

Initiative on Child Rights in the Global Compacts

Child-Rights Compliant Returns as part of Sustainable Solutions for Migrant Children

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This briefing is produced by the Initiative for Child Rights in the Global Compacts and based on the positions adopted by the members of the Initiative and outlined in its documents, including in [Protecting, promoting and implementing the human rights of children on the move in the proposed Global Compacts](#), in [Actionable Commitments for Children on the Move](#) and in its [responses to the consultations and negotiations for the Compacts](#). The Initiative is a multi-stakeholder partnership bringing together 30 UN, civil society as well as philanthropic organisations around a shared agenda: to ensure that children's rights are at the heart of the two global compacts on migration and on refugees and to create a continuum of care, protection and support for migrant and refugee children.

Sustainable solutions are long-term arrangements for migrant children that fulfil the child's best interests. Finding a sustainable solution in the best interests of the child should be a core and decisive component of any decision by the authorities in a State other than their own concerning their future. A range of options is available for these children, whether accompanied or unaccompanied. A fundamental principle is that such options should be tailored to suit the individual child.

Children require security and stability for healthy development, so the options concerning their future must be sustainable, rather than short-term ones that aggravate a child's sense of precariousness and insecurity. Various options for sustainable solutions exist, including for example, (further) integrating children (and, when relevant, their families) into the community in the country they are in; returning to their country of origin with (or to be reunited with) their family, only if this is in their best interests; or integration in a third country, also provided that this is in their best interests.

The **Initiative for Child Rights in the Global Compacts** recommends that:

The GCM establishes concrete measures, including cooperation initiatives, which ensure migrant children can access comprehensive, protective and sustainable solutions that ensure their long-term protection and support and the fulfilment of their rights. Such solutions, identified after a Best Interests Determination, would include options for reunification with (extended) family members; identification of pathways for regularization, including plans for their integration in the country of residence; or options for their safe, assisted and voluntary return to countries of origin, only if in their best interests and carried out in a child rights-compliant manner.

In particular, the Global Migration Compact should ensure the following key elements to guarantee a migrant child's access to a sustainable solution:

- 1. Uphold the principle of non-refoulement and the prohibition of arbitrary or collective expulsions.**

The principle of non-refoulement places a prohibition on States from removing a person from their jurisdiction when that person would be at risk of irreparable harm upon return, including persecution, torture, cruel, inhuman and degrading treatment or punishment and other serious violations of human rights. Non-refoulement is binding and non-derogable under customary international law and international human rights law and applies to all migrants, not strictly to refugees.

A child rights perspective on the principle of non-refoulement, includes a substantiated risk to the child's life, survival and development as well as deprivation of liberty,¹ and requires careful consideration of child-specific human rights violations and child-specific drivers of migration. These drivers include, but are not limited to, violence in the home or in their communities, threat of child marriage and other forms of gender-based violence, forcible recruitment into state and non-state armed groups, and trafficking and other forms of exploitation and abuse, including the worst forms of child labour. The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services².

2. **Best interests of the child determination in all decisions affecting migrant children, including returns**

When making decisions with long-term implications for a child (whether accompanied or unaccompanied), competent authorities should conduct robust, well-documented, multi-disciplinary and impartial Best Interests Determination (BID) procedures that are child-focused and participatory. Such procedures should be **formalised in law, policy and practice, as well as in cooperation frameworks**, and they should substantively inform decisions about long-term solutions for children. These include decisions related to the status of parents of children in a given territory; of families with children; and of separated or unaccompanied children. This applies to any sustainable solution involving the transfer of a child, including return to the country of origin or transfer to a third country.

The outcome of this determination must, at a minimum, be informed by:

- **Length of residence and level of integration in the country** (indicators include: language skills; enrolment in school or vocational training; and family and social attachments, amongst others).
- An extensive **child rights assessment** in the country of origin and an **assessment of the risk** of irreparable harm to the child should he/she be returned, in line with States' non-refoulement obligations.³ Child-focused country of origin information reports could be developed for this purpose.
- A careful **social assessment of the family situation** when family reunification in the country of origin or another country is being considered, including the family's agreement and ability to care for the child. Or an **assessment of the care options** for the child. In line with the UN Guidelines on Alternative Care, institutionalised care is only a last resort and it is not an appropriate long-term care option for children.
- Whether the child would be able to access a **safe and protective environment** upon return, including a careful assessment concerning **access to food, housing, health care, education, vocational training and employment opportunities** in the country of origin. This would include considerations and support as a child transitions into adulthood.
- The **views and opinion of the child should be heard** throughout the process (and properly taken into account) in determining the child's best interests. The views of the child's parent(s) should also be duly heard and considered.
- In line with the principle of **family unity**, the BID procedure must also **be implemented in decisions that could lead to the return or removal of one of the child's caregivers**.⁴
- **Due process safeguards**, such as access to free quality legal advice and representation, as well as access to effective judicial remedies, must be ensured.

¹ General Comment No. 4 (2017) of the Committee against Torture on the implementation of article 3 of the Convention in the context of article 22, para. 29(o); Joint General Comment No. 22 of the Committee on the Rights of the Child, para. 45; Committee on the Rights of the Child, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, para. 27; Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

² CRC/GC/2005/6

³ Committee on the Rights of the Child, General Comment No. 6, para. 27; and General Comment no. 22, para. 46.

⁴ See e.g. paras 28-29, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 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.

- **Child rights and protection actors should always be involved in the procedure**, as well as the **guardian or representative**, in the case of unaccompanied and separated children.
- Any Best Interests Determination procedure and return decision-making process should be **monitored by an independent body** with the autonomy to raise issues to national and international authorities.
- **No child should be detained** whilst their status is being determined or pending return or removal. Non-custodial and community-based alternatives to detention should be put in place and children should continue to access basic services, such as education and healthcare.

3. Returns should always be in keeping with children’s best interests and procedures be child-rights compliant

States will need to consider the best interests of the child – as a primary consideration – in any decision to return a child, and also when working to implement those decisions. In this respect, return of children should only take place when based on the best interests of the child, and not simply to meet States’ migration management aims. The best interests of the child must be given preference over the administrative aims of the State. If, and only if, it is determined to be in the best interests of the child to be returned to a protective environment in another State—such as for the purposes of family reunification--procedures should be carried out in a child rights-compliant manner by competent and independent child protection authorities, and should be accompanied by long-term reintegration support and monitoring upon return. Additionally, children’s rights, including the child’s right to life, survival, development and freedom from all forms of violence, should be systematically considered in any return or readmission agreements.

When implementing returns procedures, at a minimum, the following criteria should be in place:

- Once a decision is taken that return is in the best interests of the child following a BID procedure, the decision should be implemented by arranging a **voluntary, safe and dignified departure**, with appropriate assistance.
- **Individual plans** for the child’s sustainable return should be developed, including time to prepare, information in a language they can understand and provision of support to prepare themselves for return and reintegration. This should include any necessary assistance to ensure that the conditions upon which return or moving to a third country was identified as a durable solution will be met in practice, including appropriate psychosocial support, when relevant.
- Continued assistance from the child or **family’s legal advisor and/or guardian** should be ensured and access to **legal support and representation** should be available to children and families involved in return procedures, including access to appeal and judicial remedies.
- Actors involved in the implementation of voluntary returns should be trained in child rights and child protection, and child protection authorities should be able to support children.
- Appropriate **cross-border cooperation** focussed on child protection should be in place between actors involved in return procedures, aiming at ensuring a continuum of care for children in pre-return, return and post-return procedures. Cooperation between child rights and protection actors should also take place on issues such as restoring family contacts, transferring custodial responsibility, and exploring return and reintegration where it is in the best interests of the child. Regard to use of private international law should be considered, such as the 1996 Hague Convention.
- Where the return of the child is determined by a relevant child protection authority or guardian to be in their best interests but all options for voluntary returns have been exhausted, all possible measures for the return of the child or the family need to be taken to **prevent child rights violations and reduce harm to children and in line with child protection standards**. **The experience of enforced returns can be very harmful to children.** Therefore, sufficient safeguards need to be in place to ensure the return is safe and protects the best interests of the child at all times. In this respect, any returns procedures must never involve experiencing or witnessing the use of force on children or their families, or family separation. Rather, returns should be adequately planned with children and their families, who should be given the time to physically and psychologically prepare for their departure.

- **Independent monitoring** should be established, and child and gender sensitive **complaint mechanisms** should be in place and safe and accessible to children and their families. Adequate and ongoing **post-return evaluations** that analyse the long-term impacts of return on children should also be established.

4. Ensure that reintegration is sustainable and child-focussed.

For return to be in the best interests of the child, at a minimum, the following conditions must be in place in the return environment, so as to ensure sustainable reintegration and solutions for any child. These conditions must be monitored over time to guarantee that the environment remains conducive for long-term reintegration:

- **A child's legal safety must be assured.** For a child, this means that their documentation must be valid and recognized. Secondly, legal safety can only be secured when the child is reunited with a primary caregiver or assigned a guardian.
- **A child's physical safety must be assured.** Children must have safe spaces to live, play, learn and grow, spaces where all threats of harm are minimized as far as possible. There must also be clear and reliable guarantees that the drivers that led the child and/or family to migrate in the first place have been addressed. For example, at the community level, threats to physical safety can include remnants of violence or other forms of harm. At the household level, the child must be protected from abuse or other causes of harm.
- **A child's material safety must be assured.** Even when a sustainable solution is found for a child, it is necessary to consider the conditions of children in receiving communities. The absorption capacity of the local services including health, education and livelihoods, must be robust enough to provide for existing and new populations of children.
- **A child's psychosocial safety must be assured.** Child migrants often face violence, harassment and exclusion and other violations of their human rights. For these reasons, it is essential that children's psychosocial safety be addressed. Children's mental health and wellbeing must be carefully considered when deciding on sustainable solutions. A child must have a sense of belonging in the place they eventually settle in.

5. Seek alternatives to the return of children, including regularization, residence status and integration policies.

Return is only one of the many options for sustainable solutions for children (unaccompanied or with their families). There will be cases where a child would face rights violations if returned. In these and other situations where return is found not to be in the best interests of a child, the option must be available for continued residence in the country where they are and further integration, in order for children to receive adequate and meaningful protection. In such situations, government laws and policies must promote social inclusion. It is essential for children to have equal access to services as soon as possible, including child protection.⁵

Regularisation is a very common policy tool used by governments to address the reality and situation of people without authorisation to reside on a given territory. Regularisation has important benefits for well-managed migration systems, such as increased tax revenues and social security payments; information about the resident population and labour market; increased trust in state authorities amongst migrant communities; reduced inequality and social exclusion; reduced vulnerability to exploitation, abuse and trafficking; and better regulation and coverage of working conditions and health and social services. For children, young people and their families, clear status determination procedures mean secure and long-term perspectives and sense of security and belonging. **The Initiative therefore recommends that the Compact maintains reference to facilitating access to procedures towards residence status and regularization for children, youth and families, including the current language in objective 16 para 31 g.**

Recommendations and concrete language suggestions for the Global Compact on Migration:

Recommendation: The reference to best interest determinations in the context of returns is welcome, but additional safeguards are needed in the case of migrant children, as reflected below in the suggested language. The GCM should make clear reference to the principle of non-refoulement. It should also propose the systematic consideration of child rights in return and readmission agreements and the development of international standards for safe, assisted and voluntary return of children to their countries of origin. The Compact should also keep specific language on regularization through the text and add the following:

Paragraph 36a *Develop bilateral, regional and multilateral cooperation frameworks ensuring that return and readmission of migrants to their own country is fair, dignified and in full compliance with international human rights law, child rights and the best interests of the child, and that they also include provisions that facilitate sustainable reintegration*

Paragraph 36e: *Ensure that return decisions are carried out by competent authorities, including child protection and welfare authorities, and removal orders follow an individualized assessment of the circumstances that may weigh against the expulsion, such as risks of torture, or cruel, inhuman and degrading treatment or punishment, persecution, gross violations of human rights or other irreparable harm, children's best interests and level of integration, in compliance with due process guarantees, the principle of non-refoulement and the principle of the best interests of the child, and with special attention to the real risks for children, so as to preclude the possibility of forced return to an unsafe country of origin, to a third country, or to a situation where the well-being of a child or other vulnerable migrant is at risk.*

Paragraph 36f: *Establish or strengthen monitoring and oversight mechanisms on return, readmission and reintegration in partnership with relevant stakeholders, including national human rights institutions where they exist with the support of child protection and welfare authorities, as relevant, in order to provide recommendations on ways and means to enhance safety, dignity and sustainability.*

Paragraph 36g: *Develop and implement guidelines and frameworks for cooperation focused on child protection which include provisions for the safe, assisted and voluntary return of children to their countries of origin, who should only be returned when this has been determined to be in their best interests. Ensure that a parent or legal guardian accompanies children throughout the return process, including post return monitoring, and ensure that child-specific country of origin information reports and child-sensitive guidelines are developed and utilized to guarantee clarity about appropriate reception and care arrangements of children in countries to which they are being returned. Increase the availability and use of child-specific country of origin information reports, and support capacity of national and sub-national authorities for child-sensitive reintegration.*

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