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Anne Sophie Gscheidlen

At Risk of Falling through the Cracks?

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

EMA, The European Master's Programme
in Human Rights and Democratisation

ANNE SOPHIE GSCHIEDLEN

AT RISK OF FALLING THROUGH THE CRACKS?
THE PROTECTION OF CHILDREN IN STATE CARE IN
CONFLICT SITUATIONS IN INTERNATIONAL
LAW AND PRACTICE

FOREWORD

The European Master's Degree in Human Rights and Democratisation (EMA) is a one-year intensive programme launched in 1997 as a joint initiative of 8 universities which now has participating universities in all EU Member States with support from the European Commission. Based on an action- and policy-oriented approach to learning, it combines legal, political, historical, anthropological and philosophical perspectives on the study of human rights and democracy with targeted skills-building activities. The aim from the outset was to prepare young professionals to respond to the requirements and challenges of work in international organisations, field operations, governmental and non-governmental bodies, and academia. As a measure of its success, EMA has served as a model of inspiration for the establishment of seven other EU-sponsored regional master's programmes in the area of human rights and democratisation in different parts of the world. Today these programmes cooperate closely in the framework of the Global Campus of Human Rights, with its headquarters in Venice, Italy.

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This publication includes the thesis *At Risk of Falling through the Cracks? The Protection of Children in State Care in Conflict Situations in International Law and Practice* written by Anne Sophie Gscheidlen and supervised by Katre Luhamaa, University of Tartu.

BIOGRAPHY

Anne Sophie Gscheidlen holds a Bachelor of Arts in International Relations from Rhine-Waal University of Applied Sciences and a Master's degree in Human Rights and Democratisation from the Global Campus of Human Rights Europe. Through her studies she has developed a profound passion for human and child rights advocacy, which inspired her Master thesis. After graduating from the EMA programme, Anne completed a traineeship through the EMA Internship Programme with the Human Rights Section of the Delegation of the European Union to the United Nations and other international organizations in Geneva, where she worked inter alia on the rights of the child, human rights situations in Asia, women's rights and the right to development.

ABSTRACT

A day before the start of Russia's invasion of Ukraine, the Council of Europe vowed to create standards and mechanisms on child protection in armed conflict by 2027. It further promised to address the discrimination of children in state care. The need for a comprehensive child protection scheme during and post-armed conflict as well as efforts to combat the marginalisation 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 marginalisation of children in state care in reaction to the war against Ukraine, a country which has one of the highest child institutionalisation 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, this thesis documents how some European countries view their obligations towards these children, and what has already been undertaken by them 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

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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Lastly, a big thank you to everyone else who offered a kind, supportive word and listened to my ideas. I am so privileged and grateful to have the best support system I could have ever asked for. I could not have written this thesis and completed the E.MA programme without you.

TABLE OF ABBREVIATIONS

Additional Protocol I	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
ECtHR	European Court of Human Rights
EU	European Union
Geneva Convention IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War
HRC	United Nations Human Rights Committee

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
MSP	Міністерство соціальної політики України Ministry of Social Policy (Ukraine)
NGO	Non-governmental organisation
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% 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 United Nations (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% 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

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).

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 as adults, 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 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 organisations 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

⁶ Santa Barbara (n 2).

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.* 892.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Christian Cardon, 'Addressing challenges of children without parental care in conflict settings' (ICRC, 7 December 2021) <www.icrc.org/en/document/children-parental-care-conflict> accessed 4 July 2022.

¹³ UNICEF, 'Children in alternative care' <<https://data.unicef.org/topic/child-protection/children-alternative-care/>> accessed 4 July 2022.

¹⁴ *ibid.*

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% 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 the United Nations High Commissioner for Refugees (UNHCR), roughly 100,000 children lived in Ukrainian boarding schools and institutional facilities prior to the war.¹⁸ Many of these children have living relatives or guardians. Hence, Ukraine should seek these individuals consent and avoid family separations in line with its obligations under international child rights and humanitarian law.¹⁹ The two UN agencies further called on Ukraine to examine the best interests of these children when making evacuation decisions.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 (CRC),²¹ thereby giving children back some of the agency they lose while in state care and in conflict situations.²² 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.²³ However, as Sabine Schutter, member of the board of SOS-Kinderdorf e.V., has described from a visit to refugee centres in Poland in May 2022, 'In the silence

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 7 March 2022) <www.unhcr.org/news/press/2022/3/622619a24/unaccompanied-separated-children-fleeing-escalating-conflict-ukraine-must.html> accessed 4 July 2022.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

²² 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.

²³ *ibid.*

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'.²⁴

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.²⁵ Since 50% of children in Ukrainian institutional care have a disability,²⁶ 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.²⁷ 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.²⁸

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 institutionalisation rates, major international child rights organisations such as SOS Children's Villages and Save the Children as well as UN agencies have repeatedly drawn attention to these marginalised 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

²⁴ 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..

²⁵ SOS Children's Villages, 'Millions of children in Ukraine risk growing up without the care they need' (*SOS Children's Villages*, 4 March 2022) <www.sos-childrensvillages.org/news/millions-of-children-in-ukraine-at-risk> accessed 4 July 2022.

²⁶ Russell and Grandi (n 18).

²⁷ 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.

²⁸ *ibid.*

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 since the beginning of Russia's 2022 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,²⁹ the Fourth Geneva Convention of 1949 (Geneva Convention IV),³⁰ the Additional Protocols of 1977 (Additional Protocol I and Protocol II)³¹ and the UN Guidelines for the Alternative Care of Children (Alternative Care Guidelines or Guidelines).³² 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 analysed as their scope of application is restricted to their respective region and this thesis seeks to provide an overview over the international legal obligations 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, therefore, exclude informal care arrangements

²⁹ CRC (n 21).

³⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949) 75 UNTS 287.

³¹ 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.

³² Guidelines for the Alternative Care of Children (2010) A/RES/64/142 (Guidelines).

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 Russia's 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.

AT RISK OF FALLING THROUGH THE CRACKS?

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’.³³ This possibility enables the states to strip children from the safeguards of the CRC before the desired age subject to their discretion. In Organisation for Economic Cooperation and Development (OECD) countries as well as the European Union (EU), the age of majority is typically 18, though other age limits in national legislations may vary, typically reflecting the increasing capacities of the child.³⁴

Despite seeming similarities in the age of majority of many countries, the war against Ukraine has revealed challenges in the discrepancies

³³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 1.

³⁴ OECD, ‘Legal age thresholds regarding the transition from child- to adulthood’ (2016) <www.oecd.org/els/family/PF_1_8_Age_threshold_Childhood_to_Adulthood.pdf> accessed 9 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 9 July 2022.

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 obstacles in receiving states.³⁵ As an example, as of May 2022, they were confronted with legal obstacles in Poland because independent travel of minors is not allowed under Polish law.³⁶ Poland consequently puts these adolescents under temporary guardianship.³⁷ Thus, these differing age limits impose exceptional hurdles on those adolescents affected.

As is discussed further in chapter 3.2., international humanitarian law (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. For 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.³⁸ 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,³⁹ 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 identifies 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.

³⁵ Ministry of Social Policy, 'Ukrainian monitoring group held a working meeting with the diplomatic mission of Ukraine in Poland' (19 April 2022) <www.msp.gov.ua/news/21726.html> accessed 7 July 2022.

³⁶ *ibid.*

³⁷ Ministry of Social Policy, 'Maryna Lazebna visited the Host Center in Stalowa Wola, which houses Ukrainian children displaced by hostilities from the territory of Ukraine to the Republic of Poland' (25 May 2022) <www.msp.gov.ua/news/21853.html> accessed 7 July 2022.

³⁸ Oscar Uhler and others, *Commentary on the Geneva Conventions of 12 August 1949 (Commentary of 1958)* (ICRC 1958) 185ff.

³⁹ UNHCR, 'Child and Youth Participation' <www.unhcr.org/child-and-youth-protection.html> accessed 27 June 2022.

2.2.1 *Definition of 'family'*

Although there are various provisions in international law seeking to protect a family, the notion was never defined. The UN Human Rights Committee (HRC) 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'.⁴⁰

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.⁴¹ 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,⁴² where a family fulfils 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;
- (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.⁴³

⁴⁰ 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.

⁴¹ *ibid* para 2f.

⁴² Mary Patricia Treuthart, 'Adopting a More Realistic Definition of Family' (1990) 26 *Gonzaga Law Review* 91.

⁴³ *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).

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 in 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 articles 19 and 20 of the CRC.

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’,⁴⁴ 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’⁴⁵ 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 substance abuse, or death of parents’.⁴⁶ 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 displacement and the death of parents.

The Alternative Care Guidelines adopted a broader definition by describing children without parental care as being ‘all children not in the

⁴⁴ Also ‘children deprived of parental care’ or ‘children lacking parental care’.

⁴⁵ UNICEF, ‘Children lacking parental care’ (*UNICEF Greece*) <www.unicef.org/greece/en/children-lacking-parental-care> accessed 28 June 2022.

⁴⁶ *ibid.*

overnight care of at least one of their parents, for whatever reason and under whatever circumstances'.⁴⁷

This undoubtedly includes children who are orphaned or separated from their parents during armed conflict. Furthermore, the Alternative Care Guidelines refer explicitly to children without parental care in the context of cross-border migration and in emergency situations, distinguishing unaccompanied and separated children,⁴⁸ 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, protection and providence of a family. The definition 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 criticised 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 various subnational levels.⁴⁹ It should therefore be stressed that the following subchapters are only able to give a brief overview over the different care forms with the caveat of the intricacies of each type varying across and within state borders.

⁴⁷ Guidelines for the Alternative Care of Children (2010) A/RES/64/142 (Guidelines).

⁴⁸ *ibid.*

⁴⁹ *ibid* para 29(b).

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’.⁵⁰ Consequently, kinship care in the Alternative Care Guidelines assumes a pre-existing relationship between the child and the caregiver.⁵¹

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.⁵² Hence, the child remains in the legal custody of the parent. It is thus up to the latter to protect and provide for the child. 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 the responsible child protection authority, which then puts the child in the care of a person with an existing bond to the child.⁵³ When custody is transferred to state authorities, the state has an increased responsibility to oversee these children’s care.⁵⁴ Children in formal kinship care shall therefore be included in this thesis.

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.’⁵⁵

⁵⁰ Guidelines (n 47) para 29(c)(i).

⁵¹ Citizens Advice Scotland, ‘Kinship Care’ (*National Association of Citizens Advice Bureaux*) <www.citizensadvice.org.uk/scotland/family/children-and-young-people/kinship-care-s/> accessed 29 June 2022.

⁵² Arizona Department of Child Safety, ‘What is the difference between formal and informal kinship care?’ <<https://dcs.az.gov/resources/faq/question-what-difference-between-formal-and-informal-kinship-care>> accessed 29 June 2022.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Guidelines (n 47) para 29(c)(ii).

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 state-appointed 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*

The Alternative Care Guidelines name *Kafalah* and adoption 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.⁵⁶ Nonetheless, these two forms of placement are a last resort and temporary care and family support tailored towards family reunification is preferred, particularly for separated or unaccompanied children.⁵⁷ In adoption, however, parental rights are permanently and formally severed and the adoptive family takes on all the family functions and care vis-à-vis the child.⁵⁸

Kafalah, in contrast, is an alternative care form recognised in international law but originating from Sharia law since adoption is forbidden (*haram*) thereunder.⁵⁹ 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 vis-à-vis their biological family.⁶⁰ The caregiver also assumes legal guardianship over the child.⁶¹

⁵⁶ Guidelines (n 47) para. 2(a); Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986) A/RES/41/85 art 13.

⁵⁷ Guidelines (n 47) para 152.

⁵⁸ Better Care Network, 'Adoption or Kafala' <<https://bettercarenetwork.org/library/the-continuum-of-care/adoption-and-kafala>> accessed 29 June 2022.

⁵⁹ Usang M Assim and Julia Sloth-Nielsen, 'Islamic *kafalah* as an alternative care option for children deprived of a family environment' (2014) 14(2) 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).

⁶⁰ *ibid.*

⁶¹ 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) <www.curia.europa.eu/jcms/jcms/p1_1844252/fr/> accessed 30 June 2022.

As for the legal status of a child in *Kafalah* care, the Court of Justice of the European Union stated in its judgment 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.⁶² 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”’.⁶³ Thus, they face a higher burden of proof than adoptive or biological ‘core’ families.⁶⁴ A similar approach has been taken by the CRC Committee in *YB and NS 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.⁶⁵ And the European Court of Human Rights (ECtHR) has stressed in multiple cases that the European Convention on Human Rights does not obligate states to treat all types of guardianship, including *Kafalah*, like adoption.⁶⁶

In conclusion, the recognition of the *Kafalah* or adoptive family as a family with all the entitlements under the CRC may be problematic, for example concerning the right to reunification. Rather, the states must bear in mind the relationships between the children and the caregiver when assessing whether the child should be reunited with their caregivers or not.⁶⁷ 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.

⁶² *ibid*; C-129/18 *SM v Entry Clearance Officer, UK Visa* [2019] ECLI:EU:C:2019:248.

⁶³ Florence Boreil and others, ‘Family Reunification for Refugee and Migrant Children’ (Council of Europe 2020) 26.

⁶⁴ *ibid* 26f.

⁶⁵ Florence Boreil and others (n 63) 27 citing CRC Committee, *YB and NS v Belgium* Comm No 12/2017 (27 September 2018) UN Doc. CRC/C/79/D/12/2017.

⁶⁶ *ibid* citing *Harroudj v France* App n 43631/09 (ECtHR, 4 October 2012) para 51 and *Cbbihi Loudoudi and Others v Belgium* No 52265/10 (ECtHR, 16 December 2014).

⁶⁷ *ibid* citing *YB and NS v Belgium*.

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 finalised.⁶⁸ 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.⁶⁹

Ergo, the finalisation 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 Russia's 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'.⁷⁰

Children in such arrangements will be considered 'in state care' until a court has finalised their adoption case by granting full custody and legal guardianship to the adoptive parents.

⁶⁸ 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.

⁶⁹ UNICEF, 'Guidance for protecting displaced and refugee children in and outside of Ukraine' (10 March 2022) <www.unicef.org/emergencies/guidance-protecting-displaced-children-ukraine> accessed 30 June 2022.

⁷⁰ UNICEF, 'How to help an unaccompanied child during martial law in Ukraine' (24 March 2022) <www.unicef.org/ukraine/en/stories/help-unaccompanied-child-during-war-in-Ukraine> accessed 30 June 2022.

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'.⁷¹ According to UNHCR this is a form of 'care in which the child lives without full-time adult care'⁷² available for children above 15.⁷³ Since family-based care is seen as the best type of care, as this thesis shows in chapter 3, it should only be attempted if family placement or similar is not possible.⁷⁴ Thus, the children and adolescents not having attained majority and remaining under state guardianship are regarded as a group whose protection is analysed 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'.⁷⁵

Children in these facilities are, hence, deprived of a family environment. The Alternative Care Guidelines therefore call on states to establish alternatives to institutional placements as the goal of national care systems should be deinstitutionalisation and family placement.⁷⁶

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.⁷⁷ 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.⁷⁸ Seeing as how the Guidelines

⁷¹ Guidelines (n 47) para 29(c)(v).

⁷² UNHCR, 'Guidelines on supervised independent living for unaccompanied children' (UNHCR 2021) 5.

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ Guidelines (n 47) para 29(c)(iv).

⁷⁶ *ibid* para 23.

⁷⁷ *ibid* paras 123 and 126.

⁷⁸ *ibid* para 123.

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 thesis, regardless of whether the institution is private or state-run.

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.⁷⁹ 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.

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.⁸⁰ 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’.⁸¹

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.

In addition to the state care categories previously discussed, 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.⁸² Such children have

⁷⁹ Council of Europe, ‘Alternative care’ (*Council of Europe Children’s Rights*) <www.coe.int/en/web/children/alternative-care> accessed 28 June 2022.

⁸⁰ eg Guidelines (n 47) para 5.

⁸¹ 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.

⁸² Guidelines (n 47) para 29(a)(i) and (ii).

left their country of habitual residence or are affected by an emergency and have been separated from their primary or original caregiver.⁸³ However, the two categories must be distinguished as separated children under the Guidelines ‘may nevertheless be accompanied by another relative’,⁸⁴ whereas unaccompanied children are not in the company of a relative or other caregiver.⁸⁵ Therefore, a separated child may not require state care, unless the accompanying adult cannot care for the child or it would be against the child’s best interests for that individual to be entrusted to that individual. 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. Unaccompanied children meanwhile need to be put in state care at least until they can be placed in kinship care.

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. Surprisingly, there is no commonly recognised definition of an orphan in international law.⁸⁶ This is due to states disagreeing for example on when a child ages out of orphanhood, which may be between 15 and 18.⁸⁷ Moreover, there is no consensus on whether the loss of one parent is sufficient for a child to be considered an orphan, or whether the child must have lost both parents.⁸⁸ UNAIDS defined ‘orphans’ in the context of the AIDS pandemic as being ‘any child under age 18 who has lost one or both parents’.⁸⁹ 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.

⁸³ Guidelines (n 47) para 29(a)(i) and (ii).

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Rose Smart, *Policies for Orphans and Vulnerable Children: A Framework for Moving Ahead* (POLICY Project 2003) 3.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ UNAIDS, UNICEF and USAID, ‘Children on the Brink 2004’ (UNAIDS/UNICEF/USAID 2004) 3.

The Alternative Care Guidelines also specifically mention children at risk of losing parental care/entering state care.⁹⁰ 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.

⁹⁰ Guidelines (n 47) para 1.

AT RISK OF FALLING THROUGH THE CRACKS?

3.

STATE OBLIGATIONS PROTECTING CHILDREN
IN STATE CARE

The following chapter analyses 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 as the most important sources of state obligations vis-à-vis children in armed conflict are interpreted. Lastly, the recommendations made by the Alternative Care Guidelines on children in state care in times of war are laid out.

3.1 THE CONVENTION ON THE RIGHTS OF THE CHILD

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'.⁹¹

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. In addition,

⁹¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) preamble, sentence 5.

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 by keeping institutional care groups together, as the approach of Germany and Poland towards the care of children evacuated from Ukrainian state care demonstrates.⁹² 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.

3.1.1.1 The protection of the stability of a family unity between children and their institutional caregivers

Article 16 of the CRC prohibits and protects the child's family life from arbitrary and unlawful interference.⁹³ 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.⁹⁴

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 settings such as SOS families (a form of family-based alternative care provided by SOS Children's Villages) or perhaps even the relationship between a child in institutional care and their caregiver. Germany and Poland stressed in their submitted statements the need to keep children and their familiar caregivers together to ensure as much stability as possible for children evacuated from Ukrainian state care.⁹⁵ According

⁹² Statement by the German Federal Ministry for Families, Seniors, Women and Youth (BMFSFJ) to author (5 May 2022); Statement by the Polish Ministry of Family and Social Policy to author (8 June 2022).

⁹³ CRC (n 91) art 16.

⁹⁴ 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) para 1ff.

⁹⁵ Statement by the German Federal Ministry for Families, Seniors, Women and Youth (BMFSFJ) to author (5 May 2022); Statement by the Polish Ministry of Family and Social Policy to author (8 June 2022).

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) of the CRC.

The need for continuity in the child's upbringing is further codified in article 20(3) of the 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. Regarding the care of children evacuated from Ukrainian state care, some non-governmental organisations (NGOs) have called on receiving states to place them in family-based care as it is considered the most suitable care form for a child's development.⁹⁶ However, it can be argued that splitting them from their familiar caregivers to put them in another care form will cause additional disruption in their upbringing. The same holds true when considering the relationships of children in a care group. It may be crucial for their well-being, much like with biological, step- or other types of siblings, to maintain the unity of the care group as much as accommodation capacity and the children's other best interests allow. Hence, a decision on whether or not to separate institutional care groups when evacuating them should be taken 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'.

Furthermore, article 20(3) of the CRC 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

⁹⁶ 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 7 July 2022.

the children with their caregivers. Consequently, the state of origin⁹⁷ and receiving states⁹⁸ 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) of the CRC because of the similar background of children and caregivers.

Following this conclusion, 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 for instance due to accommodation capacity, Poland for example actively supports the contact between the different parts.⁹⁹

In summary, the unity of caregivers and their entrusted children should be seen as protected under articles 8(1) and 20(3) of the 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 and it is in the best interests of the children involved, contact with caregivers and other children that are placed elsewhere should be maintained and facilitated by state authorities.

3.1.1.2 The right to family reunification

Under article 8 of the CRC states are obligated to restore the child's family ties if they have been disrupted, and a restoration thereof is possible and in the child's best interests, as the family is seen as a fundamental element of the child's identity. Along these lines, article 22(2) of the CRC demands states to cooperate with the UN and various organisations 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

⁹⁷ 'State of origin' shall refer to the country in which the child has their residence, but has fled from due to armed conflict.

⁹⁸ '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'.

⁹⁹ 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) <www.msp.gov.ua/news/21998.html> accessed 6 July 2022.

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.¹⁰⁰ 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. Therefore reunification may contravene the child's best interests in terms of their safety in such cases.

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 thus 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 of the 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 reunification process should be continued as far as possible to ensure the restoration of family ties under article 8(2) of the CRC. However, the ability of a parent or similar caregiver to care for entrusted children is likely to

¹⁰⁰ CRC (n 91) art 10.

be further negatively affected by armed conflict due to factors such as death, injury, imprisonment or disappearance, as well as deteriorations in the economic 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) of the CRC. This may be severely challenged during conflict, when lines of communication have collapsed, and large-scale displacement and public disorder have 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 cooperate 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 summarise, the state of origin and receiving states must fulfil the following central obligations to safeguard the children'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 (article 16 of the CRC) such as arbitrary and unlawful separation of families (including potentially care groups, foster families or similar) at borders.
2. Protect families and care units from being separated *inter alia* in shelters, during evacuations, at borders, in receiving states etc by eg providing designated accommodation, safe spaces and lines at immigration (article 9(1) of the CRC) such as the arrival centre for unaccompanied minors and children from

Ukrainian state care in Stalowa Wola (Poland).

3. In case of family separation or when children are otherwise unaccompanied, the state in which the children find themselves must protect, assist and include them into its state care system (articles 20 and 22 of the CRC).
4. As far as possible respect the children's background when determining alternative care forms (article 20 of the CRC) eg 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 (article 17 of the CRC),
 - cooperate with international organisations and state(s) in which all involved individuals find themselves (article 22(2) of the CRC).
6. Consider reunification of families pre-evacuation if in the child's best interests (eg 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 family members or members of the same care group find themselves to maintain contact between them (article 10(2) of the CRC).
9. Avail themselves 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 (article 19 of the CRC) and the child's social security (article 26 of the CRC). Both forms of security are firstly integral 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.¹⁰¹

CRC's General Comment 14 points out 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)¹⁰²

As far as the protection of the physical and mental integrity of children in state care during armed conflict is concerned, a best interests evaluation would have to be carried out for instance when deciding whether and where to evacuate children. Their best interests pertaining to their safety are thereby not absolute, but an evacuation decision would rather have to be weighed against for instance the risk of increasing their

¹⁰¹ 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* (OUP 2019) 77f.

¹⁰² 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.

separation with their primary family. Security and safety concerns also play a role in evaluating whether a child should be reunified with their family before evacuating them with their care group or foster family. 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’.¹⁰³ Carrying out a comprehensive best interests evaluation during an armed conflict may be challenging for the authorities of the state of origin as their capacities and resources are impacted, but it does not excuse the state from its obligation, since it may seek international assistance.

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) of the 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,¹⁰⁴ the precise standards, nevertheless, are to be determined by the respective authorities, which leaves room for states to have different standards, especially 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 put greater strain on the state care system. In these cases, states have the obligation to avail themselves to international assistance to ensure the children’s safety in care and educational institutions.

Another codification of the state’s obligation to protect the mental

¹⁰³ UNHCR, ‘2021 UNHCR Best Interests Procedures Guidelines: Assessing and Determining the Best Interests of the Child’ (UNHCR 2021) 160.

¹⁰⁴ Eekelaar and Tobin (n 101) 105.

and physical integrity of the child can be found in the protection of the child's privacy.¹⁰⁵ Article 16 of the CRC echoes the requirements of article 17 of the International Covenant on Civil and Political Rights¹⁰⁶ and article 12 of the Universal Declaration of Human Rights.¹⁰⁷ 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.¹⁰⁸ The right thereby is not absolute. Interferences are permissible if they are lawful, justifiable and in line with other human rights.¹⁰⁹ 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'.¹¹⁰ 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 of the CRC¹¹¹ 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 medical and other 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 thereon. Tobin and Field argue that confidentiality may indeed be broken when 'protective considerations necessitate the disclosure of information by professionals who work with children'.¹¹² Yet, this may only be done to the extent to which the restriction of privacy is justifiable.¹¹³

In addition to privacy, article 16 of the CRC 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

¹⁰⁵ 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* (OUP 2019) 555.

¹⁰⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 17.

¹⁰⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 12.

¹⁰⁸ Tobin and Field (n 105) 555.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid* 559.

¹¹¹ *ibid.*

¹¹² *ibid* 570.

¹¹³ *ibid* 571.

alternative care forms such as institutional and foster care as well as the child's educational institutions.¹¹⁴ Protecting these environments ensures the child's safety therein.¹¹⁵ Armed conflicts, however, are bound to breach said safety. Yet, it does not release the state from its obligation under article 16(2) of the CRC to provide for 'the protection of the law against such interference or attacks',¹¹⁶ which includes the investigation and prosecution of any arbitrary and/or unlawful violations of article 16 of the CRC.

Finally, article 16 of the CRC safeguards the reputation and honour of the child. Children in state care are likely to be subjected to discrimination because of their care status. Their displacement may increase the risk of discriminatory treatment, thereby constituting an attack against the child's reputation and honour. 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.

Article 18 of the CRC 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 article 18 is meant to encompass children for whom the legal responsibility lies with the state.¹¹⁷ 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, but rather becomes more urgent.

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) of the 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'.

This is to be ensured independently from the decision of who is

¹¹⁴ Tobin and Field (n 105) 586.

¹¹⁵ *ibid* 587.

¹¹⁶ CRC (n 91) art 16.

¹¹⁷ 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* (OUP 2019) 663.

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’.¹¹⁸

Therefore article 19 of the 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 of the 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.¹¹⁹ Secondly, states must 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.¹²⁰

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 No 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’.¹²¹

It further holds that states should avail themselves to assistance by international agencies, institutions and organisations if they so require to guarantee child protection.¹²² Consequently, a lack of means or other challenges posed to child protection as a result of armed conflict

¹¹⁸ 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.

¹¹⁹ 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* (OUP 2019) 705.

¹²⁰ *ibid.*

¹²¹ Committee on the Rights of the Child, ‘General Comment No. 13’ (n 118) para 73.

¹²² *ibid* para 74.

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.¹²³ As for receiving states, article 19 of the 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 and safe 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.¹²⁴ 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.¹²⁵ Article 38 of the CRC as well as the Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol) hence seek to protect children from recruitment and participating in hostilities.¹²⁶

According to the Global Protection Cluster Working Group, displacement and family separation may be factors favouring recruitment.¹²⁷ What is more, 'separated or orphaned children displaced into IDP settlements and in host communities may find themselves

¹²³ 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.

¹²⁴ UNICEF, 'Children recruitment by armed forces or armed groups' (22 December 2021) <www.unicef.org/protection/children-recruited-by-armed-forces> accessed 28 June 2022.

¹²⁵ *ibid.*

¹²⁶ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) A/RES/54/263.

¹²⁷ Global Protection Cluster Working Group, 'Handbook for the Protection of Internally Displaced Persons' (2010) 182.

roaming the streets and, thus, become easy targets for recruitment'.¹²⁸ Children may wish to join state and non-state armed forces to ensure their own protection.¹²⁹ Thus, it is imperative for states to establish a well-functioning state care system for those children who 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 of the CRC. Considering that roughly 64% of children are trafficked for sexual exploitation,¹³⁰ 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.¹³¹ 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 (article 3(1) of the CRC), including what is best for their physical and mental integrity eg in decisions concerning evacuations, family reunification or long-term solutions for evacuated children.
2. Establish safety standards for their care institutions and other care forms and monitor them (article 3(3) of the CRC).

¹²⁸ Global Protection Cluster Working Group (n 127).

¹²⁹ *ibid.*

¹³⁰ European Union External Action, 'Trafficking of children, a serious threat in the EU' (*European Union External Action*, 18 October 2021) <www.eeas.europa.eu/eeas/trafficking-children-serious-threat-eu_en> accessed 11 July 2022.

¹³¹ UNSC Resolution 2388 (21 November 2017) S/RES/2388.

3. Safeguard children's privacy (article 16 of the CRC), including the protection of their physical and mental integrity.¹³² But, infringements may be necessary 'to secure the child's best interest and/or survival and development'¹³³ eg through evacuations.
4. Protect the child's home (article 16 of the CRC), including schools and care institutions.
5. Preserve the child's reputation and honour (article 16 of the CRC), particularly concerning discrimination and marginalisation of children in state care, which may be exacerbated through displacement.
6. Investigate and prosecute attacks and infringements against the reputation, honour, home and privacy of children in state care during armed conflict (article 16 of the CRC).
7. Acknowledge, respect and ensure adequate upbringing and development of children in state care (article 18 of the CRC).
8. Support parents and other natural legal guardians in raising the children in their care (article 18(2) of the CRC) to combat child abandonment, which becomes more prevalent during armed conflict.
9. Defend children from all forms of neglect, violence, abuse and exploitation, including those directly and indirectly caused and exacerbated by armed conflict (articles 19, 38(4), 32 and 34-36 of the CRC), such as forcible recruitment of children into armed forces, the participation of children under 15/18 in hostilities (article 38(2) and (3) of the CRC, Optional Protocol) and child trafficking (article 11 of the CRC). This includes eg:
 - Prohibiting such acts;
 - Investigating and prosecuting alleged violations;
 - Safe evacuations and shelters;

¹³² Tobin and Field (n 105) 555.

¹³³ *ibid* 559.

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- Registration of children, their care and whereabouts in a constantly updated database;
- Requesting, allowing for and protecting the delivery of 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; and
- Assist the rehabilitation and reintegration of victims.

10. Seek international assistance if the state is unable to perform abovementioned obligations (article 45(b) of the CRC).¹³⁴

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.¹³⁵ However, since the article should be read together with article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), General Comment No 19 of the ICESCR Committee helps to determine the scope of state obligations under article 26 of the CRC.¹³⁶ Therein the right to social security includes:

¹³⁴ UNICEF, 'Frequently asked questions on the Convention on the Rights of the Child' <www.unicef.org/child-rights-convention/frequently-asked-questions> accessed 28 June 2022.

¹³⁵ 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* (OUP 2019) 988.

¹³⁶ *ibid* 993; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

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.¹³⁷

It is thereby not only crucial in combatting poverty, protecting individuals against social exclusion and advancing social inclusion, but also in ensuring human dignity.¹³⁸

Though not specifically mentioned in article 26(1) of the CRC, the right to security of the child is predominantly understood in connection with their family, parents and/or other persons financially responsible for them.¹³⁹ Thus, children typically access social security through their parents or guardians.¹⁴⁰ This poses the question of the state's obligations concerning the social security right of children in state care.

Article 26(2) of the CRC stresses the need of the state to consider 'the circumstances of the child' when 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 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 of the 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

¹³⁷ 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.

¹³⁸ *ibid* para 3.

¹³⁹ Langford and Khaliq (n 135) 986.

¹⁴⁰ *ibid* 987.

child's physical, mental, spiritual, moral, and social development'.¹⁴¹

To conclude, states are obliged to ensure the right of children in its care to social security and an adequate standard of living through 'all appropriate legislative, administrative and other measures'¹⁴² 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'.¹⁴³
2. Policies and programmes meant to ensure safe housing, safe drinking water and hygiene facilities.¹⁴⁴
3. Reduction of access barriers to social security for children in state care who were evacuated across state borders.
4. Family and child support¹⁴⁵ 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 consequences.¹⁴⁶
6. International assistance, if the state is unable to guarantee social security due to the hardship it faces as a result of armed conflict.

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

¹⁴¹ CRC (n 91) art 27.

¹⁴² *ibid* art 4.

¹⁴³ Committee on the Rights of the Child, 'General Comment No. 21 on children in street situation' (2017) CRC/C/GC/21 para 51.

¹⁴⁴ *ibid*.

¹⁴⁵ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 19' (n 137) para 18.

¹⁴⁶ *ibid* para 2(a)

healthcare.¹⁴⁷ 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.¹⁴⁸

Ensuring children's right to health is thereby crucial for them to realise their other human rights such as the right to mental and physical integrity discussed previously.¹⁴⁹ Nevertheless, various factors such as displacement, wars, conflicts and other forms of violence may adversely affect the health of children.¹⁵⁰ These circumstances may cause for instance an elevated risk of injury or the collapse of sanitation systems and a resulting spread of communicable disease, thereby impacting the physical health of children and with that the 'right to grow and develop to their full potential'.¹⁵¹ 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',¹⁵² which unquestionably includes armed conflict. Hence, acknowledging the vulnerability of children's health in times of dire humanitarian circumstances, the Committee has urged states to do everything possible to ensure children's and adolescent's physical and mental health.¹⁵³

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'.¹⁵⁴ Children in state care are undoubtedly such a group, who in many societies are confronted with societal stigma and therefore live at the

¹⁴⁷ CRC (n 91) art 24.

¹⁴⁸ 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.

¹⁴⁹ *ibid* para 7.

¹⁵⁰ *ibid* paras 5 and 17.

¹⁵¹ *ibid* para 2.

¹⁵² *ibid* para 38.

¹⁵³ *ibid* para 40.

¹⁵⁴ *ibid* para 98.

edges of their 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 behaviours in adolescents’.¹⁵⁵ 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 shelters¹⁵⁶ and, if necessary, evacuating children in its care.
2. Provide information to children and their caregivers concerning ‘injury, accident and violence prevention’.¹⁵⁷
3. Ensure that sufficient healthcare staff, medicine and medical equipment is available despite the conflict and may be accessed by these children.¹⁵⁸
4. Guarantee psychological support to combat the mental health effects of armed conflict.¹⁵⁹
5. Seek aid such as financial, technical, material and personnel support through NGOs, other organisations, private offers by medical personnel etc to ensure the right to health (article 24(4) of the CRC).

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’.¹⁶⁰ The right to education is not only enshrined in articles 28 and 29 of the

¹⁵⁵ 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)’ (n 148) para 67.

¹⁵⁶ *ibid* para 26.

¹⁵⁷ *ibid*.

¹⁵⁸ *ibid* para 25.

¹⁵⁹ *ibid* para 39.

¹⁶⁰ 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.

CRC, but also articles 13 and 14 of the ICESCR.¹⁶¹ It is fundamental in diminishing the risks of exploitation and poverty, thereby not only benefitting the individual itself but also society as a whole.¹⁶² Moreover, during war and displacement the ability of children to continue their education wherever they may find themselves, provides them with a sense of routine and normalcy and supports their right to development and their contact with peers and teachers.¹⁶³

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) of the 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) of the 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.¹⁶⁴ Nevertheless, a lack of teachers and school capacity may still impair the inclusion of evacuated children in the school system. Integrating refugee teachers may relieve some of the pressure.

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'.¹⁶⁵ 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. Refugee teachers and teachers cognizant of the children's native language could be asked to teach integration classes to ease the transition of the children into the education system of their receiving state.

¹⁶¹ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 13 (n 160) para 2.

¹⁶² *ibid* para 1.

¹⁶³ Jerome Marston and Marika Tsolakis, 'Ukraine Points Up the Threat to Education During War' (*Inter Press Service* 1 June 2022) <www.ipsnews.net/2022/06/ukraine-points-up-the-threat-to-education-during-war/> accessed 28 June 2022.

¹⁶⁴ CRC (n 91) art 28(3).

¹⁶⁵ *ibid* art 29(1)(c).

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 Russia's invasion of Ukraine.¹⁶⁶ 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 online teaching 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, states receiving Ukrainian refugees have additionally opened their schools for refugee children and created alternative educational offers such as language classes to ease the transition.¹⁶⁷

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 frequently 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 of the CRC obligates states to provide children with opportunities to express their opinions on matters impacting them. It emphasises the child's position as a rightsholder rather than an individual whose rights are solely dependent on parents, caregivers and other adults.¹⁶⁸ 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.¹⁶⁹

¹⁶⁶ Omar Abdi, 'Children in Ukraine need an end to this war – their futures hang in the balance' (UNICEF, 12 May 2022) <www.unicef.org/press-releases/children-ukraine-need-end-war-their-futures-hang-balance> accessed 28 June 2022.

¹⁶⁷ *ibid.*

¹⁶⁸ 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.

¹⁶⁹ *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.

Furthermore, the right to be heard is interrelated with *inter alia* the determination of the child's best interests under article 3 of the CRC.¹⁷⁰ In fact, Lundy argues that any best interests assessment is impossible when the child's view on the matter is not heard.¹⁷¹ The CRC Committee has also stressed that article 12 of the CRC is one essential method of identifying the child's best interests.¹⁷² Therefore, if adequately implemented, article 12 of the CRC will assist the state and its authorities in making decisions in line with the best interests principle. The abidance with article 12 of the 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'¹⁷³ impede their involvement and adults in question lack training and awareness on the matter.¹⁷⁴

The Lundy Model illuminates the various elements of state obligations under the right to be heard to facilitate its implementation.¹⁷⁵ Firstly, states must give children 'space' to voice their views.¹⁷⁶ 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 do not want to be involved in.¹⁷⁷

In line with the non-discrimination principle in article 2 of the CRC, 'space' must also be safe and free from abuse, intimidation or negative consequences from expressing their views.¹⁷⁸ Hence, Lundy recommends to create anonymous participation formats.¹⁷⁹ 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

¹⁷⁰ Committee on the Rights of the Child, 'General Comment No. 14' (n 102) para 43.

¹⁷¹ 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-children/article-detail/not-an-optional-extra-engaging-with-children-and-their-human-rights-in-times-of-emergency.html>> accessed 28 June 2022.

¹⁷² Committee on the Rights of the Child, 'General Comment No. 14' (n 102) para 43.

¹⁷³ Committee on the Rights of the Child, 'General comment No. 12' (n 168) para 4.

¹⁷⁴ Claire O'Kane, 'Guidelines for Children's Participation in Humanitarian Programming' (Save the Children 2013) 5.

¹⁷⁵ Lundy (n 169) 927.

¹⁷⁶ *ibid* 934f.

¹⁷⁷ *ibid*.

¹⁷⁸ *ibid*.

¹⁷⁹ *ibid*.

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.¹⁸⁰ Children in the care system must also have access to such bodies.¹⁸¹ 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’.¹⁸² 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.¹⁸³ This must also include other groups of marginalised children, such as children in state care.¹⁸⁴ Consulting these children emboldens them and aids their development despite the challenging circumstances they encounter as a result of the emergency, their displacement or marginalisation.

The second element of child participation is ‘voice’.¹⁸⁵ Giving the children a ‘voice’ according to Bennett Woodhouse necessitates:

1. Provision of information comprehensible to the respective child.¹⁸⁶
2. ‘Sufficient time to understand the issues’.¹⁸⁷
3. ‘Capacity building with child-led organizations’.¹⁸⁸
4. Awareness-raising among involved adults to increase skill and willingness to engage children.¹⁸⁹

¹⁸⁰ Committee on the Rights of the Child, ‘General comment No. 12’ (n 168) para 97.

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid* para 125f.

¹⁸⁴ Lundy (n 169) 935; United Nations General Assembly, *A world fit for children* (United Nations 2002) UN/A/RES/S-27/2 para 32(1).

¹⁸⁵ Lundy (n 169) 935f.

¹⁸⁶ *ibid* citing Bennett Woodhouse.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

Children may express their ‘voice’ in various forms as the right to freedom of expression in article 13 of the CRC suggests.¹⁹⁰ For example, it may be easier for children traumatised by armed conflict and family separation to draw or write about their concerns and needs.¹⁹¹ Moreover, especially younger children and children with disabilities may require guidance or assistance from adequately trained adults, such as interpreters, or assistive technology.¹⁹² 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’.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ Lastly, ‘audience’ also entails the right of the child to be listened to by the correct 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.¹⁹⁶ 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.

The last element that can be inferred from the obligation to give ‘due weight’ to children’s points of view is ‘influence’.¹⁹⁷ 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.¹⁹⁸ It is thereby not up to the child to prove their capacity, but the state or respective adults have an obligation to assess it.¹⁹⁹ This poses the risk that they interpret said capacity too restrictively or underestimate the child’s maturity.²⁰⁰ Article

¹⁹⁰ Lundy (n 169) 935f.

¹⁹¹ *ibid.*

¹⁹² *ibid.*

¹⁹³ *ibid* 936f.

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid* 937.

¹⁹⁷ *ibid* 937f.

¹⁹⁸ *ibid* 935.

¹⁹⁹ Committee on the Rights of the Child, ‘General comment No. 12’ (n 168) para 20.

²⁰⁰ Lundy (n 169) 937f.

5 of the 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 of the CRC has to be interpreted in a manner that 'is generous and child-empowering rather than negative and opportunity-restricting'.²⁰¹ If children are led to believe that their voice does not have an impact, they may be discouraged from engaging.²⁰² Therefore, children should be informed about the impact and importance of their opinion in the decision-making process.²⁰³

In cases of conflicts, Lundy argues children should be involved in the planning of schemes meant to protect them.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ Whenever possible, the state of origin must 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, it would be insufficient for their caregivers or other individuals who do not have direct influence on the decision to take note of the children's views. Instead, the children must be heard by the responsible decision-makers, who have to give these opinions due weight depending on the children's maturity and age. The adults involved may thereby not just assume that the children do not understand the severity of the emergency situation. These adults 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.²⁰⁷

²⁰¹ Lundy (n 169) 938.

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ Lundy (n 171).

²⁰⁵ Committee on the Rights of the Child, 'General comment No. 12' (n 168) para 91.

²⁰⁶ *ibid.*

²⁰⁷ Committee on the Rights of the Child, 'General comment No. 12' (n 168) para 54.

Consequently, if groups of children have to be split or the state has capacity in its national state care system it must 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.²⁰⁸ 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 agency 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 these will now be discussed.

One state obligation without limitations is the evaluation of the child's best interests under article 3(1) of the CRC, since it applies to 'all actions' undertaken by state authorities and not simply those the state would see as 'appropriate' or 'possible'. This duty thus persists unconditionally during conflicts.

Moreover, under article 3(3) of the CRC the phrasing 'shall ensure' stresses that the state must in every situation abide by and observe its

²⁰⁸ Survey response by the Estonian Ministry of Social Affairs to author (7 June 2022).

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 the second sentence of article 4 of the 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 of the 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's care 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 International Committee of the Red Cross (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) of the 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 fulfil 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 exception being the best interests of the child, which limits for instance the prohibition of family separation.²⁰⁹ For example, the state

²⁰⁹ CRC (n 91) art 9(1).

must not safeguard the right of children in state care to maintain contact with their parents if that were to encroach on their best interests,²¹⁰ for example if that were to harm their physical or mental integrity. The same is true in regard to informing children about what happened to their family members.²¹¹ Such information must not be given to them when it would be traumatising for the children.

What is more, articles 8 and 16 of the 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. Nonetheless, it must be stressed that any such encroachment may not have a more detrimental impact on the child's best interests as possible alternatives.

3.2 INTERNATIONAL HUMANITARIAN LAW AND ARTICLE 38 OF THE CONVENTION ON THE RIGHTS OF THE CHILD

The CRC obligates states to adhere to IHL concerning the treatment and protection of children in armed conflict to which they are parties.²¹² 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'.²¹³ 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.²¹⁴

During the drafting process of article 38, it was further suggested to incorporate an explicit prohibition of subjecting children to military attacks.²¹⁵ However, this was not followed up on, leaving the protection

²¹⁰ CRC (n 91) art 9(2).

²¹¹ *ibid* art 9(4).

²¹² *ibid* art 38(1).

²¹³ *ibid* art 38(4).

²¹⁴ 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* (OUP 2019) 1550.

²¹⁵ *ibid*.

of children against attacks up to customary international humanitarian law (CIHL) Rule 54, which forbids *inter alia* attacks, destruction and removal of crucial civilian infrastructure,²¹⁶ as well as CIHL Rule 10, which protects civilian objects from attacks.²¹⁷ 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 criticise 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’ in article 38 of the CRC may nonetheless be widely interpreted to include not only direct targeting of children but also all other effects of war on them.²¹⁸ Hence, while there is no explicit prohibition of attacks against children, their protection from conflict and its effects is still implied under CIHL and article 38 of the 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’.²¹⁹ Hence, IHL in regard to the protection of children is anything but a comprehensive instrument. A state’s IHL obligations must therefore be interpreted together with the above discussed child rights obligations. As will be shown, IHL obligations must be expanded to significantly reduce the dangers and negative impacts of war on children, especially on children in state care.

This 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

²¹⁶ ICRC, ‘Rule 54. Attacks against Objects Indispensable to the Survival of the Civilian Population’ (*ICRC Customary IHL Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule54> accessed 28 June 2022.

²¹⁷ ICRC, ‘Rule 10. Civilian Objects’ Loss of Protection from Attack’ (*ICRC Customary IHL Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10> accessed 28 June 2022.

²¹⁸ Drumbl and Tobin (n 214) 1551.

²¹⁹ *ibid* 1512.

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'.²²⁰ In 1989, the CRC provided a definition with a desired age of majority of 18. While many states around the world concur, the Commentaries on Geneva Convention IV and the Additional Protocols have yet to be updated to this end. The latter for the most part set the age limit for special protective provisions to 15, though the Commentary of 1987 argues that the phrasing 'children under 15' implies that there are children 15 years and older.²²¹ While children older than 15 enjoy the benefits accorded all civilians, 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 zones;²²²
- The guarantee of free passage for humanitarian aid to certain parts of the population;²²³
- The provisions on child welfare;²²⁴ and
- The equal treatment of particular non-repatriated persons and nationals.²²⁵

²²⁰ 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.

²²¹ *ibid* para 4549.

²²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949) 75 UNTS 287, art 14, sentence 1.

²²³ *ibid* art 23, sentence 2.

²²⁴ *ibid* art 24.

²²⁵ *ibid* art 38(5).

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 reached a point 'at which there is no longer the same necessity for special measures'.²²⁶ However, an increasing number of child protection systems, organisations 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 all civilians.

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.²²⁷ 'Non-repatriated persons' are defined as 'enemy civilians retained on the territory of one of the Parties to the conflict'.²²⁸ 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,²²⁹ 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'.²³⁰

²²⁶ Fourth Geneva Convention (n 222).

²²⁷ *ibid* 244.

²²⁸ *ibid*.

²²⁹ United Nations, 'UN's Bachelet concerned over Ukraine orphans 'deported' to Russia for adoption' (*UN News*, 15 June 2022) <<https://news.un.org/en/story/2022/06/1120412>> accessed 30 June 2022.

²³⁰ Oscar Uhler and others, *Commentary on the Geneva Conventions of 12 August 1949 (Commentary of 1958)* (ICRC 1958) 248f.

3.2.3 Preferential access of children to humanitarian assistance

Under article 23 of the Geneva Convention IV, 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.²³¹ 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 has send them.²³² 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.

Article 70(1) of Additional Protocol I 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.²³³ The states in question, particularly the blockading power, should hereunder not only ‘allow’ but ‘facilitate’ the delivery of humanitarian assistance.²³⁴ This includes for instance reducing regulations on the import of humanitarian goods, whenever feasible and informing involved officials thereof.²³⁵ 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’.²³⁶

According to article 70(1) of 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 emphasise it is not the same as in article 23 of Geneva Convention IV.²³⁷ In fact, it should be drawn from article 77 of Additional Protocol I, ergo at age 18.²³⁸ Nevertheless, special

²³¹ Uhler and others (n 230) 178f.

²³² *ibid* 181.

²³³ Pilloud and others (n 220) para 2813.

²³⁴ 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, art 70(1).

²³⁵ Pilloud and others (n 220) para 2829.

²³⁶ *ibid*.

²³⁷ *ibid* para 2819.

²³⁸ *ibid*.

attention should be given to children under 15.²³⁹ Consequently, every child below the age of 18 should be prioritised in the distribution of aid, but the most vulnerable children, particularly very young children, should receive such aid first.²⁴⁰ While raising IHL's protective age limit for children to 18 is noteworthy progress, those responsible for the distribution are left a compelling margin of discretion on the implementation of this priority.²⁴¹

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 prioritised. Since they are often marginalised, they are at heightened risk of being forgotten, when the distributing party is not made aware of their existence. Training and raising awareness among organisations 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-run or private 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 care facilities, their residents and their needs. In times of war, this will inevitably lead to the neglect of these children. Establishing such databases and regularly updating them must be put high on states' peacetime agendas.

3.2.4 Safety of children

Article 77(1) of 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'.²⁴² In view of the vulnerability of children in state care due to the lack of a family to take care of their needs, their marginalisation 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.

²³⁹ Pilloud and others (n 220).

²⁴⁰ *ibid.*

²⁴¹ *ibid* para 2817.

²⁴² *ibid* para 3179f.

The assistance and care of children in non-international armed conflicts are guaranteed under article 4(3) of 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.²⁴³ Article 4(3)(b) of 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.²⁴⁴ 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.

3.2.4.1 *Evacuations of children from besieged areas*

Article 17 of 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'.²⁴⁵ 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.²⁴⁶ The besieging forces nonetheless do not as they use the strain that the providence for civilians causes on their opp opponents to achieve their capitulation or concessions.²⁴⁷ Thus, this law is primarily directed towards the besieging side.²⁴⁸ To be successful, evacuations, however, always require an agreement between both sides.²⁴⁹ The opposing interests of the two parties are likely to impose a seemingly insurmountable hurdle to this endeavour. 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.²⁵⁰

²⁴³ Pilloud and others (n 220) para 4546.

²⁴⁴ *ibid* para 4550.

²⁴⁵ Uhler and others (n 230) 139.

²⁴⁶ *ibid*.

²⁴⁷ *ibid*.

²⁴⁸ *ibid*.

²⁴⁹ *ibid*.

²⁵⁰ *ibid*.

There is no age limit for children under this article, although the Commentary recommends an age limit of 15.²⁵¹ It is, nevertheless, up to the conflicting parties to decide thereon,²⁵² 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 of 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.²⁵³ This means that in the case of Ukraine's evacuations of Ukrainian children in state care abroad or internally during Russia's 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.²⁵⁴ The safeguards therefore bind Russia when transferring Ukrainian children abroad. This is meant to protect children from the harm of war and ensure that they have everything they need to properly develop.²⁵⁵ 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 re-education of children.²⁵⁶

According to article 78 of 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.²⁵⁷ 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.²⁵⁸ Still, the evacuating state, not the receiving state, 'remains

²⁵¹ Uhler and others (n 230) 138f.

²⁵² *ibid.*

²⁵³ Pilloud and others (n 220) para 3220f.

²⁵⁴ *ibid.*

²⁵⁵ *ibid* para 3209.

²⁵⁶ *ibid* paras 3226f and 3211.

²⁵⁷ *ibid* para 3230.

²⁵⁸ *ibid* para 3222.

responsible for the treatment given the persons who are evacuated'.²⁵⁹ 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.²⁶⁰

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 a measure must moreover be temporary 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.²⁶¹ And such evacuations may only be conducted in exceptional circumstances.²⁶² Lastly, the evacuating state must guarantee that the children in question are not left unaccompanied during the process.²⁶³

According to the Commentary, 'the evacuation of children under difficult conditions has mainly occurred in cases of internal armed conflict',²⁶⁴ thereby suggesting that more safeguards may be necessary to protect children in these circumstances than in 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.

²⁵⁹ Pilloud and others (n 220).

²⁶⁰ Protocol I (n 234) art 78(1).

²⁶¹ 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, art 4(3)(e).

²⁶² Pilloud and others (n 220) para 4560.

²⁶³ Protocol II (n 261) art 4(3)(e).

²⁶⁴ Pilloud and others (n 220) para 3215.

3.2.4.4 Evacuations of war orphans and separated children

Article 24 of Geneva Convention IV recommends the evacuation abroad of children orphaned or separated by the armed conflict until the latter has ceased.²⁶⁵ 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.²⁶⁶ This assumes that this country is better equipped to provide for the needs of the children than the children's country of habitual residence.²⁶⁷ Otherwise these children should not be evacuated.²⁶⁸

3.2.4.5 Risks of evacuations

Due to the risk of severing family ties, 'the evacuation of children itself involves serious dangers'.²⁶⁹ Whenever possible, children and their 'natural protectors' such as relatives or other guardians should therefore not be separated.²⁷⁰ 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.²⁷¹ 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.²⁷²

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. In line with the CRC, any such plans must thereby include best interests considerations.

²⁶⁵ Uhler and others (n 230) 188.

²⁶⁶ *ibid.*

²⁶⁷ *ibid.*

²⁶⁸ *ibid.*

²⁶⁹ Pilloud and others (n 220) para 3212.

²⁷⁰ *ibid* para 3213.

²⁷¹ *ibid* para 3216.

²⁷² *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.²⁷³ 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.²⁷⁴

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'.²⁷⁵ Evidently, this obligation should include children, adolescents and adults with disabilities, who cannot identify themselves.

While this recommendation²⁷⁶ 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, including those in formal kinship arrangements and foster 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.²⁷⁷ To this end, it must ensure that institutions and systems working on registration can function.²⁷⁸

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, and to prevent them from falling through the cracks thereby putting them at risk of human trafficking, exploitation and other serious child rights violations.

²⁷³ Fourth Geneva Convention (n 222) art 24, sentence 4.

²⁷⁴ Uhler and others (n 230) 185 and 190.

²⁷⁵ *ibid* 189.

²⁷⁶ *ibid*.

²⁷⁷ Fourth Geneva Convention (n 222) art 50, para 2; Uhler and others (n 230) 287f.

²⁷⁸ Uhler and others (n 230) 287f.

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.²⁷⁹ This right is especially problematic when families are separated by frontlines.²⁸⁰ In such cases, re-establishing contact may be facilitated through neutral third parties, such as the ICRC.²⁸¹ This includes the correspondence between children in state care with those relatives with whom it has been deemed safe.

As per article 26 of Geneva Convention IV, the state is also obligated to assist individuals in their attempts to find family members, from which they were separated during the conflict.²⁸² This is meant to protect the family unity and rebuild communication between the members.²⁸³ Thereby the parties must install measures aiding these individuals in finding their relatives for example through:²⁸⁴

1. Establishing institutions providing assistance in obtaining relevant information.
2. Informing postal agencies when addresses are changed eg 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

²⁷⁹ Fourth Geneva Convention (n 222) art 25.

²⁸⁰ Uhler and others (n 230) 193.

²⁸¹ *ibid* 197.

²⁸² Fourth Geneva Convention (n 222) art 26.

²⁸³ Uhler and others (n 230) 196f.

²⁸⁴ The following list is taken from *ibid*.

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

IHL codifies a few safeguards explicitly for some children in state care. For example, article 24 of Geneva Convention IV 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 15.²⁸⁵ In terms of education, article 24 of Geneva Convention IV matches article 20 of the 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.²⁸⁶ Nonetheless, this article neglects children already in state care prior to the war.

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 private and state-run care facilities in occupied territories,²⁸⁷ 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.²⁸⁸ 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.²⁸⁹ The provision thereby mirrors the safeguards under article 24 of Geneva Convention IV, but in the case of occupation.²⁹⁰

²⁸⁵ Uhler and others (n 230) 187.

²⁸⁶ Fourth Geneva Convention (n 222) art 24.

²⁸⁷ Uhler and others (n 230) 286.

²⁸⁸ *ibid.*

²⁸⁹ Fourth Geneva Convention (n 222) art 50, para 3.

²⁹⁰ Uhler and others (n 230) 288.

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 further shortcoming pertains to 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 of 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.²⁹¹ 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 needs 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 of Geneva Convention IV, which are meant to house and protect *inter alia* children under 15 from the effects of war.²⁹² While safety zones and the age limit for entry are bound to agreement between the conflicting parties,²⁹³ 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 child's best interests concerning for instance the continuity of their care, 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 of 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.

²⁹¹ Uhler and others (n 230) 179.

²⁹² *ibid* 127.

²⁹³ *ibid*.

And lastly, the existing safeguards for children in state care under articles 24 and 50 of 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 increase these children's vulnerability and have detrimental impacts on their development and rights.

3.3 UN ALTERNATIVE CARE GUIDELINES

The Alternative Care Guidelines echo the obligations of states 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.²⁹⁴ 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.²⁹⁵ Moreover, siblings should not be split unless that would be in the children's best interests.²⁹⁶ If siblings are separated, they would then have to be given the opportunity to remain in contact if they wish to and in their best interests.²⁹⁷ Other rights emphasised 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'.²⁹⁸ Furthermore, children must always be protected and supported by 'a legal guardian or other recognized responsible adult or competent public body'.²⁹⁹ 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 deinstitutionalisation.³⁰⁰

²⁹⁴ Guidelines for the Alternative Care of Children (2010) A/RES/64/142 (Guidelines) para 11-23.

²⁹⁵ *ibid.*

²⁹⁶ *ibid.*

²⁹⁷ *ibid.*

²⁹⁸ *ibid.*

²⁹⁹ *ibid.*

³⁰⁰ *ibid* para 11-23.

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.³⁰¹ For instance, they are advised to ensure the training and sufficient resources of those working with children in alternative care, even in armed conflict.³⁰²

Additionally, evacuations abroad should be prevented as far as possible unless they are temporary and for reasons of safety or medical treatment.³⁰³ 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.³⁰⁴ If the child's treatment or safety can be guaranteed by a neighbouring country, it would thus be undesirable for the child to be sent too far away. Secondly, the children must be 'accompanied by a parent or caregiver known to them'.³⁰⁵ 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.³⁰⁶ However, what the Alternative Care Guidelines overlook is the possibility of allowing children to remain in their receiving state if they so wish and nothing in their best interests contradicts their wish, notably if the conflict is of protracted nature.

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.³⁰⁷ The state should determine the identity of an unaccompanied child and place them into state care.³⁰⁸ These children should thereby never be interned for breaching provisions on border crossing and remaining in the territory of the receiving state.³⁰⁹

³⁰¹ Guidelines (n 294) para 153f.

³⁰² *ibid* para 154.

³⁰³ *ibid* paras 154, 160.

³⁰⁴ *ibid* para 160.

³⁰⁵ *ibid*.

³⁰⁶ *ibid*.

³⁰⁷ *ibid* para 141f.

³⁰⁸ *ibid* para 145f.

³⁰⁹ *ibid* para 143f.

Adoptive or *Kafalah* care should only be considered for these children if after thorough investigation no relative can be found to care for them.³¹⁰ If a kinship caregiver able and willing to take responsibility for the child is located, they should be the preferred care setting.³¹¹ 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.³¹²

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.³¹³

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

1. Prefer family-based care over institutional care with deinstitutionalisation 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',³¹⁴ 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.

Lastly, the Alternative Care Guidelines are only recommendations. To ensure the adherence of states to these safeguards and standards, they must be added to the binding child rights framework, for example through an Optional Protocol to the CRC.

³¹⁰ Guidelines (n 294) para 152.

³¹¹ *ibid* para 145f.

³¹² *ibid*.

³¹³ *ibid* para 148.

³¹⁴ *ibid* para 83.

AT RISK OF FALLING THROUGH THE CRACKS?

4.

CASE STUDY: PROTECTION OF CHILDREN IN UKRAINIAN STATE CARE DURING RUSSIA'S 2022 INVASION OF UKRAINE

This chapter will describe the current state of protection of children in Ukrainian state care since the start of Russia's invasion in February 2022. With Ukraine having one of the highest institutionalisation rates in Europe³¹⁵ 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 marginalised 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 countries³¹⁶ 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 rights of children evacuated from Ukrainian state care. Out of the contacted states, five survey responses were received from four states³¹⁷ by 6 July 2022. Two further states submitted a statement via email.³¹⁸

³¹⁵ Eurochild, 'A worrisome U-turn on ending the institutionalisation of children in Ukraine' (*Eurochild*, 13 October 2021) <www.eurochild.org/news/a-worrisome-u-turn-on-ending-the-institutionalisation-of-children-in-ukraine/> accessed 6 July 2022.

³¹⁶ Austria, Bulgaria, Czech Republic, Estonia, Germany, Hungary, Italy, Latvia, Lithuania, Moldova, Poland, Romania, Slovakia.

³¹⁷ Czech Republic, Estonia (two different authorities responded), Latvia, Lithuania.

³¹⁸ Germany and Poland.

This case study will be limited to Ukraine and the six responding receiving states.³¹⁹ The subchapter on Ukraine will be based on all press releases published by the Ukrainian Ministry of Social Policy (MSP) concerning children in state care between 24 February and 7 July 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-centred approach is largely due to the lack of reports by NGOs, UN agencies and similar organisations specifically on the situation of children in state care. Nonetheless, organisations such as UNICEF and SOS Children's Villages are closely cooperating with involved governments to ensure the protection of these children.³²⁰

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 and statements received between 4 May and 8 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 organisations 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 Czech Republic, Estonia, Germany, Latvia, Lithuania, Poland.

³²⁰ Bundesfamilienministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ), 'Koordinierungsstelle zur Aufnahme ukrainischer Waisenkinder nimmt Betrieb auf' (BMFSFJ, 31 March 2022) <www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/koordinierungsstelle-zur-aufnahme-ukrainischer-waisenkinder-nimmt-betrieb-auf-195192> accessed 7 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.³²¹ 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 include:³²²

- 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; and
- 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 emphasise 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 as per national policy. 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.

³²¹ Ministry of Social Policy, ‘About 5,000 children from vulnerable categories who are brought up in institutions of institutional care have been evacuated’ (MSP, 19 March 2022) <www.msp.gov.ua/news/21581.html> accessed 7 July 2022.

³²² 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’ (MSP, 28 February 2022) <www.msp.gov.ua/news/21471.html> accessed 7 July 2022.

4.1.1 *Evacuations of children in Ukrainian state care*

4.1.1.1 *Evacuations within Ukraine*

The Ukrainian government defined the procedures on temporary evacuations for children in its care in late March 2022.³²³ These laid out who would be evacuated, and in what facilities they live.³²⁴ Moreover, preparatory measures and the tasks of those accompanying the children were regulated, such as the duty of accompanying individuals to register the child.³²⁵ Lastly, the responsibilities of the different authorities involved in the evacuation process were defined.³²⁶ Thereby, the government aimed to prevent miscommunication and ensure the proper and smooth planning and implementation of the evacuations.

4.1.1.2 *Evacuations abroad*

As of 10 May 2022, over 10,700 children in Ukrainian state care had been evacuated.³²⁷ 7,400 of them had left the country, while 3,300 remained in Ukraine.³²⁸ Among the prior most of them moved to Poland and Germany.³²⁹ The Minister of Social Policy also criticised some directors of state care institutions who had refused to evacuate and cooperate with responsible authorities.³³⁰ Furthermore, in some areas children in state care institutions were trapped due to ongoing hostilities.³³¹

³²³ Ministry of Social Policy, 'The Government has regulated the procedure for the evacuation of children and persons who are in institutions around the clock' (MSP, 28 March 2022) <www.msp.gov.ua/news/21625.html> accessed 7 July 2022.

³²⁴ *ibid.*

³²⁵ *ibid.*

³²⁶ *ibid.*

³²⁷ 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' (MSP, 10 May 2022) <www.msp.gov.ua/news/21816.html> accessed 7 July 2022.

³²⁸ *ibid.*

³²⁹ Ministry of Social Policy, 'During martial law, more than 10,000 children from vulnerable categories were evacuated from areas of active hostilities' (MSP, 30 March 2022) <www.msp.gov.ua/news/21633.html> accessed 9 July 2022.

³³⁰ Ministry of Social Policy, 'About 5,000 children from vulnerable categories who are brought up in institutions of institutional care have been evacuated' (n 321).

³³¹ *ibid.*

Evacuations abroad for children in state care for health and safety reasons were facilitated in late February.³³² 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.³³³ Moreover, they must travel with a legal representative or other authorised individual.³³⁴ As for children without that status but residing in a state care institution as well as those in foster families, the same rules apply, but their evacuation may also be authorised by the guardianship authorities, the military administration or similar authorities.³³⁵ Foster children may for instance be accompanied by their foster caregiver.³³⁶

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.³³⁷ The registration allows Ukrainian authorities to monitor the children’s stay in the receiving state³³⁸ and record the children who have left Ukraine so they can be repatriated after the war.³³⁹

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

³³² Ministry of Social Policy (n 321).

³³³ *ibid.*

³³⁴ *ibid.*

³³⁵ *ibid.*

³³⁶ *ibid.*

³³⁷ *ibid.*

³³⁸ Ministry of Social Policy, ‘When evacuating children from vulnerable categories, control over their stay abroad and return to Ukraine’ (MSP, 5 March 2022) <www.msp.gov.ua/news/21494.html> accessed 7 July 2022.

³³⁹ 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’ (MSP, 27 March 2022) <www.msp.gov.ua/news/21620.html> accessed 7 July 2022.

administration at the place of their [habitual residence]’.³⁴⁰ 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.³⁴¹ It remains unclear, whether the respective individual has to be vetted before being authorised 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 particularly questioned whether 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 emphasised that children in Ukrainian state care would only be sent to ‘European countries that strictly adhere to the norms of international law’.³⁴² This statement arguably bears resemblance to article 78 of 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.

On 13 March 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.³⁴³ As a result, the institution or person with whom the child is leaving the country must 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’.³⁴⁴ That organisation must

³⁴⁰ Ministry of Social Policy, ‘When evacuating children from vulnerable categories, control over their stay abroad and return to Ukraine’ (n 336).

³⁴¹ *ibid.*

³⁴² *ibid.*

³⁴³ Ministry of Social Policy, ‘The Government has tightened control over the travel abroad of children from vulnerable categories’ (MSP, 13 March 2022) <www.msp.gov.ua/news/21543.html> accessed 7 July 2022.

³⁴⁴ *ibid.*

have prior approval from the receiving state.³⁴⁵ Secondly, the regional military administration and the National Social Service must give their written approval concerning the evacuation.³⁴⁶ It is thus no longer up to the directors of the care institutions to decide on evacuations.

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 organisations, civil society organisations and independent experts.³⁴⁷ This body has since carried out monitoring visits to various receiving states, such as Germany³⁴⁸ and Poland.³⁴⁹ 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 authorised by the parents.³⁵⁰ Moreover, the difficulties around maintaining contact with the child's parents and relatives due to the war were deliberated,³⁵¹ since the contact of children with their parents is protected for example under article 10(2) of the CRC and article 25 of Geneva Convention IV even during armed conflict. And lastly, the rights of the children to education and psychological care were reviewed.³⁵²

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.³⁵³ 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

³⁴⁵ Ministry of Social Policy, 'The Government has tightened control over the travel abroad of children from vulnerable categories' (n 343).

³⁴⁶ *ibid.*

³⁴⁷ Ministry of Social Policy, 'The government created a coordination headquarters for the protection of children's rights under martial law' (*MSP*, 17 March 2022) <www.msp.gov.ua/news/21568.html> accessed 7 July 2022.

³⁴⁸ Ministry of Social Policy, 'The Ukrainian monitoring group has started work in Germany' (*MSP*, 22 April 2022) <www.msp.gov.ua/news/21742.html> accessed 7 July 2022.

³⁴⁹ Ministry of Social Policy, 'The Ukrainian monitoring group reviewed the work of the hub for the reception and temporary placement of children in Poland' (*MSP*, 19 April 2022) <www.msp.gov.ua/news/21724.html> accessed 7 July 2022.

³⁵⁰ *ibid.*

³⁵¹ *ibid.*

³⁵² *ibid.*

³⁵³ Ministry of Social Policy, 'The Government has tightened control over the travel abroad of children from vulnerable categories' (n 343).

responsible Ukrainian authorities.³⁵⁴ As far as this research has been able to determine, as of early July 2022 this problem had yet to be resolved, though it had been addressed in bilateral meetings with receiving states, such as Lithuania.³⁵⁵ Furthermore, the European Commission has stressed that children under 18 have the right to registration in the EU upon crossing the border.³⁵⁶ 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 and other forms of abuse and exploitation. Nevertheless, such cooperation must still maintain the child's right to privacy under article 16 of the 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.³⁵⁷ These bilateral memoranda for example lay out that the needs of these children and their rights must be met.³⁵⁸ Moreover, it guarantees their right to be repatriated once it is safe to do so.³⁵⁹ 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'.³⁶⁰

³⁵⁴ Ministry of Social Policy, 'The Government has tightened control over the travel abroad of children from vulnerable categories' (n 343)..

³⁵⁵ Ministry of Social Policy, 'Ukraine signed the first bilateral agreement on the protection of children's rights with Lithuania' (MSP, 11 April 2022) <www.msp.gov.ua/news/21686.html> accessed 7 July 2022.

³⁵⁶ European Commission, 'Fleeing Ukraine: Protection for children' (*European Commission*) <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.

³⁵⁷ 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' (n 339)

³⁵⁸ *ibid.*

³⁵⁹ *ibid.*

³⁶⁰ *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 authorising the transfer of Ukrainian children from occupied territories and be adopted by Russian families.³⁶¹ 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.³⁶² The Ukrainian representative further noted that the country did not receive information about the living conditions and safety of the transferred children.³⁶³

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'.³⁶⁴ 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.³⁶⁵

On 15 June 2022, the UN High Commissioner for Human Rights noted that the allegations had not yet been confirmed.³⁶⁶ 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.³⁶⁷

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 where the parents cannot care for the child for other reasons.³⁶⁸ The aim of this measure was to give the relatives a legal claim to demand the

³⁶¹ Ministry of Social Policy, 'Ukraine signed the first bilateral agreement on the protection of children's rights with Lithuania' (n 355).

³⁶² United Nations, 'War in Ukraine Presenting "Child Protection, Child Rights Crisis"', Senior United Nations Official Tells Security Council' (UN, 12 May 2022) <www.un.org/press/en/2022/sc14889.doc.htm> accessed 7 July 2022.

³⁶³ *ibid.*

³⁶⁴ Ministry of Social Policy, 'Ukraine signed the first bilateral agreement on the protection of children's rights with Lithuania' (n 354).

³⁶⁵ *ibid.*

³⁶⁶ United Nations, 'UN's Bachelet concerned over Ukraine orphans 'deported' to Russia for adoption' (UN News, 15 June 2022) <<https://news.un.org/en/story/2022/06/1120412>> accessed 30 June 2022.

³⁶⁷ *ibid.*

³⁶⁸ 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' (MSP, 15 April 2022) <www.msp.gov.ua/news/21705.html> accessed 7 July 2022.

child's return from occupied areas or countries into which the child was illegally transferred, particularly Russia.³⁶⁹ Moreover, under article 78 of 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 re-evaluated,³⁷⁰ thereby keeping open the option of reuniting children with parents or placing them in the care of other caregivers, if that is in the children's best interests.

If a Ukrainian court, the International Criminal Court 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'.³⁷¹ Furthermore, Russia would breach article 78 of 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 in Russia. 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) of the CRC, which would necessitate Ukrainian caregivers such as relatives to be considered first before placing them in Russian families.³⁷²

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.³⁷³ Ukraine itself is not

³⁶⁹ 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' (n 368)..

³⁷⁰ *ibid.*

³⁷¹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 2(e).

³⁷² cf chapter 3.1.1.

³⁷³ 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' (*The Adoption Authority of Ireland*, 24 March 2022) <<https://bit.ly/3uBoi8v>> accessed 12 July 2022.

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 2022.³⁷⁴ Most receiving states, however, are parties to the Convention and are thus obligated to prevent adoptions during armed conflict.³⁷⁵

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’.³⁷⁶ Instead, priority should be given to the child growing up with their parents or relatives.³⁷⁷ 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.³⁷⁸ Children with finalised adoption cases, however, were able to join their adoptive families under facilitated conditions.³⁷⁹

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.³⁸⁰ As of July 2022, the Ukrainian government had 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.

³⁷⁴ 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’ (MSP, 7 June 2022) <www.msp.gov.ua/news/21909.html> accessed 7 July 2022.

³⁷⁵ HCCH, ‘33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption’ (2020) <www.hcch.net/en/instruments/conventions/status-table/?cid=69> accessed 10 July 2022; The Adoption Authority of Ireland (n 373).

³⁷⁶ Ministry of Social Policy, ‘When evacuating children from vulnerable categories, control over their stay abroad and return to Ukraine’ (n 338).

³⁷⁷ Ministry of Social Policy, ‘How to help a child correctly - explanation of the Ministry of Social Policy’ (MSP, 13 March 2022) <www.msp.gov.ua/news/21549.html> accessed 7 July 2022.

³⁷⁸ *ibid.*

³⁷⁹ 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’ (MSP, 24 March 2022) <www.msp.gov.ua/news/21852.html> accessed 7 July 2022.

³⁸⁰ Ministry of Social Policy, ‘The Ministry of Social Policy is developing changes to adopting children under martial law’ (MSP, 29 June 2022) <www.msp.gov.ua/news/21987.html> accessed 30 June 2022.

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.³⁸¹ 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 are in areas of active hostilities.³⁸²

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.³⁸³ Regular guardianship proceedings would have necessitated a larger number of documents, which would have made the procedure unsustainable during martial law.³⁸⁴ 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 they have endured through the loss of their parents or other family members during the conflict.³⁸⁵

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 and protect them from human trafficking.³⁸⁶

³⁸¹ 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' (*MSP*, 20 May 2022) <www.msp.gov.ua/news/21843.html> accessed 20 May 2022.

³⁸² *ibid.*

³⁸³ *ibid.*

³⁸⁴ *ibid.*

³⁸⁵ *ibid.*

³⁸⁶ Catherine Russell and Filippo Grandi, 'Unaccompanied and separated children fleeing escalating conflict in Ukraine must be protect' (UNHCR & UNICEF 7 March 2022) <www.unhcr.org/news/press/2022/3/622619a24/unaccompanied-separated-children-fleeing-escalating-conflict-ukraine-must.html> accessed 4 July 2022; United Nations, 'Protect unaccompanied children fleeing Ukraine: UN agency chiefs' (*UN News*, 7 March 2022) <<https://news.un.org/en/story/2022/03/1113422>> accessed 10 July 2022.

4.1.5 ‘The Child is Not Alone’ project

‘The Child is Not Alone’ project is a joint endeavour of different Ukrainian governmental bodies and UNICEF.³⁸⁷ Its core elements are electronic communication means such as a chatbot³⁸⁸ and a website³⁸⁹ that can be used by:³⁹⁰

- Ukrainian families wishing to temporarily host an unaccompanied child;
- Families who have lost a child;
- Individuals who found an unaccompanied child; and
- International NGOs offering to host Ukrainian children in state care.

As of 5 July 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.³⁹¹ Ukrainian institutions can contact these certified individuals and families to host one of the children in that facility.³⁹² They are then temporarily hosted by these families until relatives can be located or until martial law has been terminated.³⁹³ If no relatives can be found in a reasonable time, the hosting family will be primarily considered for adoption or guardianship.³⁹⁴ Throughout the process, hosting families are assisted by social workers to advise the family and safeguard the child’s best interests.³⁹⁵

³⁸⁷ Ministry of Social Policy, ‘How to help a child correctly - explanation of the Ministry of Social Policy’ (n 377).

³⁸⁸ Telegram: ‘@dytyna_ne_sama_bot’.

³⁸⁹ Website: <<https://dity.msp.gov.ua/>>

³⁹⁰ Ministry of Social Policy, ‘How to help a child correctly - explanation of the Ministry of Social Policy’ (n 377).

³⁹¹ 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’ (MSP, 5 July 2022) <www.msp.gov.ua/news/22010.html> accessed 7 July 2022.

³⁹² *ibid.*

³⁹³ *ibid.*

³⁹⁴ *ibid.*

³⁹⁵ *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 programme 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 deinstitutionalisation goal.³⁹⁶

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 organisations 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 programme at the end of March 2022, which supports families with very young children or children with disabilities.³⁹⁷ This assists Ukraine in fulfilling its 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. This may help combat child abandonment as well as support family reunification, where children were placed in state care due to lack of financial and other means of the primary family to care for their children.

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.³⁹⁸

On 8 April 2022, UNICEF and the MSP further signed a memorandum of cooperation on the protection of children in state care including *inter alia*:³⁹⁹

- Cooperation between Ukraine, UNICEF and the receiving states on registering all children that have been evacuated abroad.

³⁹⁶ 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' (n 391).

³⁹⁷ Ministry of Social Policy, 'The Ministry of Social Policy and UNICEF agreed on joint programs to help families with children and war victims' (MSP, 18 March 2022) <www.msp.gov.ua/news/21578.html> accessed 7 July 2022.

³⁹⁸ *ibid.*

³⁹⁹ 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' (MSP, 8 April 2022) <www.msp.gov.ua/news/21671.html> accessed 7 July 2022.

- 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.

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.⁴⁰⁰

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.⁴⁰¹ These suggestions included for instance:⁴⁰²

- 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, eg by making them accessible for children with disabilities.

⁴⁰⁰ 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' (MSP, 6 May 2022) <www.msp.gov.ua/news/21801.html> accessed 7 July 2022.

⁴⁰¹ 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.

⁴⁰² The following is taken from *ibid*.

- 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.⁴⁰³ Moreover, all children are entitled to psychological and medical care, education, accommodation and the right to be heard in line with article 12 of the CRC.⁴⁰⁴ If they arrive in the EU without a legal guardian, they 'will have one appointed temporarily.'⁴⁰⁵ 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 are capable of taking responsibility for their care'.⁴⁰⁶ Unaccompanied children are given other guardians such as individuals in reception centres or foster families.⁴⁰⁷ The EU Commission supports member states in safeguarding these rights.⁴⁰⁸

Additionally, the European Parliament adopted a resolution on the EU's protection of children and young people fleeing the war in Ukraine.⁴⁰⁹ 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.⁴¹⁰ Furthermore,

⁴⁰³ European Commission (n 356).

⁴⁰⁴ *ibid.*

⁴⁰⁵ *ibid.*

⁴⁰⁶ *ibid.*

⁴⁰⁷ *ibid.*

⁴⁰⁸ *ibid.*

⁴⁰⁹ 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).

⁴¹⁰ *ibid.*

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.⁴¹¹ The Parliament also emphasised the need for increased humanitarian aid to the most vulnerable sections of the Ukrainian population, particularly children in state care in conflict areas.⁴¹² Thus, the EU has recognised 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 organisations assisting them as well as offers to accommodate evacuated children are to be forwarded to the Regional and National Assistance Centers for Ukraine.⁴¹³ The Czech authorities will then coordinate with their Ukrainian counterparts on transport arrangements as well as the material and personnel needs.⁴¹⁴

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.⁴¹⁵ If relatives can be found, the state may reunite the children with them.⁴¹⁶

The Office for International Legal Protection of Children has further noted that best interests considerations in accordance with article 3 of the CRC are crucial for national authorities in regard to children evacuated from Ukrainian state care.⁴¹⁷ Such evaluations in the Czech Republic necessitate the participation of the children through interviews, if necessary, with the help of an interpreter.⁴¹⁸ The children will also receive a letter with all relevant information.⁴¹⁹

⁴¹¹ European Parliament resolution of 7 April 2022 on the EU’s protection of children and young people fleeing the war against Ukraine (n 409).

⁴¹² *ibid.*

⁴¹³ Ministerstvo vnitra České republiky and Ministerstvo práce a sociálních věcí, ‘JAK POMOCISAMOTNÝM DĚTEM Z UKRAJINY?’ <www.mpsv.cz/documents/20142/2786931/pomoc_deti_z_ukrajiny_2.pdf/> accessed 10 July 2022.

⁴¹⁴ *ibid.*

⁴¹⁵ *ibid.*

⁴¹⁶ Survey response by the Czech Office for International Legal Protection of Children to author (10 May 2022).

⁴¹⁷ *ibid.*

⁴¹⁸ *ibid.*

⁴¹⁹ *ibid.*

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.⁴²⁰ 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 Ukrainian children's repatriation after the war.

4.4 ESTONIA

As of 7 June 2022, Estonia had not taken in children evacuated from Ukrainian state care.⁴²¹ However, the National Social Insurance Board reported 18 unaccompanied Ukrainian children on 4 May and the Ministry of Social Affairs noted on 7 June 2022 that the number of children who had entered Estonia unaccompanied had risen from two to 30 since the start of the war.⁴²²

Moreover, by 4 May, two Ukrainian foster families had fled to Estonia.⁴²³ 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.⁴²⁴ Only unaccompanied children or those accompanied by individuals who cannot take care of them will enter the Estonian state care system.⁴²⁵ Their care will be organised 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.⁴²⁶ 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 interests.⁴²⁷ Further, the best interests and the 'voice' of the unaccompanied child are considered for instance

⁴²⁰ Survey response by the Czech Office for International Legal Protection of Children to author (n 416).

⁴²¹ Survey response by the Estonian Ministry of Social Affairs to author (7 June 2022).

⁴²² *ibid*; Survey response by the Estonian National Social Insurance Board to author (4 May 2022).

⁴²³ Estonian National Social Insurance Board (n 422).

⁴²⁴ *ibid*.

⁴²⁵ *ibid*.

⁴²⁶ *ibid*; Estonian Ministry of Social Affairs (n 421).

⁴²⁷ Estonian National Social Insurance Board (n 422).

through conversations and visits with them to different alternative care providers in line with the Estonian Child Protection Act⁴²⁸ and article 12 of the CRC.

4.5 LATVIA

Latvia has entirely banned adoptions of Ukrainian children to ensure their repatriation and reunification with relatives where possible.⁴²⁹ Moreover, it has extended the possibility of granting emergency guardianship for children who arrive without their legal guardian to non-Latvian citizens.⁴³⁰

As of mid-May 2022 there was no agreement between Latvia and Ukraine on the acceptance of children evacuated from the Ukrainian state.⁴³¹ 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.⁴³² 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.⁴³³ This will moreover ensure the respect for the child's right to be heard under article 12 of the CRC.⁴³⁴ The existing monitoring mechanisms are already being used in the context of unaccompanied Ukrainian children who have entered the Latvian state care system.⁴³⁵

Noteworthy is also the possibility of Ukrainian children seeing Ukrainian psychologists.⁴³⁶ Similarly, Ukrainian teachers are allowed to teach Ukrainian children with the salary being paid by the state.⁴³⁷ 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.

⁴²⁸ Estonian National Social Insurance Board (n 422); Estonian Ministry of Social Affairs (n 421); Estonia, Child Protection Act (19 November 2014) <www.riigiteataja.ee/en/eli/515052022001/consolide> accessed 14 July 2022.

⁴²⁹ Survey response by the Latvian Ministry of Welfare to author (18 May 2022).

⁴³⁰ *ibid.*

⁴³¹ *ibid.*

⁴³² *ibid.*

⁴³³ *ibid.*

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*

⁴³⁶ *ibid.*

⁴³⁷ *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.⁴³⁸ Thereunder, it has promised to receive, house, register and provide for these children until they can be repatriated.⁴³⁹ Moreover, it has banned adoption procedures for Ukrainian children for the duration of the war.⁴⁴⁰ 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.⁴⁴¹ Lastly, Lithuania has promised to repatriate the children once circumstances permit.⁴⁴²

As of 12 April 2022, 1,137 unaccompanied and separated children and children evacuated from Ukrainian care groups had entered Lithuania.⁴⁴³ The majority of unaccompanied and separated children were cared for by relatives, while only seven had entered the Lithuanian state care system.⁴⁴⁴ In April, the Ukrainian embassy in coordination with Lithuanian authorities were able to repatriate 34 unaccompanied Ukrainian children and reunite them with their parents at their wish,⁴⁴⁵ proving that the country is committed to ensuring the return of these children when possible.

4.7 GERMANY

As of 23 May 2022, 3,226 children, adolescents and caregivers from Ukrainian state care institutions had been evacuated to Germany

⁴³⁸ Ministry of Social Policy, 'Ukraine signed the first bilateral agreement on the protection of children's rights with Lithuania' (n 355).

⁴³⁹ *ibid.*

⁴⁴⁰ *ibid.*

⁴⁴¹ *ibid.*

⁴⁴² *ibid.*

⁴⁴³ LRT, 'First group of unaccompanied children returns to Ukraine from Lithuania' (*LRT.lt*, 12 April 2022) <www.lrt.lt/en/news-in-english/19/1672102/first-group-of-unaccompanied-children-returns-to-ukraine-from-lithuania> accessed 10 July 2022.

⁴⁴⁴ *ibid.*

⁴⁴⁵ *ibid.*

and distributed among the Länder.⁴⁴⁶ Like many other receiving states, Germany has recognised these children as exceptionally vulnerable and in need of special protection.⁴⁴⁷ Germany has repeatedly emphasised 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 accordance with the best interests of the child.⁴⁴⁸ To determine accommodation capacities large enough to house bigger groups of children, the German Federal Ministry for Families, Seniors, Women and Youth (BMFSFJ) has set up cooperation and coordination mechanisms at the federal level.⁴⁴⁹ This system consists of two elements.⁴⁵⁰ Firstly, the hotline run by SOS-Kinderdorf e.V. informs receiving organisations about the German system and responsible contact persons in the Länder and municipalities.⁴⁵¹ The hotline may also connect Ukrainian state care institutions directly seeking assistance with places that have the necessary capacities.⁴⁵² Secondly, a coordination office in the Federal Office of Administration (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.⁴⁵³ The gathered data ensures that Germany is able to inform the Ukrainian authorities about the whereabouts and care provided to the children.⁴⁵⁴ Additionally, the BVA coordinates the accommodation and care for children evacuated from Ukrainian state care together with their caregivers according to capacity and needs.⁴⁵⁵ 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.⁴⁵⁶ Lastly, the BVA issues letters of invitation to the evacuating institutions, which the Ukrainian authorities require to authorise care groups to leave the country.⁴⁵⁷

⁴⁴⁶ Bundesverwaltungsamt, 'Neu im BVA: die zentrale Koordinierungsstelle des Bundes für Heimkinder aus der Ukraine' (23 May 2022) <www.bva.bund.de/SharedDocs/Kurzmeldungen/DE/BVA/2022/koordinierungsstelle_heimkinder_ukraine.html> accessed 10 July 2022.

⁴⁴⁷ Statement by the German Federal Ministry for Families, Seniors, Women and Youth (BMFSFJ) to author (5 May 2022).

⁴⁴⁸ *ibid.*

⁴⁴⁹ *ibid.*

⁴⁵⁰ *ibid.*

⁴⁵¹ *ibid.*

⁴⁵² *ibid.*

⁴⁵³ *ibid.*

⁴⁵⁴ BVA (n 446).

⁴⁵⁵ *ibid.*

⁴⁵⁶ BMFSFJ (n 447).

⁴⁵⁷ BVA (n 446).

Furthermore, Germany welcomed the first visit of the Ukrainian monitoring group in late April 2022.⁴⁵⁸ In meetings with the BMFSFJ, the group received assurance that all Ukrainian children under 18 would be entitled to German social services.⁴⁵⁹ Moreover, Germany pledged to prevent the adoption of these Ukrainian children.⁴⁶⁰ 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.⁴⁶¹

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.⁴⁶² 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.⁴⁶³ Thereby, the special transport and accommodation needs of for instance children with disabilities are always considered.⁴⁶⁴ When entering Poland, unaccompanied children and those evacuated from state care are firstly transferred to the reception centre in Stalowa Wola, where they are able to rest until they can be distributed across the country.⁴⁶⁵ The children are also registered there including information on their final destination.⁴⁶⁶

Like Germany, Poland prioritises keeping children with their familiar caregivers 'to provide them with a maximum sense of security'.⁴⁶⁷ Therefore, it is important for the state to identify places that have capacities to accommodate larger groups.⁴⁶⁸

The Polish Act of 12 March 2022 on assistance to Ukrainian citizens in

⁴⁵⁸ Ministry of Social Policy, 'The Ukrainian monitoring group has started work in Germany' (n 348).

⁴⁵⁹ *ibid.*

⁴⁶⁰ *ibid.*

⁴⁶¹ *ibid.*

⁴⁶² Statement by the Polish Ministry of Family and Social Policy to author (8 June 2022).

⁴⁶³ *ibid.*

⁴⁶⁴ *ibid.*

⁴⁶⁵ *ibid.*

⁴⁶⁶ *ibid.*

⁴⁶⁷ *ibid.*

⁴⁶⁸ *ibid.*

connection with the armed conflict in the territory of Ukraine, moreover, explicitly seeks to protect children, including those evacuated from Ukrainian state care.⁴⁶⁹ It creates the possibility for the appointment of a temporary legal guardian for children travelling without their primary legal guardian.⁴⁷⁰ The request for the appointment of a temporary legal guardian can thereby be submitted by various governmental authorities, NGOs, *de facto* custodians etc.⁴⁷¹ 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.⁴⁷² 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'.⁴⁷³ Consequently, the state retains oversight over those children under temporary guardianship through social assistance centres, centres for social services or similar municipal bodies.⁴⁷⁴ Guardianship decisions are furthermore very quick due to their urgency and must be taken within three days from the submission of such application.⁴⁷⁵ It is also possible for one guardian to be given guardianship over several children.⁴⁷⁶ This is particularly desired for siblings.⁴⁷⁷ 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.⁴⁷⁸

If a temporary guardian cannot be determined, unaccompanied children will be put in national foster care.⁴⁷⁹ 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.⁴⁸⁰ Foster families established under this provision are entitled to the support accorded to regular foster families.⁴⁸¹ The Ministry of Family and Social Policy did not specify what requirements

⁴⁶⁹ Statement by the Polish Ministry of Family and Social Policy to author (n 462).

⁴⁷⁰ *ibid.*

⁴⁷¹ *ibid.*

⁴⁷² *ibid.*

⁴⁷³ *ibid.*

⁴⁷⁴ *ibid.*

⁴⁷⁵ *ibid.*

⁴⁷⁶ *ibid.*

⁴⁷⁷ *ibid.*

⁴⁷⁸ *ibid.*

⁴⁷⁹ *ibid.*

⁴⁸⁰ *ibid.*

⁴⁸¹ *ibid.*

these caregivers must meet.⁴⁸² As examined in chapter 3.1., it is desired under article 20(3) of the 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 crucial 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.

⁴⁸² Statement by the Polish Ministry of Family and Social Policy to author (n 462).

5.

CONCLUSION

This thesis analysed 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 require more support and special protection under these circumstances. Additionally, IHL as the core source of law regulating armed conflict has significant gaps that increase these children's vulnerability and the risk 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, 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 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 amended to include explicit state obligations towards children in state care, or a separate treaty or Optional Protocol to the CRC 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 best practice measures adopted for children in and evacuated from

Ukrainian state care during Russia's invasion, some of which were examined in chapter 4. Based on the discussion above, the subsequent chapter summarises 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 sustainably 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 emphasised 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. However, these policies and promises are ensured in practice can only be revealed through field research. 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.

Nonetheless, as the legal analysis in chapter 3 has demonstrated, some lessons on state obligations towards children in state care can be inferred from child rights and IHL, which must be translated into law:

Firstly, states have an obligation to consider the best interests of children in state care in all decisions affecting them (article 3 of the CRC), even more so in emergency situations. They must therein ensure that the view of the child is given 'due weight' (article 12 of the 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.⁴⁸³ 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. As has been argued in chapter 3.2, article 23 of the 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 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) of the Additional Protocol I must be re-emphasised. As criticised 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 correct humanitarian assistance reaches children in state care, the state in which they reside must keep complete records on the location and potential special needs of these children.

⁴⁸³ Survey response by the Estonian National Social Insurance Board to author (4 May 2022); Survey response by the Estonian Ministry of Social Affairs to author (7 June 2022).

Thirdly, as has been shown concerning evacuations of nationals, the safeguards in article 78 of Additional Protocol I do not bind states when evacuating nationals abroad or conducting domestic evacuations. 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 of 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 neighbouring 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 (eg article 78 of 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) of the CRC wherever possible and in the child's best interests, the EU gives children the right to request to stay with their familiar caregiver.⁴⁸⁴ This includes children evacuated from state care from a non-EU country, such as Ukraine.

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 the 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.⁴⁸⁵ 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.

Sixthly, states affected by influx of children another state's care system and states confronted with armed conflict or similar humanitarian emergencies must be reminded of their duty to seek international assistance and cooperation to safeguard these children's rights.

It can be asked whether such further international regulations would be feasible. The CRC is the most widely ratified international human

⁴⁸⁴ European Commission, 'Fleeing Ukraine: Protection for children' (*European Commission*) <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.

⁴⁸⁵ UNICEF, 'Guidance for protecting displaced and refugee children in and outside of Ukraine' (10 March 2022) <www.unicef.org/emergencies/guidance-protecting-displaced-children-ukraine> accessed 30 June 2022.

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 Russia's invasion prove, states are waking up to the realisation 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 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.

AT RISK OF FALLING THROUGH THE CRACKS?

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