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At Risk of Falling Through the Cracks?

The Protection of Children in State Care in Conflict Situations in International
Law and Practice

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Abstract

A day before the start of the Russian invasion of Ukraine, the Council of Europe vowed to create standards and mechanisms on child protection in armed conflict by 2027.¹ It further promised to address the discrimination of children in State care.² The need for a comprehensive child protection scheme during and post-armed conflict as well as efforts to combat the marginalization of children in State care have, thus, been acknowledged. Yet, as far as Europe is concerned, States have only begun to fuse child protection during armed conflict with the awareness of the heightened vulnerability and marginalization of children in State care in reaction to the war against Ukraine, a country which has one of the highest child institutionalization rates in the region. With thousands of children in State care continuing to be evacuated abroad in a humanitarian effort to protect their lives and rights, this thesis seeks to firstly discuss the (in)sufficiency of the existing international legal rights and protective framework for these children. Secondly, the thesis documents how States view their obligations towards these children, and what has already been undertaken by the international community vis-à-vis these children in light of the war against Ukraine as of early July 2022.

Keywords: *child protection, rights of the child, children in State care, armed conflict, Ukraine*

¹ Council of Europe, 'Strategy for the Rights of the Child (2022-2027) – Children's Rights in Action: from continuous implementation to joint innovation' (23 February 2022), 47.

² *Ibid*, 19.

To the children in State care affected by war. In a perfect world, this thesis would not have been about you. In a perfect world, your lives would not have been uprooted. It is my sincere hope that one day soon your voices will be heard, and your rights protected wherever you may be. I hope that you will be able to safely return home shortly and grow up to be strong adults and witnesses to the world of the senselessness of wars.

To my parents, grandfather, brother, friends, and mentors, who have always believed in me, my skills, and my ideas, even when I was struggling to do so myself, this thesis would not have come to fruition without you.

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Abbreviations

Additional Protocols I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
Alternative Care Guidelines	UN General Assembly Guidelines for the Alternative Care of Children
BMFSFJ	<i>Bundesministerium für Familie, Senioren, Frauen und Jugend</i> Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (Germany)
BVA	<i>Bundesverwaltungsamt</i> Federal Office of Administration (Germany)
CIHL	Customary International Humanitarian Law
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
EU	European Union
Geneva Convention IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
MSP	<i>Міністерство соціальної політики України</i> Ministry of Social Policy (Ukraine)
NGO	Non-governmental organization
Optional Protocol	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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1. Introduction

1.1. Children without Parental Care in Armed Conflict

In 2019, more than 16 percent of children were growing up in conflict areas, a number that has been on the rise since the 2000s.¹ Children are among the most vulnerable sections of the population as “war affects children in all the ways it affects adults, but also in different ways.”² Among the six gravest violations against children during armed conflict, which were identified by the UN Secretary General in 2005, the most common in 2020 were the killing or maiming of children, their recruitment and use in hostilities, and deprivation of humanitarian assistance to them.³ Child abductions and sexual violence against children were also on the rise with a 90 and 70 percent increase respectively in 2020.⁴

In addition to the threats against children’s development and lives listed by the Secretary General, children face peril deriving from the impacts of the conflict on persons close to them and their surroundings: The loss of their parents or similar caregivers, or their mental health problems caused by the conflict can place a heavy burden on the psychological wellbeing of the child for years to come.⁵ Moreover, disruptions in education and displacement, including their placement in camps, where they are unable to lead a regular life, will fundamentally shape their future.⁶ Disabilities caused by war may present additional barriers to accessing education, employment and integrating children into society as they rarely have or only have delayed access to rehabilitation programs, prosthetics or other support.⁷ Furthermore, victims of sexual violence may be shunned from their communities, unable to found their own families, while they struggle with the mental health impacts, sexually-transmitted diseases, or unwanted pregnancies resulting from their abuse.⁸ Confronted with the abhorrent realities of war, children and adolescents find themselves in need of having to deconstruct their world and moral views to survive and reconcile with their experience.⁹ Armed conflict thus escalates the risk of mental illnesses such as posttraumatic stress

¹ Gudrun Østby, Siri Aas Rustad and Andreas Forø Tollefsen, ‘Children Affected by Armed Conflict 1999-2019’, (Conflict Trends 23 November 2020) 1.

² Joanna Santa Barbara, ‘Impact of War on Children and Imperative to End War’ (2006) 47 *Croat Med J.* 891.

³ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, ‘Summary: Children Affected by Grave Violations – Trends and Developments 2020’ (2020) 2.

⁴ *Ibid.*

⁵ Santa Barbara (n 2).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, 892.

disorder, depression, and anxiety, which will only be enhanced when the child is displaced.¹⁰ During the displacement the child is then confronted with disenfranchisement from their home community and culture leading to a further identity crisis.¹¹

Children deprived of parental care, such as children living in State care, or separated from their family during armed conflict face additional vulnerability as they “are more likely to be at risk of abuse, exploitation, violence and, in some cases, recruitment by armed forces or armed groups.”¹² Additionally, many States lack reliable data on the children in their care, making it challenging to abide by their child rights obligations in peacetime, but unsurmountable during an armed conflict or war.¹³ The insufficiency of the data particularly concerns children in private institutions,¹⁴ thereby making it more challenging for State authorities and humanitarian organizations to locate these children and provide them with aid and protection.

The primary focus of this research is the examination of the protection of children in State care under international law taking into account their elevated dependence on the State and the States’ ability and willingness to abide by its legal obligations during armed conflict.

The highest share of children in institutional care were recorded in Central and Eastern Europe and the Commonwealth of Independent States, although most regions of the world only have insufficient data available.¹⁵ This covers Ukraine,¹⁶ where, as of June 2022, 40 percent of all individuals uprooted by the war were children, including children from institutional care, separated and unaccompanied children and those “accompanied by adults of unknown kinship”.¹⁷

According to UNICEF and UNHCR, roughly 100,000 children live in Ukrainian boarding schools and institutional facilities.¹⁸ Many of these children have living relatives or guardians,

¹⁰ Ibid.

¹¹ Ibid.

¹² Christian Cardon, ‘Addressing challenges of children without parental care in conflict settings’ (ICRC 07 December 2021) <<https://www.icrc.org/en/document/children-parental-care-conflict>> accessed 04 July 2022

¹³ UNICEF, ‘Children in alternative care’ (n.d.) <<https://data.unicef.org/topic/child-protection/children-alternative-care/>> 04 July 2022

¹⁴ Ibid.

¹⁵ Nicole Petrowski, Claudia Cappa and Peter Gross, ‘Estimating the number of children in formal alternative care: Challenges and results’ (2017) 70. *Child Abuse & Neglect* 388.

¹⁶ Ibid.

¹⁷ UNHCR and UNICEF, ‘Regional Inter-Agency Child Protection Update June 2022’ (1 July 2022), <<https://data.unhcr.org/en/documents/details/93981>>, accessed 4 July 2022

¹⁸ Catherine Russell and Filippo Grandi, ‘Unaccompanied and separated children fleeing escalating conflict in Ukraine must be protect’ (UNHCR & UNICEF 07 March 2022) <<https://www.unhcr.org/news/press/2022/3/622619a24/unaccompanied-separated-children-fleeing-escalating-conflict-ukraine-must.html>>, accessed 04 July 2022

which requires Ukrainian authorities planning to evacuate these children abroad to seek these individual's consent and to avoid family separations as far as possible.¹⁹ The two UN agencies further called on Ukraine to examine the best interests of these children.²⁰

As will be shown in chapter 3, a best interests evaluation would require children to be consulted in line with Article 12 of the Convention on the Rights of the Child (hereinafter: CRC), thereby giving children back some of the agency they lose while in State care and in conflict situations.²¹ Agency is crucial in child protection as they will only confide in adults concerning their protection needs when they know that they are being heard and their voice is given due consideration.²² However, as Sabine Schutter, member of the board of SOS-Kinderdorf e.V., has described from a visit to refugee centers in Poland in May 2022:

“In the silence of Expo Ptak, the voices of the children have subsided. They do not express themselves anymore, they are only functioning. [...] They know that at this moment their protest does not matter and that they will not be heard.”²³

Giving Ukrainian children, especially those in State care, back their voice and agency by engaging them in such decisions may help them regain a sense of control over their lives in times of turmoil and upheaval.

In addition to children being relocated, children remaining in institutions in the country are at risk of losing humanitarian support and staff, putting children in peril of neglect and abuse.²⁴ Since 50 percent of children in Ukrainian institutional care have a disability,²⁵ it is sadly not surprising that Disability Rights International exposed in April 2022, that the lack of staff, State and international support disproportionately affects children with the severest disabilities in Ukrainian institutions.²⁶ Children with lesser special needs can more easily be evacuated abroad, leaving behind those with higher needs in already overcrowded institutions, many of whom are without their medical histories or identity documents.²⁷

¹⁹ Ibid.

²⁰ Ibid.

²¹ Sabine Schutter, 'Krieg ist ultimative Verletzung der Kinderrechte' (*epdsozial* 13 May 2022) <https://w.epd.de/digital/soz_weekly/2022/05/13/270224.htm>, accessed 28 May 2022

²² Ibid.

²³ Ibid.

²⁴ SOS Children's Villages, 'Millions of children in Ukraine risk growing up without the care they need' (4 March 2022) <<https://www.sos-childrensvillages.org/news/millions-of-children-in-ukraine-at-risk>> accessed 04 July 2022

²⁵ Russell and Grandi (n 18)

²⁶ Eric Rosenthal and others, 'Left Behind in the War: Dangers Facing Children with Disabilities in Ukraine's Orphanages' (Disability Rights International 5 May 2022), 1f.

²⁷ Ibid.

1.2. Approach

The war against Ukraine has revealed the pernicious effects war has on children in State care, opening up a discussion on the sufficiency of international child protection legislation and international cooperation. Owing to high institutionalization rates, major international child right's organizations such as SOS Children's Villages and Save the Children as well as UN agencies have repeatedly drawn attention to these marginalized children and called on Ukraine and the international community not to forget about them. This debate must include taking stock of the current relevant international legal provisions and how these account for children in State care's heightened vulnerability and dependence on the State. This thesis will, hence, seek to answer the questions: How are children in State care protected during armed conflict under international law? And, how do States implement their obligations vis-à-vis these children in practice? The latter will be illuminated using the measures undertaken by Ukraine and receiving States vis-à-vis children in Ukrainian State care during the 2022 Russian invasion of Ukraine as an example.

The thesis begins by discussing the terminology central for understanding the topic and the possible implications of every term. The central focus is on what situations are considered as being in "State care" for the purposes of the current research. The third chapter presents a dogmatic legal analysis of the State obligations in relation to children in State care during armed conflicts. For this purpose, the following three international treaties are of special interest: the CRC,²⁸ the Fourth Geneva Convention of 1949 (hereinafter: Geneva Convention IV),²⁹ the Additional Protocols of 1977,³⁰ and the UN Guidelines for the Alternative Care of Children (hereinafter: Alternative Care Guidelines)³¹. The other three Geneva Conventions are not examined as they pertain to armed forces and prisoners of war. While it is possible that children participate in hostilities in violation of international law, hence are part of the armed forces of a party to the conflict, and may become prisoners of war, this thesis will limit itself to civilian children in State care, whose protection is codified in Geneva Convention IV. Furthermore, other international treaties will be excluded as the CRC takes up most of their provisions in a child-specific manner. Regional conventions and policy frameworks will not be analyzed as their scope of application is restricted to their

²⁸ Convention on the Rights of the Child (CRC) [1989] E/CN.4/RES/1990/74.

²⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) [1949] 75 UNTS 287.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) [1977] 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [1977], 1125 UNTS 609.

³¹ Guidelines for the Alternative Care of Children (Guidelines) [2010] A/RES/64/142.

respective region and this thesis seeks to provide an overview over the legal obligations of nearly every State in the world vis-à-vis children in State care during armed conflict. Lastly, the legal analysis will be limited to the State obligations of children in formal alternative care arrangements. It will, hence, exclude informal care arrangements and the obligation of the States towards children in parental care, as will be explained in chapter 2.

Finally, the fourth chapter will discuss the current situation of children in and evacuated from Ukrainian State care in light of the Russian invasion of Ukraine, drawing on survey responses and statements received by the author from States who have taken in evacuated children. The survey sent to these States received limited responses, thus, the conclusions drawn from this first-hand research are constrained.

2. Terminology

This thesis focuses on the protection of the rights of children in State care. This chapter defines the central legal terms as well as types of situations when the child is in State care during an armed conflict.

2.1. Definition of the “Child”

The CRC codifies State obligations vis-à-vis children and for this purpose defines who is a child entitled to protection under it. From the wording of Article 1 of the CRC, it can be inferred that the globally desired age limit for a child is 18 years. Nevertheless, this comes with the caveat that States are allowed to set the age of majority below 18 when “[...] under the law applicable to the child, majority is attained earlier.”³² This possibility enables the States to strip children from the safeguards of the Convention before the desired age subject to their discretion. In OECD countries as well as the European Union, the age of majority is typically 18, though other age limits in national legislations may vary, typically reflecting the increasing capacities of the child.³³

Despite seeming similarities in the age of majority of many countries, the war against Ukraine has revealed challenges in the discrepancies of other age limits particularly in cross-border displacement situations. For instance, Ukrainian children over 16 are allowed to leave the country unaccompanied under national law, but then face with obstacles in receiving States.³⁴ As an example, as of May 2022, they face legal obstacles in Poland because independent travel of minors is not allowed under Polish law.³⁵ Poland consequently puts these adolescents under temporary guardianship.³⁶ Thus, these differing age limits impose exceptional hurdles on those adolescents affected.

As is discussed further in chapter 3.2., international humanitarian law (hereinafter: IHL) does not have a clear and separate definition of the child. Geneva Convention IV and the Additional Protocols use various age limits with respect to protective measures for children.

³² CRC (n 28) Art. 1

³³ OECD, ‘Legal age thresholds regarding the transition from child- to adulthood’ (2016) <https://www.oecd.org/els/family/PF_1_8_Age_threshold_Childhood_to_Adulthood.pdf> accessed 09 July 2022; European Agency for Fundamental Rights ‘How age limits children’s access to rights’ (2018) <<https://fra.europa.eu/en/news/2018/how-age-limits-childrens-access-rights>> accessed 09 July 2022

³⁴ Ministry of Social Policy, ‘Ukrainian monitoring group held a working meeting with the diplomatic mission of Ukraine in Poland’ (19 April 2022) ><https://www.msp.gov.ua/news/21726.html>> accessed 07 July 2022

³⁵ Ibid.

³⁶ Ministry of Social Policy, ‘Maryna Lazebna visited the Host Center in Stalova Wola, which houses Ukrainian children displaced by hostilities from the territory of Ukraine to the Republic of Poland’ (25 May 2022) <<https://www.msp.gov.ua/news/21853.html>> 07 July 2022

As an example, Article 24 of Geneva Convention IV requires States to ensure that orphans and children separated from their families under 15 years are not left on their own.³⁷ The definition of the child has not been interpreted further after the adoption of the CRC. IHL therefore does not consider that youth between 15 and 24 are exceptionally vulnerable to exploitation, trafficking, forcible recruitment, violence, and abuse in displacement situations,³⁸ and there is thus a need for extending protective age limits beyond 15.

2.2. Different circumstances of children who are not cared for by their parents

There are multiple reasons why children are not cared for by their biological parents. The current subchapter therefore firstly defines a “family” and continues by identifying various terms used in international law to note the circumstances when children are not in parental care and when the State has an obligation to care for them.

2.2.1. Definition of “Family”

Although there are various provisions in international law and notably in the CRC seeking to protect a family, the notion was never defined. The UN Human Rights Committee has stated:

“the concept of the family may differ in some respects from State to State, and even from region to region within a State, and [...] it is therefore not possible to give the concept a standard definition.”³⁹

Consequently, international law and treaty bodies have purposely left it up to the States how to define a “family” and what kind of protection different types of families are granted under national law.⁴⁰ Discussing in-depth the meaning of “parent” and “family” in every State would go beyond scope and intention of this thesis. However, considering that as per the Preamble of the CRC “a family is imperative for the child growth and development”, thereby fulfilling an essential function vis-à-vis the child or children in a family, this thesis follows Treuthart’s “functional approach” to family,⁴¹ where a family fulfills various tasks such as:

“(1) maintaining the physical health and safety of family members by providing for their shelter, food, clothing, health care, and economic sustenance;

³⁷ Oscar Uhler and others, *Commentary on the Geneva Conventions of 12 August 1949 (Commentary of 1958)* (ICRC 1958), 185ff.

³⁸ UNHCR, ‘Child and Youth Participation’ (n.d.) <<https://www.unhcr.org/child-and-youth-protection.html>> accessed 27 June 2022

³⁹ Human Rights Committee, ‘CCPR General comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses’ (1990), para. 2.

⁴⁰ *Ibid.*, para. 2f.

⁴¹ Mary Patricia Treuthart, ‘Adopting a More Realistic Definition of Family’ (1990) 26 *Gonzaga Law Review* 91.

- (2) providing conditions for emotional growth, motivation, and self-esteem within a context of love and security;
- (3) helping to shape a belief system from which goals and values are derived, and encouraging shared responsibility for family and community;
- (4) teaching social skills and critical thinking, promoting life-long education, and providing guidance in responding to culture and society; and
- (5) creating a place for recreation and recuperation from external stresses.”⁴²

In addition, a nurturing, loving bond between the child and their caregivers is another imperative function to be fulfilled by families.

Family can therefore exist outside the biological, marital, or other legal relationships between the head or heads of the family and the other family members. Tying the “family”-notion to functions seeks to prevent the exclusion of some family units and the connected withdrawal of safeguards and rights. Furthermore, arbitrarily stripping certain types of families of protection, solely by omitting them from the definition, would arguably violate the affected child’s best interests concerning stability and maintenance of ties with their familiar caregivers as will be discussed in chapter 3.1. Due to the approach taken, this thesis focuses on the responsibilities of families vis-à-vis the child or children living within the family unit, which ensures that their fundamental needs and rights are met as part of the family functions. When the family is unable or unwilling to meet these functions, the State must step up to guarantee the proper care of the affected child or children, be it through family support or by putting them in its State care system in accordance with CRC Articles 19 and 20.

2.2.2. “Children without Parental Care”

Most commonly children who are not cared for by their parents are referred to as “children without parental care”,⁴³ a term that focusses on what they are lacking. UNICEF indirectly defines these children as those who have lost “their first line of protection – their family”⁴⁴ due to, but not limited to “displacement, inability of families to care for children due to poverty, disability, domestic violence, abuse or neglect, addiction or other forms of

⁴² Ibid citing California Legislature, ‘Planning a Family Policy for California - First Year Report of the Joint Select Task Force on the Changing Family’ (June 1989).

⁴³ Also: “children deprived of parental care” or “children lacking parental care”

⁴⁴ UNICEF, ‘Children lacking parental care’ (UNICEF Greece n.d.)

<<https://www.unicef.org/greece/en/children-lacking-parental-care>> accessed 28 June 2022

substance abuse, or death of parents”.⁴⁵ It is notable that this definition lacks attention to the conflict-related causes of children being in the care of the State, with the exceptions of the displacement and death of parents.

The Alternative Care Guidelines adopted a broader definition by describing children without parental care as being:

“all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances.”⁴⁶

This undoubtedly includes children who are orphaned or separated from their parents during armed conflict. Furthermore, the Guidelines refer explicitly to children without parental care in the context of cross-border migration and in emergency situations, distinguishing unaccompanied and separated children,⁴⁷ thus including *inter alia* children who were split from their families, parents, or caregivers due to conflict.

In summary, the term “children without parental care” identifies what crucial aspects for the child’s development are missing: the love and protection that a family provides. The definition of the Alternative Care Guidelines is sufficiently wide to include not only those children already separated from their caregivers before the conflict but also those who were split from them due to the conflict. What can be criticized in regard to the phrasing of “children without parental care” is firstly that according to the definition of the Alternative Care Guidelines only separation from parents is included, but not from relatives or other caregivers fulfilling similar functions. Moreover, this term only expresses the absence and the negative “is not”-state, yet neglects the positive “is” or “should be”-state. Hence it gives no indication of who should take responsibility for the protection and care of these children.

2.2.3. “Children in Alternative Care” and the Different Forms of Care

Another term with a slightly different connotation than the previous, but representing the same group of children is the term “children in alternative care”. As per the Alternative Care Guidelines, alternative care may be provided either informally, based on a private agreement, or formally, mandated by the State’s administrative or judicial bodies, and may take on a variety of forms across States and different subnational levels.⁴⁸ It should therefore be stressed that the following subchapters are only able to give a brief overview over the

⁴⁵ Ibid.

⁴⁶ Guidelines (n 31)

⁴⁷ Ibid.

⁴⁸ Ibid, para. 29(b)

different care forms with the caveat of the intricacies of each type varying across and even within State borders.

2.2.3.1. Kinship Care

Kinship care is “family-based care within the child’s extended family or with close friends of the family known to the child.”⁴⁹ Consequently, kinship care in the Alternative Care Guidelines assumes a pre-existing relationship between the child and the caregiver.⁵⁰

Kinship care arrangements may be informal or formal. When it is informal, the natural guardian/parent of the child may entrust them into the care of a relative or family friend.⁵¹ Hence, the child remains in the legal custody of the parent. It is thus up to the latter to ensure that the caregiver is able to ensure the child’s protection and provide for their needs. Nevertheless, the State as for children living with their parents must still step in if the child and their needs are in danger. Due to the difficulty of State oversight in these cases, the following research considers informal kinship care as equal to parental care, and will thus be excluded.

As for formal kinship care, the custody over the child is transferred to another private individual or to the responsible child protection authorities, which then puts the child in the care of a person with an existing bond to the child.⁵² When custody is transferred to State authorities, the State has an increased responsibility to oversee these children’s care.⁵³ They shall therefore be included in this thesis.

⁴⁹ Ibid, para. 29(c)(i)

⁵⁰ Citizens Advice Scotland, ‘Kinship Care’ (*National Association of Citizens Advice Bureaux* n.d.) <<https://www.citizensadvice.org.uk/scotland/family/children-and-young-people/kinship-care-s/>>, accessed 29 June 2022

⁵¹ Arizona Department of Child Safety, ‘What is the difference between formal and informal kinship care?’ (n.d.) <<https://dcs.az.gov/resources/faq/question-what-difference-between-formal-and-informal-kinship-care/>>, accessed 29 June 2022

⁵² Ibid.

⁵³ Ibid.

2.2.3.2. Foster Care

Foster care is another type of alternative care, which is defined as:

“situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care.”⁵⁴

Ergo, the State authorities take on the responsibility of finding a family environment to care for the child, much like in formal kinship care. Yet, with the difference of there being no pre-existing ties between the child and their caregiver. As the State retains oversight over the family and the child, this type of care form will also be considered by this thesis.

2.2.3.3. Kafalah Care and Adoption

In the Alternative Care Guidelines, *Kafalah* and adoption are named together as measures to be taken if it is not possible to keep or return children to their families to secure permanency for the respective child.⁵⁵ Nonetheless, these two forms of placement are a last resort and temporary care tailored towards supporting family reunification is preferred, particularly for separated or unaccompanied children.⁵⁶ In adoption, parental rights are permanently and formally severed and the adoptive family takes on all the family functions and care vis-à-vis the child.⁵⁷

Kafalah, in contrast, is an alternative care form recognized in international law but originating from Sharia law since adoption is forbidden (*haram*) thereunder.⁵⁸ While the intricacies of *Kafalah* vary across the Islamic world, a *Kafalah* caregiver generally has the duty to protect and provide for the child, but ties to the child’s biological family and their family status remain unchanged, as to be seen in the maintenance of their family name and inheritance rights

⁵⁴ Guidelines (n 31), para. 29(c)(ii)

⁵⁵ Ibid, para. 2(a); Declaration on Social and Legal Principles relating to the Protection and Welfare of Children [...] [1986] A/RES/41/85, Art. 13

⁵⁶ Guidelines (n 31), para. 152.

⁵⁷ Better Care Network, ‘Adoption or Kafala’ (n.d.) <<https://bettercarenetwork.org/library/the-continuum-of-care/adoption-and-kafala>>, accessed 29 June 2022

⁵⁸ Usang M. Assim and Julia Sloth-Nielsen, ‘Islamic *kafalah* as an alternative care option for children deprived of a family environment’, 14 African Human Rights Law Journal 322, 324f.; International Social Service and International Reference Centre for the Rights of Children Deprived of their Family, ‘Fact Sheet No. 50: Specific Case – KAFALAH’ (2007)

vis-à-vis their biological family.⁵⁹ The caregiver also assumes legal guardianship over the child.⁶⁰

As for the legal status of a child in *Kafalah* care, the Court of Justice of the European Union stated in its judgement in *SM v Entry Clearance Officer, UK Visa Section* that children in *Kafalah* care are seen as ‘other family members’ and not ‘direct descendants’ of their *Kafalah* caregivers under EU law, as would be the case for adoptees.⁶¹ To be granted access to the EU like ‘direct descendants’, *Kafalah* families must prove “further elements of dependency, involving ‘more than the normal emotional ties’”.⁶² Thus, they face a higher burden of proof than adoptive or biological ‘core’ families.⁶³ A similar approach has been taken by the CRC Committee in *Y.B. and N.S. v Belgium*, which ruled that there is no guarantee to family reunification for children with their *Kafalah* caregivers, although in the evaluation of the child’s best interests the relationship between the two must be taken into account.⁶⁴ And the European Court of Human Rights (hereinafter: ECtHR) has made it clear in several cases that the European Convention on Human Rights (hereinafter: ECHR) does not obligate States to treat all types of guardianship, including *Kafalah*, like adoption.⁶⁵

In conclusion, the recognition of the *Kafalah* or adoptive family as a family with all the entitlements under the CRC may be problematic, such as the right to reunification. Rather, the States must bear in mind the relationships between the child and the carer when assessing whether the child should be reunited with its caregivers or not.⁶⁶ Since guardianship and the obligation to care and provide for the child in both cases lie solely with the family, this thesis does not consider these children unless they are separated from their family due to a conflict and/or the ensuing displacement.

⁵⁹ Ibid.

⁶⁰ Court of Justice of the European Union, ‘Press Release No. 41/19: A minor in the guardianship of a citizen of the EU under the Algerian kafala system cannot be regarded as a ‘direct descendant’ of that citizen’ (26 March 2019), <<https://www.atiner.gr/journals/social/2014-1-2-2-Duca.pdf>>, accessed 30 June 2022

⁶¹ Ibid.

⁶² Florence Boreil and others, ‘Family Reunification for Refugee and Migrant Children’ (Council of Europe 2020) 26.

⁶³ Ibid, 26f.

⁶⁴ Ibid 27 citing *Y.B. and N.S. v Belgium* (CRC Committee)

⁶⁵ Ibid citing *Harroudj v. France*, No. 43631/09, 4 October 2012, paragraph 51 and *Chbihi Loudoudi and Others v. Belgium*, No. 52265/10, 16 December 2014.

⁶⁶ Ibid citing *Y.B. and N.S. v Belgium* (CRC Committee)

2.2.3.4. “Other forms of family-based or family-like care placements”

Another example of alternative care is what the Alternative Care Guidelines call “other forms of family-based or family-like care placements”. According to the EU Commission, this includes instances, where the child lives with their future adoptive family before the adoption is finalized.⁶⁷ When a child in such cases is separated during a conflict and/or migration the question of whether or not they should be reunited with their prospective adoptive family must be answered with an examination of the child’s best interests. In this regard, UNICEF notes that:

“Displacement in an emergency should not be used as justification for expediting adoption or circumventing international standards. Adoptions should always be made in the best interests of the child, with full respect for [their] rights. [...] In an emergency situation, it can be near impossible to ensure that the standards and safeguards of the convention are respected. This escalates the risk of child abduction, sale, or trafficking, and of illegal adoptions.”⁶⁸

Ergo, the finalization of adoptions should either be suspended, or safeguards must be in place to guarantee that the adoption is indeed in the child’s best interests, and the child is not at risk of being trafficked or abused. As an example, in response to the Russian invasion of Ukraine, Ukraine as of March 2022 has “suspended [adoptions] due to the inability to ensure compliance with the law and safety of children.”⁶⁹

Children in such arrangements will be considered ‘in State care’ until a court has finalized their adoption case by granting full custody and legal guardianship to the adoptive parents.

2.2.3.5. “Supervised independent living arrangements”

The last form of alternative care mentioned by the Alternative Care Guidelines are “supervised independent living arrangements”.⁷⁰ According to UNHCR this is a form of “care in which the child lives without full-time adult care”⁷¹ available for children above 15.⁷² Since family-based care is seen as the best type of care, as this thesis shows in chapter 3, it should

⁶⁷ Veronique Lerch and Anna Nordenmark Severinsson, ‘Feasibility Study for a Child Guarantee - Target Group Discussion Paper on Children in Alternative Care’ (European Commission 2019) 20.

⁶⁸ UNICEF, ‘Guidance for protecting displaced and refugee children in and outside of Ukraine’ (10 March 2022) <<https://www.unicef.org/emergencies/guidance-protecting-displaced-children-ukraine>>, accessed 30 June 2022

⁶⁹ UNICEF, ‘How to help an unaccompanied child during martial law in Ukraine’ (24 March 2022) <https://www.unicef.org/ukraine/en/stories/help-unaccompanied-child-during-war-in-Ukraine>, accessed 30 June 2022

⁷⁰ Guidelines (n 31), para. 29(c)(v)

⁷¹ UNHCR, ‘Guidelines on supervised independent living for unaccompanied children’ (UNHCR 2021) 5.

⁷² Ibid.

only be attempted if family placement or similar is not possible.⁷³ Thus, the children and adolescents not having attained majority and remaining under State guardianship are regarded as a group whose protection is analyzed in this thesis irrespective of their practical living arrangements.

2.2.3.6. Institutional/Residential Care

The Alternative Care Guidelines define residential care as

“care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes.”⁷⁴

Children in these facilities are, hence, deprived of a family environment. The UN Guidelines therefore call on States to establish alternatives to institutional placements as the goal of national care systems should be deinstitutionalization and family placement.⁷⁵

Where residential care continues to exist, it should resemble a family environment as much as possible by keeping the institution and the care group setting small and providing enough caregivers.⁷⁶ Institutional care should further only be temporary with the goal of reunifying children with their family and if that is not feasible, the child should be rehomed into a family environment.⁷⁷ Seeing as how the Guidelines make it unmistakably clear that the obligation to oversee the care standards in residential care facilities lies with the State, the children in these institutions are included in this these.

2.2.3.7. Conclusion

To conclude, the term “alternative care” points to a myriad of more or less State supervised care schemes. The Council of Europe describes children in alternative care as being “placed with relatives, in foster care or other family-like settings, or in residential institutions”, although a family environment is preferred.⁷⁸ Nevertheless, like the phrasing ‘children without parental care’, the term ‘children in alternative care’ does not sufficiently acknowledge who is responsible for the care of the children.

⁷³ Ibid.

⁷⁴ Guidelines (n 31), para. 29(c)(iv)

⁷⁵ Ibid, para. 23

⁷⁶ Ibid, para. 123 and 126

⁷⁷ Ibid, para. 123

⁷⁸ Council of Europe, ‘Alternative care’ (*Council of Europe Children’s Rights* n.d.) <<https://www.coe.int/en/web/children/alternative-care>>, accessed 28 June 2022

2.2.4. Children in State Care

The Alternative Care Guidelines highlight that the obligation to ensure the care of children without parental care lies with the State.⁷⁹ Using the term ‘children in State care’ accentuates said obligation. Del Valle depicts State care as:

“a situation in which governments or local authorities take responsibility for looking after dependent children who lack a family to perform the functions of upbringing and protection.”⁸⁰

This thesis will follow del Valle’s approach of considering children in State care as those formally placed in a form of alternative care, unless that is adoption or *Kafalah* care.

Additionally, there are children who require State care or State-arranged care due to the effects of an armed conflict. For example, the Alternative Care Guidelines identify separated and unaccompanied children.⁸¹ Such children have left their country of habitual residence or are affected by an emergency and have been separated from their primary or original caregiver.⁸² However, the two categories must be distinguished as separated children under the Guidelines “may nevertheless be accompanied by another relative”,⁸³ whereas unaccompanied children are not in the company of a relative or other caregiver.⁸⁴ Therefore, the first may not necessarily require State care, but the second will. Nonetheless, the State under whose jurisdiction the child is, should monitor the caregiving circumstances of the separated child to protect the child from being trafficked and abused by someone claiming to be a relative.

Another category of children lacking parental care, which is not mentioned in the Alternative Care Guidelines, are orphans. With armed conflict causing the death of high numbers of civilians and military personnel, the risk for children to be orphaned through the loss of one or both parents is aggravated. There is no commonly recognized definition of an orphan in international law.⁸⁵ This is due to States disagreeing for example on when a child ages out of orphanhood, which may be between 15 and 18.⁸⁶ Moreover, there is no consensus on whether the loss of one parent is sufficient for a child to be considered an orphan, or whether

⁷⁹ E.g. Guidelines (n 31), para. 5

⁸⁰ Jorge F. del Valle, ‘Children in State Care’ in A. Ben-Arieh and others (eds), *Handbook of Child Well-Being* (Springer Science+Business Media Dordrecht 2014) 2945f.

⁸¹ Guidelines (n 31), para. 29(a)(i) and (ii)

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Rose Smart, *Policies for Orphans and Vulnerable Children: A Framework for Moving Ahead* (POLICY Project 2003) 3.

⁸⁶ Ibid.

the child must have lost both parents.⁸⁷ UNAIDS defined “orphans” in the context of the AIDS pandemic as being “any child under age 18 who has lost one or both parents”.⁸⁸ This broad definition can surely be transferred to children whose loss is directly or indirectly attributable to armed conflict. It must, however, be pointed out that not every orphan will end up in State care, notably when the child has one surviving parent or relatives are willing and able to take care of the child respecting their best interests.

The Alternative Care Guidelines also specifically mention children at risk of losing parental care/entering state care.⁸⁹ As State assistance to families is likely to be impaired due to armed conflict, the risk of children being abandoned by their families, who are unable to support them, increases. This thesis will, however, not include these children unless they enter State care or become unaccompanied or separated from their family.

To conclude, the term ‘children in State Care’ in this thesis is understood to include all those children, whose alternative care has been formally arranged by State authorities before, during or after the conflict, and where guardianship has not yet been finally transferred to adoptive, *Kafalah* or similar caregivers. Moreover, this thesis will examine the State obligations concerning unaccompanied children and those children who may arrive in a country with a relative, family friend or other adult, but this individual is not able to care for the child or where the care by this caregiver would not be in the child’s best interests.

⁸⁷ Ibid.

⁸⁸ UNAIDS and UNICEF and USAID, ‘Children on the Brink 2004’ (2004) 3.

⁸⁹ Guidelines (n 31), para. 1

3. State Obligations protecting children in State care

The following chapter analyzes existing obligations of States vis-à-vis children in State care in armed conflict as defined above. It will thereby firstly focus on the CRC as the most comprehensive international treaty protecting the rights of children. Secondly, the States' IHL obligations under Geneva Convention IV and the Additional Protocols are analyzed as the most important sources of humanitarian obligations vis-à-vis children. Lastly, the recommendations made by the Alternative Care Guidelines on children in State care during armed conflict are laid out.

3.1. The Convention on the Rights of the Child (CRC)

3.1.1. Protection of the Right to “Family” Life

As was noted in chapter 2.2.1., the notion ‘family’ was purposely not defined in international law as it may take on a myriad of forms across different cultures and societies. However, the CRC places great importance on family for ensuring the protection and development of children, calling it “the fundamental group of society and the natural environment”.⁹⁰

The subsequent subchapters acknowledge that when discussing how to protect ‘families’ during armed conflict, it would be insufficient to only consider ‘family environments’ in the more classical sense such as biological, kinship, adoptive, *Kafalah*, or foster families. Rather, the bond and relationship a child or adolescent has with their familiar institutional caregiver and other members of the care unit should be taken into account in accordance with the child’s best interests. In situations of turmoil and upheaval it may be in the child’s best interests to provide them with stability and continuity as much as possible, as the approach of Germany and Poland towards the care of children evacuated from Ukrainian State care demonstrates.⁹¹ It will be shown, that when making the placement or return decision, the State should consider *inter alia* maintaining the existing unity and relationships of children with their foster parents, institutional care units, and caregivers, unless they can be safely reunited with their biological parents, relatives or similar caregivers instead.

⁹⁰ CRC (n 28), Preamble, sentence 5

⁹¹ Statement by the German Federal Ministry for Families, Seniors, Women and Youth (BMFSFJ), 5 May 2022. C.f. Appendix 6; Statement by the Polish Ministry of Family and Social Policy, 8 June 2022. C.f. Appendix 7

3.1.1.1. The Protection of the Stability of a Family Unity between Children and their Institutional Caregivers

Article 16 CRC prohibits and protects from arbitrary and unlawful interference with the child's family life.⁹² Consequently, infringements upon a child's family life are only allowed when they are reasonable and in accordance with national law and relevant international human rights treaties.⁹³

The question is whether this protection only applies to children living with their biological, step-, *Kafalah*, kinship or adopted families, or whether it also includes children in foster families, other family-type care setting such as SOS families or perhaps even the relationship between a child in institutional care and their caregiver. Germany and Poland stressed in their responses the need to keep children and their familiar caregivers together to ensure as much stability as possible for children evacuated from Ukrainian State care.⁹⁴ According to them, this is in these children's best interests. It may be argued that this implies that the relations of a child with their institutional caregiver may amount to what the CRC terms "family relations", which are protected from illegal infringements under Article 8(1) CRC.

The need for continuity in the child's upbringing is further codified in Article 20(3) CRC. This is exceptionally crucial for children in State care as they have already been separated from their families and their familiar surroundings when they were placed in State care. Evacuations during armed conflict once again uproot these children's lives and force them into an unknown environment, especially when they are moved abroad. Splitting them from their familiar caregivers, as would be the case when placing evacuated children in family-based care rather than with their institutional caregivers as has been demanded by some NGOs regarding children evacuated from Ukrainian State care⁹⁵, will cause additional disruption in their upbringing.

Thus, it is in the best interests of the child in State care for their relationship with their familiar caregivers to be protected as much as possible when evacuating them during armed conflict. Further, keeping children together with the other children in their care groups may be crucial

⁹² CRC (n 28), Art. 16

⁹³ Human Rights Committee, 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (1988), paras. 1ff.

⁹⁴ BMFSFJ (n 91); Polish Ministry of Family and Social Policy (n 91)

⁹⁵ Eurochild, 'War in Ukraine: Putting Children First' (23 May 2022), <<https://eurochild.org/uploads/2022/05/War-in-Ukraine-Putting-Children-First-Eurochild-Statement.pdf>> accessed 07 July 2022

for their well-being, much like with biological, step- or other types of siblings. Consequently, the wholeness of these types of relationships should be assessed on a case-by-case basis, and when they provide safety and stability for the child, preserved in the same way as what would typically be considered a “family”.

Article 20(3) CRC further codifies the respect for the child’s background, including language, culture, and religion, and “desirability of continuity in a child’s upbringing”, which echoes the need to maintain the unity of care groups in the context of evacuations, if that is in the child’s best interests. Their caregivers firstly provide continuity and stability in a situation where the child’s entire life is uprooted, since they share the child’s background. Secondly, not every receiving State may have its own caregivers with the same background or speaking the same language, which could be remedied through keeping the children with their caregivers. Consequently, the State of origin⁹⁶ and receiving States⁹⁷ are not only obligated under the provisions of the CRC to maintain the unity of caregivers and their entrusted children, but particularly in the case of receiving States this is also in the interest of the State seeking to implement Article 20(3) CRC because of the similar background of children and caregivers.

Following this conclusion, CRC Article 20(3) can also be interpreted as obliging the States to support the contact between different parts of care groups separated in the course of humanitarian evacuations. To this end, if Ukrainian care groups have been split, Poland for example actively supports the contact between the different parts.⁹⁸

In summary, the unity of caregivers and their entrusted children should be seen as protected under Articles 8(1) and 20(3) CRC to maintain stability in the child’s upbringing, unless this unity infringes upon other interests of the child. If keeping them together is not possible, contact should be maintained and facilitated by State authorities.

3.1.1.2. The Right to Family Reunification

Article 8 CRC considers the child’s family a fundamental element of the child’s identity, and States are obligated to restore any elements of the identity that the child may have lost. This suggests that the State must restore the child’s family ties, if possible and in the child’s best interests. Moreover, Article 22(2) CRC demands States to cooperate with the UN and

⁹⁶ “State of origin” shall refer to the country in which the child has their residence, but has fled from due to armed conflict.

⁹⁷ “Receiving State” shall refer to the country in which the child (or parent) has taken up their new residence after fleeing from the armed conflict in their “State of origin”.

⁹⁸ Ministry of Social Policy, ‘Political Declaration Between The Ministry Of Social Policy Of Ukraine And Ministry of Family And Social Policy Of The Republic Of Poland On Social Protection Of Children Victims of Military Actions and Armed Conflict’ (1 July 2022), <<https://www.msp.gov.ua/news/21998.html>> accessed 06 July 2022

various organizations to help the refugee child in determining the whereabouts of their parents or relatives for the sake of reunification. This obligation has foremost been defined in relation to children who have been separated from their parents while fleeing or during the conflict which preceded their flight. It also includes those unaccompanied minors, who have been sent abroad by their parents to live with family members or friends. Here cooperation of the receiving State with other States, where family members are living, and the State of origin is crucial. When children's relatives have been found and reunification is feasible and in the child's best interests, involved States must allow parents or relatives and children to enter and leave their territory for reunification.⁹⁹ Nevertheless, reunification during armed conflict may not only be difficult as lines of communication are disrupted, but it may also be dangerous for the child to return to their country of origin for reunification. Hence, if the safety of the child would be endangered, it is likely not in the child's best interests, which should be at the forefront of considerations concerning any such endeavors.

As for children who lived in State care institutions before the conflict, the State may seek to reunify them before evacuating and separating them further from their families. However, any such undertaking requires a close evaluation of the child's interest and should be decided on a case-by-case basis. Once the child has been relocated to another country, the State of origin should inform the receiving State of why the child was separated from their parents or other guardians, to ensure that the receiving State only reunifies the child with the latter if that is in the child's best interests concerning their health, safety, well-being, and any other relevant criteria. Alternatively, the State of origin should seek assurances from the receiving States that no child evacuated from State care facilities shall be reunified until the child has been repatriated and that contacts between the children and their parents are maintained if that is possible, safe and in their best interests. What can be held against this alternative is that depending on the length of the conflict, precluding reunification for the duration of the displacement may cause an undue prolongation of family separation in contradiction to Article 8 CRC, as the case has been practically put on hold. Thus, where the State of origin was pursuing family reunification long-term and when the risks to the child arising from the family have been or can be remedied or do not pose severe harm to the child, the process should be continued as far as possible to ensure the restoration of family ties under Article 8(2) CRC. However, the possibility of a child to be cared for by their parents is likely to be further negatively affected by armed conflict due to factors such as death, injury, imprisonment, or disappearance, as well as deteriorations in the economic

⁹⁹ CRC (n 28), Art. 10

circumstances, living situation etc. of the parents. Reunification may, hence, become more improbable.

3.1.1.3. The Right to Contact with Parents

Where children have been separated from their parents or caregivers and cannot be reunified, or are in State care and the responsible authorities have deemed it safe and in the children's best interests, they have "the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents" under Article 10(2) CRC. This may be severely challenged during conflict, when lines of communication have broken down and large-scale displacement and public disorder has occurred. Therefore, it may be difficult for the State, in which the child finds itself, to determine the whereabouts of the parents, relatives or similar primary caregivers to establish contact. The State of origin and receiving States must therefore work together to facilitate the child's right to contact with these individuals despite the adversities arising from armed conflict and ensure, as far as possible, the contact between the child either in person or through letter, electronic communication or phone calls.

3.1.1.4. Summary: State obligations concerning the child's right to family life

To summarize, the State has to fulfill the following central obligations to safeguard the child's right to family life in times of armed conflict:

1. Refrain from and protect children from arbitrary and unlawful interference into their family life (CRC Art. 16).
2. Protect families and care units from being separated *inter alia* in shelters, during evacuations, at borders, in receiving States etc. by e.g. providing designated accommodation, safe spaces and border lines (CRC Art. 9(1)).
3. In case of family separation or when children are otherwise unaccompanied, protect, assist and include them into its State care system (CRC Arts. 20 and 22).
4. As far as possible respect the children's background when determining alternative care forms (CRC Art. 20) e.g. through foster families or other caregivers with a similar cultural, linguistic, or other background or keeping them with familiar caregivers.

5. Reunite children with their family/caregivers when they have been separated during armed conflict/migration if it is in the child's best interests and to this end:
 - allow entry and exit from territory (CRC Art. 17),
 - cooperate with international organizations, State(s) in which all involved individuals find themselves etc. (CRC Art. 22(2)).
6. Consider reunification of families pre-evacuation if in the child's best interests (e.g. concerning safety etc.) to prevent further severance of family ties.
7. Seek guarantees from the receiving State not to reunify the family, unless that is in the child's best interests and in line with national safeguards.
8. Ensure through cooperation between all States in which involved individuals find themselves to maintain contact between them (CRC Art. 10(2)).
9. Avail itself to international assistance if unable to ensure the child's right to family life in the context of an armed conflict.

3.1.2. Protection of the Child's Security

The CRC contains various provisions directly and indirectly protecting the child's security and safety from harm. This thesis distinguishes between security from mental and physical harm (CRC Article 19) and the child's social security (CRC Article 26). Both forms of security are firstly essential to ensuring the child's proper development and well-being as envisioned *inter alia* by Article 6(2) of the CRC, and secondly the basis for their enjoyment of other human and child rights.

3.1.2.1. Protection of the Physical and Mental Integrity of the Child

As a general principle, a fundamental aspect to be considered in the protection of the physical and mental integrity of the child are their best interests. Article 3 of the CRC makes the child's best interests a point of "primary consideration" "in all actions concerning children". 'Actions' thereby also incorporate inactions, which affect a single child or children as a group.¹⁰⁰

¹⁰⁰ John Eekelaar and John Tobin, 'Article 3. The Best Interests of the Child', in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 77f.

CRC's General Comment 14 requires that any

“assessment of the child's best interests must also include consideration of the child's safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse (Art. 19), sexual harassment, peer pressure, bullying, degrading treatment, etc., as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflict, etc. (Arts. 32-39)”¹⁰¹

Consequently, best interests evaluations play a fundamental role for children in State care during armed conflict, for instance when decisions are taken concerning evacuations, and whether they should be conducted domestically or across borders. The child's best interests also have to be evaluated when the State of origin deliberates on family reunification before evacuating the child, or increasing family separation through an evacuation seeking to protect the child's physical and mental integrity. UNHCR therefore suggests to initiate a best interests determination *inter alia* when “the family member or relative that the child will join lives in an environment (in detention, in an area affected by armed conflict, etc.) that is likely to expose the child to physical or emotional harm.”¹⁰² Carrying out a comprehensive best interests evaluation during an armed conflict may be challenging for State authorities of the State of origin, but it does not excuse the State from its obligation, since it may seek international.

As far as the receiving State is concerned, it is for instance responsible to ensure the best interests of the child by protecting them from physical and mental harm during the child's stay on its territory. This refers for example to the conditions of the evacuation and the accommodation provided by the receiving State, as well as long-term placement solutions for the child and the evaluation of whether a return to the country of origin or local integration should be pursued after the cessation of hostilities.

Article 3(3) CRC stipulates that State institutions concerned with the care and protection of children should ensure certain standards, *inter alia* regarding safety. This unquestionably implicates the alternative care system. While inspiration can be drawn from the Alternative Care Guidelines,¹⁰³ the precise standards, nevertheless, are to be determined by the respective authorities, which leaves room for States to have different standards, especially

¹⁰¹ Committee on the Rights of the Child, 'General Comment No. 14 on the right of the child to have his or her best interests as primary consideration (art. 3, para. 1)' (2013) CRC/C/GC/14, para. 73.

¹⁰² UNHCR, '2021 UNHCR Best Interests Procedures Guidelines: Assessing and Determining the Best Interests of the Child' (2021) 160.

¹⁰³ Eekelaar and Tobin (n 100) 105.

when they decide not to give priority to their childcare system. Furthermore, due to armed conflict, States may no longer be able to abide by their own standards. And for smaller, economically weaker receiving States it may be impossible to abide by them, when additional children are added and putting greater strain on the State care system. In these cases, States have the obligation to avail themselves to international assistance.

Another codification of the State's obligation to protect the mental and physical integrity of the child can be found in the protection of the child's privacy.¹⁰⁴ Article 16 CRC echoes the requirements of Article 17 of the International Covenant on Civil and Political Rights¹⁰⁵ and Article 12 of the UDHR.¹⁰⁶ Tobin and Field note that the right to privacy encompasses the child's right to have their mental and physical integrity, personal identity, decisional autonomy as well as informational and physical/spatial privacy protected.¹⁰⁷ The right thereby is not absolute. Interferences are permissible if they are lawful, justifiable, and in line with other human rights.¹⁰⁸ This may include circumstances in which the invasion of the child's privacy is necessary "to secure the child's best interest and/or survival and development".¹⁰⁹ This becomes particularly relevant in situations where armed conflict threatens the child's life, well-being, and survival. Tobin and Field argue, that the State here is obligated to infringe on the child's rights under Article 16 CRC¹¹⁰ for instance when the State of origin and the receiving States exchange information on the whereabouts and state of care of evacuated children. Moreover, the State of origin may need to breach the child's privacy to provide the receiving State with necessary information to make sure that a child's special needs are met. If the States do not exchange such information, it may take the authorities of the receiving country some time to carry out their own evaluations concerning the child's medical or other needs. Tobin and Field argue that confidentiality may indeed be broken when "protective considerations necessitate the disclosure of information by professionals who work with children".¹¹¹ Yet, this may only be done to the extent to which the restriction of privacy is justifiable.¹¹²

¹⁰⁴ John Tobin and Sarah M. Field, 'Article 16. The Right to protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 555.

¹⁰⁵ International Covenant on Civil and Political Rights [1966] 999 United Nations Treaty Series 171, Art. 17

¹⁰⁶ Universal Declaration of Human Rights [1948] 217 A (III), Art. 12

¹⁰⁷ Tobin and Field (n 104) 555.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, 559.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 570.

¹¹² *Ibid.*, 571.

In addition to privacy, Article 16 CRC also envisions the protection of the child's home. Following the HRC's and ECtHR's understanding of 'home', the notion must be understood broadly to also encompass alternative care forms such as institutional and foster care as well as the child's educational institutions.¹¹³ Protecting these environments, ensures the child's safety therein.¹¹⁴ Armed conflicts, however, are bound to breach said safety. Yet, it does not release the State from its obligation under CRC Article 16(2) to provide for "the protection of the law against such interference or attacks",¹¹⁵ which includes the investigation and prosecution of any arbitrary and/or unlawful violations of Article 16 CRC.

Finally, Article 16 CRC also safeguards the reputation and honor of the child. Children in State care may already deal with discrimination because of their status. Their displacement may increase the risk of discriminatory treatment, thereby constituting an attack against the child's reputation and honor. Therefore, it can be argued that States are obliged to consider this risk in their legislation and ensure that displaced children in State care are protected from such attacks and any such attacks are investigated.

CRC Article 18 sees "primary responsibility for the upbringing and development of the child" to lie with parents and other legal guardians. Protecting the mental and physical integrity of the child are thereby essential elements in the child's development and must therefore be ensured by parents and other legal guardians. The inclusion of the latter in CRC Article 18 is meant to encompass children for whom the legal responsibility lies with the State.¹¹⁶ While the State's functioning, along with that of its authorities having legal guardianship over children, is likely to be challenged during armed conflicts, State responsibility in ensuring the development of the children in its care does not subside.

Another, more explicit codification of the State's obligation to protect the physical and mental integrity and thereby the security of the child, is contained in Article 19(1) CRC, which holds that

"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of [...] violence, [...] injury, [...] abuse [...] or exploitation [...]."

¹¹³ Ibid, 586.

¹¹⁴ Ibid, 587.

¹¹⁵ CRC (n 28), Art. 16

¹¹⁶ John Tobin and Florence Seow, 'Article 18. Parental Responsibilities and State Assistance' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 663.

This is to be ensured independently from the decision of who is taking care of the child when the listed harms occur, hence, also when children find themselves in different forms of State care. Indeed, General Comment 13 stresses that:

“Article 19 also applies to children without a primary or proxy caregiver or another person who is entrusted with the protection and well-being of the child such as, for instance [...] unaccompanied children outside their country of origin”.¹¹⁷

Therefore Article 19 CRC is also applicable during displacement, when children flee abroad unaccompanied or children from State care are evacuated outside the boundaries of their country of origin. The receiving State here has the duty to protect children from violence and other forms of harm.

The State obligation under Article 19 CRC is twofold requiring the State firstly to defend children from “acts or omissions, intentionally or unintentionally, that would constitute violence and/or any of the other forms of harm listed” perpetrated by both state and non-state actors.¹¹⁸ Secondly, States should ensure that children can defend themselves against violations of their integrity under Article 19 to the extent to which they are able considering their maturity.¹¹⁹

Armed conflict unquestionably increases the risk of children being subjected to various forms of violence, abuse, and exploitation. In these times, it is therefore all the more pertinent for States to abide by Articles 19, 32, 34, 35 and 36 of the CRC to protect the physical and mental integrity of children impacted by conflict. Due to resource constraints arising under such circumstances, the State’s adherence to these obligations may nevertheless be constrained.

The CRC Committee’s General Comment 13, however, makes clear:

“that resource constraints cannot provide a justification for a State party’s failure to take any, or enough, of the measures that are required for child protection”.¹²⁰

It further holds that States should avail themselves to assistance by international agencies, institutions, and organizations if they so require to guarantee child protection.¹²¹

¹¹⁷ Committee on the Rights of the Child, ‘General Comment No. 13: The right of the child to freedom from all forms of violence’ (2011) CRC/C/GC/13, para. 35.

¹¹⁸ John Tobin and Judith Cashmore, ‘Article 19. The Right to Protection against All Forms of Violence’, in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 705.

¹¹⁹ *Ibid.*

¹²⁰ Committee on the Rights of the Child (n 147) para. 73.

¹²¹ *Ibid.*, para. 74.

Consequently, a lack of means or other challenges posed to child protection as a result of armed conflict cannot be seen as a legitimate excuse to derogate from implementing Articles 19, 32, 34, 35 and 36. States must therefore protect children's mental and physical integrity from violence and exploitation under all circumstances, and above all whenever these aspects of a child's well-being are threatened most as is the case for children in State care during armed conflict. For example, the State of origin has the duty to protect these children against injury from shelling or the neglect caused by the absence of caregivers and professionals due to war as is currently the case in Ukraine, where the absence of caregivers disproportionately impacts children with disabilities in institutional care.¹²² As for receiving States, Article 19 CRC must be understood to *inter alia* demand the provision of safe spaces for children who have fled from armed conflict, particularly if they are unaccompanied or already in State care. This includes the provision of appropriate accommodation and if necessary additional staff and caregivers to guarantee the proper care of these children.

Another issue faced by children during armed conflict is their forcible or 'voluntary' recruitment into the non-state or State armed forces. Their participation in the hostilities exposes them to the threat of being killed, injured, or becoming disabled.¹²³ Furthermore, it may lead to substance abuse, sexual and gender-based violence, trauma as well as detrimental living conditions, all of which impair their mental and physical integrity.¹²⁴ Article 38 CRC as well as the Optional Protocol on the Involvement of Children in Armed Conflict (hereinafter: Optional Protocol) hence seek to protect children from recruitment and participating in hostilities.¹²⁵

According to the Global Protection Cluster Working Group, displacement and family separation may be factors favoring recruitment.¹²⁶ What is more, "separated or orphaned children displaced into IDP settlements and in host communities may find themselves roaming the streets and, thus, become easy targets for recruitment".¹²⁷ Children may wish to join State and non-State armed forces to ensure their own protection.¹²⁸ Thus, it is imperative for States to establish a well-functioning State care system for those children who

¹²² Rosenthal and others (n 27)

¹²³ UNICEF, 'Children recruitment by armed forces or armed groups' (22 December 2021) <<https://www.unicef.org/protection/children-recruited-by-armed-forces>>, accessed 28 June 2022

¹²⁴ Ibid.

¹²⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict [2000] A/RES/54/263

¹²⁶ Global Protection Cluster Working Group, 'Handbook for the Protection of Internally Displaced Persons' (2010) 182.

¹²⁷ Ibid.

¹²⁸ Ibid.

cannot be cared for by their parents or other natural legal guardians and secure this system especially during armed conflict so as to combat child recruitment and the ensuing harmful consequences for the child's mental and physical integrity.

Lastly, States have an obligation to protect children from being trafficked abroad under Article 11 CRC. Considering that roughly 64 percent of children are trafficked for sexual exploitation,¹²⁹ it is evident that this risk infringes on their physical and mental integrity. UN Security Council Resolution 2388 stressed that displaced and unaccompanied children are exceptionally vulnerable to human trafficking during armed conflict and that they therefore require special protection.¹³⁰ This unquestionably concerns children already in State care and their protection from illegal adoptions, which will be further discussed in chapter 4 in the context of the alleged illegal transfer of Ukrainian children to Russia for adoption.

In summary, the State has a myriad of obligations when it comes to safeguarding the physical and mental integrity of children in its care during armed conflict.

States and their responsible authorities must *inter alia*:

1. Consider children's best interests in all actions affecting them (Art. 3(1) CRC), including what is best for their physical and mental integrity e.g. in decisions concerning evacuations, family reunification, or long-term solutions for evacuated children.
2. Establish safety standards and monitor them (Art. 3(3) CRC).
3. Safeguard children's privacy (Art. 16 CRC), including the protection of their physical and mental integrity.¹³¹ But, infringements may be necessary "to secure the child's best interest and/or survival and development"¹³² e.g. through evacuations.
4. Protect the child's home (Art. 16 CRC).
5. Preserve the child's reputation and honor (Art. 16 CRC), particularly concerning discrimination and marginalization of children in State care, which may be exacerbated through displacement.

¹²⁹ European Union External Action, 'Trafficking of children, a serious threat in the EU' (18 October 2021) <https://www.eeas.europa.eu/eeas/trafficking-children-serious-threat-eu_en> accessed 11 July 2022

¹³⁰ UNSC Resolution 2388 (21 November 2017) S/RES/2388.

¹³¹ Tobin and Field (n 104) 555.

¹³² *Ibid*, 559.

6. Investigate and prosecute attacks and infringements against the reputation, honor, home, and privacy of children in State care during armed conflict (Art. 16 CRC).
7. Acknowledge, respect, and ensure adequate upbringing and development of children in State care (Art. 18 CRC).
8. Support parents and other natural legal guardians in raising the children in their care (Art. 18(2)) to combat child abandonment.
9. Defend children from all forms of neglect, violence, abuse, and exploitation, including those directly and indirectly caused and exacerbated by armed conflict (Art. 19, Art. 38(4), (Arts. 32, 34-36)), such as forcible recruitment of children into armed forces, the participation of children under 15/18 in hostilities (Art. 38 (2) and (3) CRC, Optional Protocol) and child trafficking (CRC Art. 11). This includes e.g.
 - Prohibiting such acts
 - Investigating and prosecuting allegations of violations
 - Safe evacuations and shelters
 - Registration of children, their care, and whereabouts in a constantly updated database
 - Humanitarian aid
 - Training and educating public employees, armed forces etc. on the heightened risks of abuse, exploitation, human trafficking, forced recruitment etc. during armed conflict
 - Strengthening the child protection system
 - Maintaining care standards throughout the conflict
 - Assist the rehabilitation and reintegration of victims
10. Seek international assistance if the State is unable to perform abovementioned obligations (Art. 45(b) CRC).¹³³

¹³³ UNICEF, 'Frequently asked questions on the Convention on the Rights of the Child' (n.d.) <<https://www.unicef.org/child-rights-convention/frequently-asked-questions>>, accessed 28 June 2022

3.1.2.2. *Protection of the Social Security of the Child*

The child's right to social security and social insurance is laid out in Article 26 of the CRC, although the CRC Committee itself has not commented on the article.¹³⁴ However, since the article should be read together with Article 9 of the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR), General Comment No. 19 of the ICESCR Committee helps to determine the scope of State obligations under Article 26 CRC.¹³⁵ Therein the right to social security includes

“the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, *inter alia*, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.”¹³⁶

It is thereby not only crucial in combatting poverty, protecting individuals against social exclusion, and advancing social inclusion, but also in ensuring human dignity.¹³⁷

Though not specifically mentioned in Article 26(1) CRC, the right to security of the child is predominantly understood in connection with their family, parents and/or other persons responsible for them.¹³⁸ Thus, children typically access social security through their parents or guardians.¹³⁹ This poses the question of the State's obligations concerning the social security right of children in State care.

Article 26(2) CRC stresses the need of the State to consider “the circumstances of the child” when deciding on granting social security benefits. It can be argued that these circumstances include children in State care. Consequently, while the literature and General Comments on social security rights do not directly discuss children in State care, the article can still be interpreted in a way that these children's right to social security is protected.

In armed conflicts, social security systems may face exceptional strain as more people may require assistance, and financial means of the State may be stretched thin due to the financial needs of other sectors. Furthermore, receiving States may deal with an increased

¹³⁴ Malcolm Langford and Urfan Khaliq, 'Article 26. The Right to Social Security' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 988.

¹³⁵ *Ibid*, 993.

¹³⁶ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 19: The right to social security' (2008) E/C.12/GC/19, para. 2.

¹³⁷ *Ibid*, para. 3.

¹³⁸ Langford and Khaliq (n 134), 986.

¹³⁹ *Ibid*, 987.

burden on their social security system due to a high influx of refugees. This nonetheless does not release the State from its obligation under Article 26 CRC, since the general obligations included in Article 4 of the CRC require the State to “undertake all appropriate legislative, administrative and other measures” to ensure the rights of children including their right to benefit from social security. This obligation must include children in State care who depend only on the State to have their social and economic rights secured including their right to “a standard of living adequate for the child’s physical, mental, spiritual, moral, and social development.”¹⁴⁰

To conclude, States are obliged to ensure children in State care’s right to social security and an adequate standard of living through “all appropriate legislative, administrative and other measures”¹⁴¹ under Articles 26 and 27 in connection with Article 4 of the CRC, even in situations of armed conflict. This may be done for instance through:

1. “Child-focused policies and budgeting”¹⁴²
2. Policies and programs meant to ensure safe housing, safe drinking water and hygiene facilities¹⁴³
3. Reduction of access barriers to social security for children in State care who were evacuated across State borders
4. Family and child support¹⁴⁴ to combat the risk of child abandonment during armed conflicts due to the inability of families to provide for their children in these situations
5. Support for those children who have lost their parents or other providers due to armed conflict and its consequences¹⁴⁵
6. International assistance, if the State is unable to guarantee social security due to the hardship it faces as a result of armed conflict

¹⁴⁰ CRC (n 28) Art. 27

¹⁴¹ Ibid, Art. 4

¹⁴² Committee on the Rights of the Child, ‘General Comment No. 21 on children in street situation’ (2017) CRC/C/GC/21, para. 51.

¹⁴³ Ibid.

¹⁴⁴ UN Committee on Economic, Social and Cultural Rights, (n 136) para. 18.

¹⁴⁵ Ibid, para. 2(a)

3.1.3. Protection of the Right to Health

Article 24(1) of the CRC obligates States to guarantee the child's right "to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illnesses and rehabilitation of health." Moreover, States must prevent children from being deprived of healthcare.¹⁴⁶ The CRC Committee defines the child's right to health as

"an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health."¹⁴⁷

Ensuring the child's right to health is thereby crucial for the child to realize its other human rights such as the right to mental and physical integrity discussed previously.¹⁴⁸ Nevertheless, various factors such as displacement, wars, conflicts, and other forms of violence may detrimentally impact the health of children.¹⁴⁹ These circumstances may cause for instance a heightened risk of injury or the collapse of sanitation systems and a resulting spread of communicable disease, thereby directly impacting the physical health of children and with that the "right to grow and develop to their full potential".¹⁵⁰ Furthermore, the CRC Committee voiced concern regarding the deteriorating mental health situation of young people expressed for example in "psychological trauma resulting from abuse, neglect, violence or exploitation",¹⁵¹ which unquestionably includes armed conflict. Hence, acknowledging the vulnerability of children's health in times of dire humanitarian circumstances, the Committee has urged that States must do everything possible to ensure children's and adolescent's physical and mental health.¹⁵²

In doing so, "particular attention must be given to identifying and prioritizing marginalized and disadvantaged groups of children, as well as children who are at risk of any form of violence and discrimination."¹⁵³ Children in State care are undoubtedly such a group, who in many societies are confronted with societal stigma and therefore live at the edges of their

¹⁴⁶ CRC (n 28) Art. 24

¹⁴⁷ Committee on the Rights of the Child, 'General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (2013) CRC/C/GC/15, para. 2

¹⁴⁸ *Ibid*, para. 7

¹⁴⁹ *Ibid*, paras. 5 and 17

¹⁵⁰ *Ibid*, para. 2

¹⁵¹ *Ibid*, para. 38

¹⁵² *Ibid*, para. 40

¹⁵³ *Ibid*, para. 98

communities. Moreover, the CRC Committee considers parents “the most important source of early diagnosis and primary care for small children, and the most protective factor against high-risk behaviors in adolescents”.¹⁵⁴ In the case of children in State care, the State and the caregivers it assigns must entirely take on the responsibility of providing for the children’s health, developmental and other needs, despite the challenges the State faces during armed conflict. The State of origin and receiving States must therefore:

1. Prevent injury and other substantial health risks by providing safe shelters¹⁵⁵ and, if necessary, evacuating children in its care.
2. Provide information to children and their caregivers concerning “injury, accident and violence prevention”.¹⁵⁶
3. Ensure that sufficient healthcare staff, medicine and medical equipment is available despite the conflict and may be accessed by these children.¹⁵⁷
4. Guarantee psychological support to combat the mental health effects of armed conflict.¹⁵⁸
5. Seek international, bilateral, private, or other aid to ensure the right to health (Art. 24(4) CRC) e.g. financial, technical, material and personnel support through NGOs, other organizations, private offers by medical personnel etc.

3.1.4. Protection of the Right to Education

Much like the right to health, “education is both a human right in itself and an indispensable means of realizing other human rights.”¹⁵⁹ It is fundamental in diminishing the risks of exploitation and poverty, thereby not only benefitting the individual itself but also society as a whole.¹⁶⁰ The right to education is not only enshrined in Articles 28 and 29 of the CRC, but also Articles 13 and 14 of the ICESCR.¹⁶¹ Moreover, during war and displacement the ability of children to continue their education wherever they may find themselves, has been

¹⁵⁴ Ibid, para. 67

¹⁵⁵ Ibid, para. 26

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, para. 25

¹⁵⁸ Ibid, para. 39

¹⁵⁹ UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 13: The Right to Education (Art. 13 of the Covenant)’ (1999) E/C.12/1999/10, para. 1

¹⁶⁰ Ibid.

¹⁶¹ Ibid, para. 2

shown to provide them with a sense of routine and normalcy as well as support their right to development and the ability to maintain contacts with their peers and teachers.¹⁶²

Like many other rights, armed conflict negatively affects the right to education due to *inter alia* the displacement of children and teachers, the stress and uncertainty caused by it and the destruction of schools and learning materials. This challenges the State's obligation under Article 28(1)(e) CRC to "take measures to encourage regular attendance at schools and the reduction of drop-out rates." Still, the States in which the children find themselves during the conflict are obligated to provide at least primary education for every child in line with Article 28(1)(a) CRC. In the case of smaller receiving States, which face a high influx of children, this is likely to impose a strain on the education system. However, if the State of origin or a receiving State struggle to implement the right to education, it should seek international assistance.¹⁶³

One of the goals of education is to promote the child's "own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate".¹⁶⁴ This implies that when integrating evacuated children into its school system, the receiving State should keep in mind and protect the connection of the children with their country of origin and culture.

One way in which education may continue in times of turmoil and upheaval are online formats, which have been created in cooperation between the Ukrainian Ministry of Education and Science, UNICEF, and other partners during the Russian invasion of Ukraine.¹⁶⁵ This solution has the advantage that it ensures that children can continue their education "in" their State of origin while also continuing to learn about their own culture and country, thereby maintaining continuity. However, a lack of internet access or a device to access may hinder the success of such educational formats. Considering, that armed conflicts for the most part leave children in protracted displacement and children benefit from in-person interactions with their peers and teachers, long-term integration into the national school systems should be sought. Hence, receiving States have additionally opened their

¹⁶² Jerome Marston and Marika Tsolakis, 'Ukraine Points Up the Threat to Education During War' (*Inter Press Service* 1 June 2022) <<https://www.ipsnews.net/2022/06/ukraine-points-up-the-threat-to-education-during-war/>>, accessed 28 June 2022

¹⁶³ CRC (n 28) Art. 28(3)

¹⁶⁴ *Ibid*, Art. 29(1)(c)

¹⁶⁵ Omar Abdi, 'Children in Ukraine need an end to this war – their futures hang in the balance' (*UNICEF* 12 May 2022) <<https://www.unicef.org/press-releases/children-ukraine-need-end-war-their-futures-hang-balance>>, accessed 28 June 2022

schools for refugee children and created alternative educational offers such as language classes to ease the transition.¹⁶⁶

Lastly, the State of origin and receiving States must guarantee the right to education for all children, including those in State care. These children are already at a disadvantage in life as they lack the guidance of parental figures in becoming adults and preparing to live independently. The States involved must therefore protect their right to education to ensure that their displacement does not leave them further behind.

3.1.5. Protection of the Child's Participation Rights

Article 12 CRC obligates States to provide children with opportunities to express their opinions on matters impacting them. It emphasizes the child's position as a rightsholder rather than an individual whose rights are solely dependent on parents, caregivers, and other adults.¹⁶⁷ It is thereby up to the child on whether or not they wish to exercise this right, as they have the right not the obligation to engage in decision-making processes concerning them.¹⁶⁸

Furthermore, the right to be heard is interrelated with *inter alia* the determination of the child's best interests under Article 3 CRC.¹⁶⁹ In fact, Lundy argues that any best interests assessment is impossible when the child's view on the matter is not heard.¹⁷⁰ The CRC Committee has also stressed that Article 12 CRC is one essential method of identifying the child's best interests.¹⁷¹ Therefore, if adequately implemented, Article 12 CRC will assist the State and its authorities in making decisions in line with the best interests principle. The abidance with Article 12 CRC is thus in the State's own interest. Yet, the participation of children continues to face compelling obstacles as "long-standing practices and attitudes, as well as political and economic barriers"¹⁷² impede their involvement and adults in question lack training and awareness on the matter.¹⁷³

¹⁶⁶ Ibid.

¹⁶⁷ Committee on the Rights of the Child, 'General comment No. 12 (2009): The right of the child to be heard' (2009) CRC/C/GC/12, para. 18

¹⁶⁸ Ibid, para. 16; Laura Lundy, "'Voice' is not enough: conceptualizing Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 British Educational Research Journal 927, 934.

¹⁶⁹ Committee on the Rights of the Child (n 123) para. 43

¹⁷⁰ Laura Lundy, 'Not an Optional Extra: Engaging with children, and their human rights, in times of emergency' (GC *Human Rights Preparedness*, 16 June 2022)

<<https://gchumanrights.org/preparedness/article-on/not-an-optional-extra-engaging-with-children-and-their-human-rights-in-times-of-emergency.html>>, accessed 28 June 2022

¹⁷¹ Committee on the Rights of the Child (n 123) para. 43

¹⁷² Committee on the Rights of the Child (n 167) para. 4

¹⁷³ Claire O'Kane. 'Guidelines for Children's Participation in Humanitarian Programming' (Save the Children 2013) 5.

The Lundy Model illuminates the various elements of and State obligations under the right to be heard to facilitate its implementation.¹⁷⁴ Firstly, States must give children “space” to voice their views.¹⁷⁵ This implies that the State has an obligation to proactively encourage children to participate in decision-making processes and to consult children on what decisions they want to express themselves on and which they don’t want to be involved in.¹⁷⁶

In line with the non-discrimination principle in Art. 2 CRC, “space” must also be safe and free from abuse, intimidation, or negative consequences from expressing their views.¹⁷⁷ Hence, Lundy recommends to create anonymous participation formats.¹⁷⁸ In the case of children in State care their heightened dependence on the State and their fear of reprisal may make many reluctant to express for instance discontent with the system, their placement conditions, or on measures to be taken such as evacuations. Yet, to ensure that their needs and best interests are met in the care system it is pertinent to consult them in relevant decisions. The CRC Committee thus called on States to establish formats and institutions such as an ombudsman for child rights to ensure that the views of children in State care are being heard and considered.¹⁷⁹ Children in the care system must also have access to such bodies.¹⁸⁰ Further, formats such as representative councils within the care institution should be installed to empower the children and young people “to participate in the development and implementation of the policy and rules of the institution”.¹⁸¹ Similarly, refugee and migrant children and those affected by emergencies should be given avenues such as children’s forums to ensure that any measures, policies and legislation affecting them are in their best interests, and give them back a sense of agency in their lives.¹⁸² This must include marginalized children, such as those in State care.¹⁸³ Consulting these children emboldens them and aids their development despite the challenging circumstances they encounter as a result of the emergency, their displacement, or marginalization.

¹⁷⁴ Lundy (n 168) 927.

¹⁷⁵ *Ibid.*, 934f.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Committee on the Rights of the Child (n 167) para. 97

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*, para. 125f.

¹⁸³ Lundy (n 168) 935; United Nations General Assembly, *A world fit for children* (United Nations 2002) UN/A/RES/S-27/2, para. 32(1).

The second element of child participation is “voice”.¹⁸⁴ Giving the children a “voice” according to Bennett Woodhouse necessitates:

1. Provision of information comprehensible to the respective child¹⁸⁵
2. “Sufficient time to understand the issues”¹⁸⁶
3. “Capacity building with child-led organizations”¹⁸⁷
4. Awareness-raising among involved adults to increase skill and willingness to engage children¹⁸⁸

Children may express their “voice” in various forms as the right to freedom of expression in Article 13 CRC suggests.¹⁸⁹ For example, it may be easier for children traumatized by armed conflict and family separation to draw or write about their concerns and needs.¹⁹⁰ Moreover, especially younger children and children with disabilities may require guidance or assistance from adequately trained adults, such as interpreters, or assistive technology.¹⁹¹ It is crucial that such training and technology also reaches the State care systems even in conflict situations to ensure that the children in these systems are being heard.

Moreover, children must be given an “audience”.¹⁹² This is implied in the State’s obligation to give “due weight” to the child’s views and obliges decision makers to actively listen to the child’s views rather than just hearing them.¹⁹³ This requires the training of involved adults to for instance correctly identify and derive opinions from a variety of forms of expression, particularly with younger children.¹⁹⁴ Lastly, “audience” also entails the right of the child to be listened to by the right audience, hence those people who have an influence over the matter in question to ensure that the expressed view has a chance of making an impact.¹⁹⁵ In the context of children in State care during armed conflict asking them concerning their needs will not make a difference unless this information reaches the ears of those who could provide for them.

¹⁸⁴ Lundy (n 168) 935f.

¹⁸⁵ *Ibid.* citing Bennett Woodhouse

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Lundy (n 168) 935f.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, 936f.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, 937.

The last element that can be inferred from the obligation to give “due weight” to children’s points of view is “influence”.¹⁹⁶ The expression of an opinion is solely restricted by the child’s ability to voice their opinion, whereas the question of whether that opinion is given “due weight” is tied to the child’s perceived maturity and age.¹⁹⁷ It is thereby not up to the child to prove their capacity, but the State or respective adults have an obligation to assess it.¹⁹⁸ This poses the risk that they interpret said capacity too restrictively or underestimate the child’s maturity.¹⁹⁹ Article 5 CRC nevertheless formulates the State’s responsibility to ensure that the “evolving capacity” of children and young people are taken into account, which suggests that Article 12 CRC has to be interpreted in a manner that “is generous and child-empowering rather than negative and opportunity-restricting”.²⁰⁰ If children are led to believe that their voice does not have an impact, they may be discouraged from engaging.²⁰¹ Therefore, children should be informed about the impact and importance of their opinion in the decision-making process.²⁰²

In cases of conflicts, Lundy argues children should be involved in the planning of schemes meant to protect them.²⁰³ Both the State of origin and the receiving State of children in State care should make use of the Lundy Model to guarantee these children’s right to be heard. This can be done both on the individual level, but also in a representative manner through child-led bodies.²⁰⁴ The latter format would arguably be the most sensible for decisions affecting groups of children in State care such as for instance planning humanitarian aid to State care institutions or evacuating the children.²⁰⁵ Whenever possible, the State of origin should proactively seek the input of the children’s representative organ on these matters and give them all available information concerning the situation and all possible measures including their risks to ensure that they can reach an informed conclusion. Additionally, the right audience would have to listen to them. It would not be enough to simply have their caregivers or other individuals who do not have direct influence on the decision to take note of the children’s views, rather the children should be heard by the responsible decision-makers. Furthermore, the State should give these opinions due weight depending on the children’s maturity and age. The adults involved may thereby not just assume that the

¹⁹⁶ *Ibid*, 937f.

¹⁹⁷ *Ibid*, 935.

¹⁹⁸ Committee on the Rights of the Child (n 167) para. 20.

¹⁹⁹ Lundy (n 168) 937f.

²⁰⁰ *Ibid*, 938.

²⁰¹ *Ibid*.

²⁰² *Ibid*.

²⁰³ Lundy (n 170).

²⁰⁴ Committee on the Rights of the Child (n 167) para. 91.

²⁰⁵ *Ibid*.

children do not understand the severity of the emergency situation. The prior must hence be adequately trained to properly assess whether and in how far due weight shall be given to the point of views of the affected young individuals, notably in these exceptional circumstances.

Moreover, receiving States should apply the Lundy Model for instance when they decide the care form for the arriving children.²⁰⁶ Consequently, if groups of children have to be split or the State has capacity in its national State care system the State should inform the affected children about the alternatives and should then ask for their preferred option, as is done for instance by Estonia concerning unaccompanied Ukrainian refugee children.²⁰⁷ Depending on the child's maturity, their opinion would then be given less or more weight in the final decision.

Lastly, the State of origin and receiving States should consult children and adolescents in State care concerning their general needs and concerns, be it regarding their education, their worries for the future, about the lives of their family members and being separated even further from them, having their lives uprooted or other. As the Lundy Model and the General Comments stress, children need to be involved and informed to give them a sense of control over their lives, and even more so when events occur that profoundly impact and uproot their present and future.

3.1.6. Limitations to Child Rights in Armed Conflict

As has been shown previously, State obligations under the CRC cannot be limited during armed conflict, since the CRC does not have a derogation clause. Still, the implementation of these State duties may be challenged through *inter alia* family separations, widespread destruction of civilian infrastructure and the financial and capacity strain caused by conflict on the State's ability to abide by its duties.

While none of the CRC's State obligations may be derogated in times of emergency, some of them are not absolute either. Depending on the wording of these obligations, States have a varying degree of discretion to limit them according to their abilities and capacities to abide by them. Some of which will be discussed in the following.

One State obligation without limitations is the evaluation of the child's best interests under Article 3(1) CRC, since it applies to 'all actions' undertaken by State authorities and not

²⁰⁶ Committee on the Rights of the Child (n 167) para. 54

²⁰⁷ Survey response of the Estonian Ministry of Social Affairs, 07 June 2022. C.f. Appendix 3.

simply those the State would see as 'appropriate' or 'possible'. This duty thus persists unconditionally during conflicts.

Moreover, under Article 3(3) CRC the phrasing 'shall ensure' stresses that the State must in every situation abide by and observe its own standards when it comes to institutions protecting and caring for children, such as State care institutions. States affected by conflict likely find themselves under resource and other constraints. Yet, the phrasing of this paragraph unlike for example Article 4 sentence 2 CRC on economic, social, and cultural rights does not leave the possibility to acknowledge the State's resources. It is true that national implementation standards may be reduced under martial law. The legality of this, however, is questionable keeping in mind Article 4 CRC, which speaks of 'all appropriate measures' and surely keeping children in State care safe and providing for their needs, development, and a life in dignity and in the child's best interests even under martial law should be seen as an 'appropriate measure'. The State standards even in times of martial law should, hence, not fall below that threshold.

Additionally, the CRC includes some norms that are not entirely absolute. For instance, Article 7(1) demands of States to safeguard the child's "right to know and be cared for by his or her parents" unless this is impossible. In armed conflict, this may hold true for example when parents cannot care for their children while they are participating in the fighting or are injured making it impossible for them to look after and provide for their children. Another case would be when a very young child is found unaccompanied, and the State, potentially with the help of the ICRC, cannot determine the child's parentage. Then the State shall be seen as having fulfilled its obligations under this article.

Another provision of the CRC with a caveat is the right to "personal relations and direct contacts with both parents" under Article 10(2) CRC which may only be limited by "exceptional circumstances". This is relevant *inter alia* for those children already in State care who have at least one living parent. 'Exceptional circumstances' can be for instance when armed conflict makes such relations or direct contacts impossible when the parents cannot be found or are imprisoned by the enemy side of the conflict and the State with the help of the ICRC cannot establish contact. The State has a very restricted window in which it does not have to fulfill its obligations under this article, and would have to prove that there are 'exceptional circumstances' at play.

Some other articles of the CRC list specific exceptions with the most notable being the best interests of the child, which limits for instance the prohibition of family separation.²⁰⁸ For example, the State must not safeguard the right of children in State care to maintain contact with their parents if that would encroach on their best interests.²⁰⁹ The same is true in regard to informing children about what happened to their family members.²¹⁰ Such information must not be given to them when it would be traumatizing for the children.

What is more, Articles 8 and 16 CRC allow for infringements into the different aspects of the rights to identity and privacy if these are legal and not arbitrary. One such example would be separating the child from their caregiver and/or care group when it is no longer safe for the child to stay with them.

All in all, not every provision of relevance during armed conflict to children in State care, and unaccompanied or separated children is absolute. Some allow for limited situations in which the State may suspend its obligations. It should be stressed though that any such encroachment may not have a more detrimental impact on the child's best interests as possible alternatives.

²⁰⁸ CRC (n 28) Art. 9(1)

²⁰⁹ *Ibid*, Art. 9(2)

²¹⁰ *Ibid*, Art. 9(4)

3.2. International Humanitarian Law and Article 38 of the CRC

The CRC obligates States to adhere to IHL concerning the treatment and protection of children in armed conflict to which they are parties.²¹¹ They are moreover under the responsibility to “take all feasible measures to ensure protection and care of children who are affected by an armed conflict”.²¹² Drumbl and Tobin argue that the latter obligation refers to measures additional to those in IHL, which the State is able to take to protect and care for children during armed conflict.²¹³

During the drafting process of Article 38, it was further suggested to incorporate an explicit prohibition of subjecting children to military attacks.²¹⁴ However, this was not followed up on, leaving the protection of children against attacks up to Customary International Humanitarian Law (hereinafter: CIHL) Rule 54, which forbids *inter alia* attacks, destruction and removal of crucial civilian infrastructure,²¹⁵ as well as CIHL Rule 10, which protects civilian objects from attacks.²¹⁶ The advantage of these rules are that due to their customary nature they are binding upon all States, unless a State is a persistent objector. Nevertheless, these provisions protect infrastructure and therefore only indirectly the people, including children, depending on these infrastructures. Thus, one may criticize that there is no explicit mention that civilian children, may never be targeted in armed conflicts. According to Drumbl and Tobin, the phrase ‘affected by armed conflict’ may nonetheless be widely interpreted to include not only direct targeting of children but also all other effects of war on them.²¹⁷ Hence, while there is no explicit prohibition of attacks against children, their protection from conflict and its effects is still both implied under CIHL and Article 38 CRC.

As for the applicable IHL obligations that States must abide by in regard to children, this thesis will only discuss the provisions of Geneva Convention IV, as well as Additional Protocol I and II that explicitly concern children. It should however be pointed out that the IHL provisions specific to the protection of children resemble a “patchwork”.²¹⁸ Hence, IHL in regard to the protection of children is anything but a comprehensive instrument, these

²¹¹ Ibid, Art. 38(1)

²¹² Ibid, Art. 38(4)

²¹³ Mark A. Drumbl and John Tobin, ‘Article 38. The Rights of Children in Armed Conflict’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1550.

²¹⁴ Ibid.

²¹⁵ ICRC, ‘Rule 54. Attacks against Objects Indispensable to the Survival of the Civilian Population’ (Customary IHL Database n.d.) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule54>, accessed 28 June 2022

²¹⁶ ICRC, ‘Rule 10. Civilian Objects’ Loss of Protection from Attack’ (Customary IHL Database n.d.) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10>, accessed 28 June 2022

²¹⁷ Drumbl and Tobin (n 213) 1551.

²¹⁸ Ibid, 1512.

obligations should be interpreted together with the above discussed obligations under the CRC, and the IHL obligations should be expanded to significantly reduce the dangers and negative impacts of war on children, especially on children in State care.

The following chapter will begin with examining the definition of the 'child' under IHL. It will then illuminate the preferential treatment accorded to children for instance in terms of access to humanitarian aid. This will be followed by an analysis of the IHL provisions concerning the safety of children in various situations that may arise during armed conflict. Furthermore, this chapter will address the State's obligations in regard to identification and registration of children in times of conflict. It will then briefly describe the family rights under IHL. Lastly, this chapter will discuss the gaps that limit the protection of children in State care under IHL.

3.2.1. International Humanitarian Law's Definition of a "Child"

When Geneva Convention IV and the Additional Protocols were adopted and commented there was no universal definition of a 'child'.²¹⁹ In 1989, the CRC provided a definition with a desired age of majority of 18. While many States around the world concur, the Commentaries have yet to be updated to this end. Geneva Convention IV and the Additional Protocols for the most part set the age limit for special protective provisions to 15, though Commentary of 1987 argues that the phrasing 'children under 15' implies that there are children 15 years and older.²²⁰ While children older than 15 enjoy the benefits accorded to all other persons protected under IHL, they are excluded from the exceptional safeguards and support provisions for children. Such humanitarian law obligations with an explicit age limit of 15, include:

- The recommendation on who should benefit from safe zones²²¹
- The guarantee of free passage for humanitarian aid to certain parts of the population²²²
- The provisions on child welfare²²³
- The equal treatment of particular non-repatriated persons and nationals²²⁴

Additionally, the Commentaries assert that even when an article dealing with children does not foresee an age limit, 15 years can be implied since the child's development has then

²¹⁹ Claude Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary of 1987)* (ICRC 1987), para. 3179

²²⁰ *Ibid*, para.4549

²²¹ Fourth Geneva Convention (n 29) Art. 14, sentence 1

²²² *Ibid*, Art. 23, sentence 2

²²³ *Ibid*, Art. 24

²²⁴ *Ibid*, Art. 38(5)

reached a point “at which there is no longer the same necessity for special measures”.²²⁵ As was discussed in chapter 2.1., however, an increasing number of child protection systems, organizations and legislation dismiss this assumption by setting protective age limits at 18 or higher. Combined with a consideration of the heightened vulnerability of children and adolescents, particularly those outside a family environment in armed conflict, the reasoning of the Commentaries’ authors and drafters of Geneva Convention IV and the Additional Protocols is to be refuted. Although they do not preclude the possibility for individual States to set protective age restrictions at a higher age, this remains a voluntary concession. Hence, adolescents above 15 do not have any binding guarantees under IHL beyond what is granted to adults.

3.2.2. Preferential Treatment of Non-repatriated Children

Under Article 38(5) of Geneva Convention IV, non-repatriated children under 15 are to be given the same treatment as those nationals who receive preferential treatment due to their exceptional vulnerability and special care needs.²²⁶ ‘Non-repatriated persons’ are defined as “enemy civilians retained on the territory of one of the Parties to the conflict”.²²⁷ In the context of the war against Ukraine and the plight of children in State care, which will be examined in chapter 4, this provision binds Russia to treat those children allegedly transferred onto its territory like Russian children. This, however, does not cover facilitated adoptions of Ukrainian children by Russian families, as Russia has been accused of,²²⁸ but rather humanitarian assistance such as “supplementary ration cards, facilities for medical and hospital treatment, special welfare treatment, exemption from certain forms of work, protective measures against the effects of war, evacuation, transfer to a neutral country, admission to hospital and safety zones and localities, etc.”²²⁹

3.2.3. Preferential Access of Children to Humanitarian Assistance

Under Geneva Convention IV Article 23, humanitarian assistance such as “essential foodstuffs, clothing and tonics” meant to reach children under 15 may not be seized. This provision intends to reduce the suffering of children, who live in an area under blockade.²³⁰ Therefore it primarily addresses the blockading party, which must ensure that the listed consignments reach the vulnerable population for which they are intended regardless of who

²²⁵ Ibid.

²²⁶ Ibid, 244.

²²⁷ Ibid.

²²⁸ United Nations, ‘UN’s Bachelet concerned over Ukraine orphans ‘deported’ to Russia for adoption’ (15 June 2022) <<https://news.un.org/en/story/2022/06/1120412>>, accessed 30 June 2022

²²⁹ Uhler and others (n 37) 248f.

²³⁰ Ibid, 178f.

has send them.²³¹ While not explicitly stated by this article, owing to the extraordinary dependence of children in State care on the providence of food, clothing and other items necessary for their survival and development by the State, the States in question hold due diligence in safeguarding aid deliveries to these children.

Additional Protocol I Article 70(1) broadens the group of recipients of protected humanitarian assistance to the entirety of the civilian population in international armed conflicts, if they otherwise do not have sufficient access to medical supplies and food.²³² The States in question, particularly the blockading power, should hereunder not only ‘allow’ but ‘facilitate’ the delivery of humanitarian assistance.²³³ This includes for instance reducing regulations on the import of humanitarian goods, whenever feasible and informing involved officials thereof.²³⁴ The Commentary acknowledges that the passage of aid through areas of conflict is generally dangerous and therefore no State “is expected to do the impossible, [...] [but] must do all it can to facilitate the passage of relief consignments”.²³⁵

According to Article 70(1) Additional Protocol I, children are among those to be given priority when the humanitarian goods are given out. While the article does not provide an age limit, the commentators emphasize it is not the same as in Article 23 Geneva Convention IV.²³⁶ In fact, it should be drawn from Article 77 Additional Protocol I, ergo at age 18.²³⁷ Nevertheless, special attention should however be given to children under 15.²³⁸ Consequently, every child below the age of 18 should be giving priority in the distribution of aid, but the most vulnerable children, particularly very young children should receive such aid first.²³⁹ While this is noteworthy progress raising IHL’s protective age limit for children to 18, those responsible for the distribution are given a compelling margin of discretion on the implementation of this priority.²⁴⁰

While it is crucial that the Additional Protocol contains such a provision, the absence of precise measures and suggestions are deeply troubling in the context of children in State care, who must be prioritized. Since they are often marginalized, they are at heightened risk of being forgotten, when the distributing party is not made aware of their existence. Training

²³¹ Ibid, 181.

²³² Pilloud and others (n 219) para. 2813.

²³³ Protocol I (n 30) Art. 70(1).

²³⁴ Pilloud and others (n 219), para. 2829.

²³⁵ Ibid.

²³⁶ Ibid, para. 2819.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid, para. 2817.

and raising awareness among organizations and State authorities involved in the aid distribution in such circumstances is hence paramount. Lastly, the distributing agency should seek information from those local or national authorities that may provide an overview over where State care institutions and the most vulnerable children are to be found and how they can be reached. However, most States do not have accurate, reliable databases on their State care facilities, their residents and their needs. In times of war, this will inevitably lead to the neglect of these children.

3.2.4. Safety of Children

Article 77(1) Additional Protocol I obligates States involved in an international armed conflict to protect children “against any form of indecent assault” and “provide them with the care and aid they require, whether because of their age or for any other reason”. Here again the authors of the Commentary recommend an age limit of 15, though children with disabilities fall within the category ‘for any other reason’.²⁴¹ In view of the vulnerability of children in State care due to the lack of a family to take care of their needs, their marginalization in society and the obligation of States to assist them in peacetime, it is additionally conceivable that States are bound to extend the protection of this article to these children regardless of their age.

The assistance and care of children in non-international armed conflicts are guaranteed under Article 4(3) Additional Protocol II. Hereunder, the *de facto* and *de jure* authorities of an area must refrain from inflicting physical and mental harm on children and install measures to support their development, for example by guaranteeing their education.²⁴² Article 4(3)(b) Additional Protocol II moreover obligates the authorities to facilitate family reunification. Since no age restriction is given in this article, the Commentary interprets it as including the possibility of extending this protection beyond age 15, for instance when a child’s maturity is not in line with their age.²⁴³ As has been argued before, however, adolescents in general find themselves in a psychologically vulnerable state, which is likely to deteriorate during armed conflict. Considering the dependence of children in State care on provision of their needs by the responsible authorities, this provision should also extend to them at least until they reach majority.

²⁴¹ Ibid, para. 3179f.

²⁴² Ibid, para. 4546.

²⁴³ Ibid, para. 4550.

3.2.4.1. Evacuations of Children from Besieged Areas

Article 17 Geneva Convention IV strongly recommends conflicting parties to cooperate to evacuate those parts of the civilian population requiring the most protection, such as children, “from besieged or encircled areas”.²⁴⁴ The Commentary argues that the besieged forces are likely to have an interest to evacuate civilians to eliminate the challenge of having to supply them with humanitarian aid.²⁴⁵ The besieging forces nonetheless do not as they use the strain that the providence for civilians causes on their opponents to achieve their capitulation or concessions.²⁴⁶ Thus, this law is primarily directed towards the besieging side.²⁴⁷ To be successful, evacuations, however, always require an agreement between both sides.²⁴⁸ The opposing interests of the two parties are likely to impose a seemingly insurmountable hurdle to this endeavor. Therefore, the warring parties may be well-advised to seek the help of a neutral third party, such as another State or the ICRC, to mediate.²⁴⁹

There is no age limit for children under this article, although the Commentary recommends an age limit of 15.²⁵⁰ It is, nevertheless, up to the conflicting parties to decide thereon,²⁵¹ which may result in additional obstacles in reaching an agreement, when the parties’ definitions of a ‘child’ fundamentally diverge.

3.2.4.2. Evacuations of Children in International Armed Conflict

Article 78 Additional Protocol I regulates the evacuations of children in international armed conflicts. Only children with the nationality of the evacuating country may be evacuated abroad as well as all other children internally without the safeguards of this article, though States are advised to apply them regardless.²⁵² This means that in the case of Ukraine’s evacuations of Ukrainian children in State care abroad or internally during the Russian invasion the following safeguards are not binding.

The article does, however, apply to non-national children, who may only be evacuated for medical, health and safety reasons.²⁵³ The safeguards therefore bind Russia when transferring Ukrainian children abroad. This is meant to protect children from the harm of

²⁴⁴ Uhler and others (n 37) 139.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*, 138f.

²⁵¹ *Ibid.*

²⁵² Pilloud and others (n 219) para. 3220f.

²⁵³ *Ibid.*

war and ensure that they have everything they need to properly develop.²⁵⁴ The listed reasons are exhaustive and in occupied territories security is not a legitimate reason for evacuations as it may be used to justify politically motivated evacuations, for example for the reeducation of children.²⁵⁵

According to Article 78 Additional Protocol I, evacuations of non-national children abroad must moreover be temporary. Ergo, the evacuating party is obliged to plan and guarantee the proper conditions for the children's repatriation.²⁵⁶ Furthermore, they may only be evacuated to States bound by the Geneva Convention and Additional Protocols and willing and able to apply the Convention vis-à-vis these children.²⁵⁷ Still, the evacuating State, not the receiving State, "remains responsible for the treatment given the persons who are evacuated".²⁵⁸ Lastly, the State carrying out the evacuation is obligated to acquire where possible the consent of parents or legal guardians, where possible, before it is undertaken.²⁵⁹

Thus, when Russia transfers Ukrainian children from occupied territories to Russia, it must do so with the consent of the children's parents or guardians. Such measure must moreover be temporarily and for medical reasons only since safety and security reasons are not considered legitimate justifications for evacuating children from occupied territories. Finally, Russia must repatriate these children once the reasons for the evacuation have subsided.

3.2.4.3. Evacuations of Children in Non-International Armed Conflict

During non-international armed conflicts, only temporary evacuations within the country are allowed, and only after the consent of parents or guardians has been obtained.²⁶⁰ And such evacuations may only be conducted in exceptional circumstances.²⁶¹ Lastly, the evacuating State must guarantee that the children in question are not left unaccompanied during the process.²⁶²

According to the Commentary, "the evacuation of children under difficult conditions has mainly occurred in cases of internal armed conflict",²⁶³ thereby suggesting that more safeguards may be necessary to protect children in these circumstances as non-

²⁵⁴ Ibid, para. 3209.

²⁵⁵ Ibid, para. 3226f. and 3211

²⁵⁶ Ibid, para. 3230.

²⁵⁷ Ibid, para. 3222

²⁵⁸ Ibid.

²⁵⁹ Protocol I (n 30) Art. 78(1).

²⁶⁰ Protocol II (n 30) Art. 4(3)(e)

²⁶¹ Pilloud and others (n 219) para. 4560

²⁶² Protocol II (n 30) Art. 4(3)(e)

²⁶³ Pilloud and others (n 219) para. 3215

international armed conflicts. This conclusion may be warranted in light of the fact that these conflicts as per their definition have at least one non-State armed party that is not bound by this provision. Nevertheless, as has been seen from the dramatic evacuations of civilians from besieged Ukrainian cities such as Mariupol in spring 2022, the assumption that evacuations during international armed conflicts are less challenging has arguably been disproven.

3.2.4.4. Evacuations of War Orphans and Separated Children

Geneva Convention IV Article 24 recommends the evacuation abroad of children orphaned or separated by the armed conflict until the latter has ceased.²⁶⁴ It is thereby paramount that the receiving State is able to care for these children and guarantee their rights to education and manifestation of their religion.²⁶⁵ This assumes that this country is better equipped to provide for the needs of the children than the children's country of habitual residence.²⁶⁶ Otherwise children should not be evacuated.²⁶⁷

3.2.4.5. Risks of Evacuations

Due to the risk of severing family ties, "the evacuation of children itself involves serious dangers".²⁶⁸ Whenever possible, children and their 'natural protectors' such as relatives or other guardians should therefore not be separated.²⁶⁹ It should here be questioned whether this would also include the prevention of separating children from their familiar caregivers during evacuations.

Another risk relating to evacuating children abroad is a loss of identity, particularly following prolonged displacement abroad.²⁷⁰ This risk underlines the need to guarantee a swift return of the children to the country of origin as soon as the circumstances allow, regardless of whether the armed conflict is international or non-international.²⁷¹

Owing to their risks, evacuations must be carried out only in exceptional circumstances and under the conditions laid out by the provisions applicable to the case in question. In all cases, however, the temporariness of the measure should be of utmost importance and plans to return the evacuated children as soon as possible must be in place.

²⁶⁴ Uhler and others (n 37) 188.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Pilloud and others (n 219) para. 3212.

²⁶⁹ Ibid, para. 3213.

²⁷⁰ Ibid, para. 3216.

²⁷¹ Ibid, para. 3218.

3.2.5. Child Registration and Identification

To facilitate family reunification in case of separation, conflicting parties should attempt to have children under 12 wear something by which they can be identified, such as identity discs.²⁷² These should include at least the child's name, birth date and address, but photos, fingerprints, blood group etc. could be added to ensure that the ID disc is not accidentally switched.²⁷³

The different age limit in this provision stems from the assumption of the XVIIth International Red Cross Conference "that children over twelve were generally capable of stating their own identity".²⁷⁴ Evidently, this obligation should include children, adolescents, and adults with disabilities, who cannot identify themselves.

While this recommendation²⁷⁵ may be difficult to enforce for children living with their parents or in informal care arrangements, it should be common practice for children in State care to avoid them from getting lost in the turmoil surrounding armed conflict.

In occupied territories, the occupier is obligated to ease registration and identification of children.²⁷⁶ To this end, it must ensure that institutions and systems working on registration can function.²⁷⁷

Registering and being able to correctly identify children and those individuals unable to do so themselves, particularly children in State care for whom the State has a higher responsibility, is crucial. All State parties to the conflict are well advised to have mechanisms in place to guarantee this to facilitate family reunification of separated and unaccompanied children and of those children in State care for whom it is safe and in their best interests.

3.2.6. Family Rights in Armed Conflict

Geneva Convention IV codifies the right to 'family news' under Article 25, which protects the personal correspondence between family members in occupied territories and States of conflict, even when normal postal services are no longer functioning.²⁷⁸ This right is especially problematic when families are separated by frontlines.²⁷⁹ In such cases, reestablishing contact may be facilitated through neutral third parties, such as the ICRC.²⁸⁰

²⁷² Fourth Geneva Convention (n 29) Art. 24 (sentence 4)

²⁷³ Uhler and others (n 37), 185 and 190.

²⁷⁴ *Ibid*, 189.

²⁷⁵ *Ibid*.

²⁷⁶ Fourth Geneva Convention (n 29) Art. 50 (para. 2), Uhler and others (n 37) 287f.

²⁷⁷ Uhler and others (n 37) 287f.

²⁷⁸ Fourth Geneva Convention (n 29) Art. 25.

²⁷⁹ Uhler and others (n 37) 193.

²⁸⁰ *Ibid*, 197.

This includes the correspondence between children in State care with those relatives with whom it has been deemed safe.

As per Geneva Convention IV Article 26, the State is also obligated to assist individuals in their attempts to find family members, from which they were separated during the conflict.²⁸¹ This is meant to protect the family unity and rebuild communication between the members.²⁸² Thereby the parties must install measures aiding these individuals in finding their relatives for example through:²⁸³

1. Establishing institutions providing assistance in obtaining relevant information
2. Informing postal agencies when addresses are changed e.g. during evacuations
3. Creating broadcasts or similar formats through which individuals can search for their family members
4. Providing an identification system for young children and individuals not able to identify themselves

Children in State care are likely to face additional barriers in availing themselves to facilities established to reconnect with family members, since they may lack adult support to do so. The State's obligation to facilitate enquiries into the whereabouts of family members should be understood as demanding the provision of additional assistance as well as child-friendly information about the process to children and adolescents, especially those in State care.

3.2.7. Summary: Are Children in State care falling through the cracks of humanitarian law?

3.2.7.1. Existing Safeguards

Geneva Convention IV Article 24 obligates States to provide care and support as well as to ensure the right to education and manifestation of religion vis-à-vis war orphans and unaccompanied children under the age of 15.²⁸⁴ In terms of education, Article 24 Geneva Convention IV matches Article 20 CRC, as both highlight the need for the educator and caregiver respectively to be from *inter alia* the same cultural background as the child. To ensure these rights evacuations to third countries should be facilitated.²⁸⁵

Under Article 50 of Geneva Convention IV, the occupier must cooperate with local and national authorities to ensure the functioning of care and educational facilities. This includes

²⁸¹ Fourth Geneva Convention (n 29) Art. 26

²⁸² Uhler and others (n 37) 196f.

²⁸³ The following list is taken from: Ibid.

²⁸⁴ Uhler and others (n 37) 187.

²⁸⁵ Fourth Geneva Convention (n 29) Art. 24.

private and State-run care facilities in occupied territories,²⁸⁶ but ignores those not under occupation. The occupying party under this article must not only refrain from attacking or otherwise infringing upon these institutions, but must also assist them in carrying out their task.²⁸⁷ Ergo, should the local authorities be unable to guarantee the care and education of children who have entered State care because of the conflict, the occupier must step in and secure these rights, where possible through an individual of the same national, linguistic, or religious background.²⁸⁸ The provision thereby mirrors the safeguards under Article 24 Geneva Convention IV, but in the case of occupation.²⁸⁹

3.2.7.2. Issues and Gaps of these Provisions affecting Children in State care

IHL undoubtedly has several gaps that affect children in State care, some of which were previously introduced. One pertains to the IHL's definition of the child. For the most part children for the purpose of IHL's special protection measures are individuals under 15. However, in many States children are in State care until the age of 18 or even beyond that. This can become problematic for instance in the context of the guarantee of free passage for humanitarian assistance under Article 23 Geneva Convention IV. Consignments not solely sent to children below 15 could be considered material used in the conflict and be seized by the parties to the conflict.²⁹⁰ In cases where children live in the same institution until 18 and the aid is sent to this institution, it may thus be confiscated, therefore not reaching the protected group. The same may happen with caregivers as assistance that may also reach adults not specifically mentioned in this provision, may be impounded. Here IHL simply would have to be expanded or interpreted to account for such situations, so as to ensure that aid is not seized when going to State care institutions and all persons working and living therein.

Another concern is the establishment of safety zones under Article 14 Geneva Convention IV, which are meant to house and protect *inter alia* children under 15 from the effects of war.²⁹¹ While safety zones and the age limit for entry are bound to agreement between the conflicting parties,²⁹² the article's age limit leaves open whether younger children would have to be split from their caregivers and older children in their care unit as they are not included as beneficiaries of these zones. Being separated from them may not only be contrary to the

²⁸⁶ Uhler and others (n 37) 286.

²⁸⁷ *Ibid.*

²⁸⁸ Fourth Geneva Convention (n 29) Art. 50 (para. 3).

²⁸⁹ Uhler and others (n 37) 288.

²⁹⁰ *Ibid.*, 179.

²⁹¹ *Ibid.*, 127.

²⁹² *Ibid.*

child's best interests, but leaves them more vulnerable to various forms of exploitation and human trafficking as they are no longer in the protective care of an adult.

What is more, the lack of specific measures under Article 26 Geneva Convention IV dealing with the facilitation of inquiries concerning the whereabouts of family members does not account for the additional help needed by children in State care, firstly in being made aware of this right and secondly learning how to avail themselves to the respective services.

And lastly, the existing safeguards for children in State care under Articles 24 and 50 Geneva Convention IV only account for war orphans and unaccompanied children. There are no such explicit provisions concerning children who had already been in State care, considering that they too depend on State assistance. IHL must therefore be promptly updated to fill these cracks that are likely to increase their vulnerability and have detrimental impacts on the development and rights of these children.

3.3. UN Alternative Care Guidelines

The Alternative Care Guidelines echo the obligations under the CRC and lay out a range of principles that States are recommended to abide by for children in state care. For instance, the education, home, and residence of the child should only be minimally disrupted.²⁹³ Thus, before splitting families all alternatives should be explored and the separation should be ended as soon as the reason for removal has been eliminated.²⁹⁴ Moreover, siblings should not be split unless that would be in the children's best interests.²⁹⁵ If siblings are separated, they would then have to be given the opportunity to remain in contact if they wish to.²⁹⁶ Other rights emphasized by the Guidelines include the respect for the child's dignity, "access to education, health and other basic services, the right to identity, freedom of religion or belief, language and protection of property and inheritance rights".²⁹⁷ Furthermore, children must always be protected and supported by "a legal guardian or other recognized responsible adult or competent public body".²⁹⁸ And lastly, residential care should be strictly limited and preference should be given to family-based, notably for very young children, as the overall tendency should go towards deinstitutionalization.²⁹⁹

While these principles remain valid in armed conflicts and under occupation, the Alternative Care Guidelines also contain provisions specific for such emergencies, which address all authorities in the affected area whether *de facto* or official State institutions.³⁰⁰ For instance, they are advised to ensure the training and sufficient resources of those working with children in alternative care, even in armed conflict.³⁰¹

Evacuations abroad should be prevented as far as possible unless they are temporary and for reasons of safety or medical treatment.³⁰² Thus, it would be permissible to relocate children when their homes are under attack, their physical and mental integrity is otherwise under threat due to the conflict, or the treatment of their injuries can only be undertaken abroad. Under these circumstances, firstly, due consideration should be paid to proximity to the child's home.³⁰³ If the child's treatment or safety can be guaranteed by a neighboring country, it would thus be undesirable for the child to be sent too far away. Secondly, the

²⁹³ Guidelines (n 31) para. 11-23.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*, para. 11-23.

³⁰⁰ *Ibid.*, para. 153f.

³⁰¹ *Ibid.*, para. 154.

³⁰² *Ibid.* and para. 160.

³⁰³ *Ibid.*, para. 160.

children must be “accompanied by a parent or caregiver known to them”.³⁰⁴ The approach of Germany and Poland of keeping care units together would thus be the desired solution. And finally, there must be plans in place to repatriate the children as soon as possible.³⁰⁵ If the conflict is of protracted nature, however, and best interest assessments conclude that it would be better to keep the child in the receiving State or they express the wish to remain, this should arguably not be precluded.

The Alternative Care Guidelines also make suggestions on the treatment of separated and unaccompanied children for receiving States. They are to be treated equally to nationals, though the child’s cultural, ethnic, and other background should be considered when deciding on the best care form for them.³⁰⁶ The State should determine the identity of an unaccompanied child and place them into State care.³⁰⁷ These children should thereby never be interned for breaching provisions on border crossing and remaining in the territory of the receiving state.³⁰⁸ Adoptive or *Kafalah* care should only be considered for these children if after thorough investigation no relative can be found to care for them.³⁰⁹ If a family member able and willing to take responsibility for the child is located, they should be the preferred care setting.³¹⁰ In case that is impossible, contact between the child and the relative should be set up, unless that is not in the child’s best interests.³¹¹

Ultimately, returning the separated or unaccompanied child to their country of origin should only be pursued when there are no concerns as to the child’s security and safety, an appropriate caregiver can be found, and nothing in the child’s best interests would argue against it.³¹²

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid, para. 141f.

³⁰⁷ Ibid, para. 145f.

³⁰⁸ Ibid, para. 143f.

³⁰⁹ Ibid, para. 152.

³¹⁰ Ibid, para. 145f.

³¹¹ Ibid.

³¹² Ibid, para. 148.

In short, States and *de facto* authorities during armed conflicts are advised to:

1. Prefer family-based care over institutional care with deinstitutionalization being the end goal
2. Evacuate children only in exceptional circumstances respecting proximity and temporariness of the measure and guaranteeing the accompaniment by a familiar adult
3. Respecting basic child rights and the background of the child

A striking gap of the Alternative Care Guidelines is its negligence towards the facilitation and guarantee of children in State care's access to humanitarian aid during conflicts. While it holds that "carers should ensure that children receive adequate amounts of wholesome and nutritious food"³¹³, this disregards that the immediate caregivers of the child in conflict situations may not be able to abide by this task without the help of the State or *de facto* authority. An explicit inclusion of an obligation of these authorities to provide for the needs of children in its care during humanitarian emergencies would thus have to be incorporated.

³¹³ Ibid, para. 83.

4. Case Study: Protection of Children in Ukrainian State Care during the 2022 Russian Invasion of Ukraine

This chapter will describe the current state of protection of children in Ukrainian State care since the start of the Russian invasion in February 2022. With Ukraine having one of the highest institutionalization rates in Europe³¹⁴ and the number of displaced children growing every day, so is the need to provide sustainable solutions to guarantee the rights and protection of children in Ukrainian State care, who are doubtlessly among the most vulnerable and marginalized victims of this war. This case study has, thus, been chosen with the aim of documenting and raising awareness to the response of Ukraine and the refugee receiving States to this current and dynamic child protection emergency.

Due to the strain on Ukrainian child protection authorities and the respective ministries, the author has refrained from contacting Ukrainian authorities. Instead, the responsible authorities of 13 European countries³¹⁵ who have received large numbers of Ukrainian refugees were asked to fill out a survey with 24 questions on legislation and policies, institutional responsibility, statistics, and the child concerning children evacuated from Ukrainian State care. Out of the contacted States, five survey responses were received from four States³¹⁶ by July 6th. Two further States opted to submit a statement via email.³¹⁷ All responses and statements have been attached in the appendix of this thesis.

This case study will be limited to Ukraine and the six responding receiving States.³¹⁸ The subchapter on Ukraine will be based on all press releases published by the Ukrainian Ministry of Social Policy (hereinafter: MSP) concerning children in State care between February 24th and July 7th, 2022, while the subchapters on the receiving States will focus on the protection measures presented by the responding national authorities in their survey responses or statements. This State-centered approach is largely due to the lack of reports by NGOs, UN agencies and similar organizations specifically on the situation of children in

³¹⁴ Eurochild, 'A worrisome U-turn on ending the institutionalisation of children in Ukraine', (13 October 2021) <<https://www.eurochild.org/news/a-worrisome-u-turn-on-ending-the-institutionalisation-of-children-in-ukraine/>> accessed 06 July 2022

³¹⁵ Austria, Bulgaria, Czech Republic, Estonia, Germany, Hungary, Italy, Latvia, Lithuania, Moldova, Poland, Romania, Slovakia.

³¹⁶ Czech Republic, Estonia (two different authorities responded), Latvia, Lithuania.

³¹⁷ Germany and Poland.

³¹⁸ C.f. footnotes 444 and 445.

State care. Nonetheless, organizations such as UNICEF and SOS Children's Villages are closely cooperating with involved governments to ensure the protection of these children.³¹⁹

In terms of challenges, it must be noted that the protection of Ukrainian children in the country and those evacuated abroad is everchanging as States are constantly developing new policies and legislation to tackle the situation. Thus, the research for this chapter was restricted to material available in early July 2022 as well as the survey replies sent between 4th May and 8th June.

Moreover, where sources aside from the State replies were consulted, these were in the official language and had to be translated. Therefore, some language nuances may have been missed. In the case of Germany, German material was used and translated by the author.

Lastly, official governmental data is conceivably biased. A complete, neutral analysis of the child protection situation on the ground would necessitate field visits and long-term monitoring, including interviews with children, caregivers, directors of institutions, authorities, and organizations working with these children in Ukraine and in the receiving States. This would have gone beyond the scope of this research. Hence, this chapter does not aim to provide an evaluation of the undertaken measures, but rather a descriptive snapshot of what is being done to help and care for children in Ukrainian State care.

³¹⁹ Bundesfamilienministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ), 'Kordinierungsstelle zur Aufnahme ukrainischer Waisenkinder nimmt Betrieb auf' (31 March 2022) <<https://www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/koordinierungsstelle-zur-aufnahme-ukrainischer-waisenkinder-nimmt-betrieb-auf-195192>> accessed 07 July 2022

4.1. Ukraine

Children in Ukrainian State care live in various forms of institutions, under the auspices of different ministries, including the Ministry of Education and Science, the Ministry of Health, and the MSP.³²⁰ In its efforts to ensure the protection of children in these facilities during the current war, the MSP refers to them as “children of vulnerable categories”, which includes³²¹:

- Orphans and ‘children deprived of parental care’ under 18 continuously residing in various forms of institutions
- Children neither orphans nor ‘deprived of parental care’ but living in such institutions
- Children in foster care

This chapter will refer to these children as ‘children in State care’ unless they have been returned to the care of their parents or other legal guardians because of the war. The term ‘children in/evacuated from Ukrainian State care’ shall thereby emphasize that these children despite their evacuation abroad remain under the formal care of the Ukrainian State and are to return to Ukraine after the cessation of hostilities. This chapter will use reports of the MSP on its policies and measures concerning children in State care, including their evacuation within the country and abroad, its cooperation with States receiving these children, the alleged illegal transfer of children without parental care to Russia, adoptions during martial law, and separated and unaccompanied children, war orphans, and the “The Child is Not Alone” project.

4.1.1. Evacuations of Children in Ukrainian State Care

4.1.1.1. *Evacuations within Ukraine*

The government defined the procedures on temporary evacuations for children in State care in late March 2022.³²² These laid out who would be evacuated, and in what facilities they live.³²³ Moreover, preparatory measures and the tasks of those accompanying the children were regulated, such as the duty of accompanying individuals to register the child.³²⁴ Lastly, the responsibilities of the different authorities involved in the evacuation process were

³²⁰ Ministry of Social Policy, ‘About 5,000 children from vulnerable categories who are brought up in institutions of institutional care have been evacuated’ (19 March 2022), <<https://www.msp.gov.ua/news/21581.html>> accessed 07 July 2022

³²¹ Taken from: Ministry of Social Policy, ‘Orphans and children deprived of parental care will be able to leave the country with accompanying persons under a simplified procedure during martial law’ <<https://www.msp.gov.ua/news/21471.html>> accessed 07 July 2022

³²² Ministry of Social Policy, ‘The Government has regulated the procedure for the evacuation of children and persons who are in institutions around the clock’ (28 March 2022), <<https://www.msp.gov.ua/news/21625.html>>, accessed 07 July 2022

³²³ Ibid.

³²⁴ Ibid.

defined.³²⁵ Thereby, the government aimed to prevent miscommunication and ensures the proper and smooth planning and implementation of the evacuations.

4.1.1.2. Evacuations Abroad

As of May 10th 2022, over 10,700 children in Ukrainian State care had been evacuated.³²⁶ 7,400 of them had left the country, while 3,300 remained in Ukraine.³²⁷ Among the prior most of them moved to Poland and Germany.³²⁸ However, the Minister of Social Policy also criticized some directors of State care institutions who had refused to evacuate and cooperate with responsible authorities.³²⁹ Furthermore, in some areas children in State care institutions were trapped due to ongoing hostilities.³³⁰

Evacuations abroad for children in State care for health and safety reasons were facilitated in late February.³³¹ Orphans and 'children deprived of parental care' living in a form of State care require a Ukrainian passport, birth certificate or another identification document, as well as the approval of the director or substitute of the child's institution.³³² Moreover, they must travel with a legal representative or other authorized individual.³³³ As for children without that status but residing in a State care institution as well as those in foster families, the same rules apply, although their evacuation may also be authorized by the guardianship authorities, the military administration, or similar authorities.³³⁴ Foster children may for instance be accompanied by their foster caregiver.³³⁵

Regardless of the child's status, the accompanying individual always has the obligation to register the child in a Ukrainian consulate or embassy within one day of arriving in the receiving State, which will then pass on that information to the National Social Service.³³⁶ The registration allows Ukrainian authorities to monitor the children's stay in the receiving

³²⁵ Ibid.

³²⁶ Ministry of Social Policy, 'The Government has strengthened control during martial law over the observance of the rights of children from vulnerable categories evacuated inside or outside Ukraine' (10 May 2022) <<https://www.msp.gov.ua/news/21816.html>> accessed 07 July 2022

³²⁷ Ibid.

³²⁸ Ministry of Social Policy, 'During martial law, more than 10,000 children from vulnerable categories were evacuated from areas of active hostilities.' (30 March 2022), <<https://www.msp.gov.ua/news/21633.html>> accessed 09 July 2022

³²⁹ Ministry of Social Policy (n 320).

³³⁰ Ibid.

³³¹ Ministry of Social Policy (n 394).

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid.

State³³⁷ and record the children who have left Ukraine so they can be repatriated after the war.³³⁸

As per the MSP's press release from late February 2022, it appears that under this facilitated policy no governmental body has an obligation to approve the evacuation abroad, since it is sufficient for the director of the institution to approve it. This would put the children at risk of being knowingly or unknowingly placed into the hands of a human trafficker, as there seem to be no further conditions on the person accompanying the child. Nevertheless, in a statement by the Ministry in early March 2022 it appears as if "in order for children to travel outside of Ukraine accompanied by authorized persons, it is [indeed] necessary to obtain the approval of the body of guardianship and care or the military administration at the place of their [habitual residence]."³³⁹ Moreover, the Ministry clarified that the person should not have to care for more than 15 children or four children, if the latter have a disability.³⁴⁰ It remains unclear, whether the respective individual has to be vetted before being authorized to accompany a child or whether the group of people that may be considered for this role is limited.

Aside from a seeming lack of safeguards concerning the accompanying person, there is also no mention of the child's right to be heard under Article 12 of the CRC. Furthermore, it can be questioned whether particularly the military administrations are aware of their obligations under the CRC and trained to carry out best interests evaluations in line with Article 3 of the CRC for the children impacted by their decisions.

The MSP also emphasized that children in Ukrainian State care would only be sent to "European countries that strictly adhere to the norms of international law".³⁴¹ This statement arguably bears resemblance to Article 78 Additional Protocol I, which holds that receiving States of evacuated children must be State parties to the Geneva Conventions and Additional Protocols. Since the evacuated children are Ukrainian citizens, the safeguards of Article 78 do not bind Ukraine in this case. Nevertheless, as argued in chapter 3.2., it is still advisable for the evacuating State to ensure for instance that receiving States are bound by the relevant international law to protect the rights of the evacuees.

³³⁷ Ministry of Social Policy, 'When evacuating children from vulnerable categories, control over their stay abroad and return to Ukraine' (5 March 2022) <<https://www.msp.gov.ua/news/21494.html>> accessed 07 July 2022

³³⁸ Ministry of Social Policy (n 103)

³³⁹ Ministry of Social Policy (n 337)

³⁴⁰ Ibid.

³⁴¹ Ibid.

On March 13th 2022, the Ukrainian government expanded the list of documents needed for children in State care to leave Ukraine in an attempt to safeguard the child's rights in the receiving country and guaranteeing their return after the cessation of hostilities.³⁴² As a result, the institution or person with whom the child is leaving the country must for one present "an invitation specifying the country of the children's final stay, the number and category of children, the conditions of their stay, the responsible organization that will accompany the children during the entire period of their stay outside of Ukraine."³⁴³ That organization must have prior approval from the receiving State.³⁴⁴ Secondly, the regional military administration and the National Social Service must give their written approval concerning the evacuation.³⁴⁵

Another measure undertaken by the Ukrainian government to guarantee the protection of the children in the receiving States was the establishment of the Coordination Headquarters for the Protection of Children's Rights in Martial Law, which brings together representatives of different State agencies and bodies as well as international organizations, civil society organizations and independent experts.³⁴⁶ This body has since carried out monitoring visits to various receiving States, such as Germany³⁴⁷ and Poland.³⁴⁸ In Poland the team discussed challenges with local authorities as well as the responsible diplomatic representation concerning for example the possibility of reunifying children with parents, relatives, legal guardians or other individuals authorized by the parents.³⁴⁹ Moreover, the difficulties around maintaining contact with the child's parents and relatives due to the war were deliberated³⁵⁰, since the contact of children with their parents is protected under the CRC and Geneva Convention IV even during armed conflict. And lastly, the rights of the children to educations and psychological care were reviewed.³⁵¹

³⁴² Ministry of Social Policy, 'The Government has tightened control over the travel abroad of children from vulnerable categories' (13 March 2022) <<https://www.msp.gov.ua/news/21543.html>> accessed 07 July 2022

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Ministry of Social Policy, 'The government created a coordination headquarters for the protection of children's rights under martial law' (17 March 2022) <<https://www.msp.gov.ua/news/21568.html>> accessed 07 July 2022

³⁴⁷ Ministry of Social Policy, 'The Ukrainian monitoring group has started work in Germany' (22 April 2022) <<https://www.msp.gov.ua/news/21742.html>> accessed 07 July 2022

³⁴⁸ Ministry of Social Policy, 'The Ukrainian monitoring group reviewed the work of the hub for the reception and temporary placement of children in Poland' (19 April 2022) <<https://www.msp.gov.ua/news/21724.html>> accessed 07 July 2022

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid.

Another issue that was revealed during these visits was the insufficiency of the Ukrainian registration system since it relies on the accompanying person to inform the diplomatic representation.³⁵² In some instances, however, they do not register the child and even move the child to a country that had not been previously approved by the responsible Ukrainian authorities.³⁵³ As far as this research has been able to determine, this problem has yet to be resolved, though this has been addressed in bilateral meetings with receiving States, such as Lithuania.³⁵⁴ Furthermore, the European Commission has stressed that children under 18 have the right to registration in the EU upon crossing the border.³⁵⁵ This indicates, that the receiving EU States would have to register the children, including those evacuated from Ukrainian State care. Cooperation between the Ukrainian National Social Service and the receiving State's authorities responsible for the registration may help prevent that some children are not registered, thereby mitigating the risk of children in State care falling through the cracks and becoming victims of human trafficking. Nevertheless, such cooperation must still maintain the child's right to privacy under Article 16 CRC as much as possible.

Cooperation on such consular records is part of the bilateral memoranda the Ukrainian MSP sent to 23 States in late March, which aim to guarantee the rights of children evacuated from Ukrainian State care.³⁵⁶ These bilateral memoranda for example lay out that the needs of these children and their rights must be met.³⁵⁷ Moreover, it guarantees their right to be repatriated once it is safe to do so.³⁵⁸ And lastly, the receiving State would promise to prevent "the adoption of Ukrainian children without the consent of Ukraine and the application of national legislation on adoption."³⁵⁹

³⁵² Ministry of Social Policy (n 342).

³⁵³ Ibid.

³⁵⁴ Ministry of Social Policy, 'Ukraine signed the first bilateral agreement on the protection of children's rights with Lithuania' (11 April 2022) <<https://www.msp.gov.ua/news/21686.html>> accessed 07 July 2022

³⁵⁵ European Commission, 'Fleeing Ukraine: Protection for children' (n.d.) <https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-solidarity-ukraine/eu-assistance-ukraine/information-people-fleeing-war-ukraine/fleeing-ukraine-protection-children_en#the-rights-of-children-arriving-from-ukraine> accessed 10 July 2022

³⁵⁶ Ministry of Social Policy, 'The Ministry of Social Policy offered 23 countries to sign bilateral memoranda on the protection of the rights of children from vulnerable categories' (27 March 2022) <<https://www.msp.gov.ua/news/21620.html>> accessed 07 July 2022

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

4.1.2. The Alleged Illegal Transfer of Ukrainian Children to Russia

In April 2022, the Ukrainian government first accused Russia of preparing a draft law authorizing the transfer of Ukrainian children from occupied territories and be adopted by Russian families.³⁶⁰ Ukraine brought the matter before the UN Security Council in a debate in May 2022, claiming that Russia had already relocated over one million children to its territory.³⁶¹ The Ukrainian representative further noted that the country did not receive information about the living conditions and safety of the transferred children.³⁶²

Ukraine and six EU countries later issued a statement to various UN bodies and the international community calling Russia's transfer policy "a flagrant and cynical violation of the rights and freedoms of such children".³⁶³ They urged the international community to prevent Russia from continuing to transfer Ukrainian children and exert pressure on Russia to return and reunify these children with their families.³⁶⁴

On June 15th, 2022, the UN High Commissioner for Human Rights noted that the allegations had not yet been confirmed.³⁶⁵ Nonetheless, she echoed Ukraine's concerns as she doubted that such measures would be done in the best interests of the affected children and would include the option of reunifying them where possible with surviving relatives.³⁶⁶

In mid-April 2022, in reaction to Russia's planned facilitated adoption policy, the Ukrainian government allowed relatives to obtain guardianship and legally represent children residing in occupied or active conflict areas, when they have been orphaned, deprived of parental care, or the parents cannot care for the child for other reasons.³⁶⁷ The aim of this measure was to give the relatives a legal claim to demand the child's return from occupied areas or countries into which the child was illegally transferred, particularly Russia.³⁶⁸ Moreover, under Article 78 Additional Protocol I Russia would be forced to request the permission of these guardians before transferring the children abroad. Guardianship conferred under this policy is to be suspended with the cessation of martial law and the child's status will then be

³⁶⁰ Ministry of Social Policy (n 354).

³⁶¹ United Nations, 'War in Ukraine Presenting 'Child Protection, Child Rights Crisis', Senior United Nations Official Tells Security Council' (12 May 2022) <<https://www.un.org/press/en/2022/sc14889.doc.htm>> accessed 07 July 2022

³⁶² Ibid.

³⁶³ Ministry of Social Policy (n 354).

³⁶⁴ Ibid.

³⁶⁵ United Nations (n 267).

³⁶⁶ Ibid.

³⁶⁷ Ministry of Social Policy, 'The government has strengthened the protection of children who are left without parental care and are in the occupied territory, the territory of active hostilities or displaced abroad' (15 April 2022) <<https://www.msp.gov.ua/news/21705.html>> accessed 07 July 2022

³⁶⁸ Ibid.

reevaluated,³⁶⁹ thereby keeping open the option of reuniting children with parents or placing them in the care of other caregivers, if that is in their best interests.

If a Ukrainian court, the ICC, or any other national court applying universal jurisdiction can prove that Russia transferred the children with an ‘intent to destroy’, this may fall under Article II(e) of the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits “forcibly transferring children of the group to another group”.³⁷⁰ Furthermore, Russia would breach Article 78 Additional Protocol I as the evacuation of Ukrainian children from occupied territories is only allowed temporarily and for the health reasons of the child. Considering the alleged number of transferred children, this act is likely not undertaken for this reason. And the temporariness of the measure is infringed as these children are put up for adoption. Additionally, several provisions of the CRC would be breached such as the respect for the orphaned or unaccompanied child’s background when determining the best care for them as per Article 20(3) CRC, which would necessitate Ukrainian caregivers such as relatives to be considered first before placing them in Russian families.³⁷¹

4.1.3. Adoptions during Martial Law

Separated and unaccompanied children and those evacuated from Ukrainian State care “cannot be assumed to be orphans and/or in need of adoption” as many still have living relatives.³⁷² Ukraine itself is not yet a party to the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, although it announced its ratification plans in early June 2022.³⁷³ Most receiving States, however, are parties to the Convention and are thus obligated to prevent adoptions during armed conflict.³⁷⁴

Ukraine has repeatedly underlined that none of the children evacuated abroad “may be adopted or given to foreigners for upbringing without the consent of Ukraine and in compliance with Ukrainian national legislation.”³⁷⁵ Instead, priority should be given to the

³⁶⁹ Ibid.

³⁷⁰ Convention on the Prevention and Punishment of the Crime of Genocide [1948] 78 Treaty Series 277, Art. 2(e).

³⁷¹ C.f. chapter 3.1.1.

³⁷² The Adoption Authority of Ireland, ‘HCCH: Children deprived of their family environment due to the armed conflict in Ukraine: Cross-border protection and intercountry adoption’ (24 March 2022) <<https://bit.ly/3uBoi8v>> accessed 12 July 2022

³⁷³ Ministry of Social Policy, ‘Maryna Lazebnaya’s speech at the special session of the OECD ministerial meeting on the humanitarian consequences of the war in Ukraine and recovery plans’ (7 June 2022) <<https://www.msp.gov.ua/news/21909.html>> accessed 07 July 2022

³⁷⁴ HCCH, ‘33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption’ (2020) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>> accessed 10 July 2022; The Adoption Authority of Ireland (n 372)

³⁷⁵ Ministry of Social Policy (n 337).

child growing up with their parents or relatives.³⁷⁶ Since finding relatives able to care for the child during the state of emergency is challenging as not all involved authorities are fully functional, it is impossible to simplify adoption procedures while protecting the child's right to reunification under such conditions.³⁷⁷ Children with finalized adoption cases, however, are able to join their adoptive families.³⁷⁸

At the end of June 2022, Ukraine announced that it was seeking to introduce legislation on adoptions in times of martial law in an attempt to strike a balance between the child's right to a family and their protection against trafficking or similar violations of child rights.³⁷⁹ It has yet to specify what these adoption safeguards will look like and whether they will sufficiently protect various rights of the child, particularly their right to family reunification, their right to be heard and their right to be protected against all forms of exploitation and abuse.

4.1.4. Separated and Unaccompanied Children and War Orphans

In late March 2022, the MSP eased the process of putting unaccompanied children and war orphans into care during martial law.³⁸⁰ It is now possible for child protective services to place children in foster families or other family-type placements if their relatives cannot be found, contacted, are wounded, or in areas of active hostilities.³⁸¹

Simultaneously, the procedures for putting orphans under the guardianship of the State or relatives have been facilitated by limiting the required documents to a passport copy, proof of relation with the child, evaluation of a psychiatrist and a proof or statement concerning the lack of a criminal record.³⁸² Regular guardianship proceedings would have necessitated a larger number of documents, which would have made the procedure unsustainable during martial law.³⁸³ The central aim of this simplification was to allow these exceptionally vulnerable children to be raised in a family environment to help them deal with the trauma

³⁷⁶ Ministry of Social Policy, 'How to help a child correctly - explanation of the Ministry of Social Policy' (13 March 2022) <<https://www.msp.gov.ua/news/21549.html>> accessed 07 July 2022

³⁷⁷ Ibid.

³⁷⁸ Ministry of Social Policy, 'The government has simplified the mechanism of transferring a child temporarily evacuated to the territory of another state to an adoptive family' (24 March 2022) <<https://www.msp.gov.ua/news/21852.html>> accessed 07 July 2022

³⁷⁹ Ministry of Social Policy, 'The Ministry of Social Policy is developing changes to adopting children under martial law' (29 June 2022) <<https://www.msp.gov.ua/news/21987.html>>, accessed 30 June 2022

³⁸⁰ Ministry of Social Policy, 'The Ministry of Social Policy took part in a round table dedicated to the protection of the rights of children who were forced to leave Ukraine due to hostilities' (20 May 2022) <<https://www.msp.gov.ua/news/21843.html>> accessed 20 May 2022

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid.

they have endured through the loss of their parents or other family members during the conflict.³⁸⁴

As for unaccompanied and separated children who have left Ukraine, UNICEF and UNHCR have demanded that these children are immediately identified and registered, and then temporarily placed in family- or community-based care by governmental authorities until they can be reunified with relatives.³⁸⁵

4.1.5. “The Child is Not Alone” Project

“The Child is Not Alone” Project is a joint endeavor of different Ukrainian governmental bodies and UNICEF.³⁸⁶ Its core elements are electronic communication means such as a chatbot³⁸⁷ and a website³⁸⁸ that can be used by:³⁸⁹

- Ukrainian families wishing to temporarily host an unaccompanied child
- Families who have lost a child
- Individuals who found an unaccompanied child
- International organizations offering to host Ukrainian children in State care

As of July 5th 2022, a total of 21,000 individuals had submitted applications to host unaccompanied and separated children and 1,000 Ukrainians had gone through the training preparing them to care for these children.³⁹⁰ Ukrainian institutions can contact these certified individuals and families to host one of the children in that facility.³⁹¹ They are then temporarily hosted by these families until relatives can be located or until martial law has been terminated.³⁹² If no relatives can be found in a reasonable time, the hosting family will be primarily considered for adoption or guardianship.³⁹³ Throughout the process, hosting families are assisted by social workers to advise the family and safeguard the child’s best interests.³⁹⁴

³⁸⁴ Ibid.

³⁸⁵ Russell and Grandi (n 18); United Nations, ‘Protect unaccompanied children fleeing Ukraine: UN agency chiefs’ (07 March 2022) <<https://news.un.org/en/story/2022/03/1113422>> accessed 10 July 2022

³⁸⁶ Ministry of Social Policy (n 376)

³⁸⁷ Telegram: “@dytyna_ne_sama_bot”

³⁸⁸ Website: <<https://dity.msp.gov.ua/>>

³⁸⁹ Ministry of Social Policy (n 376)

³⁹⁰ Ministry of Social Policy, “‘The child is not alone’ program: more than 1,000 Ukrainians have completed training and are ready to adopt a child into their family during the war’ (05 July 2022) <<https://www.msp.gov.ua/news/22010.html>> accessed 07 July 2022

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

The Adviser to the President of Ukraine on Children's Rights and Child Rehabilitation expressed confidence that the willingness of Ukrainians to participate in this program was a sign that Ukraine could in the long-term make progress in ensuring every child's right to a family in line with the overarching deinstitutionalization goal.³⁹⁵

4.1.6. Cooperation of the Ministry of Social Policy with UNICEF and Save the Children

In addition to "The Child is Not Alone" Project and the cooperation with receiving States, the MSP is collaborating with various international organizations and NGOs, such as UNICEF and Save the Children.

In line with Article 45(a) of the CRC, UNICEF is encouraged to assist in the implementation of the CRC. For instance, UNICEF launched a family support program at the end of March 2022, which supports families with very young children or children with disabilities.³⁹⁶ This is in line with Ukraine's obligations under Article 18(2) of the CRC, under which the State must assist parents and legal guardians in raising the children in their care.

UNICEF also supports Ukraine's digital learning system by providing laptops and assisting teachers, thereby contributing to the implementation of Articles 28 and 29 of the CRC.³⁹⁷

On April 8th, 2022, UNICEF and the MSP further signed a memorandum of cooperation on the protection of children in State care including *inter alia*:³⁹⁸

- Cooperation between Ukraine, UNICEF, and the receiving States on registering all children that have been evacuated abroad.
- Providing information on relevant international and national legislation on the protection of evacuated Ukrainian children to all sides involved.
- Cooperation between UNICEF and relevant authorities in receiving States concerning the placement and care of evacuated children in respect of their best interests.
- Repatriation of evacuated Ukrainian children after the war.
- Mechanisms in receiving States to enable family reunification.

³⁹⁵ Ibid.

³⁹⁶ Ministry of Social Policy, 'The Ministry of Social Policy and UNICEF agreed on joint programs to help families with children and war victims' (18 March 2022) <<https://www.msp.gov.ua/news/21578.html>> accessed 07 July 2022

³⁹⁷ Ibid.

³⁹⁸ Ministry of Social Policy, 'The Ministry of Social Policy and UNICEF signed a Memorandum of Cooperation to ensure the protection of the rights of children affected by the war in Ukraine' (08 April 2022) <<https://www.msp.gov.ua/news/21671.html>> accessed 07 July 2022

Finally, the MSP sought cooperation with Save the Children on assisting host communities of children with and without families, family tracing for separated children, and psychological support for children.³⁹⁹

4.1.7. Recommendations

In late March, the Voices of Children Charity Foundation and the Kharkiv Institute for Social Research compiled a short list of recommendations to the Ukrainian authorities on the basis of what had been learned from the first month of the war.⁴⁰⁰ These suggestions included for instance:⁴⁰¹

- Provision of clear instructions concerning evacuations to directors of institutions.
- Documentation of all children in State care institutions including their medical and other special needs that are relevant for the planning and execution of evacuations.
- Dialogue of State authorities and not evacuating institutions concerning their needs.
- Updating shelters and bringing them up to standard, e.g. by making them accessible for children with disabilities.
- Planning of humanitarian aid deliveries.
- Securing financial assistance.
- Contingency plans on where to evacuate the children when needed.

While some of these recommendations may have already been implemented, they may also be suitable for States that face or will face similar situations in the future.

4.2. EU Response

Most of the children fleeing the war, have found refuge in the EU where all children under 18 have the right to registration upon entry as well as having relatives documented, with whom they could be reunified.⁴⁰² Moreover, all children are entitled to psychological and medical care, education, accommodation and right to be heard in line with Article 12 CRC.⁴⁰³ If they arrive to the EU without a legal guardian, they will have one appointed temporarily.⁴⁰⁴ This guardian may be the adult travelling with the child when that is in the child's best interests, as the child has "the right to ask not to be separated from the known adults who

³⁹⁹ Ministry of Social Policy, 'The Ministry of Social Policy of Ukraine continues to cooperate with international partners on the protection of children's rights in wartime' (06 May 2022) <<https://www.msp.gov.ua/news/21801.html>> accessed 07 July 2022

⁴⁰⁰ Svitlana Shcherban and others, 'Children and the War in Ukraine' (Voices of Children Charity Foundation and Kharkiv Institute for Social Research 24.02.-24.03.2022) 24f.

⁴⁰¹ The following is taken from: Ibid.

⁴⁰² European Commission (n 355)

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

are capable of taking responsibility for their care”.⁴⁰⁵ Unaccompanied children are given other guardians such as individuals in reception centers or foster families.⁴⁰⁶ The EU Commission supports Member States in safeguarding these rights.⁴⁰⁷

Additionally, the European Parliament adopted a Resolution on the EU’s protection of children and young people fleeing the war in Ukraine.⁴⁰⁸ It acknowledges *inter alia* the plight of children in Ukrainian State care and reaffirms the EU’s commitment to the child’s best interests in all decisions affecting them, including evacuations.⁴⁰⁹ Furthermore, the Parliament demanded that the receiving States cooperate with Ukrainian authorities to assist evacuations of children from Ukrainian State care and coordinate in the fight against human trafficking and illegal adoptions.⁴¹⁰ The Parliament also emphasized the need for increased humanitarian aid to the most vulnerable sections of the Ukrainian population, particularly children in State care in conflict areas.⁴¹¹ Thus, the EU has recognized the children who are not accompanied by their parents or similar legal guardians as exceptionally vulnerable and in need of protection.

4.3. The Czech Republic

In the Czech Republic, evacuation requests by Ukrainian State care institutions or organizations helping them as well as offers to accommodate evacuated children are to be forwarded to the Regional and National Assistance Centers for Ukraine.⁴¹² The Czech authorities will then coordinate with their Ukrainian counterparts on transport arrangements as well as the material and personnel needs.⁴¹³

Unaccompanied children or children arriving with a stranger will receive ‘socio-legal protection’ as well as alternative care, such as foster care, or care in State or private institutions.⁴¹⁴ If relatives can be found, the State may reunite the children with them.⁴¹⁵

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ European Parliament resolution of 7 April 2022 on the EU’s protection of children and young people fleeing the war against Ukraine [2022] 2022/2618(RSP).

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² Ministerstvo vnitra České republiky and Ministerstvo práce a sociálních věcí, ‘JAK POMOCI SAMOTNÝMDĚTEM Z UKRAJINY?’ (n.d.)

<https://www.mpsv.cz/documents/20142/2786931/pomoc_deti_z_ukrajiny_2.pdf/> accessed 10 July 2022

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Survey response by the Czech Office for International Legal Protection of Children, 10 May 2022. C.f. Appendix 1

The Office for International Legal Protection of Children has further noted that best interests considerations in accordance with Article 3 CRC are crucial for national authorities in regard to children evacuated from Ukrainian State care.⁴¹⁶ Such evaluations in the Czech Republic necessitate the participation of the children through interviews, if necessary, with the help of an interpreter.⁴¹⁷ The children will also receive a letter with all relevant information.⁴¹⁸

Lastly, the responding authority claimed that no statistics were available concerning children in Czech State care and those who have been evacuated from Ukrainian State care.⁴¹⁹ If this is true, the Czech Republic should start collecting all necessary information on the location and care of these children to protect them from falling through the cracks of the Czech child protection system. This is also necessary in the context of ensuring the children's repatriation after the war.

4.4. Estonia

As of June 7th, 2022, Estonia had not taken in children evacuated from Ukrainian State care.⁴²⁰ However, the National Social Insurance Board reported 18 unaccompanied Ukrainian children on May 4th and the Ministry of Social Affairs noted on June 7th, 2022, that the number of children who had entered Estonia unaccompanied had risen from two to 30 since the start of the war.⁴²¹

Moreover, by May 4th, two Ukrainian foster families had fled to Estonia.⁴²² However, the Estonian State system does not become involved in these cases since Ukrainian foster caregivers are viewed as the legal guardians of the children in their care.⁴²³ Only unaccompanied children or those accompanied by individuals who cannot take care of them will enter the Estonian State care system.⁴²⁴ Their care will be organized by the National Social Insurance Board, which chooses a caregiver according to the child's needs for example if additional qualifications are needed due to a disability or special medical needs.⁴²⁵ The Board will also ensure that children are not split from their siblings, which is fundamental in maintaining some degree of stability unless that is not in the children's best

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Estonian Ministry of Social Affairs (n 207)

⁴²¹ Ibid.; Survey response by the Estonian National Social Insurance Board, 04 May 2022. C.f. Appendix 2

⁴²² Estonian National Social Insurance Board (n 421).

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid.; Estonian Ministry of Social Affairs (n 207).

interests.⁴²⁶ Further, the best interests and the “voice” of the unaccompanied child are considered for instance through conversations and visits with them to different alternative care providers in line with the Estonian Child Protection Act.⁴²⁷

4.5. Latvia

Latvia has entirely banned adoptions of Ukrainian children to ensure their repatriation and reunification with relatives where possible.⁴²⁸ Moreover, it has extended the possibility of granting emergency guardianship for children who arrive without their legal guardian to non-Latvian citizens.⁴²⁹

As of mid-May there was no agreement between Latvia and Ukraine on the acceptance of children evacuated from Ukrainian State.⁴³⁰ However, the Ministry of Welfare noted that the protective mechanisms for children evacuated from Ukrainian State care would be the same, potentially with more frequent checks on the children’s situation in the beginning.⁴³¹ Such checks and follow-up visits are carried out by the Juvenile or Orphan’s Court or the Ombudsman, which monitors the observation of child rights.⁴³² The prior will moreover ensure the respect for the child’s right to be heard under Article 12 CRC.⁴³³ The existing monitoring mechanisms are already being used in the context of unaccompanied Ukrainian children who have entered the Latvian State care system.⁴³⁴

Noteworthy is also the possibility of Ukrainian children seeing Ukrainian psychologists.⁴³⁵ Similarly, Ukrainian teachers are allowed to teach Ukrainian children with the salary being paid by the State.⁴³⁶ This provides the children with some familiarity and may break down potential language and cultural barriers that impede their unhindered access to education and psychological care.

⁴²⁶ Estonian National Social Insurance Board (n 421).

⁴²⁷ Ibid; Estonian Ministry of Social Affairs (n 207); Estonia, Child Protection Act [19 November 2014]

<<https://www.riigiteataja.ee/en/eli/515052022001/consolide>> accessed 14 July 2022

⁴²⁸ Survey response by the Latvian Ministry of Welfare, 18 May 2022. C.f. Appendix 4

⁴²⁹ Ibid.

⁴³⁰ Ibid

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Ibid.

⁴³⁵ Ibid.

⁴³⁶ Ibid.

4.6. Lithuania

Lithuania was the first receiving State to tailor its policies assisting Ukrainian children to Ukrainian standards and the first country to sign the bilateral memorandum on the protection of Ukrainian children, including those evacuated from State care.⁴³⁷ Thereunder, it has promised to receive, house, register, and provide for these children until they can be repatriated.⁴³⁸ Moreover, it has banned adoption procedures for Ukrainian children for the duration of the war.⁴³⁹ It has further vowed to ensure that the evacuated children are adequately informed of their rights and access to services and exchange information with Ukrainian authorities about the care these children receive.⁴⁴⁰ Lastly, Lithuania has promised to repatriate the children once circumstances permit.⁴⁴¹

As of April 12th 2022, 1,137 unaccompanied and separated children and children evacuated from Ukrainian care groups had entered Lithuania.⁴⁴² The majority of unaccompanied and separated children were cared for by relatives, while only seven had entered the Lithuanian State care system.⁴⁴³ In April, the Ukrainian embassy in coordination with Lithuanian authorities were able to repatriate 34 unaccompanied Ukrainian and reunite them with their parents at their wish,⁴⁴⁴ proving that the country is committed to ensuring the return of these children when possible.

4.7. Germany

As of May 23rd 2022, 3,226 children, adolescents, and caregivers from Ukrainian State care institutions had been evacuated to Germany and distributed among the Länder.⁴⁴⁵ Like many other receiving States, Germany has recognized these children as exceptionally vulnerable and in need of special protection.⁴⁴⁶ Germany has repeatedly emphasized the need to ensure stability for these children and the resulting need to keep them with their care units and familiar caregivers, as the German authorities view this as being in

⁴³⁷ Ministry of Social Policy (n 354)

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*

⁴⁴² 'First group of unaccompanied children returns to Ukraine from Lithuania' (*LRT.lt* 12 April 2022) <<https://www.lrt.lt/en/news-in-english/19/1672102/first-group-of-unaccompanied-children-returns-to-ukraine-from-lithuania>> accessed 10 July 2022

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Bundesverwaltungsamt, 'Neu im BVA: die zentrale Koordinierungsstelle des Bundes für Heimkinder aus der Ukraine' (23 May 2022) <https://www.bva.bund.de/SharedDocs/Kurzmeldungen/DE/BVA/2022/koordinierungsstelle_heimkinder_ukraine.html> accessed 10 July 2022

⁴⁴⁶ BMFSFJ (n 91)

accordance with the best interests of the child.⁴⁴⁷ To determine accommodation capacities large enough to house bigger groups of children, the German Federal Ministry for Families, Seniors, Women and Youth (hereinafter: BMFSFJ) has set up cooperation and coordination mechanisms at the federal level.⁴⁴⁸ This system consists of two elements.⁴⁴⁹ Firstly, the hotline run by SOS-Kinderdorf e.V. informs receiving organizations about the German system and responsible contact persons in the Länder and municipalities.⁴⁵⁰ The hotline may also connect Ukrainian State care institutions directly seeking assistance with places that have the necessary capacities.⁴⁵¹ Secondly, a coordination office in the Federal Office of Administration (hereinafter: BVA) and its Länder offices seeks to collect data on admissions and capacities of the Länder, thereby aiming to get an overview over the evacuated children.⁴⁵² The gathered data ensures that Germany is able to inform the Ukrainian authorities about the whereabouts and care provided to the children.⁴⁵³ Additionally, the BVA coordinates the accommodation and care for children evacuated from Ukrainian State care together with their caregivers according to capacity and needs.⁴⁵⁴ This is of exceptional relevance for children with severe medical needs or disabilities, which the BMFSFJ has said are taken into account when determining proper accommodation for these children.⁴⁵⁵ Lastly, the BVA issues letters of invitation to the evacuating institutions, which the Ukrainian authorities require to authorize the institutions to leave the country.⁴⁵⁶

Furthermore, Germany welcomed the first visit of the Ukrainian monitoring group in late April 2022.⁴⁵⁷ In meetings with the BMFSFJ, the group received assurance that all Ukrainian children under 18 would be entitled to German social services.⁴⁵⁸ Moreover, Germany pledged to prevent the adoption of these Ukrainian children.⁴⁵⁹ The monitoring group in turn noted several challenges such as the lack of interpreters and hurdles in the system of registering evacuated Ukrainian children with the Ukrainian consular division in Germany.⁴⁶⁰

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² Ibid.

⁴⁵³ BVA (n 492)

⁴⁵⁴ Ibid.

⁴⁵⁵ BMFSFJ (n 91)

⁴⁵⁶ BVA (n 492)

⁴⁵⁷ Ministry of Social Policy (n 347)

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

4.8. Poland

Poland, which has received the largest number of Ukrainian refugees, including children evacuated from Ukrainian State care, established two units within the Ministry of Family and Social Policy to facilitate the evacuation of such children.⁴⁶¹ The Children’s Evacuation Staff provides information concerning the transport of the children, whereas the Children’s Place Staff maintains a database on accommodation capacities.⁴⁶² Thereby, the special transport and accommodation needs of for instance children with disabilities are always considered.⁴⁶³ When entering Poland, unaccompanied children and those evacuated from State care are firstly transferred to the reception center in Stalowa Wola, where they are able to rest until they can be distributed across the country.⁴⁶⁴ The children are also registered there including information on their final destination.⁴⁶⁵

Like Germany, Poland prioritizes keeping children with their familiar caregivers “to provide them with a maximum sense of security”.⁴⁶⁶ Therefore, it is important for the State to identify places that have capacities to accommodate larger groups.⁴⁶⁷

The Polish Act of March 12, 2022 on assistance to Ukrainian citizens in connection with the armed conflict in the territory of Ukraine, moreover, explicitly seeks to protect children, including those evacuated from Ukrainian State care.⁴⁶⁸ It creates the possibility for the appointment of a temporary legal guardian for children travelling without their primary legal guardian.⁴⁶⁹ The request for the appointment of a temporary legal guardian can thereby be submitted by various governmental authorities, NGOs, *de facto* custodians etc.⁴⁷⁰ The guardianship court of the area where the child is residing will then determine their temporary guardian and will set the scope of the guardian’s rights vis-à-vis the child.⁴⁷¹ The guardian will typically have temporary custody over the child and their property, although they must seek approval of the guardianship court “in all major matters that concern the minor or his/her property”.⁴⁷² Consequently, the State retains oversight over those children under temporary guardianship through social assistance centers, centers for social services, or

⁴⁶¹ Polish Ministry of Family and Social Policy (n 91)

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

similar municipal bodies.⁴⁷³ Guardianship decisions are furthermore very quick due to their urgency and must be taken within three days from the submission of such application.⁴⁷⁴ It is also possible for one guardian to be given guardianship over several children.⁴⁷⁵ This is particularly desired for siblings.⁴⁷⁶ As for children who have entered Poland with their Ukrainian foster caregivers, the guardianship court will appoint these foster caregivers as the children's legal guardian.⁴⁷⁷

If a temporary guardian cannot be determined, unaccompanied children will be put in national foster care.⁴⁷⁸ Under the Act on assistance to Ukrainian citizens it is possible that Ukrainian citizens can become foster caregivers for Ukrainian children even if they have not received the necessary training.⁴⁷⁹ Foster families established under this provision are entitled to the support accorded to regular foster families.⁴⁸⁰ The Ministry of Family and Social Policy did not specify what requirements these caregivers must meet.⁴⁸¹ As examined in chapter 3.1., it is desired under Article 20(3) CRC that the child's background is taken into account when determining the best alternative care for them. Having this special exception which allows placement of Ukrainian children with Ukrainian families satisfies this requirement. However, safeguards must still be in place such as background checks and oversight by State authorities to ensure that the child is adequately cared for, and their rights are met. Moreover, foster caregivers under this provision should still be obligated to undergo training after they have taken the child in, since training for foster caregivers on war trauma is highly necessary when taking in a child that has fled and experienced war and related losses. Consequently, training caregivers would be in the child's best interests.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

5. Conclusion

This thesis analyzed the State obligations concerning the protection of children in State care during armed conflict under the CRC, in IHL, and the Alternative Care Guidelines. The research revealed that neither the CRC nor IHL explicitly codify the rights and protection of children in State care during armed conflict, thereby neglecting that these children are likely to require more support and special protection under these circumstances. Additionally, IHL as the core source of law regulating armed conflict has significant gaps that might increase these children's vulnerability and risks to exploitation, abuse, and neglect. The Alternative Care Guidelines make recommendations, which States should adhere to during armed conflict, *inter alia* on the conditions for evacuations of children in State care, the need to train public employees, and the need to place children in family-based rather than institutional care. However, the Guidelines do not provide a comprehensive catalogue of suggestions for States in these circumstances. Moreover, they are not legally binding.

Consequently, it can be argued that the protection of children in State care during armed conflict is largely left to the goodwill of the States and to general child protection legislation, which neglects the higher State dependence of children in State care notably during armed conflict. Moreover, IHL only protects a limited group of children in State care, namely war orphans, separated children, and children in State care in occupied areas. It is therefore paramount that the existing legal framework meant to protect children and ensure their rights during armed conflict is either amended to include explicit State obligations towards children in State care, or a separate treaty is adopted to this end. A codification of these State obligations must thereby draw on the lessons learned during previous and current armed conflicts, such as the measures adopted for children in and evacuated from Ukrainian State care during the Russian invasion, some of which were examined in chapter 4. Based on the discussion above, the subsequent chapter summarizes the state of protection of the rights of the child in state care and recommends possible improvements to international law to improve the protection of children in State care during conflicts.

Ukraine and the countries receiving unaccompanied and separated Ukrainian children as well as children evacuated from Ukrainian State care have acknowledged the need to adopt and implement policies catering to the exceptional vulnerability and protection needs of these children. They have promptly adopted or amended their legislation on guardianship and installed mechanisms to place these children and ensure continuity in their care. As the conflict is ongoing and the States are adapting to these new circumstances, little can be said

about whether the adopted procedures and measures are indeed in the children's best interests and protect their needs and rights. Furthermore, guardianship, continuity in care, and accommodation are just some of the rights that the States must protect. It remains to be seen what the States will undertake concerning their other child protection obligations vis-à-vis these children such as their duty to guarantee medical and psychological care, education, and the children's right to be heard. Some of the surveyed States have nonetheless emphasized that any Ukrainian child regardless of their guardianship status or care situation is entitled to the same treatment as any other child in the country. Finally, the success of measures intended to facilitate eventual repatriations such as the registration of unaccompanied and separated children and children evacuated from Ukrainian State care can only be assessed after these children have returned back to Ukraine.

Firstly, States have an obligation to consider the best interests of children in State care in all decisions affecting them (Article 3 CRC), even more so in emergency situations. They must therein ensure that the view of the child is given 'due weight' (Article 12 CRC). This includes urgent decisions on for instance evacuations or the delivery of humanitarian aid to properly address the needs of the affected children in State care. As practiced for example by Estonia, unaccompanied children must also be involved in determining the best care form for them in the receiving State.⁴⁸² To this end, the training of and awareness-raising among public employees concerned with such decisions is fundamental as they need to be able to interpret different expressions of views and correctly evaluate how much weight a child's opinion should be given according to their maturity.

Secondly, as for humanitarian assistance, IHL for the most part only accords special protection to children under 15 as its definition of the child has yet to be updated in accordance with the internationally desired age of majority defined in the CRC. This may be problematic for instance when children in State care live together until 18 and humanitarian aid is sent to that alternative care facility. However, as has been argued in chapter 3.2, Article 23 Geneva Convention IV holds the risk that humanitarian aid to such institutions may be confiscated, since it is not solely intended for children under 15. IHL hence needs to take such cases into account and guarantee that the needs of all children in State care under 18 and their caregivers are protected, since these children rely on the State and their adult carers to meet their needs instead of their families. Due to the strain on States imposed by armed conflict, guarantees must be included so as to ensure that State care facilities are

⁴⁸² Estonian National Social Insurance Board (n 421); Estonian Ministry of Social Affairs (n 207).

properly staffed and have all the supplies the children may need. This includes for instance food, medical supplies, clothing, sanitary items, but also accessible, safe, and sufficient shelter. All parties to the conflict must be obligated to actively facilitate the provision of these items for children in State care, regardless of their age, and their caregivers. Furthermore, these children's priority in accessing humanitarian aid, particularly for younger children and children with disabilities and special medical and other needs as codified in Article 70(1) Additional Protocol I must be reemphasized. As criticized in chapter 3.2., to limit the margin of discretion of the distributing agents in determining priority, specific binding guidelines thereon must be adopted. Lastly, to ensure that the right humanitarian assistance reaches the right children in State care, the State in which they reside must keep and provide complete records on the location and potential special needs of these children.

Thirdly, as has been shown concerning evacuations of nationals, the safeguards in Article 78 Additional Protocol I do not bind States when evacuating nationals abroad or conducting evacuations internally. Still, it is reasonable for States to abide by these requirements even during internal evacuations or when evacuating their nationals. Analysis of State obligations and practice shows that under a framework on the protection of children in State care during conflict, evacuations must meet the following requirements:

1. Evacuations should be prepared and include a contingency plan that considers any special needs children may have when it comes to transport etc. during an evacuation. This also includes a clear definition of evacuation procedures and division of responsibilities, which heads of alternative care facilities, caregivers, and all other public employees involved must be trained on.
2. Evacuations should be undertaken only for medical and safety reasons of the child (Article 78 Additional Protocol I), and only when the life and health of the child can no longer be protected or is under immediate threat where they habitually reside.
3. As far as possible, the child should be evacuated in proximity to the child's habitual residence. If receiving neighboring States have the ability and capacity to provide for the evacuee's best interests, this must be preferred over farther destinations (Alternative Care Guidelines para. 160).
4. During the evacuations, collection of reliable data is essential. Any evacuated child in State care must be registered and their placement and living conditions recorded and monitored. This should be done in close cooperation between the State of origin and the receiving State as is done for instance through the Ukrainian monitoring group.

5. Evacuations should be temporary (e.g. Article 78 Protocol I). This includes plans for and the facilitation of repatriations of evacuated children in State care once that is safe. However, if a child expresses the wish to remain in the receiving State, they are mature and informed enough to make such a decision, it is deemed safe, and in the child's other best interests, they must be allowed to do so.

Fourthly, the care after an evacuation must be clearly defined. This includes the obligation of the receiving State or the State of origin, depending on where the child was evacuated to, to evaluate the best interests of the child in State care and consult them depending on their maturity on whether they remain with their familiar caregiver or be placed in a family-based care environment. For instance, in line with the obligation to ensure continuity in the care of children under Article 20(3) CRC wherever possible and in the child's best interests, the EU gives children the right to request to stay with their familiar caregiver.⁴⁸³ This includes children evacuated from State care from a non-EU country.

For separated and unaccompanied children and war orphans, family-based care should be sought until they can be reunified with their parents or other relatives willing and able to care for them. Here, a system of temporary fostering such as the Ukrainian "The Child is Not Alone" Project could serve as a blueprint, if it proves successful in ensuring the best interests of the children in a long run.

Fifthly, adoptions should be banned during a conflict due to the impossibility of guaranteeing that adoptions are carried out in the best interests of the children, including the assurance that priority is given to family reunification.⁴⁸⁴ Furthermore, safeguards must be in place to prevent illegal adoptions of separated and unaccompanied children as well as children already in State care prior to the conflict.

It can be asked whether such further international regulations would be feasible. The CRC is the most widely ratified international human rights treaty, which demonstrates the willingness of the international community to protect children and their rights through legally binding treaties. As the responses of Ukraine and receiving States of children evacuated from Ukrainian State care during the Russian invasion prove, States are waking up to the realization that these children require special protection from the international community in addition to what is accorded to children generally. While an international treaty on the matter may not be created in the near future, the increased awareness and lessons learned

⁴⁸³ European Commission (n 335)

⁴⁸⁴ UNICEF (n 68)

concerning the additional protection needs of children in State care during the war against Ukraine, may serve as an impetus for European countries to adapt their national and regional protection frameworks to this end.

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Appendix

- Appendix 1:** Survey response of the Czech Office for International Legal Protection of Children
- Appendix 2:** Survey response of the Estonian National Social Insurance Board
- Appendix 3:** Survey response of the Estonian Ministry of Social Affairs
- Appendix 4:** Survey response of the Latvian Ministry of Welfare
- Appendix 5:** Survey response of the Lithuanian State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour
- Appendix 6:** Statement by the German Federal Ministry for Families, Seniors, Women, and Youth (BMFSFJ)
- Appendix 7:** Statement by the Polish Ministry of Family and Social Policy

Appendix 1: Survey response of the Czech Office for International Legal Protection of Children

Response received: 10 May 2022



Children in State care are among the most vulnerable groups during armed conflicts as they depend even more on the protection of their State than their peers living with their families. With Ukraine having one of the highest institutionalization rates in Europe, the current humanitarian crisis accompanying the war affects these children disproportionately. Among the Ukrainian refugees received by many European countries, several States are providing safe havens for evacuated children in Ukrainian State care and their caregivers. The following survey seeks to investigate what States are doing to accommodate the needs of these children, and what they have so far learned from this process. It will inform my Master thesis on the topic "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" which I am writing as part of the European Master's Programme in Human Rights and Democratisation at the Global Campus of Human Rights (Venice, Italy) and the University of Tartu (Estonia). The aim of my work is to add to the academic discourse on children's rights. My wish is that my research will raise awareness to and be a voice for this marginal, vulnerable group of children. The information you will provide in this survey will help me accomplish this.

The survey will close on Monday June 6th. The thesis will be defended in Venice September 24th.

If you have any questions or concerns, or wish to do an in-person interview instead, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Thank you!

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Please note: The survey does not ask for personal opinions or information of the respondent. It rather only explores measures undertaken by the State, its institutions and authorities. Thus, it should be filled out from the standpoint of the State, not the respondent.



Section A: General Information

The following information is needed for me to properly allocate your answers to your country and institution.

A1. Please choose your country!

- | | |
|----------------|-------------------------------------|
| Austria | <input type="checkbox"/> |
| Bulgaria | <input type="checkbox"/> |
| Czech Republic | <input checked="" type="checkbox"/> |
| Estonia | <input type="checkbox"/> |
| Germany | <input type="checkbox"/> |
| Hungary | <input type="checkbox"/> |
| Italy | <input type="checkbox"/> |
| Latvia | <input type="checkbox"/> |
| Lithuania | <input type="checkbox"/> |
| Moldova | <input type="checkbox"/> |
| Poland | <input type="checkbox"/> |
| Romania | <input type="checkbox"/> |
| Slovakia | <input type="checkbox"/> |

A2. Please specify the institution/ministry/governmental body etc. you represent!

Office for International Legal Protection of Children



Section B: Legislation and Policies

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

This section refers to both policies and legislation on State care in your country generally as well as - if applicable - policies and legislation specifically on children in Ukrainian State care that find themselves in the territory of your country due to the current war.

B1. What legislation and/or policy guidelines govern how children in State care are treated in your country? Please provide links or add a document at the bottom of this section, if available!

Civil Code (89/2012 Coll., <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>), Act on Social and Legal Protection of Children (359/1999 Coll.), Act on special court proceedings (292/2013 Coll.), Civil proceedings Act (99/1963 Coll.), Act on the Provision of Institutional Education or Protective Education in School Facilities and on Preventive Educational Care in School Facilities and on the Amendment of Other Acts (109/2002 Coll.)

B2. Has your State adopted any new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine?

Yes

No

Currently discussed:

Currently discussed:

B3. If your government has adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: What changes were made?

No changes, just policy guidelines from Ministry of labour and social affairs concerning interpretation and application of current laws.



B4. If your government has not yet adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: Have there been any considerations or debates on whether such policy guidelines or legislation will be set up in the future?

Yes

No

B5. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section C: Institutional Responsibility

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

C1. Which institution has practical/institutional responsibility for children in State care? If there are multiple institutions involved, please shortly state what their task is in this regard!

Ministry of Justice

Comment

Just court proceedings

Ministry of Social Affairs

Comment

Children institutions, Foster care, main gestor regarding protection of children

Ministry of Family Affairs

Comment

Municipalities

Comment

Municipalities and Regional authorities = social services



Child Welfare Services



Comment

see above

Other (Please specify!)



Comment

Ministry of Education and Ministry of Health - children institutions, Office for International Legal Protection of Children

C2. Is practical/institutional responsibility in your country located differently for children who were evacuated from Ukrainian State care?

Yes (Please comment!)

No

C3. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section D: Statistics

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

D1. How many children are currently in State care in your country (excluding children who were evacuated from Ukrainian State care)?

we do not have these statistics



D2. As of the most recent statistics of your government, how many children who were evacuated from Ukrainian State care is your country accommodating?

we do not have these statistics

D3. If available, please add statistics concerning ages, average age, gender/sexuality, disability, as well as form of accomodation in which these children live in your country etc.:

Section E: Rights of the Child in State Care

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

E1. What resources are available in your country to ensure the right to education children who were evacuated from Ukrainian State care? Please explain shortly!

Separate State-provided formats (e.g., classes only for Ukrainian students)



Comment

Regular schools



Comment

None



Comment

Other



Comment

NGO-supported activity or similar



Comment



E2. What kind of accomodation is provided in your country for children who were evacuated from Ukrainian State care?

Placement in private institutions (e.g., SOS Children's Villages)

Placement in State institutions

Placement with the child's Ukrainian caregivers

Placement in foster families (where available)

Other

Other

E3. Does your State provide children who were evacuated from Ukrainian State care with psychological support?

Yes

No

Depends on the case:

Depends on the case:

E4. Does your State facilitate reunification of children who were evacuated from Ukrainian State care with living relatives?

Yes

If relatives are known

No

Only with parents

If relatives are in the same country

Other

Other



E5. How do you ensure that the best interest of children who were evacuated from Ukrainian State care are taken into account when taking actions affecting them?

participation, the best interests of the child should be a fundamental criterion for national authorities

E6. Are children who were evacuated from Ukrainian State care consulted in line with Article 12 of the Convention on the Rights of the Child (CRC)?

Article 12 CRC: "1. 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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Yes

No

Sometimes

Sometimes

E7. If children who were evacuated from Ukrainian State care are consulted in line with Article 12 CRC, how do you engage them?

interview with child (interpreteur), letter informing child

E8. How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...?

... other (Please specify!)

a l w a y s t a k



... disability/other special need

... gender/sexuality

... age

E9. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section F: Further Comments

F1. Is there any important aspect that this survey did not ask about? For example, does your State have any special initiatives, projects, debates etc. concerning children who were evacuated from Ukrainian State care etc., that would be important for my research? Do you have any other comments? Please add them here!

<https://www.mpsv.cz/web/en/social-and-legal-protection-of-children-general-introduction>
https://www.mpsv.cz/documents/20142/2786931/pomoc_deti_z_ukrajiny_2.pdf/
<https://www.praha22.cz/urad/organizacni-struktura/odbory-uradu/usek-socialne-pravni-ochrany-deti/what-is-social-and-legal-protection-of-children/>

F2. Please add further documents here:

Thank you for your participation! The information you have provided will be vital for my Master thesis research on "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" and help me raise awareness to the fate of these children, particularly in the context of the current war in Ukraine.

If you have any questions or concerns, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Response of the Czech Office for International Legal Protection of Children to Question E.8

[G04Q17_SQ001] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... age)

[G04Q17_SQ002] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... gender/sexuality)

[G04Q17_SQ003] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... disability/other special need)

[G04Q17_SQ004] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... other (Please specify!))

always taking into account the individual needs of the child

Appendix 2: Survey response of the Estonian National Social Insurance Board

Response received: 04 May 2022



Children in State care are among the most vulnerable groups during armed conflicts as they depend even more on the protection of their State than their peers living with their families. With Ukraine having one of the highest institutionalization rates in Europe, the current humanitarian crisis accompanying the war affects these children disproportionately. Among the Ukrainian refugees received by many European countries, several States are providing safe havens for evacuated children in Ukrainian State care and their caregivers. The following survey seeks to investigate what States are doing to accommodate the needs of these children, and what they have so far learned from this process. It will inform my Master thesis on the topic "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" which I am writing as part of the European Master's Programme in Human Rights and Democratisation at the Global Campus of Human Rights (Venice, Italy) and the University of Tartu (Estonia). The aim of my work is to add to the academic discourse on children's rights. My wish is that my research will raise awareness to and be a voice for this marginal, vulnerable group of children. The information you will provide in this survey will help me accomplish this.

The survey will close on Monday June 6th. The thesis will be defended in Venice September 24th.

If you have any questions or concerns, or wish to do an in-person interview instead, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Thank you!

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Please note: The survey does not ask for personal opinions or information of the respondent. It rather only explores measures undertaken by the State, its institutions and authorities. Thus, it should be filled out from the standpoint of the State, not the respondent.



Section A: General Information

The following information is needed for me to properly allocate your answers to your country and institution.

A1. Please choose your country!

- | | |
|----------------|-------------------------------------|
| Austria | <input type="checkbox"/> |
| Bulgaria | <input type="checkbox"/> |
| Czech Republic | <input type="checkbox"/> |
| Estonia | <input checked="" type="checkbox"/> |
| Germany | <input type="checkbox"/> |
| Hungary | <input type="checkbox"/> |
| Italy | <input type="checkbox"/> |
| Latvia | <input type="checkbox"/> |
| Lithuania | <input type="checkbox"/> |
| Moldova | <input type="checkbox"/> |
| Poland | <input type="checkbox"/> |
| Romania | <input type="checkbox"/> |
| Slovakia | <input type="checkbox"/> |

A2. Please specify the institution/ministry/governmental body etc. you represent!

Estonian National Social Insurance Board



Section B: Legislation and Policies

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

This section refers to both policies and legislation on State care in your country generally as well as - if applicable - policies and legislation specifically on children in Ukrainian State care that find themselves in the territory of your country due to the current war.

B1. What legislation and/or policy guidelines govern how children in State care are treated in your country? Please provide links or add a document at the bottom of this section, if available!

*²Family Law Act (Perekonnaseadus), RT I 2009, 60, 395 - Guardianship: Arts. 175, 175
 et: <https://www.riigiteataja.ee/akt/13330603?leiaKehitv>
 en: <https://www.riigiteataja.ee/en/eli/513112020002/consolidate>
 *²Social Welfare Act (Sotsiaalhoolekande seadus), RT I 1995, 21, 323
 et: <https://www.riigiteataja.ee/akt/122032021014>
 en: <https://www.riigiteataja.ee/en/eli/531032021007/consolidate>
 *²Act on Granting International Protection to Aliens (Välismaalasele rahvusvahelise kaitse andmise seadus), RT I 2006, 2, 3 - Guardianship: Art. 6.1 (4)
 et: <https://www.riigiteataja.ee/akt/102072013067?leiaKehitv>
 en: <https://www.riigiteataja.ee/en/eli/517082021001/consolidate>
 *²Child Protection Act (Lastekaitse seadus) 19 November 2014
 et: <https://www.riigiteataja.ee/akt/LasteKS>
 en: <https://www.riigiteataja.ee/en/eli/ee/506052015001/consolidate/current>
 *²Obligation to Leave and Prohibition on Entry Act, (Väljasõidukohustuse ja sissesõidukeelu seadus), 21 October 1998
 et: <https://www.riigiteataja.ee/akt/108072021018>
 en: <https://www.riigiteataja.ee/en/eli/517082021005/consolidate>
 *²The contract between Ukraine and the Republic of Estonia on legal assistance and legal relations in civil and criminal cases
 et: <https://www.riigiteataja.ee/akt/13119066>
 en: n/a

 *²Family Law Act (Perekonnaseadus), RT I 2009, 60, 395 - Guardianship: Arts. 175, 175
 et: <https://www.riigiteataja.ee/akt/13330603?leiaKehitv>
 en: <https://www.riigiteataja.ee/en/eli/513112020002/consolidate>

B2. Has your State adopted any new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine?

Yes

No

Currently discussed:



Currently discussed:

Guardianship procedures

B3. If your government has adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: What changes were made?



B4. If your government has not yet adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: Have there been any considerations or debates on whether such policy guidelines or legislation will be set up in the future?

Yes
 No

Ministry of Justice has made a formal suggestion to review and refresh the policy and legislation of guardianship. Currently it is possible to assign a guardian separated children (children who are 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. (ref: https://www.icrc.org/en/doc/assets/files/other/icrc_002_1011.pdf)) through normal procedure, but the discussion is to make this simpler and/or the deadlines refreshed.

B5. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section C: Institutional Responsibility
 Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

C1. Which institution has practical/institutional responsibility for children in State care? If there are multiple institutions involved, please shortly state what their task is in this regard!

Ministry of Justice

Comment

Family Law Act (incl. guardianship)

Ministry of Social Affairs

Comment

Social welfare and child protection

Ministry of Family Affairs

Comment

Municipalities

Comment

Child protection services, other social services, role of guardian if the child does not have one



Child Welfare Services



Comment

Child protection

Other (Please specify!)



Comment

Police and Boarder Guard, Social Insurance Board

C2. Is practical/institutional responsibility in your country located differently for children who were evacuated from Ukrainian State care?

Yes (Please comment!)

No

No children from Ukrainian state care have been evacuated to Estonia.

C3. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section D: Statistics

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

D1. How many children are currently in State care in your country (excluding children who were evacuated from Ukrainian State care)?

Currently we have 18 children under direct State care. Those are the children who are classified as unaccompanied minors (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 (ref: https://www.icrc.org/en/doc/assets/files/other/icrc_002_1011.pdf)). Additionally, I have information that two foster families from Ukraine have come to Estonia; as under Ukrainian legislation the foster families fulfil the role of legal representative, the State does not need to interfere.



D2. As of the most recent statistics of your government, how many children who were evacuated from Ukrainian State care is your country accommodating?

No children from State care (institutional care, foster care in an institution) in Ukraine have arrived to Estonia.

D3. If available, please add statistics concerning ages, average age, gender/sexuality, disability, as well as form of accomodation in which these children live in your country etc.:

Section E: Rights of the Child in State Care

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

E1. What resources are available in your country to ensure the right to education children who were evacuated from Ukrainian State care? Please explain shortly!

Separate State-provided formats (e.g., classes only for Ukrainian students)



Comment

Some schools have set up classes specially for Ukrainian children to ease their integration into school life in Estonia

Regular schools



Comment

Ukrainian children who have received temporary protection can enroll into a school without issue

None



Comment

Other



Comment

NGO-supported activity or similar



Comment

NGOs offer integration programs, language learning etc



E2. What kind of accomodation is provided in your country for children who were evacuated from Ukrainian State care?

Placement in private institutions (e.g., SOS Children's Villages)

Placement in State institutions

Placement with the child's Ukrainian caregivers

Placement in foster families (where available)

Other

Other

E3. Does your State provide children who were evacuated from Ukrainian State care with psychological support?

Yes

No

Depends on the case:

Depends on the case:

E4. Does your State facilitate reunification of children who were evacuated from Ukrainian State care with living relatives?

Yes

If relatives are known

No

Only with parents

If relatives are in the same country

Other

Other



E5. How do you ensure that the best interest of children who were evacuated from Ukrainian State care are taken into account when taking actions affecting them?

The needs of the child are assessed, the child is included into the decision making process.

E6. Are children who were evacuated from Ukrainian State care consulted in line with Article 12 of the Convention on the Rights of the Child (CRC)?

Article 12 CRC: "1. 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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Yes

No

Sometimes

Sometimes

E7. If children who were evacuated from Ukrainian State care are consulted in line with Article 12 CRC, how do you engage them?

We meet with them, talk with them, visit possible alternative care providers with them etc.

E8. How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...?

... other (Please specify!)

V e r y i m p o r



... disability/other special need

C a r e p r o v i

... gender/sexuality

P e r t o c h i

... age

S i m i l a r a g

E9. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section F: Further Comments

F1. Is there any important aspect that this survey did not ask about? For example, does your State have any special initiatives, projects, debates etc. concerning children who were evacuated from Ukrainian State care etc., that would be important for my research? Do you have any other comments? Please add them here!

When talking about Ukraine, we must view a few different groups of children who arrive to Estonia. Like I wrote before, we don't have Ukrainian State Care children evacuated to Estonia, but we do have thousands of children who have arrived here with a trusted adult who accompanies them (for example grandparent, adult sibling, close family friend), we have some children who arrive to Estonia with an adult, but that adult is not able to take care of them and we have children who arrive to Estonia completely alone (unaccompanied minors). The last two groups are the children who will receive direct care from our state.

F2. Please add further documents here:

Thank you for your participation! The information you have provided will be vital for my Master thesis research on "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" and help me raise awareness to the fate of these children, particularly in the context of the current war in Ukraine.

If you have any questions or concerns, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Response of the Estonian National Social Insurance Board to Question E.8

[G04Q16] If children who were evacuated from Ukrainian State care are consulted in line with Article 12 CRC, how do you engage them?	We meet with them, talk with them, visit possible alternative care providers with them etc.
[G04Q17_SQ001] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... age)	Similar age groups placed together
[G04Q17_SQ002] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... gender/sexuality)	Per to childs preference. Children live in private rooms (usually)
[G04Q17_SQ003] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... disability/other special need)	Care provider must be qualified and is chosen considering the child's needs
[G04Q17_SQ004] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... other (Please specify!))	Very important factor: siblings are not separated with placed under the care of the state

Appendix 3: Survey response of the Estonian Ministry of Social Affairs

Response received: 07 June 2022



Children in State care are among the most vulnerable groups during armed conflicts as they depend even more on the protection of their State than their peers living with their families. With Ukraine having one of the highest institutionalization rates in Europe, the current humanitarian crisis accompanying the war affects these children disproportionately. Among the Ukrainian refugees received by many European countries, several States are providing safe havens for evacuated children in Ukrainian State care and their caregivers. The following survey seeks to investigate what States are doing to accommodate the needs of these children, and what they have so far learned from this process. It will inform my Master thesis on the topic "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" which I am writing as part of the European Master's Programme in Human Rights and Democratisation at the Global Campus of Human Rights (Venice, Italy) and the University of Tartu (Estonia). The aim of my work is to add to the academic discourse on children's rights. My wish is that my research will raise awareness to and be a voice for this marginal, vulnerable group of children. The information you will provide in this survey will help me accomplish this.

The survey will close on Monday June 6th. The thesis will be defended in Venice September 24th.

If you have any questions or concerns, or wish to do an in-person interview instead, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Thank you!

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Please note: The survey does not ask for personal opinions or information of the respondent. It rather only explores measures undertaken by the State, its institutions and authorities. Thus, it should be filled out from the standpoint of the State, not the respondent.



Section A: General Information

The following information is needed for me to properly allocate your answers to your country and institution.

A1. Please choose your country!

- | | |
|----------------|-------------------------------------|
| Austria | <input type="checkbox"/> |
| Bulgaria | <input type="checkbox"/> |
| Czech Republic | <input type="checkbox"/> |
| Estonia | <input checked="" type="checkbox"/> |
| Germany | <input type="checkbox"/> |
| Hungary | <input type="checkbox"/> |
| Italy | <input type="checkbox"/> |
| Latvia | <input type="checkbox"/> |
| Lithuania | <input type="checkbox"/> |
| Moldova | <input type="checkbox"/> |
| Poland | <input type="checkbox"/> |
| Romania | <input type="checkbox"/> |
| Slovakia | <input type="checkbox"/> |

A2. Please specify the institution/ministry/governmental body etc. you represent!

Ministry of Social Affairs



Section B: Legislation and Policies

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

This section refers to both policies and legislation on State care in your country generally as well as - if applicable - policies and legislation specifically on children in Ukrainian State care that find themselves in the territory of your country due to the current war.

B1. What legislation and/or policy guidelines govern how children in State care are treated in your country? Please provide links or add a document at the bottom of this section, if available!

Social Welfare Act - Alternative Care Service
<https://www.riigiteataja.ee/en/eli/509052022004/consolide>

B2. Has your State adopted any new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine?

Yes

No

Currently discussed:

Currently discussed:

B3. If your government has adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: What changes were made?



B4. If your government has not yet adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: Have there been any considerations or debates on whether such policy guidelines or legislation will be set up in the future?

Yes
No

There has been no need for changes in the law. So far, there has been flexibility within them to deal with different situations.

B5. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section C: Institutional Responsibility
 Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

C1. Which institution has practical/institutional responsibility for children in State care? If there are multiple institutions involved, please shortly state what their task is in this regard!

Ministry of Justice

Comment

Legislation, policy making on custody and guardianship issues

Ministry of Social Affairs

Comment

Legislation, policy making on social welfare services

Ministry of Family Affairs

Comment

Municipalities

Comment

Organizing and financing of a alternative care service



Child Welfare Services



Comment

Other (Please specify!)



Comment

Social Insurance Board - Organizing and financing of alternative care service for unaccompanied minors

C2. Is practical/institutional responsibility in your country located differently for children who were evacuated from Ukrainian State care?

Yes (Please comment!)

No

C3. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section D: Statistics

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

D1. How many children are currently in State care in your country (excluding children who were evacuated from Ukrainian State care)?

All children in State care : 945 (800 in family homes and substitute homes and 145 in foster families), also ca 1300 children living in guardianship families.
 Unaccompanied minors 30, before Ukrainian war the number was 2.



D2. As of the most recent statistics of your government, how many children who were evacuated from Ukrainian State care is your country accommodating?

No such children have arrived in Estonia.

D3. If available, please add statistics concerning ages, average age, gender/sexuality, disability, as well as form of accomodation in which these children live in your country etc.:

Section E: Rights of the Child in State Care

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

E1. What resources are available in your country to ensure the right to education children who were evacuated from Ukrainian State care? Please explain shortly!

Separate State-provided formats (e.g., classes only for Ukrainian students)



Comment

Regular schools



Comment

None



Comment

Other



Comment

For information about education please contact Ministry of Education and Research.

NGO-supported activity or similar



Comment



E2. What kind of accomodation is provided in your country for children who were evacuated from Ukrainian State care?

- Placement in private institutions (e.g., SOS Children's Villages)
- Placement in State institutions
- Placement with the child's Ukrainian caregivers
- Placement in foster families (where available)
- Other

Other

We do not have children from Ukrainian State care. The answers are given about unaccompanied minors who have arrived in the country.

E3. Does your State provide children who were evacuated from Ukrainian State care with psychological support?

- Yes
- No
- Depends on the case:

Depends on the case:

E4. Does your State facilitate reunification of children who were evacuated from Ukrainian State care with living relatives?

- Yes
- If relatives are known
- No
- Only with parents
- If relatives are in the same country
- Other

Other

No such children. In the case of unaccompanied minors, of course, the Estonian state supports the return of children to Ukraine.



... disability/other special need

... gender/sexuality

... age

E9. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section F: Further Comments

F1. Is there any important aspect that this survey did not ask about? For example, does your State have any special initiatives, projects, debates etc. concerning children who were evacuated from Ukrainian State care etc., that would be important for my research? Do you have any other comments? Please add them here!

F2. Please add further documents here:

Thank you for your participation! The information you have provided will be vital for my Master thesis research on "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" and help me raise awareness to the fate of these children, particularly in the context of the current war in Ukraine.

If you have any questions or concerns, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Appendix 4: Survey response of the Latvian Ministry of Welfare

Response received: 18 May 2022



Children in State care are among the most vulnerable groups during armed conflicts as they depend even more on the protection of their State than their peers living with their families. With Ukraine having one of the highest institutionalization rates in Europe, the current humanitarian crisis accompanying the war affects these children disproportionately. Among the Ukrainian refugees received by many European countries, several States are providing safe havens for evacuated children in Ukrainian State care and their caregivers. The following survey seeks to investigate what States are doing to accommodate the needs of these children, and what they have so far learned from this process. It will inform my Master thesis on the topic "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" which I am writing as part of the European Master's Programme in Human Rights and Democratisation at the Global Campus of Human Rights (Venice, Italy) and the University of Tartu (Estonia). The aim of my work is to add to the academic discourse on children's rights. My wish is that my research will raise awareness to and be a voice for this marginal, vulnerable group of children. The information you will provide in this survey will help me accomplish this.

The survey will close on Monday June 6th. The thesis will be defended in Venice September 24th.

If you have any questions or concerns, or wish to do an in-person interview instead, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Thank you!

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Please note: The survey does not ask for personal opinions or information of the respondent. It rather only explores measures undertaken by the State, its institutions and authorities. Thus, it should be filled out from the standpoint of the State, not the respondent.



Section A: General Information

The following information is needed for me to properly allocate your answers to your country and institution.

A1. Please choose your country!

- | | |
|----------------|-------------------------------------|
| Austria | <input type="checkbox"/> |
| Bulgaria | <input type="checkbox"/> |
| Czech Republic | <input type="checkbox"/> |
| Estonia | <input type="checkbox"/> |
| Germany | <input type="checkbox"/> |
| Hungary | <input type="checkbox"/> |
| Italy | <input type="checkbox"/> |
| Latvia | <input checked="" type="checkbox"/> |
| Lithuania | <input type="checkbox"/> |
| Moldova | <input type="checkbox"/> |
| Poland | <input type="checkbox"/> |
| Romania | <input type="checkbox"/> |
| Slovakia | <input type="checkbox"/> |

A2. Please specify the institution/ministry/governmental body etc. you represent!

The Ministry of Welfare



Section B: Legislation and Policies

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

This section refers to both policies and legislation on State care in your country generally as well as - if applicable - policies and legislation specifically on children in Ukrainian State care that find themselves in the territory of your country due to the current war.

B1. What legislation and/or policy guidelines govern how children in State care are treated in your country? Please provide links or add a document at the bottom of this section, if available!

Law on the protection of the children's rights (<https://likumi.lv/ta/en/en/id/49096-law-on-the-protection-of-the-childrens-rights>)

B2. Has your State adopted any new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine?

Yes

No

Currently discussed:

Currently discussed:

B3. If your government has adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: What changes were made?

The complete ban on adoption of the children that has come from Ukraine during the war (the aim is not to lose these children and to ensure that they may return home after war to their relatives if that will be possible). The possibility to appoint an emergency guardian - also a person from Ukraine if an unaccompanied child travels with this person, knows this person and feels safe with him/her. Previously only citizens of Latvia has been able to be guardians and the process to become someone's guardian at this point for Ukrainians has been made easy.

Law on Assistance to Ukrainian Civilians <https://likumi.lv/ta/en/en/id/330546-law-on-assistance-to-ukrainian-civilians>



B4. If your government has not yet adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: Have there been any considerations or debates on whether such policy guidelines or legislation will be set up in the future?

Yes
No

B5. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section C: Institutional Responsibility
 Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

- C1. Which institution has practical/institutional responsibility for children in State care? If there are multiple institutions involved, please shortly state what their task is in this regard!**
- Ministry of Justice

Comment
 - Ministry of Social Affairs

Comment

Ministry of Welfare - policy making and adoption processes, also guarding children's rights through the State Agency for Protection of Children's Rights.
 - Ministry of Family Affairs

Comment

Ministry of Welfare - policy making
 - Municipalities

Comment

Practically organizing care in social care centers. Social Services that are part of every municipality takes care of the family to ensure that the family and children gets help before there is need to separate child from its family. Provides family assistants, for example.



Child Welfare Services

**Comment**

Juvenile or Orphan's Court in Latvia. Decide if a child needs to be separated from it's family/parents and is in need of different care. If another form of care is provided for the child, this Court follows up the child to ensure that child's rights has been respected.

Other (Please specify!)

**Comment**

Ombudsman, also is able to follow up if the rights of the children has been ensured, can inform society about the children's rights. May receive and look after any complaints about situations (especially in state or municipality institutions) when a child's rights has not been ensured.

C2. Is practical/institutional responsibility in your country located differently for children who were evacuated from Ukrainian State care?

Yes (Please comment!)

No

I am fairly sure that there are no children in Latvia that has been tranferred directly from a care centre in Ukraine as there has not yet been an agreement betweenour states about this, but nevertheless, the attitude and the system would be the same, the same organizations would follow up those children in the same manner, maybe more often at the beginning.

C3. If you wish to provide a document pertaining to the topic of this section, please add it here:**Section D: Statistics**

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

D1. How many children are currently in State care in your country (excluding children who were evacuated from Ukrainian State care)?

As of today 5910 children are in State care in Latvia. 1413 are in foster families. 3938 are under guardianship. 514 are in care institutions.



D2. As of the most recent statistics of your government, how many children who were evacuated from Ukrainian State care is your country accommodating?

At the moment I have no information about such children. We have about 150 adults that have been evacuated from Luhansk city and now lives in social care centres, so I am fairly sure there are none at the moment.

D3. If available, please add statistics concerning ages, average age, gender/sexuality, disability, as well as form of accomodation in which these children live in your country etc.:

Section E: Rights of the Child in State Care

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

E1. What resources are available in your country to ensure the right to education children who were evacuated from Ukrainian State care? Please explain shortly!

Separate State-provided formats (e.g., classes only for Ukrainian students)



Comment

It is possible to provide such service as Ukrainians teachers are allowed to teach Ukrainian children and the State or municipality must pay their salaries.

Regular schools



Comment

Schools are accepting children from Ukraine, municipalities together with schools and other parents are providing necessary books and other things (including clothing when necessary).

None



Comment

Other



Comment

NGO-supported activity or similar



Comment



E2. What kind of accomodation is provided in your country for children who were evacuated from Ukrainian State care?

Placement in private institutions (e.g., SOS Children's Villages)

Placement in State institutions

Placement with the child's Ukrainian caregivers

Placement in foster families (where available)

Other

Other

E3. Does your State provide children who were evacuated from Ukrainian State care with psychological support?

Yes

No

Depends on the case:

Depends on the case:

Not yet as we do not have such children, but we do have Ukrainian psychologists here in Latvia so that will be possible when needed.

E4. Does your State facilitate reunification of children who were evacuated from Ukrainian State care with living relatives?

Yes

If relatives are known

No

Only with parents

If relatives are in the same country

Other

Other

Not happened yet.



E5. How do you ensure that the best interest of children who were evacuated from Ukrainian State care are taken into account when taking actions affecting them?

Every time when anything involved Ukrainian unaccompanied minor takes place - the Orphan Court gets involved, as well as the Social Services. They continue to check upon the child at least once a month or more often if necessary.

E6. Are children who were evacuated from Ukrainian State care consulted in line with Article 12 of the Convention on the Rights of the Child (CRC)?

Article 12 CRC: "1. 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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Yes

No

Sometimes

Sometimes

E7. If children who were evacuated from Ukrainian State care are consulted in line with Article 12 CRC, how do you engage them?

Has not yet happened, but in any case there is going to be the Orphan Court and maybe even the State Agency for Guarding Children's Rights involved.

E8. How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...?

... other (Please specify!)

O	v	e	r	a	l	l	t	h
---	---	---	---	---	---	---	---	---



... disability/other special need

I f s p e c i a l

... gender/sexuality

N o n e

... age

N o n e

E9. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section F: Further Comments

F1. Is there any important aspect that this survey did not ask about? For example, does your State have any special initiatives, projects, debates etc. concerning children who were evacuated from Ukrainian State care etc., that would be important for my research? Do you have any other comments? Please add them here!

F2. Please add further documents here:

Thank you for your participation! The information you have provided will be vital for my Master thesis research on "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" and help me raise awareness to the fate of these children, particularly in the context of the current war in Ukraine.

If you have any questions or concerns, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Response of the Latvian Ministry of Welfare to Question E.8

[G04Q17_SQ001] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... age)	None
[G04Q17_SQ002] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... gender/sexuality)	None
[G04Q17_SQ003] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... disability/other special need)	If special care is needed, it is going to be provided.
[G04Q17_SQ004] How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...? (... other (Please specify!))	Overall the Law states that Ukrainians have exactly the same rights for social, medical and educational services as Latvian citizens.

Appendix 5: Survey response of the Lithuanian State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour

Response received: 26 May 2022



Children in State care are among the most vulnerable groups during armed conflicts as they depend even more on the protection of their State than their peers living with their families. With Ukraine having one of the highest institutionalization rates in Europe, the current humanitarian crisis accompanying the war affects these children disproportionately. Among the Ukrainian refugees received by many European countries, several States are providing safe havens for evacuated children in Ukrainian State care and their caregivers. The following survey seeks to investigate what States are doing to accommodate the needs of these children, and what they have so far learned from this process. It will inform my Master thesis on the topic "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" which I am writing as part of the European Master's Programme in Human Rights and Democratisation at the Global Campus of Human Rights (Venice, Italy) and the University of Tartu (Estonia). The aim of my work is to add to the academic discourse on children's rights. My wish is that my research will raise awareness to and be a voice for this marginal, vulnerable group of children. The information you will provide in this survey will help me accomplish this.

The survey will close on Monday June 6th. The thesis will be defended in Venice September 24th.

If you have any questions or concerns, or wish to do an in-person interview instead, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Thank you!

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Please note: The survey does not ask for personal opinions or information of the respondent. It rather only explores measures undertaken by the State, its institutions and authorities. Thus, it should be filled out from the standpoint of the State, not the respondent.



Section A: General Information

The following information is needed for me to properly allocate your answers to your country and institution.

A1. Please choose your country!

- | | |
|----------------|-------------------------------------|
| Austria | <input type="checkbox"/> |
| Bulgaria | <input type="checkbox"/> |
| Czech Republic | <input type="checkbox"/> |
| Estonia | <input type="checkbox"/> |
| Germany | <input type="checkbox"/> |
| Hungary | <input type="checkbox"/> |
| Italy | <input type="checkbox"/> |
| Latvia | <input type="checkbox"/> |
| Lithuania | <input checked="" type="checkbox"/> |
| Moldova | <input type="checkbox"/> |
| Poland | <input type="checkbox"/> |
| Romania | <input type="checkbox"/> |
| Slovakia | <input type="checkbox"/> |

A2. Please specify the institution/ministry/governmental body etc. you represent!

State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour of Republic of Lithuania



Section B: Legislation and Policies

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

This section refers to both policies and legislation on State care in your country generally as well as - if applicable - policies and legislation specifically on children in Ukrainian State care that find themselves in the territory of your country due to the current war.

B1. What legislation and/or policy guidelines govern how children in State care are treated in your country? Please provide links or add a document at the bottom of this section, if available!

<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163202/asr>
<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/b2b626f4fd5c11e796a2c6c63add27e9/asr>
<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.292682/asr>
<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.170462/asr>

B2. Has your State adopted any new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine?

Yes

No

Currently discussed:

Currently discussed:

B3. If your government has adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: What changes were made?

The law on benefits on the granting of benefits to children from Ukraine, as well as the law on the situation of foreigners, has been amended.



B4. If your government has not yet adopted new policy guidelines or legislation on the treatment of children in State care in the context of the war in Ukraine: Have there been any considerations or debates on whether such policy guidelines or legislation will be set up in the future?

Yes
No

B5. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section C: Institutional Responsibility
 Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

C1. Which institution has practical/institutional responsibility for children in State care? If there are multiple institutions involved, please shortly state what their task is in this regard!

Ministry of Justice

Comment

Ministry of Social Affairs

Comment

Develops child protection policy in Lithuania

Ministry of Family Affairs

Comment

Municipalities

Comment

Social services



Child Welfare Services



Comment

Other (Please specify!)



Comment

State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour of Republic of Lithuania

C2. Is practical/institutional responsibility in your country located differently for children who were evacuated from Ukrainian State care?

Yes (Please comment!)

No

C3. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section D: Statistics

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

D1. How many children are currently in State care in your country (excluding children who were evacuated from Ukrainian State care)?

7562



D2. As of the most recent statistics of your government, how many children who were evacuated from Ukrainian State care is your country accommodating?

D3. If available, please add statistics concerning ages, average age, gender/sexuality, disability, as well as form of accomodation in which these children live in your country etc.:

Section E: Rights of the Child in State Care

Children in State care for the purpose of this section shall mean children in State, private or other institutions as well as children in fostercare.

E1. What resources are available in your country to ensure the right to education children who were evacuated from Ukrainian State care? Please explain shortly!

Separate State-provided formats (e.g., classes only for Ukrainian students)

Comment

Regular schools

Comment

None

Comment

Other

Comment

NGO-supported activity or similar

Comment



E2. What kind of accomodation is provided in your country for children who were evacuated from Ukrainian State care?

Placement in private institutions (e.g., SOS Children's Villages)

Placement in State institutions

Placement with the child's Ukrainian caregivers

Placement in foster families (where available)

Other

Other

E3. Does your State provide children who were evacuated from Ukrainian State care with psychological support?

Yes

No

Depends on the case:

Depends on the case:

E4. Does your State facilitate reunification of children who were evacuated from Ukrainian State care with living relatives?

Yes

If relatives are known

No

Only with parents

If relatives are in the same country

Other

Other



E5. How do you ensure that the best interest of children who were evacuated from Ukrainian State care are taken into account when taking actions affecting them?

E6. Are children who were evacuated from Ukrainian State care consulted in line with Article 12 of the Convention on the Rights of the Child (CRC)?

Article 12 CRC: "1. 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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Yes

No

Sometimes

Sometimes

E7. If children who were evacuated from Ukrainian State care are consulted in line with Article 12 CRC, how do you engage them?

E8. How do the resources and services provided to children who were evacuated from Ukrainian State care differ by ...?

... other (Please specify!)



... disability/other special need

... gender/sexuality

... age

E9. If you wish to provide a document pertaining to the topic of this section, please add it here:

Section F: Further Comments

F1. Is there any important aspect that this survey did not ask about? For example, does your State have any special initiatives, projects, debates etc. concerning children who were evacuated from Ukrainian State care etc., that would be important for my research? Do you have any other comments? Please add them here!

F2. Please add further documents here:

Thank you for your participation! The information you have provided will be vital for my Master thesis research on "Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations" and help me raise awareness to the fate of these children, particularly in the context of the current war in Ukraine.

If you have any questions or concerns, please do not hesitate to contact me at anne.sophie.gscheidlen@ut.ee .

Sincerely,

Anne Sophie Gscheidlen

(E.MA Master student at the Global Campus of Human Rights and the University of Tartu)

Appendix 6: Statement by the German Federal Ministry for Families, Seniors, Women and Youth

Received: 05 May 2022

Original Statement

Seit Beginn des Angriffskriegs von Russland gegen die Ukraine fliehen von dort hunderttausende Menschen vor dem Kriegsgeschehen nach Deutschland. Unter ihnen sind viele Frauen und Kinder und auch Kinder, die in der Ukraine in staatlichen Einrichtungen gelebt haben.

Kinder und Jugendliche, die gemeinsam mit ihren Begleitpersonen aus ukrainischen Waisenhäusern und Kinderheimen bei uns Zuflucht suchen, sind besonders vulnerabel und in besonderem Maße schutzbedürftig.

Unter ihnen sind auch Kinder und Jugendliche mit schweren Erkrankungen oder Behinderungen. Zur Sicherung des Kindeswohls ist es von grundlegender Bedeutung, dass diese Kinder und Jugendliche als Gruppe zusammenbleiben können. Sie brauchen Stabilität und sollten deshalb auch nicht von ihren vertrauten Erzieherinnen und Erziehern getrennt werden.

Um eine am Kindeswohl orientierte Aufnahme der Kinder und Jugendlichen aus den Heimen zu ermöglichen, hat das Bundesfamilienministerium in enger Zusammenarbeit mit den Bundesländern Ende März 2022 eine zentrale Melde- und Koordinierungsstelle für die bundesweite Aufnahme evakuierter Kinder und Jugendlicher aus ukrainischen Waisenhäusern und Kinderheimen eingerichtet.

Mit Implementierung einer Koordinierung auf Bundesebene soll ein am Kindeswohl ausgerichtetes geordnetes Verfahren sichergestellt werden. Das Verfahren soll ermöglichen, dass die Kinder und Jugendlichen zusammenbleiben und gemeinsam mit ihren Betreuerinnen und Betreuern gut und geschützt in den Kinderheimen, Waisenhäusern oder weiteren Einrichtungen der Kinder- und Jugendhilfe der Länder aufgenommen werden können. Auch besondere Bedarfe wie Behinderungen oder schwere Erkrankungen sollen bei der Aufnahme der Kinder und Jugendlichen berücksichtigt werden.

Die Anlauf- und Koordinierungsstelle soll ebenfalls gemeinsam mit den Ländern eine Datenlage erstellen, die einen fundierten Überblick über Anzahl und Aufenthalt ukrainischer Kinder und Jugendlicher aus evakuierten Kinderheimen und Waisenhäuser verschafft.

Ein weiterer Zweck der Koordinierungsstelle soll die Verhinderung von Parallelanfragen zu Aufnahmen evakuierter Kinderheime und Waisenhäuser sein.

Die Stelle soll auf zwei Säulen beruhen, einer "Hotline", bei der Anfragen aller Art zum Thema Evakuierung von Waisenhäusern und Kinderheimen in der Ukraine beantwortet, aber auch Meldungen über Aufnahmeersuchen an die zuständige Koordinierungsstelle weitergeleitet werden. Die SOS Meldestelle, betrieben von SOS-Kinderdorf e.V., ist unter der kostenfreien Telefonnummer 0800 12 606 12 täglich von 8:00 bis 19:00 Uhr erreichbar.

Sie informiert Einrichtungen, Organisationen und Privatpersonen, die die Aufnahme evakuierter Heim- und Waisenkinder aus der Ukraine in Deutschland organisieren über das Verteilverfahren und die zuständigen Stellen in den Bundesländern und nennt Ansprechpartnerinnen und -partner. Fragen Gruppen ukrainischer Heim- und Waisenkinder auf dem Weg nach Deutschland von sich aus an, vermittelt die Meldestelle sie auch direkt dorthin, wo es freie Kapazitäten gibt.

Die zweite Säule ist die zentrale Koordinierungsstelle, eingerichtet beim Bundesverwaltungsamt. Sie registriert Aufnahmen und Kapazitäten in den Bundesländern und stellt die gerechte Verteilung der evakuierten Gruppen auf die Bundesländer sowie die gemeinsame Unterbringung, Versorgung und Betreuung der Gruppen mit ihren Begleitpersonen sicher.

Weitere Informationen sind auf der Webseite der SOS Meldestelle unter <https://www.sos-kinderdorf.de/meldestelle-ukraine> abrufbar.

Translation

Since the beginning of the Russian invasion of Ukraine hundreds of thousands of people have been fleeing from the war to Germany. Among them are many women and children, including children who lived in State care institutions in Ukraine.

Children and youth, who are seeking refuge in Germany with their caregivers from Ukrainian orphanages and State care facilities, are exceptionally vulnerable and in need of special protection.

Among them are also children and youth with severe illnesses and disabilities. To protect the best interests of the child it is of fundamental importance, that these children and adolescents can remain together as a group. They require stability and should therefore not be separated from their familiar caregivers.

To enable a reception of the children and adolescents from State care facilities that is informed by the children's best interests, the Federal Ministry for Family Affairs in close cooperation with the Länder has created a central registration and coordination office for the admission of children and youth evacuated from Ukrainian orphanages and State care facilities.

The implementation of the coordination at the federal level is meant to ensure a procedure that is aligned with the best interest of the child. The procedure makes it possible for the children and youth to stay together and to be received and protected with their caregivers in the State care facilities, orphanages, and other institutions of the child and youth welfare service of the Länder. Special needs such as disabilities and severe illnesses are to be considered in the admission of these children and youth.

Furthermore, the coordination office together with the Länder gathers data to gain a thorough overview over the quantity and location of children and youth evacuated from Ukrainian State care facilities and orphanages.

A further aim of the coordination office is to prevent parallel enquiries for the admission of evacuated State care institutions and orphanages.

The office rests on two pillars: One is the hotline, which answers all questions concerning the evacuation of Ukrainian orphanages and State care facilities. It will also pass on evacuation requests to the coordination office. The SOS hotline, run by SOS-Kinderdorf e.V., is reachable daily from 08:00 a.m. to 07.00 p.m. through the number 0800 12 606 12 free of charge.

It informs institutions, organizations and individuals organizing the admission of children evacuated from Ukrainian State care in Germany about the distribution system and the responsible authorities in the Länder and names contact persons. If groups of children from Ukrainian State care on their way to Germany contact the hotline directly, they will be referred to places with available capacity.

The second pillar is the central coordination office, attached to the Federal Office of Administration. It registers the admissions and capacities of the Länder and ensures a fair distribution of evacuated groups among the Länder as well as joint accommodation, provision for, and care of the groups with their caregivers.

Further information can be found on the website of the SOS coordination office at <https://www.sos-kinderdorf.de/meldestelle-ukraine> .

Appendix 7: Statement of the Polish Ministry of Social Policy

Response received: 08 June 2022

**MINISTERSTWO
RODZINY I POLITYKI SPOŁECZNEJ**
Biuro Pełnomocnika Rządu do Spraw Polityki
Demograficznej

BPD-V.55.1.21.2022.PW

Warszawa, dnia 8 czerwca 2022 r.

Ms
Anne Sophie Gscheidlen

Dotyczy: Protection of the Rights of Children in State Care in Conflict and Post-Conflict Situations

Dear Madam

In response to your letter dated May 4th, 2022 please find attached the general information on support of Ukrainian minors in Poland.

Please note that because of a lot tasks concerning the current situation we are not able to fill out at that time the attached survey.

Best regards

z up. Piotra Gołębiewskiego – Dyrektora Biura
Pełnomocnika Rządu ds. Polityki Demograficznej
w Ministerstwie Rodziny i Polityki Społecznej

Katarzyna Napiórkowska
Naczelnik Wydziału

*/-podpisano bezpiecznym podpisem elektronicznym
weryfikowanym przy pomocy ważnego
kwalifikowanego certyfikatu/*

Sprawę prowadzi: Paulina Wójcicka
E-mail: paulina.wojcicka@mrips.gov.pl
Telefon: + 48 538 117 237

Minors from Ukraine in Poland- current organisational and legal basis

The Ministry of Family and Social Policy makes every effort to provide unaccompanied Ukrainian minors residing in the territory of the Republic of Poland and children from Ukrainian foster care with the best possible care. In the Ministry of Family and Social Policy, two staffs have been established to evacuate and place in Poland children from foster care from Ukraine - the Children's Evacuation Staff and the Children's Place Staff. Information on the transport of children from Ukraine is reported to the Children's Evacuation Staff, while the Children's Place Staff coordinates the database of places where the groups can be accommodated. As part of the activities of the Staffs, the needs of transport and placement of orphaned, unaccompanied children, in need of special care or disabled children are also taken into account.

The Ministry remains in contact with the Ministries of Justice, of Infrastructure, of Foreign Affairs, of Internal Affairs and Administration, as well as with non-governmental organizations. We try to coordinate activities in this area as much as possible, so that children can find a safe shelter as soon as possible. Additionally, a reception point for children evacuated from foster care as well as unaccompanied minors was created in Stalowa Wola. There, after a long and exhausting journey, children are cared and then placed in their final destination all over the country. We collect data from all over the country on places where, first of all, it is possible to place larger groups of children. We want the children not to be separated, in order to provide them with a maximum possible sense of security.

In order to fully secure the situation of Ukrainian citizens residing on the territory of the Republic of Poland in connection with the current geopolitical situation, the Act of March 12, 2022 on assistance to Ukrainian citizens in connection with the armed conflict in the territory of Ukraine was adopted (Journal of Laws of 2022, item 583). It also aims at a proper protection of the situation of children, including children from foster care, evacuated from Ukraine. This law creates an "institution" of a temporary guardian. It is a legal solution dedicated to the current, extraordinary situation, unknown to the Polish legal order so far.

The procedure for appointing a temporary guardian may be initiated upon request or ex officio. The following entities will have the right to submit an application for the initiation of the above-mentioned procedure: Border Guard; mayor of the village, town, city, starost, voivodeship marshal, prosecutor; Police; managers of organisational units of social assistance; representatives of international or non-governmental organisations involved in providing assistance to foreigners; person taking actual custody of the minor; person who has taken actual custody of the minor after the minor has entered the territory of the Republic of Poland and exercises it on the day of submitting the application; other persons or entities, within the framework of their tasks.

In accordance with the law, the temporary guardian is appointed by the guardianship court having jurisdiction over the minor's place of stay. A temporary guardian, unless the scope of his/her rights and obligations has been specified otherwise during his/her appointment, is authorised to represent the minor and to exercise custody of him/her and his/her property.

However, the temporary guardian should obtain the authorisation of the guardianship court in all major matters that concern the minor or his/her property. The implementation of the rights

and responsibilities of the temporary guardian is supervised by the social assistance centre or the centre for social services or other organisational unit indicated by the mayor of the village, town or city.

Aiming to ensure the child's sense of security and guided by his welfare, the temporary guardian should be appointed, first of all, from among relatives, relatives by marriage or other persons giving a guarantee of proper performance of the guardian's duties. The urgency of such cases determines the immediate action of the court, including the examination of the case and issuing a final decision no later than within 3 days from the date of receipt of the application by the court or becoming aware of the need to appoint a temporary guardian. The court serves a copy of the decision on the participants in the procedure, the competent social assistance unit and the Commander-in-Chief of the Border Guard.

One temporary guardian may be appointed for several minors if there is no conflict between their interests. If possible, the same person should be appointed as a temporary guardian for siblings. If the minors, prior to their arrival on the territory of the Republic of Poland, were placed in foster care on the territory of Ukraine and came together with the person exercising this custody, the court appoints that person as a temporary guardian for all these minors. There are special conditions that need to be faced when appointing a temporary guardian. For example a person who does not have full legal capacity or who has been deprived of public rights may not be appointed as a guardian, or a person who is likely to fail to perform the duties of a caregiver may not be appointed as a guardian.

If it is not possible to appoint a temporary guardian, unaccompanied minors are placed in foster care. The Act on assistance to Ukrainian citizens indicates that the court may entrust an Ukrainian citizen the performance of a foster family, in regard to an Ukrainian child, despite he/she does not meet the conditions for foster families in terms of necessary training. With regard to such families, the provisions of the Act of June 9, 2011 on supporting the family and the foster care system will apply accordingly.

The Ministry of Family and Social Policy constantly monitors the situation and the number of unaccompanied minors. With the welfare and safety of children in mind, records of minors were introduced, kept by poviats family assistance centers using the ICT system. The system allows to export data, e.g. for the needs of the Ukrainian side.