it is in the authorities' interests to develop and implement procedures and guidelines for assessing the age of individuals who do not possess adequate proof of age and who may be children. Governments and other agencies that need to know the age of a person claiming to be a child are using a variety of assessment methodologies, including medical, physical and psychosocial forms of assessment, for that purpose. Age assessments are typically undertaken only when the children have no documentation and/or the authorities doubt that they are under 18, although some countries apply them as a matter of routine to all unaccompanied or separated children. Practices vary from country to country, but the assessments are usually performed shortly after arrival.

While there is no prescription for a “definitive” or “perfect” age assessment procedure, standards and guidelines do exist to assist countries in defining what elements an age assessment procedure might comprise, how it should be conducted, and how countries should deal with cases in which, even after age assessment, the child's age remains in question. Detailed guidance on these matters and an analysis of existing procedures and frameworks is available in two papers produced (through a consultative process with United Nations entities, civil society and national governments) by UNICEF: *Age Assessment, A Technical Note*<sup>8</sup>, which lists 10 overriding standards and principles recommended for the operation of age assessment procedures, and *Age assessment practices: a literature review & annotated bibliography*,<sup>9</sup> which contains case studies, an analysis of different practices and further reading suggestions.

In summary, these papers recommend that age assessments conducted in cases when a child's age is in doubt need to be part of a comprehensive assessment that considers both the physical appearance and the psychological maturity of the individual. It is important that such assessments be conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child. As age is not calculated in the same way or given the same degree of importance universally, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian be appointed to advise the child.

## Basic needs

Vulnerable migrant children need first and foremost to be given access to the procedures established for having their best interests assessed. The ability to provide the protection the children may need is dependent on their prompt referral and identification as children, on the basis of which they should be allowed to enter the territory. As laid out in general comment No. 6 of the Committee on the Rights of the Child, State obligations under the Convention on the Rights of the Child apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory.

The presumption of protection should also apply to children who have been in the country for a period of time, but have never been formally recognized as having access to/entered the territory but are later detected or present themselves to protection, immigration or other authorities.

<sup>8</sup> Available at [www.unicef.org/protection/files/Age\\_Assessment\\_Note\\_final\\_version\\_\(English\).pdf](http://www.unicef.org/protection/files/Age_Assessment_Note_final_version_(English).pdf).

<sup>9</sup> Available at [www.unicef.org/protection/Age\\_Assessment\\_Practices\\_2010.pdf](http://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf).

Distinguishing between the various protection needs of migrant and non-national children is difficult. Traffickers in persons are developing ever more ingenious ways to instruct their victims, sometimes exploiting asylum procedures to access territory, making the task for border police and officials increasingly challenging. However, as far as the child is concerned, the paramount concern of adults should be to ensure that child's safety and basic needs, on the understanding that the specifics of protection and care, and a more detailed examination of status, will be determined once that is achieved.

Trafficked children are often forced to commit illegal activities either as a direct result of the purpose they are exploited for, or because of the trafficking process (illegal border crossing, etc.). While the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, does not specifically address this issue, the body established to provide recommendations on the Protocol's implementation suggests a non-criminalization approach.<sup>10</sup> Similarly, children who have entered a territory using the services of people smugglers should not be subject to prosecution or criminal sanctions. When it is suspected that a child has been trafficked, or has entered a territory through irregular means, the authorities should bear in mind that the child exhibiting risk factors will need immediate and exceptional protection, especially from her/his traffickers. Protective measures – including secure accommodation – in these circumstances will therefore entail careful safeguarding of the child's rights, including to freedom of movement, while addressing the potential security and personal safety risks facing the child.

## Registration and documentation

Having obtained access to the territory, the at-risk unaccompanied or separated child will now have the opportunity to explain her/his specific circumstances. Countries recognize the specific vulnerabilities and psychological distress of unaccompanied children in interviewing and investigation processes, as reflected in the policies and practices put in place, for example, in the Netherlands, Norway and the United Kingdom, where screening interviews of children at risk are scheduled to allow for a recovery period before the children progress through the immigration or asylum system.

General comment No. 6 calls for initial interviews to be conducted in an age-appropriate and gender-sensitive manner, in a language the child understands and by professionally qualified persons, to collect bio-data and a social history to ascertain the identity of the child.

In recognition of the greater protection needs of unaccompanied or separated children, States should put in place safeguards for such children as soon as they are discovered.

## Safety, security and shelter

Many migrant children, whether travelling independently (unaccompanied and separated children) or with their families, will be accommodated in some form of reception facility at some point. It is worth repeating here that the Convention on the Rights of the Child recognizes the right of every child to a standard of living appropriate for the child's physical, mental, spiritual, moral and social development, in which the right to protection from exploitation, abuse and violence, regardless of the child's migration status, is also guaranteed.

In whichever form of accommodation and/or facility children are held, the State and any other entities charged with their care and oversight are obliged to provide them with a protective and supportive environment in which they can receive a basic package of assistance and supportive measures. From the outset, in addition to protection from violence, children and adolescents must have guaranteed access to learning, play and recreational activities, medical care and psychosocial support.

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<sup>10</sup> Recommendations adopted by the meeting of the Open-ended Interim Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, annexed to *Trafficking in Women and Girls, Report of the Secretary-General* (4 August 2008, A/63/215), para. 11. See also OHCHR/Global Migration Group, *Principles and Guidelines, supported by practical guidance, on the human rights protection of vulnerable migrants* (Geneva, 2017). Available at [www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf](http://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf).

## Non-detention of migrant children and alternatives to detention

In 2005, the Committee on the Rights of the Child stated, in general comment No. 6, that children should not, as a general rule, be detained on the basis of their or their parent's migration status. Detention cannot be justified solely based on the child's unaccompanied or separated status, or on the basis of migratory or residence status, or lack thereof.

In 2012, following its Day of General Discussion on “the rights of all children in the context of international migration”, the Committee noted unequivocally that the detention of children because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children based on their immigration status. This position has since been echoed by virtually every relevant United Nations institution and by regional human rights experts, including IOM, OHCHR, UNHCR, UNICEF, the Working Group on Arbitrary Detention, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights and the Council of Europe, to name but a few.

Alternatives to detention are well documented and have proven to be effective, more humane and cheaper. However, they tend to be poorly understood by, and even unknown to, the authorities, including immigration officials. They are inexistent or too few in number for current needs. Where they are available, immigration officials at the frontlines may not be aware of their existence or may not be equipped to take them into account when applying best interests in their decisions, and these officials often have a great deal of discretionary power in placing individuals – including children – in detention.

The International Detention Coalition and UNHCR have both documented a range of good practices – applicable in different national contexts – that can be applied as alternatives to detention and that allow for supervision of migrant children and their families.

International Detention Coalition, 2012, *Captured Childhood: Voices of children who have gone through immigration detention*, a useful advocacy document. Available at <http://idcoalition.org/publication/captured-childhood/>;

UNICEF, 2011, *Administrative Detention of Children: a Global Report*: Provides an overview of types of immigration detention and case studies. Available at [www.unicef.org/protection/Administrative\\_detention\\_discussion\\_paper\\_April2011.pdf](http://www.unicef.org/protection/Administrative_detention_discussion_paper_April2011.pdf);

UNHCR, 2012, *Detention Guidelines – Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Available at [www.unhcr.org/505b10ee9.html](http://www.unhcr.org/505b10ee9.html);

International Detention Coalition, 2015, *There are Alternatives*: Describes a range of models of alternatives to detention for children and families. Available at <http://idcoalition.org/publication/there-are-alternatives-revised-edition/>.

When it is in the child's best interests to keep the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and/or guardian, and requires the authorities to choose alternative measures to detention for the entire family.

As stated by the Committee on the Rights of the Child, “legislation, policy and practices should allow children to remain with family members and/or guardians if they are present in the transit and/ or destination countries and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved”.<sup>11</sup> The documents listed above indicate a range of alternatives to the immigration detention of children and their families. They vary from alternatives implying certain restrictions or obligations (e.g. regular reporting to the authorities, deposit of a financial guarantee, obligation to stay at an assigned residence, deposit of passport, etc.) to various forms of accommodation without conditions or restrictions.

11 Committee on the Rights of the Child, op. cit., note 56.

## Adequate housing and/or accommodation

The right to adequate housing is recognized in international law as part of the right to an adequate standard of living. Although the right to housing is not an absolute right, it still translates into several concrete obligations for States that are relevant to the current situation of vulnerable migrant children. Such obligations include preventing homelessness, addressing discrimination, protecting against forced eviction, ensuring security of tenure to all, and guaranteeing that housing standards are correct.

Reception facilities and accommodations for newly arrived and/or detected migrant children – travelling with their families or as unaccompanied or separated children – can be named as or understood by national authorities under a variety of terms: transit centres, accommodation centres, reception camps, and so on.

The term “centre” refers to any place used for collective accommodation. Many States make use of collective facilities, which are in principle open facilities. Some States establish initial or so-called “transit” centres to accommodate asylum seekers pending an admissibility decision. Others do not make any difference between such initial/transit centres and other accommodation centres. Migrants in transit centres usually have less access to community services, including education and health. This is of concern for children, who, under the Convention on the Rights of the Child, should have access to such services on the same basis as children who are nationals of the territory. Many States also make use of private homes (including hotels and apartments), particularly when attempting to manage large movements of individuals into their territory.

With such a wide variety of practices and standards, the health, dignity and safety of vulnerable migrant children is at risk. It is thus crucial for States to improve the accommodation standards pertaining to children and families and to sure that they meet international and national requirements. The composition and dimensions of the facilities should be adequate and respect the right to privacy, safety and family life. The minimum standards for the protection of children in migrant accommodation centres are meant to protect children and adolescents from violence and provide them with support. They should include the following at a minimum: sufficient surface area per person and family, with openings and ventilation; separated safe spaces for women and girls; access to appropriate facilities for hygiene and sanitary needs that are separated by gender; access to water supplies, gas and electricity; and secure storage space for personal belongings. The facilities should be accessible for persons with disabilities. Health and safety standards should always be interpreted considering the best interests of the child, and not be used to justify any action that may cause further harm to children (i.e. dismantling informal camps without offering alternatives or placing children in closed centres). When clear national guidelines are missing, international standards should apply.<sup>12</sup>

Child safeguarding or protection rules are another important consideration, since adequate housing does not limit itself to the physical conditions of the building. All entities and individuals engaged in providing accommodation and services for migrants should be duly authorized to do so by the competent authorities. Recruitment screening procedures and codes of conduct should be mandatory for all staff, including police, immigration authorities, contractors and volunteers, as part of general child safeguarding policies. Staff in contact with children should have clear responsibilities, access to regular training focusing on the skills required for their work, and managerial support and supervision. There should be clear rules of accountability, reporting mechanisms for any child protection concern and adequate follow-up procedures. Children and their families should receive information about complaint mechanisms and be able to use them without interference. Regular monitoring and review should be conducted by State agencies, including ombudspersons, and children’s opinions given due weight in such processes.

For a more thorough explanation of the development and implementation of minimum safeguarding techniques and standards for migrant and refugee accommodation centres, specifically designed to provide protection for children and adolescents, see the minimum standards<sup>13</sup> developed by UNICEF and the Government of Germany.

12 See The Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, Minimum standards in shelter, settlement and non-food items. Available at [www.spherehandbook.org/en/how-to-use-this-chapter-2/](http://www.spherehandbook.org/en/how-to-use-this-chapter-2/).

13 UNICEF/ Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Minimum Standards for the Protection of Children, Adolescents and Women in Refugee Accommodation Centres* (2016). Available at [www.unicef.de/blob/133656/7de7042ecd24cde82d0c49a875bcd374/minimum-standards-for-the-protection-of-children--adolescents-and-women-in-refugee-accommodation-centres-data.pdf](http://www.unicef.de/blob/133656/7de7042ecd24cde82d0c49a875bcd374/minimum-standards-for-the-protection-of-children--adolescents-and-women-in-refugee-accommodation-centres-data.pdf).

In addition to minimum standards, and as resources allow, other conditions should be met, including availability of services, materials, facilities and infrastructure such as child-friendly spaces providing opportunities for recreational activities and for religious and spiritual life. Access to Wi-Fi, which facilitates access to information and helps maintain contacts with family members, friends and social support networks, is also an important consideration.

## Access to essential basic services, including health and education

For many migrant children, migration may have a positive impact because of the greater possibilities they have to access health and nutrition, education, and social and child protection services in the destination community. However, these benefits are not universal, and many migrant children face legal, procedural, financial, cultural and social barriers to accessing services at destination and while in transit.

One of the main bottlenecks preventing migrant children from accessing services is the overall deficiency in services for all children within a territory, for want of prioritization, capacity and funding. Where service providers are not equipped to provide quality health, education, protection and social welfare services to nationals, they are unlikely to absorb the additional demands of children on the move. Where services do exist, they are often not adapted to the specific needs of families and children on the move or returned children; this includes the mode of delivery, where highly mobile or transiting populations have to be reached, the type of support, such as catering for language and cultural barriers, and addressing specific needs such as those of unaccompanied and separated children or children who have suffered from violence and exploitation on their journey. In many cases, the accessibility of services is explicitly linked to migratory status, citizenship or residency, either in law or in practice. Children migrating internally may also be affected, where access to services is linked to registration in the locality (and the registration often difficult to obtain).

The complexity of policies and guidelines and the growing responsibility of service providers, linked with inadequate and insufficient training for staff, often create confusion, which might ultimately lead to refusal of entitlements to migrant children and their families. In addition, access to services is often within the sphere of competence of regional or local authorities, adding another layer of complexity and potentially generating inequities in access to services even within the same country.

The Principles and Guidelines on the human rights protection of vulnerable migrants<sup>14</sup> also stress the importance of providing non-discriminatory, culturally appropriate and gender-sensitive health care and access to shelter and housing. They urge countries to include migrants in national plans of action on housing and to develop procedures and mechanisms to ensure the access of all school-aged migrant children, including separated and unaccompanied children, as well as undocumented children, to adequate and appropriate education, on the basis of equality of treatment with nationals and with primary education free of charge for all.

However, particularly in transit countries, child migrants and their families often face the risk of human rights violations and abuse, and may be denied access to quality services, as transit countries may not be willing to provide those services or question their obligation to provide them to migrants who are only in transit on their territory. Article 2 of the Convention on the Rights of the Child clearly stipulates that all countries must "... respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind". All persons under the age of 18 involved in or directly affected by international migration are entitled to the full enjoyment of their rights and access to quality services, and States are obliged to treat children first and foremost – and without exception – as children.

States should place the best interests of the child before any administrative requirements and ensure that all children on their territory have equal access to quality services, regardless of whether the child is a national or resident of the country, in transit or at destination, or a regular or irregular migrant.

<sup>14</sup> OHCHR/Global Migration Group, *op. cit.*, note 10.

## 6.2 APPLICATION OF THE BEST INTERESTS PRINCIPLE IN PRACTICE

### Summary: Application of the best interests principle in practice

- The State must determine and implement a solution for each child at risk/vulnerable child and give primary consideration to the child's best interests in the process.
- Possible solutions include, but may not be limited to, return, local integration or a solution in a third country.
- In order to implement the substantive and procedural actions and obligations flowing from the Convention on the Rights of the Child, it is recommended that each State establish a best interests process, consisting of BIAs, process planning and a BID. That being said, resource constraints will often dictate that this process is simplified or limited in application.
- Safeguards to consider include the provision of a trained interpreter, an independent guardian or representative, legal representation, child-friendly procedures, multi-disciplinary independent decision-making and appropriate procedures to ensure the right of the child to participate, file a complaint and appeal as relevant at any stage of the best interests process.
- Those involved in the BID are encouraged to explore a full range of possible solutions, ensuring that the final outcome clearly explains and justifies which solution would be in the individual child's best interests.
- It is further recommended that States ensure that every child is provided with a temporary residence permit as soon as possible, and that the permit be renewed for the duration of the process and until such time as the BID is implemented.

### Introduction

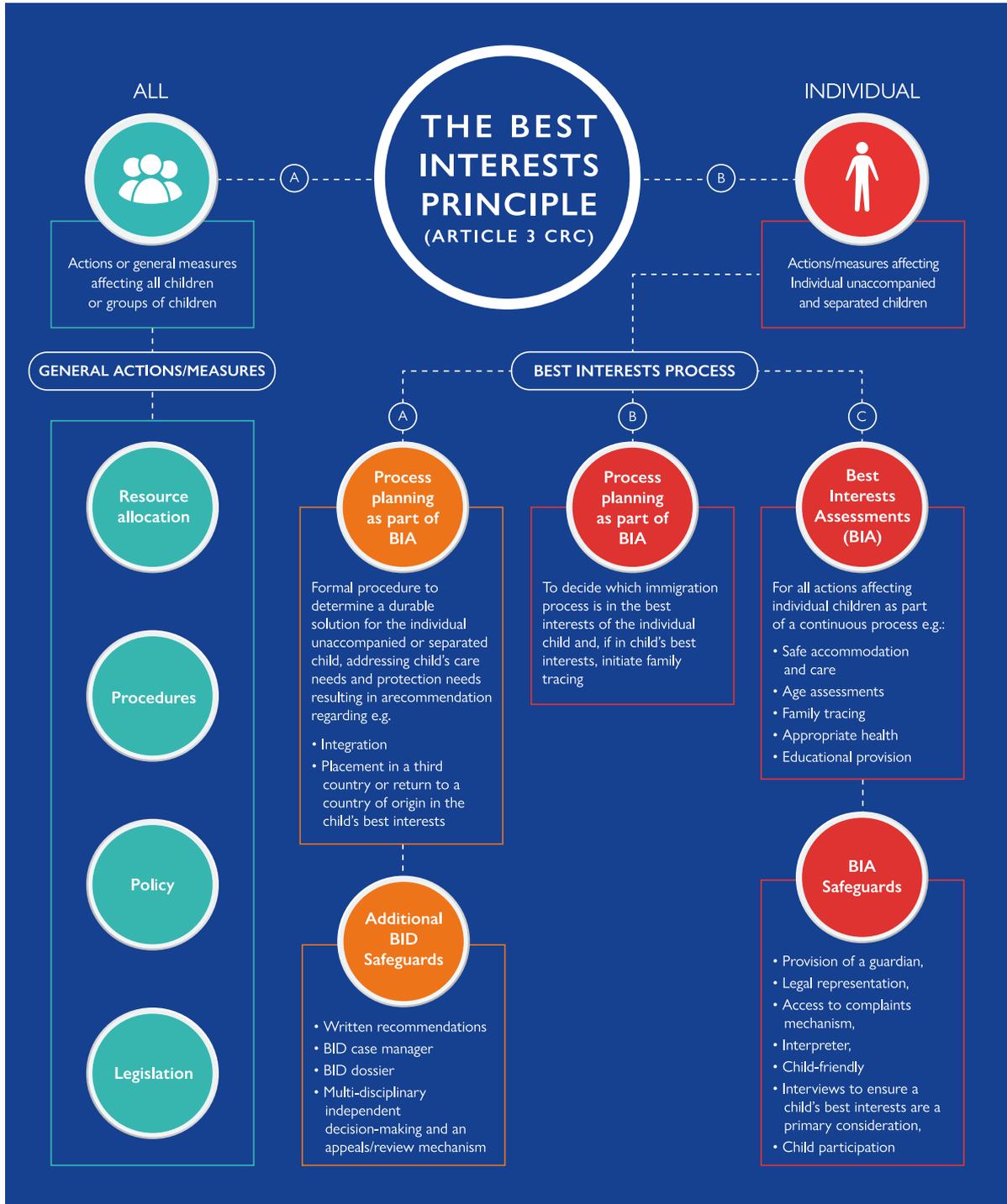
When considering what mechanism would give best effect to the best interests principle, it is recommended that States adopt a rights-based approach whereby children are recognized as active subjects of rights and the Convention on the Rights of the Child as the appropriate legal and normative framework. When applying Article 4 of the Convention to unaccompanied and separated children in particular, their vulnerability must be taken into account and will result in making the assignment of available resources to such children a priority.

This is best done through a best interests process, which can, depending on the national context, combine all or some of the following elements: BIAs, a best interests process planning meeting and a BID.

The best interests process addresses both substantive and procedural actions in relation to any child on the State's territory and may, depending on the individual case, result in the identification of a sustainable solution that is in that child's best interests and does no further harm to the child.

The length of time the process takes depends on the complexities of the individual child's needs, his/her physical and psychological health and any need for expert and home study reports (see *Home study report* on [page 280](#)). However, as a matter of principle, it is not in a child's best interests for decisions to be delayed unnecessarily or for them to be taken before the child has had the opportunity to recover from any trauma preventing him/her from disclosing information indicative of future risks and needs. In addition, care should be taken to ensure that an older child's case is not permitted to drift so that no sustainable solution is in place as s/he approaches 18. Generally, States are encouraged to complete the BID as soon as possible, observing the safeguards referred to in section 6.3 on [page 274](#), unless it is exceptionally determined to be in that child's best interests to delay the process.

Figure 1 describes a possible approach to operationalizing the best interests principle in practice. It sets out general actions for all children and specific actions for individual unaccompanied or separated children, which should both be informed by the best interests principle. It also sets out procedural safeguards for the best interests process in general and for the BID in particular.



**Figure 1**

A possible approach to applying the best interests principle:  
 From theory to practice

## Substantive implications of the best interests principle

### **The best interests principle for vulnerable migrant children who are with their families and/or caregivers**

When vulnerable migrant children are determined to be travelling with their parents or caregivers, a trusted and reliable family member or a responsible adult – in other words, when they are satisfactorily identified by a competent body as NOT being unaccompanied or separated – the de facto assumption is that they are to be cared for and protected by their parents or caregiver and that the latter are responsible, in the first instance, for protecting the child's best interests. However, this does not relieve the State of the obligation to undertake a BIA when considering solutions for the child, especially in terms of the right to remain on the territory and/or removal or return to the country of origin. The child should be treated as an individual rights holder, who has an individual case for consideration in asylum and migration status procedures.

### **Appropriate protection and care**

Unaccompanied or separated children have the same substantive rights as all other children within the State's jurisdiction who can no longer rely on a parent, other relative or guardian to care for and protect them. The State is therefore responsible for providing such children with appropriate protection and assistance, an adequate standard of living, access to health services and recreational activities, and the same educational opportunities as all other children on its territory. It is also obliged not to detain unaccompanied or separated children merely because they have entered the State irregularly or have no permission to remain. Where unaccompanied or separated children are in a need of a solution, generally States will meet this substantive right by referring them to existing child protection and welfare systems. In situations where the local and/or national child protection system is weak or unable to assume care of unaccompanied or separated children for whatever reason, others – such as civil society organizations or NGOs – may step in. Such situations should nevertheless be regarded as the exception and should always be subject to a high degree of scrutiny and oversight.

### **Timely and proper referrals**

The fact that an unaccompanied or separated child is outside his/her country of origin or habitual place of residence may also indicate that s/he has suffered torture or some other form of serious harm or exploitation or has been a victim of human trafficking. Some unaccompanied or separated children may have been neglected by their families, in which case it may not be in their best interests to be returned to the family's care. A State can best address these possible risks by ensuring that unaccompanied or separated children are referred to a best interests process and any appropriate immigration/asylum procedures as soon as possible, where this would be in that child's best interests and in order to avoid further exposure to risks.

It may be in the unaccompanied or separated child's best interests to be returned to his/her parents, relatives or adults who previously cared for him/her, whom the State is therefore under an obligation to trace. If they are located and the relationship verified, the State may undertake or commission a home study report to evaluate if it would be in the child's best interests to be returned to the parents or caregivers. The procedure for restoring family links and, where possible, working with family members and the child to explore when reunification might be in the best interests of the child is a crucial first step in this process. These actions are all part of BIAs.

### **The obligation to find a solution**

The obligation to find a solution for unaccompanied or separated children is based on the acknowledgement that it is usually in the best interests of such children to be reunited with their families or provided with alternative permanent care by other adults able and willing to do so in an appropriate manner. At the same time, it is in children's best interests to be provided with a nationality, if they do not have one, or to have their nationalities confirmed by appropriate documents, or to be granted immigration status permitting them to live in a country where they will not be at risk of harm or ill-treatment and where their rights under the Convention on the Rights of the Child can be respected.

## Definition of a solution

**Sustainable solutions** are those that ensure that unaccompanied or separated children are able to **develop into adulthood** in their country of origin or habitual residence, in the receiving country or in a third country, in an environment that meets their needs and fulfils their rights, as defined by the Convention on the Rights of the Child, and does not put the children at risk of persecution or serious harm.

Solutions should not presume that age is the only risk factor in a vulnerable migrant child's case. Merely permitting a child to remain in the State until s/he turns 18, potentially or because s/he has no passport to confirm his/her nationality or because the State has not been able to trace the family or previous guardian, is not a meaningful solution for either the State or the child. It can lead to the child experiencing prolonged detention and/or homelessness, going missing or being vulnerable to trafficking networks when s/he turns 18 and is no longer entitled to support and accommodation or leave to remain in the receiving State as a child.

Further, States should not postpone decisions on children's right to international protection or conclusions in the BID process until unaccompanied or separated children become adults. Nor should they delay consideration of children's international protection concerns indefinitely in hope that family tracing will identify a family member in the country of origin who can take the child and thus allow for his/her removal or return. Any delay not necessitated by an unaccompanied or separated child's individual circumstances is likely to exacerbate the child's anxiety about his/her future and, consequently, may lead to psychological and emotional harm.

## Examples of possible solutions

### Integration in the receiving country

In some circumstances, integration into society in the receiving country is likely to be the solution that is in the child's best interests. This is more likely to be the case for children who have been granted international protection on the basis that they will be at risk in their country of origin. It will also be more common where return is not possible on either legal or factual grounds, e.g. where there is no re-admission agreement with the country concerned or the child is stateless.

Integration in the receiving country must be based on a secure legal status, including residence status, and be governed by the rights under the Convention on the Rights of the Child that are fully applicable to all children who remain in the country, irrespective of whether this is due to their recognition as refugees, because they have been accorded some other form of international protection or there are other legal obstacles to return, or whether the BID has recommended against return and the children have another right to remain in the receiving State, in circumstances where respect for their rights under the Convention and/or any other applicable legal instruments cannot be guaranteed in their country of origin or habitual residence.

### Family reunification in the receiving country

If a child has been granted refugee status or another form of national or international protection, it may also be appropriate to grant the child's parents, other relatives or the adults who previously cared for him/her permission to enter the State for the purposes of family reunification, if this is in the child's best interests. Any such application should be dealt with in a positive, humane and expeditious manner and in the context of children's right not to be separated from their parents against their will unless this is in their best interests.

Where it is believed that an unaccompanied or separated child's parents or relatives or an adult who had previously taken responsibility for him/her has travelled to the receiving country and been granted permission to remain, sufficient time should be allowed for them to be located in-country and a home study report completed.

## Return to the child's country of origin

Should return be considered the most appropriate solution, it should not be carried out unless a suitable caregiver, such as a parent, other relative, other adult caretaker, or a child-care agency in the country of origin, has first agreed and is able to take responsibility for the child and provide him/her with appropriate protection and care.

States are encouraged to inform children of the availability of any assisted voluntary return and reintegration programmes and assist them to access any such schemes, before any decision is taken on forced return.

### Return to the child's family

Children's right to be brought up by their parents is one of the fundamental principles of international human rights law, and it is generally acknowledged that the family is the natural and fundamental unit of society and that it should be protected by the State. Furthermore, to ensure the full and harmonious development of their personalities, children should grow up in a family environment, in an atmosphere of happiness, love and understanding,<sup>15</sup> and States should take all appropriate steps to ensure that unaccompanied or separated children are reunited with their parents except where further separation is necessary for the best interests of the child. Children are thus helped to preserve their identity and family ties, and to retain their ethnic, religious, cultural and linguistic background.

That being said, full account should be taken of children's right to express their views about any proposed return, and any reluctance to be reunited with their families should be carefully assessed. It should not be automatically presumed that it is always in children's best interests to be returned to the care of their parents or other relatives in their country of origin.

When unaccompanied or separated children have previously been abused, exploited or neglected by their parents in breach of the rights enshrined in the Convention on the Rights of the Child, it is very unlikely that it would be in their best interests to be returned to the care of their parents in a country of origin or a third country. This is an issue that the BID should address as a priority.

Practical examples of such situations include cases of children being sold to human traffickers by a parent, or left to fend for themselves on the streets because of a parent's addiction or new relationship or marriage. Further, attention must be paid to the risk of stigmatization and social exclusion that trafficked children, especially those exploited in the sex industry, may experience upon return to their country of origin or arrival in a third country. Finally, the risk of possible exclusion or punishment by family or the community that await the returning child, for instance, for failing to pay off debts owed to smugglers, may also need to be considered and assessed.

States should also analyse the precise circumstances which led to the unaccompanied or separated child being separated from or abandoned by his/her parents. Any factors which could potentially lead to a further separation should be assessed, such as:

- Local patterns of violence and displacement;
- Food shortages;
- Lack of security;
- Lack of access to basic services; and
- The possible recruitment of children into the armed forces.

### Return to an appointed legal guardian

If an unaccompanied or separated child's parents or other family members cannot be traced or are known to have died, the child should only be returned to his/her country of origin if appropriate arrangements have been put in place for his/her accommodation and care. Provision should be made for an adult to acquire legal responsibility for the unaccompanied or separated child on return and for this responsibility to continue until the child becomes an adult or a later date, if the child suffers from a physical or other disability or is particularly vulnerable. It is not generally understood to be in a child's best interests to be returned to an institution, orphanage or residential children's home, which does not provide such individualized guardianship. Return to a child welfare institution in the

<sup>15</sup> The Preamble to the Convention on the Rights of the Child recognizes "that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

country of origin or a third country should be considered the least preferred option, to be taken only if it is part of an agreed plan to reunite with family in a timely fashion or there are exceptional reasons for believing such return to be in the child's best interests.

### **Solution in a third country**

Relocation to a third country may be in children's best interests when they cannot return to their country of origin and there are no other options in the receiving State. For example, if an unaccompanied or separated child has parents or close relatives who have a right to remain in a third country and a home study report has confirmed that they are capable of and willing to care for the child, it is likely to be in the child's best interests to be reunited with them in that third country.

### **Family tracing and restoring family links**

The search for a solution should start with an analysis or assessment of the possibility of restoring family links and family reunification. States therefore need to take proactive steps to trace children's parents, if doing so is in the child's best interests.

However, as national child protection systems recognize, some children may be at risk from members of their own family. States should therefore recognize that it may not be in an individual child's best interests to be returned to the care of his/her family or even to resume contact with them. This will particularly be the case when the child has previously been abused, exploited or neglected by a parent or legal or customary guardian.

Other children may have been put under pressure by smugglers or their families not to reveal the families' whereabouts. It is vital that they be informed about the initial objective of family tracing, which is to restore family links. A guardian, or person in a similar position, could play a key role in counselling the child on the process and help build the necessary trust, thereby encouraging truthful disclosure. If a child refuses to consent to family tracing, but family tracing is nevertheless assessed to be in the child's best interests (for instance, where process planning finds that the child does not have any international protection needs), a guardian could consent to tracing.

Unaccompanied or separated children should not be expected to consent to family tracing on their behalf if they believe that this would place them or members of their family at risk. It will usually be inappropriate to initiate family tracing before a child's entitlement to international protection has been determined, especially if the child faces a risk of persecution by State agents. Care should be taken to ensure that any information about children and their families is collected, processed and distributed confidentially, to avoid placing them at risk.

Before commencing family tracing, it is recommended to assess:

- Whether and when it would be safe to trace the child's family;
- Whether and when it would be in the child's best interests for family members to be traced;
- Which, if any, organizations may be able to facilitate family tracing in the child's country of origin or a third country;
- Whether the child is old and/or mature enough to provide reliable information about his/her family and its whereabouts;
- Whether the information being provided by the child is accurate or whether it is designed to protect the child's family or any agents/smugglers who helped him/her come to the receiving country;
- Whether there are any conflicts of interest between the child and the parents or any other family members;
- Whether the child is still too afraid of or influenced by any agents/smugglers or traffickers to provide a true account of his/her origins;
- Whether the child is fully informed and understands his/her rights and the possible implications of tracing;
- Whether the child is giving informed consent to the family being traced at that point of time;
- Whether the child's guardian has consented to family tracing having assessed that it would be in the child's best interests.

If tracing is in an unaccompanied or separated child's best interests and does not place him/her or the family at risk, those involved should, with the child's or the guardian's consent, implement procedures to search for and find

the family as soon as possible. Where necessary, it may be useful to work with United Nations organizations, the ICRC, the National Red Cross or Red Crescent Society in the country, IOM, UNICEF or the ISS network of national branches, affiliated bureaux and correspondents. At the same time, the child should be regularly informed about any progress made and provided with any support needed to re-establish sustainable contact with the family.

## The components of the best interests process

Figure 2 on the following page sets out possible components of a best interests process from the moment an unaccompanied or separated child arrives or is detected in the territory of a State until a sustainable solution is found. It describes the safeguards and actions that need to be in place throughout the process, building on international and regional legal instruments and on authoritative guidance, notably the general comments of the Committee on the Rights of the Child. Systems and procedures vary considerably among and even within States. Consequently, this Figure is very general in its conception and aims to simply indicate the elements that may be drawn from to strengthen national child protection and asylum and migration systems and procedures where needed.

## Procedural safeguards, including guardianship

States are required to put in place procedural safeguards flowing from the Convention on the Rights of the Child, which ensure that migrant children can access the same child protection and welfare provisions as all other children on the territory of the State. These safeguards should ensure that the child's best interests are treated as a primary consideration in BIAs and the BID; they help ensure that the child has the physical, psychological and emotional stability to participate in the status determination and best interests process.

To ensure that children's best interests will be treated as a primary consideration, children should be provided with a professional interpreter, ideally trained specifically to interpret for children; a guardian or a professional exercising a similar role; and a child-friendly interview. Steps should be taken to ensure that children can exercise their right to participate, file a complaint and appeal, as applicable under national law.

## Legal capacity and the appointment of a guardian

Being under 18, children are generally speaking not legally competent to make their own decisions about the services offered or to appreciate the legal and practical consequences of processes in which they are asked to participate.<sup>16</sup> In the case of migrant children travelling with their parents or a recognized caregiver, the parent or caregiver is to be recognized as being competent to take such decisions on behalf of the child, unless the relevant child protection authorities have ascertained it is not in the child's best interests for this to happen and have undertaken the necessary processes under national law to remove the child from the care of the parent/caregiver. In the case of unaccompanied or separated children, or migrant children who have been removed from the care of a parent or caregiver, this warrants the appointment of a guardian and a legal representative, and/ or other persons who can support and ensure the child's best interests as soon as practicable. In particular, States should take steps to ensure that a guardian represents and assists an unaccompanied or separated child to obtain access to and benefit from reception and care provisions and procedures.

## The importance of a qualified, independent guardian

Every guardian should have sufficient expertise in the field of childcare to be able to ascertain whether the best interests of the child are being safeguarded and his/her legal, social, health, psychological, material and educational needs are being appropriately met. As such, a guardian should have the necessary training and experience in child protection and child welfare, and, ideally, specific knowledge of international human rights law relating to unaccompanied or separated children.

National systems of guardianship vary significantly throughout the world. States have different understandings of the functions of guardians, with some countries seeing them primarily as legal representatives and counsellors of the

<sup>16</sup> In some countries, legal capacity is attained at a younger age than at 18. For the purposes of ensuring child protection safeguards are maintained and obligations under the Convention on the Rights of the Child met, child-friendly procedural safeguards should be put in place and followed for all children under 18.

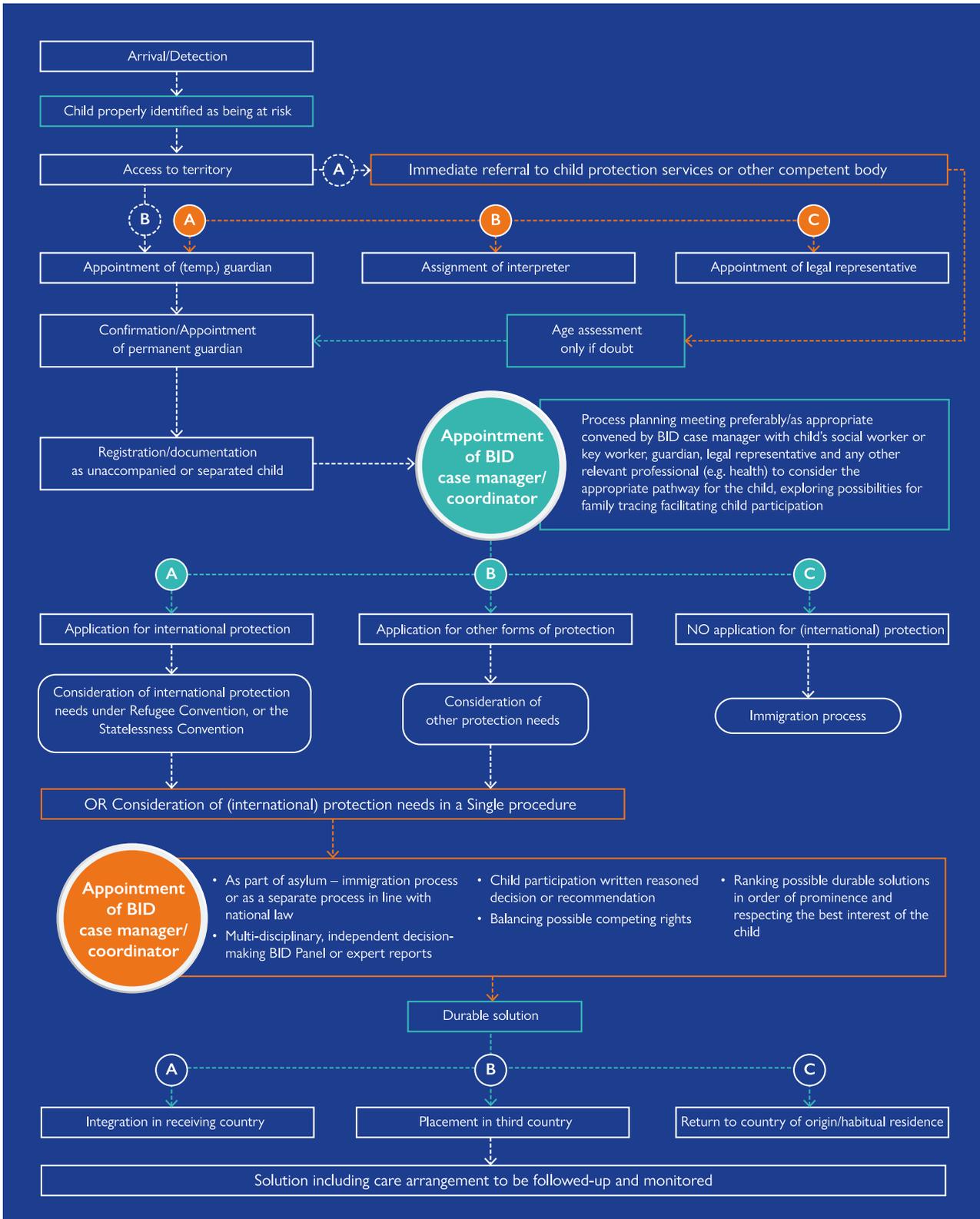


Figure 2

Possible components of a best interests process

children in their care, whose main responsibility is to assist their wards in asylum applications and procedures during the process of migratory status determination. In some countries, these guardians are also expected to arrange for the child's education, accommodation and health-care needs. However, in many States, guardians – as the main adults in the child's life – are expected primarily to ensure the child's physical and psychosocial well-being, and have little or no substantive input into the asylum/migration process. In many countries, it is not uncommon for a legal representative to be expected to ensure appropriate schooling for the child, or for a social worker to assist the child legally in the asylum procedure. Both guardians and other social workers can, in some States, participate in the BID, identifying sustainable solutions and integration support.

A further challenge is that of differentiating between professionalized, as opposed to benevolent or voluntary, guardianship systems. In a few countries, both types of systems exist in parallel. Professionalized guardians are employees of government agencies and NGOs who work in the social and legal sectors and have undergone formally recognized training to an agreed standard that may comprise licencing requirements. Benevolent and voluntary guardians are private persons who volunteer to become guardians. Depending on the country's system, capacities and potential conflicts of interest will have to be considered from different angles. In such cases, professionals trained in child protection – such as the ISS or UNICEF – can provide invaluable input.

### **The guardian as a bridge between the unaccompanied or separated child and other professionals**

In some States, migrant children are also likely to be in contact with a very wide range of professionals, such as border and immigration officials, social workers and foster carers, employees in residential accommodation, lawyers and the judiciary, health-care workers, teachers and interpreters; they may have a limited understanding of the different roles that these people can play in their lives. Migrant children travelling in a family can generally rely on a parent or relative to mediate between them and other adults and ensure that their rights are protected. Unaccompanied or separated children cannot. Guardians can act as the link between children and existing specialist agencies and individuals who provide care and other services, explaining the children's views and advising them whether any services proposed are in their best interests.

### **Possible role and tasks of guardians**

Child guardians should help children to participate throughout the best interests process. They should act in the child's best interests and play a variety of roles throughout the process, for example:

- Supporting and advising the child based on a relationship of trust;
- Facilitating the child's participation;
- Monitoring and coordinating the child's interaction with other professionals and any NGO advocates;
- Using their expertise to advise other professionals involved with the child;
- Ensuring that the child's health, educational, accommodation and support needs are met;
- Ensuring that the child obtains suitably trained and experienced legal representation;
- Making sure that the child has access to procedures to determine his/her needs for international protection if s/he wishes to apply for it or it was proposed as a result of the process planning meeting;
- Obtaining any necessary expert advice on behalf of the child;
- Advising the child early on about the possibility to restore family contacts through family tracing and its possible consequences, if the child is not or no longer in contact with the family;
- Acting on the child's behalf in relation to status determination decisions and the BID;
- Assisting the child to appeal against or complain about any decisions which appear to be unlawful and/or unreasonable, in accordance with established rules and procedures.

Responsibility for a child should preferably not be transferred between different guardians unless this is necessary in order to provide the child with specialist representation or support and is in the child's best interests. Children for whom it is necessary to provide a different guardian should be fully informed of the proposed change and the reasons for it. A child's request for a transfer to an alternative guardian should be facilitated if the request is reasonable and in the child's best interests. Children may request such transfers because they are looking for a guardian they can trust and to whom they can disclose their history, needs and families' whereabouts.

## How to consider best interests

This section provides an overview of the possible components of a best interests process, i.e. a BIA, process planning and a BID.

### Best interests assessment

A **BIA** is part of the overall best interests process and an assessment tool for protection of individual children. It generally results in an assessment of the child's situation and recommendations for protection and care. It can take place at various points throughout the best interests process, whenever an action is planned or taken that may have a direct impact on the unaccompanied or separated child's best interests. Moreover, an initial BIA is a fundamental first step to engaging the best interests process and may, depending on whether the child is in need of a sustainable solution, lead to a BID.

In many States, BIAs are most appropriately carried out by the competent child protection services. To reach the most informed conclusion, they should involve expert professionals from other disciplines, as relevant. Those involved in BIAs should have the necessary training, skills and expertise. The unaccompanied or separated child and the guardian should also participate, to enhance credibility and comprehensiveness.

BIAs may be needed in relation to, among other things, decisions to:

- Place a child in accommodation and decide on immediate care arrangements which are appropriate to meet his/her individual needs;
- Determine whether tracing of the child's family would be in the child's best interests and not put the child or family at risk, in the case of unaccompanied or separated children;
- Provide a child with health, educational or recreational services;
- Apply or not apply for international or other forms of protection;
- Decide whether a formal BID is needed;
- Collect the information needed for a BID.

Any later formal BID is likely to benefit from BIAs that are properly supported and documented and included in the BI(D) dossier.

### First-line referrals and process planning

In most cases, the immediate welfare needs of unaccompanied or separated children are met after they have been referred to the competent child protection system and services. Immigration status may also need to be resolved.

#### Identification of unaccompanied or separated children at risk

##### *When a child is found at the border*

When a child arrives or is found at the border alone or accompanied by someone who is not the child's caregiver, it is recommended that a BIA be undertaken without delay, to assess whether the child is at risk.

Children travelling alone and arriving at a State border will in general immediately raise questions about their situation. Equally, children arriving with certain adults or even family members may raise alarms due to their behaviour and demeanour or other child protection risk indicators.

Of course, older children or adolescents travelling alone may have passports, visas and other relevant documents, and they may be arriving in the country for a holiday, meeting their parents or travelling as a group with their parents' permission. Many children travel alone in circumstances which have been planned by the family and which do not meet the definition of unaccompanied or separated child, or raise any other child protection concerns.

However, to ensure that no child falls between the cracks, and given that in some instances information which might otherwise lead to a BID may not immediately be proffered by the child or available otherwise on first contact, it is recommended that a simple BIA be done, for example by contacting child protection services, in order to assess whether a more formal BID or risk assessment is required.

Unaccompanied or separated children can be most effectively identified by reference to the following non-exhaustive list of risk factors:

- Fraudulent documents (which may indicate smuggling, persecution, and/or human trafficking);
- No documents, or invalid documents (e.g. no/expired visa);
- Demeanour (behaviour possibly caused by pressure from a smuggler or trafficker or, indirectly, parents);
- The child states that s/he does not want to return home (reluctance to join parents or previous caregiver);
- The child indicates that s/he wants to apply for international protection or another status.

#### *When a child is found on the territory*

In this case, additional factors may be relevant, including, for example, when the child is unable or unwilling to give the address or name of a caregiver or accommodation facility in the receiving country (indicating the child may be a runaway or victim of human trafficking, have been involved/forced into organized begging, pickpocketing and/or child prostitution, be on the move to another destination, or have absconded from care to avoid return).

Potential actions/responses include:

- Granting access to the territory (in case of identification at the border);
- The quickest possible referral to child protection services or a court, as applicable under the national system;
- The appointment of a guardian, interpreter, legal representative, etc.

#### **Temporary residence permit**

For the duration of any procedure the child may need to go through, s/he should benefit from a temporary resident permit.

#### **Main aim of the process planning meeting**

It is recommended that the best interests process comprise a process planning meeting, to ensure that unaccompanied or separated children are channelled in a timely manner in the appropriate procedure, and allowed to seek international protection if needed.

Process planning is intended to bring efficiency both for the children and for the adults appointed to assist them, and to help avoid situations where (especially older) unaccompanied or separated children are left to “drift” and given leave to remain or some other form of temporary residence status until they are 18, after having been rejected in an asylum procedure or where no examination of their application for international protection would otherwise take place. It would also prevent situations where unaccompanied or separated children are channelled into the asylum procedure regardless of potential international protection needs, clogging the system and resulting in longer waiting periods; this would be in the best interests of neither the child nor the relevant authorities.

More specifically, process planning may be used to:

- Share the contents of the best interests dossier (on the child's circumstances, needs and wishes), while respecting any applicable data protection laws, as compiled to date;
- Take note of any request for, or wish to request, international protection that a child may have expressed to that point;
- Where no such request has been made, ascertain whether an application for international protection should be made on behalf of the child and, if so, whether s/he can give informed consent or whether the guardian will have to decide on his/her behalf;
- Discuss whether it is necessary to obtain any further medical, expert or country evidence for the status determination process;

- Consider what steps must be taken for a BID;
- Decide on a target date for the BID, considering that it may be preceded by, or run concurrent to, a status determination procedure, and that any disability or trauma from which the child may be suffering, and any special educational needs, may mean that a longer period will be needed to complete the BID process;
- Discuss whether and when family tracing should be initiated. If relevant, this discussion should consider whether the child has given, or can give, informed consent to such tracing or whether the child's guardian may have to be asked to consent on his/her behalf.

### Who participates in the process planning meeting?

It is recommended that the child's guardian, legal representative and designated social worker (as relevant) participate in the process planning meeting. Appropriate experts may also be invited to attend or prepare reports. They may be invited by a professional responsible for managing the BID process, such as the child's guardian or legal representative, or a BID case manager, as suggested in this Handbook. It would also be appropriate to invite the child to attend part of the meeting, if s/he is sufficiently mature and attendance would not exacerbate any emotional or psychological trauma. Alternatively, the guardian could represent the child's views and best interests.

### The best interests determination

Decisions regarding sustainable solutions for unaccompanied or separated children have long-term implications for their safety and welfare and should not be made lightly. It is therefore recommended that a formal BID procedure or mechanism be created, with clear procedural safeguards and documentation requirements, designed to find solutions for individual unaccompanied or separated children that are in their best interests.

The BID should be devised so that the child can participate in the process and involve participants with relevant expertise who can identify and balance all factors relevant to recommending the best available option for that child, which will be both sustainable and conclusive (for further details, see [section 6.3 on page 274](#)).

Every child displaying risk factors, whether in need of international protection or not, has the right to a BID to identify a sustainable solution. Even if an unaccompanied or separated child is found to be entitled to international protection, it is recommended that the State conduct a BID to ensure that the child's best interests are met in relation to other aspects of his/her life, as it cannot be assumed that a defined immigration status alone will achieve this. Similarly, if a child is found not to need international protection, it is important to undertake a BID, which may reveal that it is not in the child's best interests under the Convention on the Rights of the Child to return him/her to the country of origin or place him/her in a third country.

Section 6.3 on page 274 describes a suggested formal BID procedure and its main features in greater detail. States may wish to draw on all or some of the elements, as applicable and where there is no system in place or where current systems require strengthening. Admittedly, in many States it will not be possible to institute a formal BID procedure as outlined in this Handbook – or the State will ask an organization other than the national child protection and/or immigration authorities to conduct the BID. In such cases, the organization concerned must have clearly defined responsibilities and authorizations attributed by the State, and must proceed with extreme caution. Wherever possible, it should decline to conduct the BID without the participation of State participants, especially if the BID is likely to include decisions related to return to the country of origin or removal from the territory.

## 6.3 FEATURES OF A BEST INTERESTS DETERMINATION

### Summary: Features of a best interests determination

- Countries should set up a BID procedure or mechanism, which is a holistic assessment of all possible sustainable solutions that could meet the best interests of children in need of such solutions and address their rights and needs, particularly any need for international protection and adequate care arrangements.
- As national systems vary greatly, there may be different ways to embed and to develop a BID procedure in existing systems. These may include out-sourcing elements of the BID process to civil society or intergovernmental organizations, for example, but in such cases, extreme caution must be exercised.
- As it involves a particularly important decision affecting the unaccompanied or separated child's future, it is recommended that the BID be a formal process with specific procedural safeguards, involving participants with expertise in child protection, and preferably the protection of migrant children in particular.
- Steps should be taken to ensure that the child can participate in a meaningful way throughout the BID process.
- Those responsible for the BID should consider criteria such as the child's individual characteristics and identity; his/her (international) protection needs; the ability and willingness of family members to care for the child; and the current political, social and economic situation in the child's country of origin.
- If an unaccompanied or separated child and/or his/her guardian and/or legal representative disagree with the BID outcome, the child should have the right to seek review by a court of law or to appeal, if possible under national law.

### Introduction

There is no single way to reach a BID. Where no existing process provides for best interests to be given primary consideration in the circumstances where it is needed, namely to determine which sustainable solution is in the best interests of a child, there are several potential ways to strengthen existing systems and procedures. These are described in the paragraphs below.

### The best interests determination in practice

The BID addresses key questions, including:

- Where it is in the child's best interests to live;
- With whom it is in the child's best interests to live;
- Who is best placed to have parental and/or legal responsibility for the child in the future;
- How the child feels about the options identified and proposed;
- What resources will have to be deployed and what services provided to sustain the solution recommended in the BID.

### Preparatory actions and prior conditions

Where it has been determined that a formal BID is needed, certain conditions need to be in place and preparatory actions taken, such as ensuring that the child is:

- Given access to the State's territory (as a child at risk);
- Identified as an unaccompanied or separated child;
- Registered and provided with any necessary documentation;
- Referred to competent child protection services;
- Provided with safe accommodation and appropriate support by such services (and not detained);

- Provided with a temporary residence permit;
- Appointed a guardian;
- Provided with appropriate health and educational services;
- Provided with assistance to trace and make contact with family members, if such contact had been lost and if restoring contact is (deemed) in the child's best interests and will not put the child's family at risk.

### Key features of the best interests determination

It is recommended that the BID be designed to consider a range of solutions and to recommend the one which has the most positive impact on the child in question, in the light of relevant legal and other considerations. It is further recommended that the BID:

- Be holistic, look at all the circumstances and ensure that a picture of the child's general circumstances is established, including what is known and not known, and what is required to explore "options" and identify possible outcomes;
- Be multidisciplinary (Participants should have relevant expertise and be capable of identifying and balancing all relevant factors in order to recommend the optimum option for the child. Such experience and knowledge are essential, as BID participants will be required to predict results and consequences. They can only do so accurately if they have all the information required);
- Ensures child participation through child-friendly procedures and proper information and support from both the child's guardian and legal representative or adviser;
- Be informed by the Convention on the Rights of the Child, i.e. examined in light of a specific protection/immigration regime but also more generally examine rights under the Convention;
- Ideally, feed into a determination process that is independent and has all due process safeguards;
- Demonstrate and document that the child's best interests have been a primary consideration;
- Be rigorous, flexible, transparent and accountable;
- Be carried out in a timely manner;
- Consider the short-, medium- and long-term options.

### Child participation

The BID process needs to permit and facilitate participation by the child whose future is being considered, in line with Article 12 of the Convention on the Rights of the Child. The manner in which the child participates in the BID process will depend upon:

- His/her age, maturity and intellectual capability;
- The child's experience, environment, social and cultural expectations, and available support, all of which contribute to the development of his/her ability to form and express a view, given that a child's level of understanding is not uniformly linked to his/her biological age;
- Cultural and developmental factors, which may mean that young children are able to make cogent and well-informed decisions about serious matters affecting their lives;
- The information made available to the child and his/her guardian and legal representative;
- Any previous traumatic experiences which may prevent or hinder the child from fully disclosing his/her experience or fears, or the recounting of which may have a re-traumatizing effect.

### Timing

The BID should be scheduled as soon as the BID case manager and the unaccompanied or separated child's guardian and legal representative have agreed that there is sufficient information in the child's best interests dossier (see *The best interests dossier* on [page 276](#)) for a sustainable and conclusive BID.

In the event that a return or third-country solution is being considered, it may not be possible to decide on a solution without a psychological, expert or home study report being provided. In that event, any delay would be purposeful and appropriate, but should be kept to the minimum time needed to obtain the missing information. In addition, it may become apparent during the BID that there is insufficient evidence and information on which to base a recommendation on which sustainable solution is in the unaccompanied or separated child's best interests. In that

case, it may be necessary to adjourn the BID so that the child's social worker, guardian or legal representative can obtain the required information and/or evidence.

## Managing the best interests determination

As soon as an unaccompanied or separated child has come or been brought to the attention of the authorities and is considered a child at risk, the child should be referred either to the appropriate child protection services or another competent body within the country's child protection system, as appropriate. The child protection services then appoint an official to coordinate and manage the process – the BID case manager – as appropriate and resources allowing. In some countries, this may be an NGO, a civil society organization, or even an international organization; if so, there should exist a formal and recognized mechanism for documenting and recording such referrals, with adequate documentary proof that the organization's appointed BID case manager is an experienced social worker, childcare professional or other professional with appropriate expertise. S/he should have previously obtained the training and gained the experience required to understand the varying needs of unaccompanied or separated children and the way the BID process should be managed.

### The need for an independent manager or coordinator

In order to avoid a possible conflict of interest, it is recommended that BID case managers not be the guardian or social worker assigned to the child, as they may be tasked to recommend a solution for the child and this may affect the relationship of trust between the child and the guardian/social worker.

The introduction of BID case managers may be a gradual process involving limited resources. Parts of the information-gathering and dossier compilation process may need to be (initially) undertaken by guardians or social workers.

Depending on how the BID is or may be linked to or integrated into existing national asylum and immigration processes, BID case managers can be given primary responsibility for compiling and updating the best interests dossier; convening a process planning meeting (see section 6.2 above) and drafting a BID report (see *Data collection and protection* on page 278). They can also be responsible for pursuing tracing efforts and obtaining information on the family or previous caregivers in the child's country of origin or habitual residence, if this is in the child's best interests (see *Information-gathering* on page 279); for commissioning medical or other expert reports, which may be needed before a solution can be identified; and for arranging a BID that takes the form of a panel meeting or includes expert input (orally or in writing) in existing procedures at national level, provided such input is given appropriate weight, i.e. primary consideration.

## The best interests dossier

It is recommended that the best interests dossier be opened by the BID case manager or other competent person as soon as s/he has been appointed to work with an unaccompanied or separated child. The dossier should be updated regularly until the BID has been made. Any data collected in the process leading up to the BID and included in the dossier should comply with national and regional data protection legislation and be gathered in the light of the best interests of the child (see *Data collection and protection* on page 278 for further details).

## Criteria for determining best interests

The primary consideration of the BID should be whether there is an option that would better secure the child's rights and needs in the short, medium and long term. This can only be determined by considering the individual unaccompanied or separated child's needs and circumstances, the indivisible nature of the Convention on the Rights of the Child and the interdependency of its various articles. As such, a BID on a sustainable solution in the child's best interests can rarely be reached by reference to a single factor, even if it is an important one. It is vital that each BID focus on the specific child in question: his/her individual characteristics, including age, sex, gender identity and sexual orientation; upbringing; level of physical and intellectual maturity; nationality (or lack thereof); cultural, spiritual and linguistic background; family ties and other relationships; physical, psychological and emotional vulnerabilities; and particular (wider) protection needs.

The criteria which BID participants are recommended to consider include, but are not restricted to, those listed below.

### Safe environment

Safety is normally the priority. Exposure or likely exposure to harm usually outweighs other factors. It is recommended that those involved in the BID examine:

- Safety in the geographical locations under consideration, e.g. violence, recruitment of children into armed forces, and so on;
- Safety in the society, e.g. laws and policies in place to protect children if unaccompanied;
- Safety in the community, e.g. community attitudes may stigmatize certain children;
- Safety in the family/household;
- Past harm (frequency, patterns, trends and continued risk of harm);
- The capability to monitor the child's safety, e.g. child protection services present in the country to safeguard the child in the family;
- The availability of life-saving medical treatment for sick children.

### Family and close relationships

Except when there are issues of safety, children's best interests are generally best met when they are with their own families. Family bonds and other close relationships are a key factor in determining a child's best interests. It is recommended that those involved in the BID:

- Consider what have been and are now the child's significant relationships;
- Look at the quality and duration of all the child's close relationships (parents, caregivers, siblings, other family members, other adults, children in the cultural community);
- Consider the child's attachment to them (length of any separation, age at separation, etc.);
- Consider the effect of separation from any significant relationship (past and future);
- Consider the potential effect of change in caregivers on the child;
- Assess the capacity of parents, caregivers and those with close relationships;
- Obtain the views of caregivers and those close to the child;
- Consider the possibility of family reunification (after tracing, verification and assessment of the relationship).

If family reunification is not practically possible but would otherwise be in the child's best interests, all necessary steps should be taken to enable the child to maintain contact with his/her parents so as not to undermine the possibility of family reunification in the future.

### Identity rights and development rights

Children's developmental needs are generally best met by remaining in or maintaining close contact with not just their families, but also social and cultural networks. It is therefore recommended that those involved in the BID:

- Look at any child-specific considerations based on age, sex, gender identity, sexual orientation, ability, or other characteristics;
- Consider how best to preserve the child's identity, including nationality, name and family ties;
- Consider how best to continue the child's upbringing (cultural and community network);
- Consider how best to maintain the child's ethnic, religious, cultural and linguistic background, e.g. really understand the child's culture and traditions (Children who have spent a long period outside their country of origin may have had different experiences. Any possible conflicts may need to be explored and resolved before reunification.);
- Consider that continuity (of people and places) is vital to a child's feelings of security and stability;
- Consider how best to secure a standard of living adequate for the child's physical, mental, spiritual, moral and social development, e.g. systems in place to provide adequate access to services;
- Consider how rest and leisure, play and recreational activities appropriate to the child's age can best be realized;
- Consider what action will meet the child's right to physical and mental health;
- Consider how the child's educational needs can best be met;
- Weigh how to best secure successful transitions to adulthood (employment, marriage, own family).

## Active consideration of the child's views

In order to respect the child's right to be heard (Article 12 of the Convention on the Rights of the Child), those involved in the BID need to:

- Inform the child about the process, the options being considered and the relevant considerations and consequences;
- Obtain the child's views, wishes and feelings about each of the above factors (in the past, present, and for the future regarding all possible sustainable solutions);
- Assess the child's understanding and maturity, i.e. the child's ability to comprehend and assess the implications of the options;
- Actively consider and determine what weight to place on the child's views (in light of above understanding).

## Data collection and protection

Data should be collected in compliance with national and regional data protection legislation. There may be instances when the confidentiality of some reports means that only limited disclosure will be appropriate. In addition, if the best interests dossier contains information that may cause the unaccompanied or separated child psychological or emotional harm, his/her guardian and legal representative should consider whether they should take any action commensurate with their professional duties to limit its disclosure to the child. Generally, information should not be used for purposes which are contrary to a child's best interests.

The sustainability of any solution recommended in the BID will be contingent on the quality and breadth of the information obtained during the entire best interests process. A comprehensive best interests dossier is therefore an essential component of the BID. As part of this, it will be important to give due weight to any expert and country reports that address the particular needs of the individual unaccompanied or separated child.

The best interests dossier may contain any or all of the following:

- The record of any interview with the child on arrival or after identification in the territory, but only if this took place in the presence of the child's guardian and after the child had been provided with legal advice and representation (conditions that would need to be fulfilled for the information's use in a status determination procedure);
- Any police, prosecution service or criminal court records in relation to any illegal entry or human trafficking offences relating to the child or persons associated with the child;
- Any records of previous visa applications made on the child's behalf before arrival, and any evidence to indicate that these had been made by an adult who was planning to traffic or smuggle the child to the receiving State;
- Information relating to any age assessment and/or detention of the child, including on the basis that it was asserted that the child was an adult;
- Any application for (international) protection made by or on behalf of the unaccompanied or separated child;
- Any reasoned decision on such application made by an appropriate administrative body, court or tribunal, depending on where the BID fits into the national system;
- Any medical, psychiatric or psychological records and reports relating to the child, access to which is not restricted by confidentiality concerns;
- Any assessments and reports relating to the child prepared by child protection services or a manager or employee of a residential placement where the child may have lived or be living;
- Any report on tracing efforts;
- Any home study report from the country of origin or habitual residence or from other countries in which the child has close family members;
- Any report on the child's significant relationships in the receiving country;
- Reports on the general conditions in the child's country of origin or habitual residence or third country, including more specific conditions that would affect the child;
- Any other documents deemed to be relevant to that individual unaccompanied or separated child's case;
- Any identity or other official documents relating to the child from his/her country of origin or habitual residence, if the child is stateless, and if their authenticity is disputed, any expert evidence in that regard;
- Any records of BIAs and/or court proceedings.

## Information-gathering

The BID case manager or other relevant professional may be tasked to ensure that the information and expert reports needed to inform a sustainable and conclusive BID outcome are obtained beforehand.

It is important to draw on the widest possible variety of sources, as it is unlikely that the individual unaccompanied or separated child will have the necessary documentary evidence on which to reach a sustainable BID.

In order to ensure that the information-gathering process respects the best interests of the child, in particular the principles of confidentiality and privacy, and in order for it to be in line with the principles of necessity and proportionality, it is recommended that States explore possibilities for developing information-sharing protocols between relevant services and participants.

## Child participation in the context of a BID

It would not generally be appropriate to interview an unaccompanied or separated child solely to obtain information for the BID recommendation as such. Children should not be interviewed more often than necessary when the events being explored may have caused them harm. However, unaccompanied or separated children should be permitted to submit further statements if they wish to do so, or to instruct their guardians to make representations on their behalf to ensure that their views on the content of the BID report are made clear to any BID participants.

## Evidence assessment

It is vital to place the child's evidence and other supporting documentation in context by obtaining reports from experts familiar with the history, culture and socioeconomic circumstances in the child's country of origin or a third country under consideration. It is further recommended that experts also be asked to comment on the likely effect of the child's age, maturity, gender, gender identity, sexual orientation, clan or ethnic origin, religion and any disability or special educational needs or any treatment s/he may receive, on his/her treatment or living conditions if s/he were to be returned to his/her country of origin or moved to a third country.

In order to review the situation of an individual unaccompanied or separated child in its proper context, BID case managers are advised to consult information sources and child-specific reports by relevant international human rights organizations, to ensure that there is sufficient child-specific material available to identify any particular issues relating to the treatment of children in the event of their return to their country of origin or move to a third country.

## Potential sources of information

### *Past life and current conditions in the country of origin/habitual residence*

- Country reports (experts)
- Home study
- Tracing results
- Medical report
- Report from mental health professionals
- Reasoned decision of asylum/immigration authorities
- Reasoned decision of any asylum/immigration, youth, juvenile or family court
- Statement by the child

### *Journey to the receiving country*

- Country experts
- Border police
- Prosecution services
- Statement by the child

### *Past exploitation*

- Police
- Prosecution services
- Expert in human trafficking
- Representative of relevant NGOs
- Country information on prevalence and forms of exploitation
- Statement by the child

### *Medical and psychological needs*

- Medical, psychiatric and psychological reports
- Child's social worker or key worker
- Statement by the child

### *The child's current stage of development*

- Foster carer
- Key worker
- Social worker
- Child welfare assessment
- Treating physicians
- Psychologist and/or (spiritual) counsellor
- Teacher
- NGO worker
- Guardian
- Statement by the child

### *The child's preferred sustainable solution*

- Guardian
- Legal representative
- Foster carer
- Key worker
- Social worker
- The child's social and friendship network
- Statement by the child

### *Optimum sustainable solution for the child*

- Guardian
- Legal representative
- Country experts
- Expert in human trafficking
- Other experts
- Home study in the country of origin
- Home study in a third country

## **Home study report**

A home study report is a crucial source of information for any BID, as it considers the child's safety, permanency and well-being and the parents' or caregiver's ability to ensure the child's safety. It will ideally also assess the parents' or caregiver's ability to provide the child with appropriate accommodation, financial support, health care, and educational and recreational opportunities. The home study may also consider whether the child will be provided with an environment in which s/he can realize his/her potential as s/he develops into adulthood.

An integration report may be required if one of the options being considered is long-term placement with a foster family and/or in the event of adoption in the receiving country. There is long-standing international practice in home studies.<sup>17</sup> A home study report considers the situation and suitability of the family/parent(s) or previous caregiver(s) in the child's country of origin or habitual residence or in a third country, as may be relevant.<sup>18</sup>

#### *Timing of the home study*

A home study is carried out to inform the BID and to explore all the available options for the child. It usually follows successful tracing of family members or other relatives of the unaccompanied or separated child at the process planning stage, but may also be carried out during the best interests process.

A home study can be commissioned or initiated by the BID case manager or another suitable professional, including the child's social worker or guardian. It is recommended that the home study be carried out by relevant professionals from the child protection or social services in the country to which the child may be returned or transferred. In some cases, it would be inappropriate to contact national authorities, for example if there is a claim of persecution by the State.

#### *Possible elements of a home study report*

In order for the BID to be properly informed, it is recommended that the home study report contain information regarding:

- The composition of the family and patterns of social interaction of the parent(s) or former caregiver(s), including the nature of contact and involvement with others, the presence or absence of social support networks and relationships;
- The background and history of parents/caregivers, including a possible history of abuse and neglect by them;
- Information on the reasons and circumstances of the separation between the child and the family/caregiver;
- Suggestions, thoughts and difficulties (mentioned by the parents/caregivers), and problems of access to necessities such as income, employment, adequate housing, childcare, and needed services and supports (including schooling), in view of the child's eventual return and reintegration;
- The hopes and wishes of the parents/caregivers for the child's future;
- Parenting/caring practices, methods of discipline, patterns of supervision, understanding of child development and/or of emotional needs;
- Other behaviours and conditions, such as domestic violence, mental illness, physical health, physical, intellectual and cognitive disabilities, alcohol and drug abuse;
- Professional observations and possible recommendations from the relevant professional/assessor.

In order to facilitate home studies, States are encouraged to design appropriate procedures that respect the best interests of the child through transnational cooperation with relevant child protection or social services in countries of origin or habitual residence or third countries. Every effort should be made and resources invested, to the extent possible, to carry out a home study.

In the event a home study cannot be undertaken, it is recommended that the BID be conducted based on the best information available. No matter what the circumstances, the solution identified should ensure appropriate protection and care arrangements are in place for the child. In the absence of reliable home study information, it is important to recognize that any decision to return the child to his/her country of origin is being based on limited information, and as such, may not be in the child's best interests.

<sup>17</sup> The ISS, for example, carries out family assessments in countries of origin.

<sup>18</sup> The ISS Family Assessment Form contains a list of basic indicators for family type, parents' ages, siblings, living standard, income, level of education and occupation of both parents, type of accommodation, family health situation and children's clothing and hygiene, among others. It assesses resources and needs in respect inter alia of basic care, nutritional status, safety, psychoemotional security, stability, social integration, and enlarged family and community resources, and it proposes measures and attributes responsibilities.

## The BID report

The BID case manager, as appropriate, may be put in charge of drafting the BID report, which refers to the key documents in the best interests dossier, sets out one or more possible solutions and assesses the level of risk attached to each. The BID report is sent by the BID case manager to those involved in/responsible for the BID at national level. The unaccompanied or separated child's guardian and legal representative also receive the report, all within a reasonable time frame, before the BID is finalized.

If the unaccompanied or separated child and his/her guardian and/or legal representative are not satisfied that the BID report or dossier contains the necessary information or recommendations to identify a sustainable solution, or that the child's best interests have not been given primary consideration, they must be able to submit further information or reports.

## Possible participants

There is no single model or way for conducting a BID, and the people involved in the BID may vary depending on the child's needs and background. This section discusses the participants who are generally best placed to make a BID.

Unaccompanied or separated children will in many cases have experienced persecution, ill-treatment and trauma in the countries from which they arrive and/or on their journeys to the receiving country. Consequently, a wide range of issues are likely to arise in relation to their identity, nationality, possible statelessness, ethnicity, gender and the social, economic and political circumstances in their countries of origin. Some may also have been victims of human trafficking. This is likely to influence their present and future physical, psychological and emotional health and well-being.

There are therefore clear advantages to the State and to the child if the BID is conducted by a range of independent experts, who can draw on their experience and diverse qualifications to identify and balance the relevant factors. It is recommended that those responsible for or involved in a BID be drawn from a variety of backgrounds. They could be medical and psychiatric professionals, academics (e.g. in the field of children's rights), social workers, civil servants, NGO employees or legal professionals.

### Impartiality

All BID participants should maintain strict impartiality and confidentiality at all times. It is recommended that they sign a confidentiality agreement, which is kept on record, when they are appointed to the list of possible BID participants.

In order to ensure the necessary objectivity, BID participants should ideally not have managerial or other responsibility for the child, or be accountable to child protection services or the State's immigration authorities. They should bring any professional or personal conflict of interest to the attention of the BID case manager, and should be replaced by another person from the BID expert list.

### Advisers potentially able to provide input for the BID

BID case managers can provide guidance on the BID process to those involved in the BID and be responsible for producing a written record of the BID outcome and the reason therefor. Where a panel is the chosen format/arrangement for the BID, the BID case manager should be present at the panel meeting, in order to advise panel members about the best interests process and answer any procedural queries. The unaccompanied or separated child's social worker can also be present at the panel meeting or present his/her views in writing or orally, depending on the BID procedure at the national level, to clarify any issues that may arise about the child's current needs and vulnerabilities.

In addition, the unaccompanied or separated child's guardian should be present and able to participate in the panel discussion, or present his/her views otherwise. While the BID is not in and of itself a legal process, but rather part of an existing national process or (legal) procedure, it is recommended that the unaccompanied or separated child's legal representative also be involved, to protect the child's legal rights and to provide a legal perspective on any possible recommendations.

If relevant, an adult in whom the child has confidence, for instance a teacher, spiritual counsellor or foster carer, may also be invited to provide input about the child's day-to-day needs, abilities and progress. It may also be appropriate to invite law enforcement officers or State prosecution officials to contribute to or provide input for the BID, if they have relevant evidence about crimes perpetrated against the individual unaccompanied or separated child, or, more exceptionally, if the child has a criminal record that needs clarification that is not obtainable from the best interests dossier. Immigration officers can also be asked to give input, in order to clarify any points relating to the child's entry into the country, immigration status or process, as might be appropriate.

### One designated authority to ensure quality

It is further recommended that a designated national authority (e.g. child protection services) be responsible for recruiting, training and providing experts with remuneration, resources permitting, if they are appointed to sit on a BID panel or contribute to a BID. A roster of suitable candidates/panel members can be drawn up for that purpose. The BID case manager, or other authority with final responsibility for the BID under the national system in question, can then be responsible for selecting suitable BID participants for each BID.

Whereas a panel constitutes good practice for a BID, independent experts who can identify, discuss and balance the different factors and options can also make meaningful contributions, for example by submitting reports or making oral statements/contributions in other procedures.

### The outcome of a best interests determination

To be of maximum use and impact, and to give proper weight to the best interests principle, the outcome of a BID should go beyond simply stating that the child should remain in the receiving State, be returned to a country of origin or habitual residence, or move to a third country. It should also outline how this conclusion was reached, which factors were considered and how they were balanced or weighed against other possibly competing rights arising from the Convention on the Rights of the Child or other treaties.

The outcome should be based on the totality of the evidence available to the participants in the BID process, and should give priority to ensuring that an unaccompanied or separated child will be safe, be it in the country of origin or habitual residence, the receiving country or a third country. It should outline how it can best be implemented, so that this information can be passed to those with parental or legal responsibility for the child in the future. It is therefore recommended that the BID also result in the formulation of a plan, together with the child and the child's guardian, to implement the recommended sustainable solution. Any necessary timelines and the entities/persons responsible for implementing the plan should also be identified.

### Weighing best interests against “other” interests

The BID should give appropriate weight to the rights and obligations under the Convention on the Rights of the Child and other human rights instruments. It is only after a sustainable solution is identified using the BID that “other interests” can be weighed alongside best interests, although with best interests being given “primary consideration”. The Convention does not exclude other considerations, which, if rights-based, may in certain rare circumstances override best interests considerations.

The *travaux préparatoires* for the Convention clearly reflect, however, that the drafters intended that the best interests of the child could only be overridden by other interests in extremely compelling circumstances. Whereas the Convention remains silent as to when such extremely compelling circumstances may arise, general comment No. 6 of the Committee on the Rights of the Child mentions situations in which the child constitutes a serious risk to the security of the State or to society, adding that “non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations”.<sup>19</sup>

As further explained by the Committee on the Rights of the Child, if, exceptionally, 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 a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand,

<sup>19</sup> Committee on the Rights of the Child, *Treatment of unaccompanied and separated children outside their country of origin*, General comment No. 6 (2005) (CRC/GC/2005/6), para. 86.

and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration.

## Right to seek review or appeal

Written reasons for the BID should be presented to the unaccompanied or separated child and his/her guardian and legal representative as soon as is practicable, whether they were in attendance when the BID was made or not. An informed decision can then be made with or on behalf of the child as to whether there are any grounds to appeal or seek review of any legal decision informed by the BID, and as to whether it would be in the child's best interests to do so where such right is governed by national law.

## Reopening a best interests determination

A BID can be reopened if:

- There have been changes in circumstances, such as successful tracing of family members or the emergence of new evidence, that could alter the original decision;
- The initial BID (decision) could not be implemented within a reasonable time frame.

If such changes occur, the child's guardian and/or the child's legal representative should have the right to contact the child's previous BID case manager (or other authority overseeing the BID process) and request the reopening of the BID process.

The decision to do so may depend on the existence of new or further evidence that was not previously taken into account or available.

## Monitoring and data collection

A variety of monitoring and evaluation measures may need to be strengthened to assess capacity-building efforts, evolving procedures and outcomes for the children concerned. It is therefore recommended that the department or ministry responsible for the BID consider establishing its own internal monitoring process to assess whether the training it is providing is appropriate and whether the policies and procedures it has put in place are capable of protecting unaccompanied or separated children's best interests.

One very important aspect of both departmental and national monitoring processes, such as those carried out by ombudspersons for children, should be an assessment of the extent to which an individual unaccompanied or separated child is or was able to participate in a meaningful way in both the BIA and the BID. Countries should also assess whether the child was provided in a timely manner with a guardian and/or legal representative who was sufficiently expert, experienced and motivated to ensure that the child's case was presented accurately and fully in the overall best interests process. Another important focus of the monitoring process could be the extent to which child-appropriate procedures have been adopted to reflect the objectives of the best interests process.

It may also be necessary for countries to improve their methods of collecting data, as the accuracy of information in relation to children in migration movements is often uneven. This may particularly be the case if unaccompanied or separated children are being cared for by different institutions and authorities and if they have not applied for asylum. If this is the case, countries could consider working with academic institutions or NGOs to strengthen their data-collection and analysis capability.

In particular, data should be collected on the number of unaccompanied or separated children granted residence permits for reasons other than the recognition of refugee status or another international protection status. Data should also be collected on the children's sex, gender identity, sexual orientation, age, nationality, ethnic group and socioeconomic status, and on any disability they may suffer, so that the success or failure of the best interests process for all groups of children can be meaningfully analysed. Finally, it is recommended that States strengthen cooperation with countries of origin and establish measures to monitor and assess the outcomes for children who have been returned.