

Determination of the Best Interests of the Child



International Legal Framework

- **Convention on the Rights of the Child (1989)**

The 1989 Convention on the Rights of the Child (CRC)¹ is the main legal instrument on the protection of children. It embodies four general principles:

- The **best interests** of the child shall be a **primary consideration** in all actions affecting children (Article 3).
- There shall be **no discrimination** on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status (Article 2).
- States Parties recognize that every child has the inherent **right to life** and shall ensure to the maximum extent possible the **survival** and **development** of the child (Article 6).
- Children shall be assured the **right to express their views freely** in all matters affecting them, their views being given due weight in accordance with the child's age and level of maturity (Article 12).
- **The Republic of Azerbaijan has ratified this convention by the decision No. 236 of the National Assembly (Milli Mejlis), dated July 21, 1992.**

Definitions

- ❖ A **“child”** as defined in Article 1 of the Convention on the Rights of the Child (CRC), means “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”. In terms of actions by UNHCR, the word “child” refers to all children falling under the competence of the Office, including asylum-seeking children, refugee children, internally displaced children and returnee children assisted and protected by UNHCR and stateless children.
- ❖ **“Unaccompanied children”** (also called **“unaccompanied minors”**) are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.
- ❖ **“Separated children”** are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.
- ❖ **“Orphans”** are children both of whose parents are known to be dead. In some countries, however, a child who has lost one parent is also called an orphan.
- ❖ A **“best interests determination” (BID)** describes the formal process with strict procedural safeguards designed to determine the child’s best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option.
- ❖ A **“best interests assessment”** is an assessment made by staff taking action with regard to individual children, except when a BID procedure is required, designed to ensure that such action gives a primary consideration to the child’s best interests. The assessment can be done alone or in consultation with others by staff with the required expertise and requires the participation of the child.

Introduction

- ❖ One of the key priorities of UNHCR is to protect and promote within its capacity the rights of all children falling under its mandate. To achieve this, UNHCR and its partners must support the strengthening or establishment of comprehensive child protection systems.
- ❖ Such systems should include mechanisms to identify the best interests of the child. Depending on the impact on the child of the action to be taken, mechanisms may range from an assessment of which option is in the best interests of the child, to a formal process with strict procedural safeguards.
- ❖ National child protection systems usually include strict procedural safeguards to identify the best interests of the child before taking certain major decisions. These include separation of a child from his or her parents against their will, determination of parental and custody rights in the case of separation and adoptions. Such decisions can normally only be taken by competent national authorities, such as the judiciary, and are subject to procedural safeguards foreseen by law.
- ❖ A best interests determination (BID) describes the formal process, with strict safeguards, that UNHCR has established for decisions of a similar magnitude. A BID is particularly relevant for refugee children, although in certain circumstances best interests determinations may also need to be carried out by UNHCR for other categories of children.

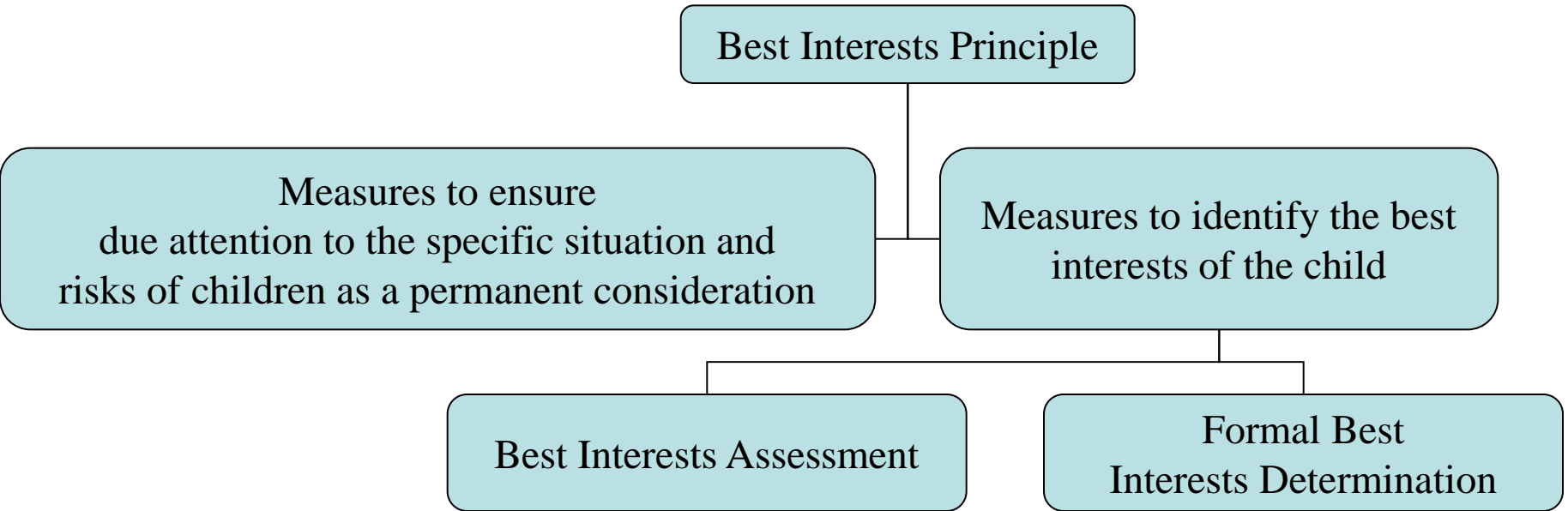
Best Interests of the Child: Principle, Assessment, Formal Determination

- Principle: As the CRC is a normative frame of reference for UNHCR the best interests of the child should be a primary consideration in all actions concerning the child
- Assessment: Best interests assessment is an ongoing process and should be implemented by the responsible officer in any action or decision affecting the child
- Determination: For specific actions for which higher procedural safeguards are required a procedure for a formal best interests determination has to be put in place (more than one individual involved and procedure to be documented)

Comprehensive child protection systems

- ❖ A comprehensive child protection system comprises laws, policies, procedures and practices designed to prevent and respond effectively to child abuse, neglect, exploitation and violence. It is the responsibility of States to promote the establishment and implementation of child protection systems, in accordance with their international obligations. Children within their jurisdiction should have non-discriminatory access to such systems. UNHCR and other relevant agencies and partners may assist States by strengthening and supplementing national child protection systems in areas where gaps exist.

Best Interests Principle



Higher Procedural Safeguards

Formal best interests determination – Higher procedural safeguards are necessary if:

- Parents are absent or unable to exercise basic parental responsibilities
- The decision has a fundamental impact on the life of the child
- A complex balancing of factors and rights is necessary.

Situations in Which a BID Is Required

- Decisions to identify durable solutions for unaccompanied and separated refugee and IDP children
- Decisions on temporary care arrangements for unaccompanied and separated children in particularly complex situations
- Decisions which may involve the separation of the child from parents against their will

Best interests determination (BID)

Three situations require UNHCR to undertake a BID for actions affecting children falling under its competence:

- the **identification of durable solutions** for unaccompanied and separated refugee children;
- **temporary care arrangements** for unaccompanied or separated children in exceptional situations as listed below; and
- possible **separation** of a child from his or her parents against their will.

Some of the benefits of a BID are as follows:

- it ensures that specific protection and care is provided to a child who is or may become deprived of the protection of his or her family;
- it enables UNHCR staff and partners to review the situation of the child in a comprehensive manner, ensuring that decisions are in line with the provisions and spirit of the CRC, and other relevant international instruments;
- it allows the child's opinion to be heard, and ensures that his or her views are given due weight according to his or her age, maturity and evolving capacities;
- by means of a child-focused approach, it helps to identify protection gaps affecting individuals or groups of children of concern to the Office; to monitor the effectiveness of past measures; to address gaps identified; and to enable follow-up remedial action if needed;
- where the age is unknown or disputed, it provides a comprehensive assessment of the person's maturity, allowing an appropriate response by UNHCR;
- through the involvement of persons with varying expertise, it avoids decisions which have a fundamental impact on the child being taken by one individual in isolation.

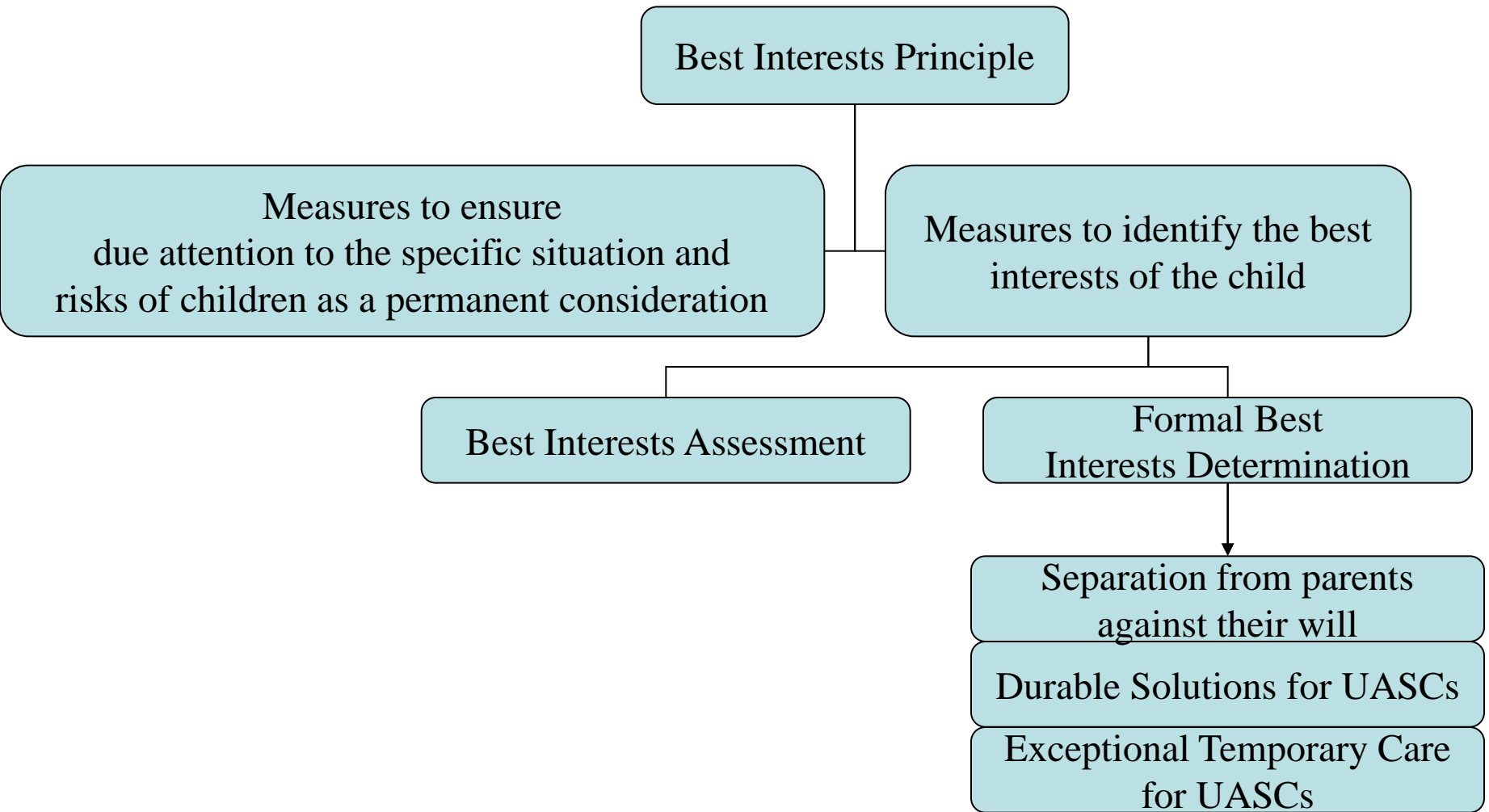
Durable solutions for unaccompanied and separated refugee children

- ❖ Identifying the most appropriate durable solution for an unaccompanied or separated refugee child generally requires carefully balancing many factors. Decisions on voluntary repatriation, resettlement or local integration are likely to have a fundamental and long-term impact on the child. Before taking such decisions a BID must be carried out to ensure sufficient focus on the child's rights when choosing:
 - the most appropriate durable solution, and
 - the right time for it.
- ❖ **Family reunification**
 - Family reunification, whenever feasible, should generally be regarded as being in the best interests of the child. Once the family is traced, family relationships verified and the willingness of the child and the family members to be reunited has been confirmed, the process should not normally be delayed by a BID procedure.

Temporary care arrangements for unaccompanied and separated children in exceptional situations

- ❖ There are, however, exceptional situations, where an assessment alone is not sufficient, and where a wide range of factors and rights require a review by more than one person, and that each step of the process be documented. These situations are as follows:
 - If there are reasonable grounds to believe that an unaccompanied or separated child is exposed or is likely to be exposed to **abuse or neglect by the accompanying adult** and a decision on whether to place the child elsewhere has to be taken. Doubts about the legitimacy of the relationship with the accompanying adult may be indicative of an abusive or exploitative relationship.
 - In cases, where there are reasonable grounds to believe that **existing care arrangements are not suitable for the child** (for example, due to the child's cultural, ethnic or religious background, his or her association with armed groups or forces, or the caregivers' association with armed groups or forces) or, where multiple specific needs such as those of an unaccompanied child with a disability, may require additional support arrangements.

Best Interests Principle



Who Should Undertake the BID

- Responsibility primarily with the State with UNHCR as subsidiary actor (e.g. in separation from parents). If States are unwilling or unable to take actions, UNHCR will assume responsibility
- Responsibility with UNHCR in decisions taken under its competence (e.g. resettlement)
- Structure:
 - BID supervisor
 - Welfare Officer
 - Multi-disciplinary BID panel

Gathering Information

- Welfare Officer
 - A verification of existing and documented information on the child
 - Several interviews with the child and if appropriate observations
 - Interviews with persons within the child's network including caregivers, family (extended and siblings), friends, neighbors, guardian, teachers, etc.
 - Background information on the conditions in the locations considered for the decision
 - Where appropriate or necessary, views of experts

Issues to remember

- Children cannot be expected to give adult-like accounts of their experiences. Simple, age-appropriate language should be used. The child's age and stage of development at the time that the relevant events took place, as well as at the time of the interviews, must be considered. Children may not be able to present information relating to context, timing, importance and details with the same precision as adults, and may only have limited knowledge of the conditions in the country of origin. Good communication is more likely to occur if the interviewer considers the ability and competence of children as being different from, rather than inferior to, those of adults.
- In order for the child to express his or her views in a meaningful way, all options should be explained in a child-sensitive manner.
- Many children find it easier to speak in the presence of a friend or guardian. However, caution must be exercised in this regard, as current care-givers, foster parents, and others, may have a personal interest in the process and may prevent the child from freely expressing his or her views. Adults suspected of abuse should never be present.
- Interviews with the child should take place in a confidential and child-friendly atmosphere. If possible, the venue should be chosen by the child. Emphasis should be placed on putting the child at ease and developing a relationship of trust. The environment and tone of the interviews should be as informal as possible. *UNHCR Guidelines on Determining the Best Interests of the Child 61*
- Children should always be allowed to say “no” or refuse to answer questions. They should be allowed to change their minds and to make mistakes.

Issues to remember

- Children may not connect emotionally with what they are recounting in the same way as adults. Children may have no emotional reaction at all or react to emotional cues from the interviewer. The interviewer therefore, should be careful not to draw judgments about how a child feels toward a certain event or situation, based on adult reactions.
- The experience of trauma can affect a child's ability to pass on information during interviews. Therefore, the child welfare officer should also use other methods and approaches, such as observation, sentence completion, games and drawing, to help the child to express traumatic experiences (e.g. flight, separation).
- The length of the interview should be tailored to the age, maturity and psychological conditions of the child. To reduce stress for the child, it is recommended to have two or three short interviews, instead of a long one. It is best to use the same interviewers and interpreters, as children often need time to build relationships. If the child at any time expresses preference for certain persons, this should be discussed.
- In exceptional cases of extreme distress, such as incidents of abuse, arrangements should be put in place to ensure that the child has immediate access to counselling, especially if the information that may cause distress is likely to surface during the interview.

A Balancing Act

- Views of the child
- Views of family members and other persons close to the child
- Physical safety and risk of harm
- Family environment and alternative care
- Development needs of the child

Views of the Child

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

Making the Decision

- Welfare Officer will present an individual file:
 - Registration Form (Unaccompanied and Separated Children)
 - Summary of the child's history
 - Available options
 - Information required to balance the relevant factors

Making the Decision

- The BID panel will base their decision on the file presented by the Welfare Officer
- Recorded in protocol including
 - Whether the decision was reached by unanimity or by a majority
 - The reasoning of the decision
 - Any relevant issues raised during the discussion

Thank you!

