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# FULFILLING THE RIGHTS OF CHILDREN WITHOUT PARENTAL CARE DISPLACED FROM UKRAINE

An analysis of international and European law

July 2023

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# Contents

<b>GLOSSARY AND KEY CONCEPTS</b>	<b>1</b>
<b>ACRONYMS</b>	<b>4</b>
<b>EXECUTIVE SUMMARY</b>	<b>6</b>
Focus on the findings in each priority area.....	7
Towards recommendations for progress .....	12
<b>1. INTRODUCTION TO THE REPORT</b>	<b>15</b>
1.1 Background and rationale.....	15
1.2 The Legal Report – purpose, audiences and potential for impact .....	16
1.3 Methodology .....	16
1.4 Structure of the Legal Report .....	17
<b>2. INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK AND LEGAL CHALLENGES</b>	<b>19</b>
2.1 Overview of the international and European legal framework .....	19
2.1.1 The UN Convention on the Rights of the Child	19
2.1.2 The wider international and European legal landscape	21
2.1.3 Bodies of law of particular relevance to displaced children	23
2.2 Broad legal challenges to fulfilling the rights of children without parental care .....	24
2.3 Novel features of the context of children from Ukraine .....	27
<b>3. RESPONSIBILITY, SUPPORT AND ASSISTANCE ARRANGEMENTS, INCLUDING GUARDIANSHIP FOR UNACCOMPANIED AND SEPARATED CHILDREN</b>	<b>30</b>
3.1 Background Introduction .....	30
3.2 The legal framework in responding countries for identifying children without parental care and providing support and assistance to them .....	32
3.2.1 Identifying a child as unaccompanied or separated under the laws of responding States	32
3.2.2 Children arriving alone or in the company of an adult who does not bear responsibility for them	33
3.2.3 Children arriving accompanied by adults who bear some responsibility for them	33
3.3 Role of the locally appointed guardian under EU laws .....	38

3.4 Forms of guardianship.....	41
3.5 The need for coordination of different roles and responsibilities between different adults.....	42
3.6 Recommendations.....	42

#### **4. ENSURING THAT CHILDREN DISPLACED FROM UKRAINE ARE PROTECTED FROM VIOLENCE, ABUSE, NEGLECT AND EXPLOITATION WHILE IN RESPONDING STATES, WITH A PARTICULAR FOCUS ON CHILDREN FROM ALTERNATIVE CARE SETTINGS IN UKRAINE 45**

4.1 Background context .....	46
4.2 Understanding Ukrainian alternative care arrangements and Ukrainian child protection law.....	47
4.2.1 Glossary of key Ukrainian terms regarding children in alternative care	48
4.2.2 Alternative care arrangements	48
4.2.3 The Ukrainian legal system and the legal context for child protection in Ukraine	51
4.3 Addressing the role and responsibilities of authorities and actors acting under the laws of Ukraine and responding countries respectively, and the cooperation between them.....	55
4.3.1 Giving effect in responding countries to the child protection measures put in place for children under Ukrainian law	55
4.3.2 Jurisdiction of responding country to take child protection measures	56
4.3.3 Cooperation between Ukrainian authorities and guardians and child protection authorities and guardians in responding countries	58
4.4 Key measures to protect these children from violence abuse neglect and exploitation when in responding countries .....	61
4.5 Recommendations.....	63

#### **5. ACCESSING THE INTERNATIONAL PROTECTION PROCEDURE APPROPRIATE TO THE INDIVIDUAL NEEDS OF THE CHILD 65**

5.1 Background context .....	65
5.2 Legal and practical issues in focus.....	66
5.2.1 The application of the EU Temporary Protection Directive	66
5.2.2 Pathway to protection and the availability of other forms of international protection	67
5.2.3 Access to other forms of international protection	68
5.2.4 Child-sensitive procedures	73
5.3 Recommendations .....	75

#### **6. FUTURE PLANNING: ENSURING COMPREHENSIVE, SECURE AND SUSTAINABLE SOLUTIONS THROUGH BEST INTERESTS PROCEDURES, SUPPORTED BY TRANSNATIONAL COOPERATION 77**

6.1 Background context .....	77
6.2 Relevant legal framework when considering comprehensive secure and sustainable solutions.....	78

6.2.1 Relevant international protection and immigration laws	79
6.2.2 National child protection and family laws	81
6.3 Transnational cooperation .....	82
6.4 Child-sensitive procedures .....	83
6.5 Towards common principles for comprehensive child-centred decision-making procedures .....	83
<b>7. RECOMMENDATIONS</b>	<b>90</b>
7.1 Aim and purpose of the recommendations .....	90
7.2 Overview of Key Recommendations .....	91
<b>BIBLIOGRAPHY</b>	<b>100</b>
<b>ENDNOTES</b>	<b>102</b>

# Glossary and key concepts

**Alternative care:** is any arrangement, formal or informal, temporary or permanent, for a child who is living away from his or her parents (Better Care Network).

Alternative care may take the form of: (i) **informal care:** any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body; (ii) **formal care:** all care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures; (UN Guidelines for the Alternative Care of Children).

With respect to the environment where it is provided, alternative care may be: (i) **kinship care:** family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature; (ii) **foster care:** 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; (iii) **Other forms of family-based or family-like care placements;** (iv) **Residential care:** 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; (v) **Supervised independent living arrangements** for children. (UN Guidelines for the Alternative Care of Children).

**Beneficiary of international protection:** A person who has been granted refugee status or subsidiary protection status (EMN Glossary).

**Beneficiary of temporary protection:** A person who has been granted protection according to Directive 2001/55/EC (EU Temporary Protection Directive; EMN Glossary; See more below under temporary protection).

**Best interests assessment:** consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team – and requires the participation of the child. (UN Committee on the Rights of the Child General Comment No 14).

**Best interests determination:** describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment. (UN Committee on the Rights of the Child General Comment No 14). (UNCRC GC14).

**Best interests procedure (BIP):** is a term used in this report to describe the procedure that ensures that decisions and actions aimed at addressing protection risks and needs for children are in their best interests. It includes steps appropriate to the particular decision and situation of the child, and may involve a best interests assessment, or, where more formal safeguards are needed, will also involve a best interests determination.

**Child protection:** The prevention and response to, violence, exploitation and abuse against children. (UNICEF).

**Child protection system:** the set of laws, policies, regulations and services needed across all social sectors – especially social welfare, education, health, security and justice – to support prevention and response to protection-related risks. (UNICEF).

**Children without parental care:** all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances

(UN Guidelines for the Alternative Care of Children). This includes children deprived of parental care on account of their being abandoned, their parents being deprived of parental rights on account of severe child abuse and neglect, or being unable to care for their children due to difficult circumstances in their lives, including illness and imprisonment.

**Comprehensive, sustainable and secure solutions:** a solution that, to the greatest extent possible, caters to the long-term best interests and welfare of the child and is sustainable and secure from that perspective. The outcome should aim to ensure that the child is able to develop into adulthood, in an environment that will meet his or her needs and fulfil his or her rights as defined by the Convention on the Rights of the Child. (Committee on the Rights of the Child General Comment 22; CMW No 3; CMW/C/GC/3-CRC/C/GC/22).

**Country of habitual residence:** refers to the country where a child has established a permanent or habitual centre of their interests. This is usually the country where the child has lived or grown up.

**Displaced person:** persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, either across an international border or within a State, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters (IOM International Migration Law No. 34 – Glossary on Migration, 2019).

**Guardian** (in family and child protection law): definition varies between national laws and in general terms refers to a person who exercise responsibilities for making decisions and performing duties regarding a child's upbringing.

**Guardian for an unaccompanied or separated child outside their country of origin or habitual residence:** an independent person who safeguards a child's best interests and general well-being. To this effect the guardian complements the limited legal capacity of the child. The guardian acts as a statutory representative of the child in all proceedings in the same way that a parent represents his or her child. (UN Committee on the Rights of the Child General Comment no 6 and UN Guidelines for the Alternative Care of Children, A/HRC/11/L.13.19).

**Guardianship authority:** the institution or organisation or other legal entity that has the responsibility for recruitment, appointment, monitoring, supervision and training of guardians. The role of the guardianship authority or organisation should be laid down in law. (UN Committee on the Rights of the Child, General Comment No. 6, CRC/GC/2005/6,18 and UN Guidelines for the Alternative Care of Children, A/HRC/11/L.13.19).

**Integrated child protection system:** the way in which all duty-bearers (namely the state authorities represented by law enforcement, judicial authorities, immigration authorities, social services, child protection agencies, etc.) and system components (e.g. laws, policies, resources, procedures, processes, sub-systems) work together across sectors and agencies sharing responsibilities to form a protective and empowering environment for all children (European Commission 2015).

**International protection:** a need for international protection arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution, threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or different situations of violence. Other risks may stem from: famine linked to situations of armed conflict; natural or man-made disasters; as well as being stateless. Frequently, these elements are interlinked and are manifested in forced displacement (UNHCR).

**Local guardian/Locally appointed guardian:** appointed by the responding country as a person who has knowledge of local services and procedures, thus capable to assist the child to navigate the local systems.

**Parental responsibility:** includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child. (Art. 1(2) 1996 Hague Convention).

Parental responsibility means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by a decision,



by operation of law or by an agreement having legal effect, including rights of custody and rights of access; 'rights of custody' includes rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child; (Brussels IIb Regulation).

**Private arrangements:** informal care provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body. (UN Guidelines for the Alternative Care of Children, A/HRC/11/L.13.19).

**Procedural safeguards for children:** safeguards to ensure that children, meaning persons under the age of 18, who are involved in legal proceedings, are able to understand and follow those proceedings, have information, support and assistance, have their individual circumstances assessed, can exercise their right to be heard and have their best interests considered as a primary consideration in all decision making in their regard. (defined in line with the provisions of the EU Procedural Safeguards Directive).

**Refugees:** people who have fled war, violence, conflict or persecution and have crossed and international border to find safety in another country (UNHCR website which notes that "the 1951 is a key legal document and defines a refugee as someone "who is unable or unwilling to return to their country of origin owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion").

**Responding country:** The country in which a migrant or refugee stays or resides whether legally, regularly or irregularly.

**Responsibility:** a concept used in EU law to define whether a child is unaccompanied; namely that the child is unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person.

**Separated children:** children who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. (UN CRC Committee on the Rights of the Child General Comment No 6).

**Stateless person:** is a person who is not considered to be a national by any State under the operation of its law (1954 Convention relating to the Status of Stateless Persons).

**Subsidiary protection:** is granted when someone cannot be returned to their country of origin or habitual residence because they face a real risk of serious harm. Serious harm means (i) the death penalty or execution; (ii) torture or inhuman or degrading treatment or punishment; (iii) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict (EU Qualification Directive – 2011/95/EU).

**Temporary Protection:** a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection. (EU Temporary Protection Directive 2001/55/EC).

**Unaccompanied children:** children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. (UN Committee on the Rights of the Child, General Comment No 6).

**Unaccompanied minor:** a child who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a [child] who is left unaccompanied after he or she has entered the territory of the Member States. (EU Qualification Directive – 2011/95/EU).

# Acronyms

<b>CSO</b>	Civil Society Organisation
<b>CEAS</b>	Common European Asylum System
<b>CJEU</b>	Court of Justice of the European Union
<b>CNUE</b>	Council of the Notaries of the EU
<b>CoE</b>	Council of Europe
<b>EC</b>	European Commission
<b>ECHR</b>	European Court of Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>EGN</b>	European Guardianship Network
<b>EP</b>	European Parliament
<b>EU</b>	European Union
<b>EUAA</b>	EU Agency for Asylum
<b>FRA</b>	EU Agency for Fundamental Rights
<b>HCCH</b>	Hague Conference on Private International Law
<b>IOM</b>	International Organization of Migration
<b>KIND</b>	Kids in Need of Defense
<b>MS</b>	Member State
<b>NGO</b>	Non-Governmental Organisation
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>PICUM</b>	The Platform for International Cooperation on Undocumented Migrants
<b>RG</b>	Reference Group
<b>SOPs</b>	Standard Operating Procedures
<b>TC</b>	Thematic Consultation
<b>TPD</b>	Temporary Protection Directive
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations Children's Fund
<b>UNICEF ECARO</b>	UNICEF Europe and Central Asia Regional Office
<b>UN CRC</b>	UN Convention on the Rights of the Child
<b>UN CRPD</b>	UN Convention on the Rights of Persons with Disabilities



# Executive Summary

Since February 2022, the Russian war on Ukraine has triggered Europe's largest refugee crisis since World War II, with millions of persons fleeing Ukraine to seek international protection in other countries. An acutely vulnerable part of this displaced population are refugee children without parental care.

This report aims to support policy makers and practitioners in ensuring that refugee children without parental care, displaced from Ukraine, can access their rights. It focuses on their right to support and assistance (including from guardians), access to appropriate international protection procedures and, in the longer term, access to comprehensive, secure and sustainable solutions. It also examines obligations to ensure that such children are protected from violence, abuse, neglect, and exploitation while in responding countries, in particular, through the application of national child protection laws. The purpose of the legal report is to analyse the different legal challenges which may arise when applying international or European laws in EU and Council of Europe Member States. The report provides recommendations for reducing and meeting these legal challenges.

The report uses the term "legal challenges" to refer to gaps in the international and European laws and uncertainties, inconsistencies or anomalies which may be generated by the application of laws. It also underlines the different ways these international and European obligations are implemented at national level. In general, such challenges often arise when responding to the situation of all unaccompanied and separated children. However, the novel features in the situation of children who have fled, or been evacuated from, Ukraine have exacerbated some of these challenges and posed new legal questions. Equally, certain features of the situation provide opportunities for progress.

## Open borders

The fact that borders between Ukraine and European countries are effectively open for crossing for women

and children, allow most persons arriving from Ukraine to move freely into Europe. This contrasts with a more classical situation of persons arriving to seek asylum in EU countries, where in absence of this legal protection they may face immigration detention or other limitations of freedom of movement.

Existing EU visa liberalization measures mean that, in contrast to many other mass influxes of refugees, most persons arriving from Ukraine can exercise freedom of movement when entering the EU and moving within the EU for a three-month period. It avoids the dangerous congestion in border areas seen in previous mass influxes of persons fleeing war, such as occurred upon the arrival of refugees in 2015 fleeing civil war in Syria. However, it also impacts on the ability of authorities to undertake child protection assessments (including identification, immediate referral to child protection agencies and initial risk assessment to address situations of acute vulnerability) at a key moment when authorities first encounter a child at a border.

The speed of their flight and evacuation may also mean in some cases that there are no records of their exit from Ukraine or their entry to a responding country and both Ukrainian and national authorities are still trying to locate some of these children.

Some children, who have not been registered in the national system or registered for temporary protection, remain "under the radar". For this reason, continuing outreach efforts to children and adults accompanying them are crucial for the purpose of ensuring that they register for temporary protection and are able to fully exercise their rights.

## Immediate application of Temporary Protection

Broadly speaking, the activation of the Temporary Protection Directive (TPD) within the EU and similar forms of temporary protection in other CoE countries is a very welcome development legally. It provides immediate access to protection and it avoids the risk

of overwhelming State asylum systems. Within the EU, this is unprecedented.

However, the fact that the TPD is being applied for the first time and that it pre-dates improved procedures for children which were introduced in the revision of other EU international protection instruments raises questions as to how its general provisions for unaccompanied and separated children should be interpreted. Responding States and authorities are left grappling with significant legal and practical questions. The TPD works to ensure a fast safe haven and access to services for persons fleeing the war, while, at the same time, it does not contain specific procedural steps that are vital to protecting displaced children such as individual assessments. It is up to Member States to define and ensure procedures of this kind. This has taken time to address in some instances and there are many lessons to be learned from challenges in doing so. Important gaps and inconsistencies persist still.

In addition to unaccompanied and separated children, *children evacuated from the alternative care system in Ukraine* are present, accompanied by adults employed by the Ukrainian government, NGOs or faith-based groups, sometimes under special arrangements put in place bilaterally between the Ukrainian government

and the governments in some responding countries. Some of those in alternative care are travelling with their foster families.

### Ensuring rights to both international protection and child protection are fulfilled

In general, children without parental care seeking protection in another country have an acute need for both international protection (protection in another country when they flee from their country of nationality or habitual residence) and child protection, (*i.e.* from violence, abuse, neglect or exploitation, in the host country, given the precarity of their situation and the risks that they face). International protection and child protection legal instruments respectively apply; however, there is sometimes an overlap (and sometimes gaps) between their provisions. This can generate a need for clarity on the specific responsibilities of different actors and the various procedures which may apply to a particular child in their individual situations in relation to specific issues. These challenges are accentuated in the legal setting for children without parental care from Ukraine, given the first time application of the temporary protection, and also given that not all children have registered or fall under temporary protection instruments.

## Focus on the findings in each priority area

### Responsibility, support and assistance, including guardianship

The question of how responsibility for children without parental care displaced from Ukraine is exercised, and to what support and assistance the child is entitled, is vital to ensuring their care and safety and access to procedures and services. The question of responsibility, support and assistance will be triggered not only upon arrival or identification but should be considered periodically thereafter in line with changes to the child's circumstances and the evolving situation.

Practical difficulties in applying the law, and an absence of specific individual assessments procedures in temporary protection, mean that some children remain unidentified as unaccompanied or separated or children at risk.

### Children with accompanying adults

More than is typically the case in situations of migration into Europe, there are significant numbers of separated children, who have arrived without their parents but accompanied by other adults who may have been given some form of responsibility for them by parents or Ukrainian authorities. Some children at the peak of the crisis have travelled in private arrangements made in Ukraine, including kinship arrangements, and this has eased pressure on State's reception capacities for unaccompanied children. Moreover, kinship care often provides the favoured care arrangement for children without parental care. Other children travelled in ad hoc arrangements with accompanying adults, (for example, with neighbours or bus drivers who received travel authorisations for children who were then received by child protection authorities in host countries).

Under EU laws, a determining factor to identifying whether a child is unaccompanied or not (and whether they should have access to key procedural safeguards) is whether they are accompanied by an adult who has responsibility for them under the laws of the responding State. However, EU laws do not explicitly define the *scope* of responsibility relevant to this question nor do they regulate the *procedural steps* by which such responsibility is established. These issues are a matter of national law.

A valuable mechanism for host States to give effect in their countries to care arrangements made in Ukraine lies in the Hague Convention of 19 October on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (HCCH 1996 Child Protection Convention), given that Ukraine and most responding States have ratified this convention.

Helpful information and resources have been made available including as regards the use of the 1996 Convention mechanisms (Articles 16, 23, and 40 of the 1996 Convention). However, the ways in which responding States identify whether and what mechanisms have been put in place under Ukrainian law or by Ukrainian parents or authorities is new territory for some national immigration and protection agencies as well as courts, giving rise to some uncertainties as to its use. Moreover, while Ukrainian consular authorities are playing a role in helping host States understand and obtain official documents issued by Ukraine on the attribution of legal responsibility and decisions, their capacity is also limited in this emergency situation.

It is also important for national child protection services to support and provide oversight for these arrangements where they are in the best interests of the child, taking into account the difficulties that might naturally arise, when provisional arrangements become more protracted, and in light of the trauma and difficulties that these adults themselves often also face. However, it appears that, in some cases, the national procedures for assessing risks and supporting children and the adults caring for them are not being applied in the same way to displaced children from Ukraine, with the result that children and their guardians may not receive the support they need.

Moreover, giving effect to the legal arrangements put in place does not exclude the responding State's responsibility to put in place any complementary support and assistance to which the child may be entitled for the purposes of local procedures (including any immigration and protection procedures and child protection procedures). For example, a parent may appoint an accompanying person to exercise only certain legal responsibilities for their child. Consequently, the responding State should assess the scope and purpose of the private arrangements for the child, to establish whether such complementary support is required. The lack of knowledge of Ukrainian law caused difficulties in this regard, as well as uncertainty as to the role of the guardian for beneficiaries of temporary protection.

When locally appointed guardians are in place, their role needs to be defined clearly. Many children will not need the same level of support and assistance in accessing temporary protection as is required for unaccompanied children who are involved in often more complex and lengthy procedures when applying for international protection. However, child's right to support and assistance for other purposes or at a later stage needs to be properly recognised. For example, the need for a guardian is clear if children need assistance to navigate access to services, if they find themselves at risk of exploitation, or in the event of a family reunification process. They will also need assistance as they transition to adulthood or if they need ultimately to find a comprehensive, secure and sustainable solution when temporary protection expires.

How guardianship processes should be developed or adapted to fulfill the rights of these children is being actively considered. Different models of guardianship exist in different countries, shaped by international law obligations and by the way unaccompanied and separated children are cared for in the country. Consequently, there exist differences in the manner in which guardianship is organised nationally and sometimes even locally. Constraints in resources, often pre-existing, but exacerbated by the scale of arrivals from Ukraine, need to be acknowledged and addressed in innovative ways.

Significant legal questions arise where authorities are not accustomed to considering the role of different adults connected with the child and what that means in terms of care, support and assistance for different

purposes. Indeed, the use of the term guardian in different ways for different purposes in family and child welfare law and for international protection laws generates uncertainty. Where a child has several persons exercising some form of powers and responsibilities, or supporting and assisting them, it will be necessary to address who is responsible for what, and in what ways they need to coordinate at particular times.

### **Protection from violence, risk, abuse and exploitation, with a particular focus on children evacuated from alternative care in Ukraine**

Addressing the needs and rights of children evacuated from alternative care in Ukraine is a priority area precisely because of the particularly vulnerable situation of these children. They are in alternative care settings, often in large groups or in big foster families, and they are displaced from a country at war. Some of them have specific needs, arising from disabilities, physical or mental health concerns or special educational needs. Moreover, in general terms, children in large groups may be at risk of neglect, exploitation, abuse or violence (including between peers).

The tremendous challenges faced by accompanying adults are evident. Such difficulties are heightened in the uncertain environment of temporary protection. Arrangements which were intended to be short-lived, such as accommodation in large hotels, may have increasingly adverse effects on the child. The difficulties of maintaining provisional caregiving arrangements, without adequate support arrangements, become greater as the conflict becomes more protracted.

The role of the national child protection services in responding countries to assist in this regard is coming into sharper focus, the longer the situation continues. Lack of registration within national systems, whether for temporary protection or national child welfare systems, can be a root cause for lack of involvement of child protection authorities.

Moreover, in general, fulfilling children's rights to protection from violence, abuse, neglect and exploitation poses difficult legal questions because it involves a complicated and interrelated set of actions. These range from prevention through support

including identification and assessments as well as special protection and assistance to children. They engage several actors and procedures relevant to different aspects of the child's situation. This requires the coordination amongst different sectors and authorities, often across different levels (local, national and transnational). Clearly this is no easy task, legally or practically.

However, the difficulties in defining and establishing such coordination are all the more pronounced when it involves different actors from two countries. In the instance of children evacuated in groups accompanied by adults from Ukraine who are typically the staff of institutions in Ukraine, this issue falls into stark relief. Some challenges have arisen because of the fact that the alternative care and child protection arrangements and laws in Ukraine and in responding countries are often considerably different and may not be understood. It is essential to build a better understanding of key Ukrainian laws, arrangements and terms with which policy makers and practitioners need to be familiar.

More broadly, the responsibilities that exist under Ukrainian law and the child protection and international protection laws applied by responding countries currently sit side by side and need to be delineated properly and coordinated with each other. This has been assisted by the HCCH 1996 Child Protection Convention (see Arts 1(2), 16 and 23 of the HCCH 1996 Child Protection Convention) and certain bilateral agreements in place between Ukraine and host countries. However more guidance is required as well as raising awareness, disseminating information and providing training to child protection professionals, guardians and lawyers.

New forms of collaboration between national authorities and accompanying adults are also taking shape in some countries, which may provide inspiration for progress.

Responding countries need to consider carefully how to ensure key child protection measures are in place and inform actions in relation to children, including individual assessments, safeguards to address particular vulnerabilities including disabilities, provision of support and assistance including legal assistance where necessary.

Moreover, despite UN advisories against returns at this time, there have been some returns of groups of children from alternative care to Ukraine in a sudden way, reportedly without clear decision-making procedures and without a clear process for supporting individual children in the process. Any returns which risk harm to children and do not ensure their best interests are a primary consideration should not take place.

The fact that these children precisely need – and are provided with – international protection, *de jure* or *de facto*, in responding countries, in light of a war, raises legal questions concerning the responsibility of responding countries to put in place necessary safeguards for the children. This includes as regards procedures for informing and supporting future plans for these children, including whether, when and how they can return. Furthermore, under national child protection laws, responding States have a responsibility to prevent serious risk to children. For example, responding States could take urgent measures to suspend any returns on a provisional basis, pending proper assessments on this, with support having been provided to children.

A key question to be resolved is how actors and authorities in responding countries work together with Ukrainian accompanying adults and authorities in relation to children in alternative care in Ukraine to ensure that assessment of the best interests of each child and their individual circumstances, guides actions in their regard. This can build on common principles contained in existing guidance and ongoing collaboration to build better case management, including the provision of legal counselling. For children from within its child protection system, Ukraine maintains extensive records, family information and other case file information that should inform the best interest assessment.

### **Access to international protection procedures appropriate to their individual circumstances**

Temporary protection has provided rapid access to protection for the vast majority of persons who have fled Ukraine. According to UNHCR<sup>1</sup>, as of February 2023, over 8 million refugees from Ukraine were recorded across Europe, of which 4.8 million were registered for Temporary Protection or similar national protection schemes. Of that number 40%

are children. It is not possible to provide clear data on how many unaccompanied and separated children are registered for temporary protection.

However, not all children who fled Ukraine without parental care have been able to access temporary protection. In some cases, this is because of gaps in law (e.g. because the child does not fall under the scope of the TPD, for example, in some countries because they are not nationals of Ukraine or they are stateless). In other cases, it is due to a lack of support or practical barriers (e.g. there is a delay appointing a guardian that leads to a delay in registration and in accessing temporary protection). It may not be clear to some children why they should register for temporary protection and they may prefer to remain under the radar.

Children who are displaced from Ukraine may be in need of and be able to qualify for other forms of international protection (or non-harmonised national forms of protection). The kinds of non-harmonised protection statuses vary greatly across European countries. In some cases, such a status may provide a pathway for a comprehensive, secure and sustainable solution for a child.

The legal implications of accessing appropriate procedures are wide-ranging, in terms of procedural safeguards that will be put in place for a child, applicable procedures and the entitlements to which they give access.

However, there is generally not a single legal instrument which permits that the child is identified, supported and assisted as an unaccompanied or separated child to find a pathway to appropriate protection procedures. Consequently, determining the most appropriate legal pathway for a child who is unaccompanied or separated can be a very complicated exercise. This will be a particularly problematic legal situation if authorities and actors who encounter children without parental care are uncertain as to whether and how to assess their individual circumstances, provide support and assistance and provide access to protection procedures.

Child-centred case management should be put in place to reduce this challenge. Access to specialised legal assistance for these children, their guardians and families is a key safeguard in ensuring an



understanding of rights and options in order to assist with more informed pathway planning. The legal framework should ensure a best interests assessment to identify whether an internationally displaced child without parental care might have special needs or rights, including those that could give rise to a claim for another form of international protection.

### Ensuring proper processes for comprehensive, secure and sustainable solutions

The current situation of children without parental care displaced from Ukraine is largely provisional in nature and uncertain in duration. At this time, the Government of Ukraine and UN agencies advise against return to Ukraine in light of the security situation. (As noted above, however, in some cases, children are already returning or being returned, including in groups from alternative care.)

In the future, when hostilities cease and martial law comes to an end, the cessation of temporary protection will raise the question much more generally of how a comprehensive, secure and sustainable solution for a child could be identified and implemented. Another key stage for children, given the protracted nature of the conflict, is when they transition to adulthood.

Every child is entitled to decisions and safeguards which take their best interests as a primary consideration, including assessment of risks to them, and proper transfer of care and custodial responsibilities, where needed. They may need measures to support their safe, voluntary, return and reintegration, where return is indeed in their best interests.

Several international, European and national laws will be relevant to this question and their application in individual cases will need to be carefully addressed. These include provisions in the TPD and the EU Return Directive. Moreover, new procedures for alternative solutions, for the mid or longer term, should also be contemplated and may need to be developed in some circumstances, including to ensure family reunification in other countries, in line with their best interests.

The possibility of private arrangements to transfer children between countries means that it may be challenging for local guardians and child protection

authorities both in law and in practice to ensure an assessment of the situation of the children and any risks to them, as well as to put in place measures which may be needed to support them. It will be important to ensure children's views must be taken into consideration and procedures should be in place to ensure this is properly facilitated. In the absence of a process for reviewing their situation, there is a risk that the child protection services in Ukraine will also not receive sufficient information on these children to support them on their return.

Consequently, currently the available procedures are uncertain. Equally, the potential for different interpretations of the legal role that different state authorities, guardians, parents, caregivers play in decision making or support for decision making is high.

Whilst international and European laws (to varying degrees) recognise that the best interests of the child is a primary consideration in decision making, it is generally a matter for national law to provide detailed procedures for examining the best interests of the child before transfers to another country.

Consequently, there is an urgent need to support the development of transparent and comprehensive best interests procedure to inform and support decision making, as well as to support the implementation of comprehensive secure and sustainable solutions.

It will be important to ensure that a multi-disciplinary, inter-agency procedure will feed into decision making in this context. The need for multidisciplinary interagency approach arises from the fact that no one authority has the knowledge, capacity or experience to address the situation of children without parental care from Ukraine, which means that responsibilities between them should be clearly delineated.

Some situations will involve the need for *best interests assessments*. For example, where family reunification is planned by the family, a risk and vulnerability assessment should be undertaken and plans should be drawn up to support the transfer of care and custodial arrangements and provide support to the child. In contrast, some situations will involve the need for more formal *best interests determinations*, in the face of the need for a detailed review of the child's situation and complex or sensitive issues arising that may pose risk to a child.

In an ideal scenario, in more complex and sensitive cases, the best interests procedure would inform a formal decision to be taken by an *independent* body such as a juvenile court, with the possibility of a review process. This would ensure that there are no conflicts of interests that might influence decision making, including where services might take decisions that are based on competing interests, such as resource constraints in the system.

There is a need for a child-centred approach to these procedures, including child-sensitive procedures. Given the scale of the situation it will be important to find effective means to address a large caseload and specialised services that might be useful to doing so. An integrated, specialised and under one roof approach to case management might provide a model for cases where there is a need to do a detailed best interests procedure.

Indeed, the importance of (and challenges to) ensuring guardianship and legal assistance for children and their parents in Ukraine or in other countries should be given priority attention. They form an essential component of the special protection and assistance needed to achieve comprehensive, secure and sustainable solutions, in particular, in complicated cases. Once more, a child's participation and views are also important here as well as legal assistance, especially in any complex cases that may involve formal procedures.

Any best interests procedure should be rooted in appropriate and well-developed transnational cooperation, in particular to ensure collaborative

processes in relation to decision making and support for implementation. The HCCH 1996 Child Protection Convention will be helpful in some instances. Some inspiration might also be drawn from relocation procedures which have been developed in the context of voluntary relocation schemes between EU States for unaccompanied children (for example, as regards standard operating procedures for such). The Fundamental Rights Agency Guidance on Children deprived of parental care found in an EU Member State other than their own also provides inspiration for guidance in this field.

In relation to children from alternative care in Ukraine, renewed commitments by the Ukrainian government to complete its programme of care reform, including deinstitutionalisation should ultimately be reflected in any arrangements for return for the children evacuated from alternative care. The transition to family or community-based care, and meeting the special needs of every child, will require funding and training as well as support from current host countries to ensure that eventual returns occur in line with the best interests of the child, in light of their individual circumstances. Support from the EU to this effect is being provided. As a member of the CoE and also a candidate for accession to the EU, Ukraine is being assisted to reform its child protection system including by supporting, along with the UN, its care reform agenda, which involves providing integrated community-based services, preventing family separation, promoting community-based alternative care and deinstitutionalisation.

## Towards recommendations for progress

Europe responded to the crisis in Ukraine with solidarity and action. However, the situation over a year on from the escalation of hostilities looks very different. What was a humanitarian crisis response, must now acknowledge the reality of a protracted war.

This report brings into clearer focus some of the complex issues regarding children without parental care displaced from Ukraine including unaccompanied and separated children, as well as children from alternative care.

When looking across the different priority areas, the legal analysis reveals legal difficulties – and real risks to children – that underlie a continuing situation of provisional protection and crisis response. It demonstrates the need to move from an emergency response to child protection system strengthening, clear access to procedural safeguards, as well as long-term planning.

The report also underlines the ways in which State authorities and actors supporting and assisting children require greater clarity on who bears responsibilities for different aspects of the child's

situation in displacement. This requirement is heightened as the displacement becomes more protracted and the child's need for continuity and stability becomes more acute. There is an urgent need for certainty and transparency in this regard, in terms of both current care arrangements for children and as procedures for future planning for these children evolve.

Ensuring the rights of these children are fulfilled demands strengthened transnational cooperation which focuses on fulfilling the best interests of the child, in line with international and European law. The welcome opportunity to strengthen cooperation exists because of both Ukraine's active engagement to protect these displaced children and the committed European response to their situation. Priority in any cooperation must be given to the best interests of each child, taking proper account of the respective responsibilities and powers of the responding countries and Ukraine in light of the circumstances involved in each case.

The report's recommendations are provided to help States, international and regional bodies and agencies to navigate some of these challenges with a view to removing or mitigating them. The recommendations propose action either at national level or regional level, depending on where the difficulties arise, and what bodies have competence to act or a particular role to play. The recommendations aim to connect with and serve ongoing initiatives at international and regional level which are focussed on protecting children displaced from Ukraine. These include in particular the EU Solidarity Platform and the newly established Council of Europe Consultation Group on Children of Ukraine. These initiatives are under constant development. The recommendations address the challenges that exist at the time of publication and acknowledge that the situation remains volatile.



## Chapter 1.

# Introduction to the Report

## 1.1 Background and rationale

In February 2022, the Russian war on Ukraine has triggered Europe's largest refugee crisis since World War II, with millions of persons fleeing Ukraine seeking international protection in responding countries.

An acutely vulnerable part of this displaced population are refugee children without parental care. These include children who arrive or become unaccompanied outside of Ukraine, children who may be accompanied by adults who are not their parents and children evacuated from alternative care settings in Ukraine.

States in Europe responded to the war by ensuring open borders with Ukraine and applying new temporary protection mechanisms, including through the EU triggering the application of the EU Temporary Protection Directive (TPD) for the first time. Ukrainian authorities also began discussions with EU, Council of Europe and national authorities as well as UN agencies in relation to the protection of these children.

A Discussion Paper was prepared by Eurochild, Child Circle and UNICEF<sup>2</sup> in May 2022 on guardianship, caregiving arrangements and custodial responsibility as vital safeguards which must be assured throughout the child's presence in the responding country. While the activation of temporary protection enabled many children to access immediate protection, the Paper underlined the need to ensure these children benefit from important procedural safeguards for children without parental care, including guardianship. The Discussion Paper also addressed access to the forms of international protection appropriate to their particular circumstances (for example, as trafficked or stateless persons). The importance of proper procedures to inform, decide on, or support implementation of comprehensive, sustainable and secure solutions in the future was recognised. Special procedural safeguards for children evacuated from

alternative care from Ukraine were also identified as a key concern.

The Discussion Paper illustrated legal complexities and uncertainties that are likely to generate challenges to fulfilling the rights of children in key areas. It became clear that difficult legal questions were faced by children, accompanying adults and caregivers, national stakeholders, authorities and local guardians as well as legal and judicial authorities in proceedings concerning children without parental care displaced from Ukraine.

The Discussion Paper also took note of the significant potential for new international and European action to address these challenges.

### The Legal Report

In follow up on this initial analysis, UNICEF partnered with Child Circle to:

- ▶ Undertake a **comprehensive analysis of the legal challenges arising out of the relevant international and regional laws and procedures relating to particular issues of concern as regards** children without parental care displaced from Ukraine, including children evacuated from alternative care settings in Ukraine
- ▶ Develop **regional recommendations and guidance for progress for** key stakeholders on issues currently raising concerns for regional and national policy makers, practitioners, and other stakeholders

### Scope

The Legal Report focuses on children without parental care displaced from Ukraine. This includes children presently unaccompanied or separated from their

parents or primary caregivers and children evacuated from alternative care settings.

The Report focuses on four priority areas and the challenges and questions that arise from the interplay of a range of different applicable international, European and national laws. It looks at:

- ▶ Addressing legal responsibility for children in establishing, recognising or monitoring custodial and caregiving arrangements as well as support and assistance arrangements, including guardianship
- ▶ Ensuring that displaced children from Ukraine

are protected from violence, abuse, neglect and exploitation while in responding States, in particular through the application of national child protection laws, with a particular focus on children from alternative care

- ▶ Ensuring access to the international protection which is appropriate to the individual circumstances of the child.
- ▶ Ensuring comprehensive, secure and sustainable solutions through best interests procedures, supported by transnational cooperation.

## 1.2 The Legal Report – purpose, audiences and potential for impact

The Legal Report is unique in its review of international and regional law across the fields of child rights, immigration, international protection, family law and child protection law. It aims to forge essential connections between the different legal settings and actors involved in responding to the situation of children without parental care displaced from Ukraine. It should serve as an important resource and a contribution to the activities of other regional stakeholders, to ensure complementarity of efforts.

In particular, the intended impact of the Legal Report is to:

- ▶ Support policy makers and authorities to identify and address the complexities, uncertainties and gaps in ensuring these children benefit from the key procedural safeguards to which they are entitled.
- ▶ Support regional policy makers and professionals working with children through the provision of regional recommendations and guidance which will

help them to assist, support and protect children as well as finding comprehensive secure and sustainable solutions for them.

- ▶ Support UNICEF's national review and engagement at national level in nine countries welcoming children without parental care displaced from Ukraine.

The Report is accompanied by a Compendium of Law and Guidance, which underpins the legal analysis and its recommendations. It provides a detailed overview of relevant laws and guidance emanating from international and European bodies that are relevant to the protection of children without parental care who are displaced from Ukraine. It also indicates authoritative guidance on the legal framework that can inform recommendations for progress, as well as existing international and European laws, policies and strategies that could stimulate action to strengthen safeguards for children. It can assist policy makers and practitioners alike as a legal reference point.

## 1.3 Methodology

The methodology for this report was legal research, by means of desk research, literature review and consultations with experts. Using a child-centered lens, a review and analysis of the application of relevant international and regional legal instruments was completed. It looked at international child rights law, international protection and anti-trafficking laws at UN, COE and EU level, the HCCH 1996 Child

Protection Convention, and other relevant laws and guidance. The main relevant instruments studied are referenced in Chapter 2. As part of the report, Ukrainian law and policy relevant to the four priority areas was examined. This allows an understanding of the situations children have come from in Ukraine (such as children in alternative care) and will be of benefit to many stakeholders who remain unclear

about the form of guardianship adults accompanying children from Ukraine may have.

A Reference Group accompanied the research and consultations and was composed of key international and European bodies, agencies and networks actively engaged in the priority areas, including the European Commission, UNHCR, the Council of Europe, the Permanent Bureau of the Hague Conference on Private International Law, EU agencies (EU Fundamental Rights Agency and the EU Agency for Asylum), the European Guardianship Network, Eurochild and KIND Europe.

In order to better understand the provisions and application of the law, the research team carried out bilateral conversations with relevant legal experts and professionals, both within the Reference Group as

well as external experts. Bilateral discussions with a Ukrainian NGO gave an in-depth understanding of the situation on the ground.

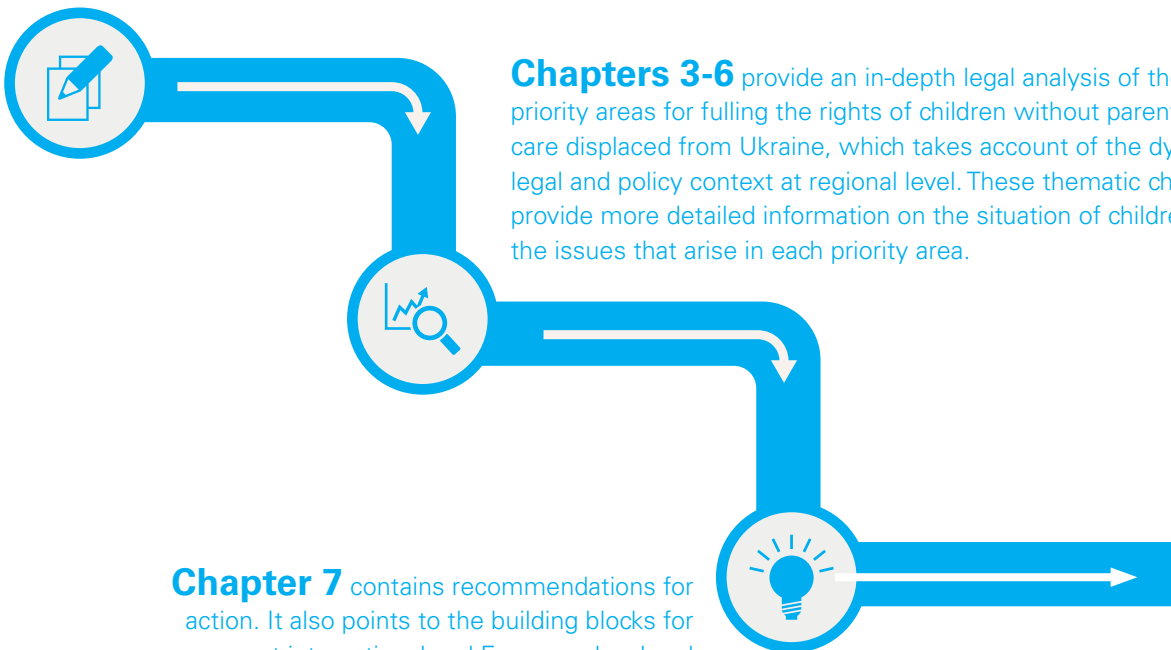
Regional thematic consultations were held throughout March and April 2023 on the priority areas to explore legal challenges as well as recommendations. A wide range of specialist stakeholders participated in the three thematic consultations and bilateral discussions, which were organised. The Reference Group and Thematic Consultations offered an important opportunity to exchange knowledge, expertise and experience across different organisations including specialised NGOs dealing with legal assistance, disabilities, missing children, statelessness, Roma rights, anti-trafficking, refugee rights and alternative care.

## 1.4 Structure of the Legal Report

**Chapter 2** of the Legal Report provides a general analysis of legal challenges which may arise. In particular, it analyses typical challenges that may arise from gaps or uncertainties in these laws (or from their application) to all children in international migration, including children who have been displaced. It notes how these challenges manifest themselves in the specific context of displacement from Ukraine.

**Chapters 3-6** provide an in-depth legal analysis of the priority areas for fulfilling the rights of children without parental care displaced from Ukraine, which takes account of the dynamic legal and policy context at regional level. These thematic chapters provide more detailed information on the situation of children and the issues that arise in each priority area.

**Chapter 7** contains recommendations for action. It also points to the building blocks for progress at international and European level and opportunities for progress.







## Chapter 2.

# International and European legal framework and legal challenges

This chapter introduces the general international and European legal framework and provides essential background to the legal analysis. It is underpinned by the accompanying Compendium of Law and Guidance. As a starting point to the in-depth analysis of priority areas, it also describes the broad legal challenges that arise from the application of the legal framework to children displaced from Ukraine without parental care.

## 2.1 Overview of the international and European legal framework

### 2.1.1 The UN Convention on the Rights of the Child

The rights of displaced children from Ukraine are anchored in the UNCRC and its three optional protocols. Ukraine has ratified these instruments, as have many countries to which children have fled or been evacuated.<sup>3</sup>

#### Key rights of children without parental care in the context of international displacement

- ▶ States shall respect and ensure the rights of each child within their jurisdiction. (Article 2)
- ▶ Children who are temporarily or permanently deprived of their family environment are entitled to special protection and assistance. (Article 20)
- ▶ In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention. (Article 22)
- ▶ States shall protect the child from all forms of violence, abuse, neglect or exploitation. (Article 19.1) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement. (Article 19.2)
- ▶ States shall take appropriate measures to ensure children who are refugees or seek refugee status receive appropriate protection and humanitarian assistance. (Article 22)
- ▶ States shall take the measures necessary to trace family (Article 22) and address applications for family reunification in a positive humane and expeditious way. (Article 10)
- ▶ States shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of their rights. (Article 5)
- ▶ Many other general rights in the UNCRC have a direct bearing on the situation of displaced children, in particular:
  - Non-discrimination: without discrimination of any kind, irrespective of the child's or his or her

parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. (Article 2)

- Right to life, survival and development (Article 6)
- The best interests should be a primary consideration (Article 3)
- Right of a child who is capable of forming his or her own views the right to express those views

freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12)

The extensive guidance from the UN Committee on the Rights of the Child ('UN Committee') on how these rights should be fulfilled, as well as guidance from regional bodies like the EU and the Council of Europe, UN and EU agencies, is noted in the Compendium of Law and Guidance.

### Focus on the best interests of the child

The principle of the best interests of the child within the meaning of Article 3 of the UN CRC: Article 3 places an obligation on the public and the private spheres, courts of law, administrative authorities and legislative bodies to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children. The purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the CRC, and the holistic development of the child.

General Comment no 14 describes the best interests principle as a threefold concept:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3(1) creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

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

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases. (UNCRC UN Committee on the Rights of the Child General Comment No 14).

The UN Committee on the Rights of the Child further describes its content and scope of application, in General Comment no. 14 for all children, and in Joint General Comment no. 22 specifically for children in the context of international migration. The Committee also refers to "best interests-assessments" and "best interests determinations." The term "best interests procedure" has been used to describe all procedures to examine the best interests of the child, and the necessary components of said procedure.

### 2.1.2 The wider international and European legal landscape

Key sources of relevant international and European laws include the UN, the Council of Europe and the European Union. Alongside the UNCRC, the international and European legal framework contains a wide range of instruments which are central to

fulfilling the rights of displaced children without parental care, in particular those laws relating to international protection. The 1951 UN Refugee Convention and its 1967 Protocol are leading instruments in the field. The Compendium of Law and Guidance provides an important overview of these laws, the key instruments being listed in the table below.

	Asylum & Migration	General Human Rights	Family law /Child protection
<b>UN</b>	<ul style="list-style-type: none"> <li>▪ UN Refugee Convention</li> <li>▪ 1967 Protocol relating to the Status of Refugees</li> <li>▪ Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime</li> <li>▪ 1954 Convention Relating to the Status of Stateless Persons</li> <li>▪ 1961 Convention on the Reduction of Statelessness</li> </ul>	<ul style="list-style-type: none"> <li>▪ UN Convention on the Rights of the Child + Optional Protocol on the sale of children, child prostitution and child pornography + Optional Protocol on the involvement of children in armed conflict + Optional Protocol on a communications procedure.</li> <li>▪ Universal Declaration of Human Rights</li> <li>▪ International Covenant on Civil and Political Rights</li> <li>▪ UN Convention on Disabilities + Optional Protocol</li> <li>▪ International Convention on the elimination of all forms of racial discrimination</li> </ul>	<ul style="list-style-type: none"> <li>▪ UN Convention on the rights of the child</li> </ul>
<b>Hague Conventions</b>			<ul style="list-style-type: none"> <li>▪ HCCH 1996 Child Protection Convention</li> <li>▪ Hague Conventions on the civil aspects of international child abduction</li> </ul>
<b>Other international conventions</b>		<ul style="list-style-type: none"> <li>▪ Vienna Consular Convention</li> <li>▪ Vienna Convention on the Status of Treaties</li> </ul>	

	Asylum & Migration	General Human Rights	Family law /Child protection
<b>Council of Europe</b>	<ul style="list-style-type: none"> <li>▪ Convention on Action against Trafficking in Human Beings</li> <li>▪ Convention on the Avoidance of Statelessness in relation to State Succession</li> </ul>	<ul style="list-style-type: none"> <li>▪ European Convention on Human Rights</li> <li>▪ European Social Charter</li> <li>▪ European Convention on Nationality</li> <li>▪ Framework Convention for the Protection of National Minorities</li> <li>▪ Istanbul Convention (Convention on preventing and combating violence against women and domestic violence)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Convention on the Exercise of Children's Rights</li> <li>▪ Lanzarote Convention (Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse)</li> </ul>
<b>European Union</b>	<ul style="list-style-type: none"> <li>▪ EU Temporary Protection Directive</li> <li>▪ Dublin Regulation and the Dublin Implementing Regulation</li> <li>▪ EU Reception Conditions Directive</li> <li>▪ EU Asylum Qualification Directive</li> <li>▪ EU Asylum Procedures Directive</li> <li>▪ EU Return Directive</li> <li>▪ EU Anti-Trafficking Directive</li> </ul>	<ul style="list-style-type: none"> <li>▪ EU Charter of Fundamental Rights</li> <li>▪ The Treaty on the Functioning of the European Union</li> <li>▪ Victims' Rights Directive</li> </ul>	<ul style="list-style-type: none"> <li>▪ EU Brussels II B Recast Regulation</li> <li>▪ Child Sexual Abuse Directive</li> </ul>

To varying degrees, the international and European instruments include provisions relevant to fulfilling key procedural rights for children. Areas where there are differences in the scope of provisions are revealed in a comparative overview of their content in different instruments, see further the table in page 15 of the Compendium of Law and Guidance.

More generally, given that the obligations at international and European law level are frequently general in nature, questions on their proper application in relation to specific issues may arise. Moreover, national laws may differ in the form they take when applying these general obligations,<sup>4</sup> or when implementing these obligations in line with the discretion that they have to choose the form and

method to do so. This is illustrated in chapters 3-6, in which different possibilities for the implementation of international and European laws at national level are described. Such differences provide opportunities to exchange on national procedures and transfer good practice between countries. However, these differences can also generate legal uncertainties in cross border cases. In such cases, authorities and stakeholders may not have a sufficient understanding of how procedures in other countries function and the roles and responsibilities of different actors under national laws.

Recent judgments<sup>5</sup> from the Court of Justice of the European Union and the European Court of Human Rights assist in the interpretation of these

international and European legal instruments in line with the CRC, the European Convention of Human Rights and in a way that respects Article 24 of the EU Charter of Fundamental Rights. The European Handbook<sup>6</sup> on Child Rights contain useful references to this jurisprudence. These include cases concerning children in international migration, in particular those examining the application of the best interests principle.

### 2.1.3 Bodies of law of particular relevance to displaced children

As has been seen in the table above, there are several bodies of law that are relevant to fulfil the obligations concerning the protection of children without parental care displaced from Ukraine.

Many *general human rights laws, including children's rights laws*, developed at international and regional level, include measures which address the protection needs and rights of particular children, such as children with disabilities and measures that address non-discrimination and the rights of children who may suffer from racism and discrimination. They include measures concerning access to justice and participation in legal proceedings.

*Asylum (international protection) and migration instruments* concern the exercise by States of their power in relation to entry and residence. They include instruments providing for international protection and temporary protection as well as statelessness determination procedure and residence permit procedures for trafficked persons. Many such measures derive from international or European instruments and in particular the 1951 UN Refugee Convention and its 1967 Protocol.

These international and European instruments, to different degrees, include provisions to ensure appropriate reception and assistance which address the situation of a child (such as provisions to ensure family members are kept together or are reunited) and their welfare and protection needs.

*Family law instruments* will also be of particular relevance to issues involving family relationships, including parental and legal responsibility and custodial arrangements put in place in countries of origin. *Child welfare measures* address the physical, social and psychological well-being of children.

*Child protection laws* set out provisions concerning preventing and responding to violence, abuse, neglect and exploitation. While the UNCRC articulates general obligations in relation to child protection, and there are some international and European legal instruments which deal with specific kinds of abuse (such as the Council of Europe Lanzarote Convention and the EU Sexual Abuse Directive), there is no international or EU legal instrument that deals *comprehensively* with how States should fulfil this general obligation to prevent and respond to violence and harm to children within their jurisdictions. Preventing and responding to general risks of abuse, exploitation, neglect and violence to internationally displaced children in the responding country are largely governed by national laws.

### Cross border cases – private international law mechanisms

Where a person or issue may be the subject of the laws of different countries in cross border cases, there is a risk of conflict of these different national laws. There exist *international private law instruments* to resolve conflicts in particular areas of the law. Most relevant to the current situation (because Ukraine and most responding countries have ratified it) is the HCCH 1996 Child Protection Convention.

In EU Member States, the HCCH 1996 Child Protection Convention will be applicable to all children who do not have habitual residence in the EU. Equally, within the EU, a similar instrument exists in relation to cross border matters within the EU, namely, Council Regulation 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), repealing Regulation (EC) No 2201/2003 (Brussels IIB). Brussels IIB will apply to children who are habitually resident in an EU Member State. Of note is that Brussels IIB does not include rules on applicable law. Instead, EU Member States rely, amongst themselves, on the HCCH 1996 Child Protection Convention rules on applicable law which are of a universal character. Whereas the HCCH 1996 Child Protection Convention deals in particular with parental responsibility and measures of child protection, it is important to note that the 1996 Convention does not deal with decisions on the right of asylum and on immigration.

Bilateral agreements between States also set out provisions which govern relations between them. It is necessary to ensure these agreements are compatible with other international instruments which State parties have ratified. Several responding

countries and Ukraine have bilateral agreements in place that may shape the responsibilities that each country will exercise and how they will cooperate on particular issues.

## Data Protection in the EU

Data of children without parental care will be subject to general data privacy obligations.

The EU Charter of Fundamental Rights stipulates that everyone has the right to protection of their personal data. Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data contains general rules which protect individuals when their data is being processed by the private sector and most of the public sector, the processing of data for law-enforcement purposes being subject to Directive 2016/680.

Directive (EU) 2016/680 on the protection of natural persons regarding processing of personal data connected with criminal offences or the execution of criminal penalties, and on the free movement of such data. This Directive will ensure that the personal data of victims, witnesses, and suspects of crime are duly protected and will facilitate cross-border cooperation in the fight against crime and terrorism.

The Eurodac database contains the fingerprints of all asylum applicants and migrants apprehended in connection with an irregular border crossing. When their fingerprints are taken, persons have the right to understand who is processing their personal data and why. They have the right to know what data are stored and for how long. They should know how to access it, correct and erase their data, in case of mistakes and whom to contact for these purposes.

## 2.2 Broad legal challenges to fulfilling the rights of children without parental care

The complex interplay of international, European and national laws, and different bodies of laws, give rise to broad challenges that arise when applying the legal framework to fulfilling the rights of children without parental care from other countries.

Some of these challenges have been exacerbated as a result of the novel features in the situation of children who have fled from, or been evacuated from, Ukraine. Equally, some new legal questions are being posed. The existence of these significant challenges has been confirmed by stakeholders working in the field<sup>7</sup> and are evidenced by the reports of cases with which the authorities are grappling.<sup>8</sup>

### Absence of a comprehensive legal approach to providing children with international protection

As has been described, several international and European legal instruments govern international protection. These include laws concerning temporary protection, asylum, subsidiary protection, protection for trafficked persons and protection for stateless persons. Determining the most appropriate legal pathway for a child who is unaccompanied or separated, can be a complicated exercise and can require legal assistance.

There is rarely a single legal instrument, setting out clear and uniform procedures and safeguards, which permit that the child is identified, supported and assisted as an unaccompanied or separated child. Instead, the procedures for such identification and entitlement to support, assistance and protection

(including guardianship) may differ considerably, depending on the specific laws under which the child falls, in line with their immigration status. This is a particularly problematic legal situation if it leaves authorities and actors who encounter children without parental care uncertain as to how to assess their situation, provide support and assistance and provide access to protection procedures.

### The application of both international child protection and child protection obligations

The UNCRC, UN Refugee Convention and EU laws on international protection, including the EU Asylum Reception, Procedures and Qualification Directives and the Temporary Protection Directive, respond to the need for international protection, namely the international law aimed at protecting the fundamental rights of persons outside their countries of origin, who lack the national protection of their own countries, including in situations of war.

“The need for **international protection** arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution, threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or different situations of violence. Other risks may stem from: famine linked to situations of armed conflict; natural or man-made disasters; as well as being stateless. Frequently, these elements are interlinked and are manifested in forced displacement.”

– UNHCR, “[Persons in need of international protection](#),” June 2017

The UNCRC provides the general obligation that all children within the jurisdiction of a State (including internationally displaced children) should be protected by the State from abuse, exploitation, neglect and violence (collectively referred to as violence hereafter) while within that State’s jurisdiction. (Article 19) As set out in extensive guidance by the UN CRC<sup>9</sup>, this obligation translates into requirements to both prevent and respond to violence against children.

Article 19(1). States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 19(2). Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Children without parental care outside of their country of origin have an acute need for both international and child protection, given the precarity of their situation and the risks that they face.

There is sometimes an overlap (and sometimes gaps) between the provisions providing protection, assistance and procedural safeguards to children under international protection and child protection instruments respectively. This can generate a need for clarity on the responsibilities and procedures which apply to a particular child in their individual situations and in relation to specific issues. Otherwise, there is a risk that children can fall between the gaps in these laws. It underscores the need for a coordinated approach between different proceedings involving the child.

Regional bodies and UN agencies have emphasised the need for integrated child protection systems to be developed to ensure that these obligations are fulfilled. The European Commission defined an integrated child protection system as “the way in which all duty-bearers (namely the state authorities represented by law enforcement, judicial authorities, immigration authorities, social services, child protection agencies, etc.) and system components (e.g. laws, policies, resources, procedures, processes, sub-systems) work together across sectors and agencies sharing responsibilities to form a protective and empowering environment for all children.” (2015)

Preventing and responding to violence against children is a key priority of the European Union Strategy on the Rights of the Child 2021 – 2024. The Commission committed to an initiative aimed at supporting the development and strengthening of integrated child protection systems, which will encourage all relevant authorities and services to better work together in a system that puts the child at the centre. This initiative is currently in progress.

The Fundamental Rights Agency is currently updating its mapping of child protection systems in the EU which was undertaken in 2013 – 2014 and found that national legislative and policy frameworks were a key component of any child protection system.<sup>10</sup> It also found that fragmentation of, and limitations to, national frameworks may exclude certain groups of children from accessing some rights and receiving adequate and quality services.

The Council of Europe’s Strategy for the Rights of the Child (2022-2027) recognised a need to support Member States in building strong child protection systems able to adjust to a crisis. The prevention of violence is also a pillar of the current Strategy for the Rights of the Child and has always been a core priority for the Council of Europe, which is committed to continue promoting a policy of zero tolerance for violence against children in its member States. An important resource in this regard is the Council of Europe Policy Guidelines on Integrated National Strategies for the Protection of Children from Violence. The Council of Europe has also undertaken extensive work on protecting children without parental care and/or living in alternative care and promoting deinstitutionalisation.<sup>11</sup>

### Intersection of family law and immigration law

Equally, at certain points in time, procedures on care and custodial responsibilities, or procedures for the transfer of a child between countries, may be primarily addressed through family law, rather than immigration law. In relation to other children, the applicable decision-making procedures on such matters may be set out in asylum and migration instruments. Careful consideration will need to be given to which procedures and actors are involved in decision making on aspects of a child’s life.

Agencies and practitioners working with children will typically be familiar with the application of some of these laws but not others. Moreover, understanding how these different laws apply is often problematic because of terminology issues. This includes the fact that the same terms (such as “guardian”) may be used differently in different legal settings. In some cases, relevant terms are not fully defined in

laws, which can lead to further uncertainty in their application. For example, the terms “guardian” or “representative” are not defined in the Asylum Qualification Directive or the Return Directive). Challenges may also arise from the simultaneous application of relevant bodies of laws.

Moreover, in some cases, family law, and international protection proceedings may apply in parallel. In such cases, there can be a danger of contradictory decisions in different courts and children providing evidence which is different and therefore seen to be unreliable – family courts/migration courts may be less familiar with the law applied in the other court.



### Frequent absence of tailored mechanisms in national child protection systems to address the situation of children from other countries

Whereas national child protection laws should apply to all children within a country's jurisdiction, in some instances, they lack the specific procedures necessary to respond to the needs of particular groups, including children from other countries without parental care.

Individual assessment processes, tailored to specific needs and taking into account the fact that children are outside of their country of origin, without parental

care, are a necessary starting point. However, child protection services are not always familiar with the needs and rights that arise for these children, and they do not always have necessary knowledge of procedures that may be applicable to their situation.

The importance of taking an integrated child protection system approach, involving multidisciplinary inter-agency approaches, centred around the circumstances and needs of the child, is discussed throughout the Legal Report. As noted above, this is an approach promoted by the UN, Council of Europe and EU; however, it remains an approach that needs to be understood and applied more widely.

## 2.3 Novel features of the context of children from Ukraine

Focusing on each of the priority areas in depth in the chapters which follow, the legal analysis reviews how these general challenges are impacted by novel features of the context of children from Ukraine.

In considering responsibility, support and assistance arrangements, including guardianship, the analysis examines, in particular, the impact of the ease of movement from Ukraine into and within Europe, because of open borders and visa liberalization rules in the EU as well as the contact which some children may maintain with parents and the effect of pendular movements in light of this greater freedom of movement. It takes note of the situation of the large body of children separated from parents but accompanied by adults who may have some form of responsibility for them, and reviews the application of HCCH 1996 Child Protection Convention to give effect to this responsibility, given that the Ukraine and most responding countries are parties to the Convention. It also considers the need for complementary forms of guardianship and oversight in responding countries, as well as the need to ensure cooperation between the different adults and authorities concerned with the situation of the child.

In considering protection from violence, abuse, neglect and exploitation, the legal report examines in particular the situation of children evacuated from alternative care in Ukraine. There are no specific provisions relating to children in this situation in the TPD. It addresses the need for authorities in responding countries to have a better understanding of alternative care arrangements and laws in Ukraine

affecting these children. It also considers the manner in which authorities in responding countries recognize and give effect to Ukrainian measures of responsibility and child protection, whilst exercising jurisdiction to undertake any necessary child protection measures concerning the children in their jurisdiction. The challenge of avoiding tensions between the respective responsibilities and further to develop cooperation between Ukrainian guardians and authorities and authorities in responding countries is also examined.

In considering whether children are accessing the appropriate international protection for their circumstances, the legal analysis considers the scope and effect of temporary protection and the possibility for children concurrently or alternatively to access forms of international protection that are appropriate to their individual circumstances. It identifies the ways in which this question can impact the safeguards and procedures available to children. It underlines the need for information, support and assistance to children, including legal assistance, at different points of time. The issue of legal assistance may indeed sometimes be overlooked on the assumption that the children have automatic access to adequate protection under temporary protection instruments.

In considering the issues encountered in moving from provisional arrangements to future planning, the legal report reflects on the need to look ahead and put in place any necessary measures that might be needed to ensure comprehensive, secure and sustainable solutions, in line with their best interests are available. It highlights the risks, in a displacement

situation, that there will be an insufficient focus on ensuring that the best interests of the child are made a primary consideration, and that their views are heard, including on whether, when and how any return arrangements are put in place for them. In particular it analyses the uncertainties concerning the availability of safeguards for children and the need to develop best interests procedures.

Across the priority areas, the report considers what forms of cooperation with Ukrainian authorities are available, appropriate and can be further developed. Children are not fleeing from persecution or from risks posed to them by the Ukrainian authorities but are rather fleeing an escalating conflict. Ukraine is actively involved in seeking to ensure safe evacuation and temporary protection of these children as well as their eventual sustainable return to Ukraine, after the end of the war. Ukraine enacted new rules on border crossing as well as a rule on consular notifications being made by Ukrainians travelling with children in responding countries. It has entered into bilateral arrangements with some countries concerning the reception of groups of children evacuated from alternative care. This presents many opportunities for progress, which do not typically exist when addressing the situation of children in international migration.

Support for transnational cooperation within the EU is provided by the EU Solidarity Platform which brings together the European Commission, Council Secretariat, the European External Action Service, EU Member States and Schengen Associated Countries, EU Agencies, and international organisations, such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), as well as Ukrainian and Moldovan authorities.

The role of The Solidarity Platform is to monitor the needs identified in EU countries and coordinate an operational response.

The European Commission notes that the Solidarity Platform also engages regularly with Ukrainian authorities to assess the needs and address potential challenges experienced by Ukrainian citizens in the EU. In addition, the Platform activities may involve the Ukrainian embassies and consulates in the EU Member States. Of note, the European Commission's Communication on the implementation of the Temporary Protection Directive: One Year On,<sup>12</sup> indicates that "Inside the EU, the Solidarity Platform will support the coordination of the transfer of unaccompanied children to family and community-based care as needed".

Following the Reykjavik Declaration of the Council of Europe in May 2023<sup>13</sup>, the Council of Europe initiated the organisation of a Consultation Group on Children of Ukraine (CGU) to facilitate the exchange of information and discussions on policies regarding Ukrainian children residing in other Council of Europe (COE) Member States. The CGU will be a venue for the Member States and other relevant stakeholders to engage in dialogue about the challenges they encounter and if possible, to develop solutions, as well as to learn about pertinent initiatives and actions.<sup>14</sup>



## Chapter 3.

# Responsibility, Support and Assistance Arrangements, including Guardianship for Unaccompanied and Separated Children

Where a child is without parental care, their access to procedures and entitlements in host countries often depends on the involvement of adults who provide them with support and assistance or who can exercise legal capacity for them, if the law so requires. This supporting adult should be appointed at the earliest possible moment and will remain an important source of support and assistance for the child throughout their displacement, when plans for their future are decided upon and implemented, including to ensure they have child friendly information, that their voices are heard and that they are supported, wherever their future lies.

**This chapter examines this question in relation to unaccompanied and separated children from Ukraine. The specific situation of children who arrive in groups from alternative care settings such as institutional care or foster families are explored in chapter 4.**

## 3.1 Background Introduction

A first opportunity for identifying whether a child is travelling alone arises when the child crosses the border or arrives at specific ports of entry, such as bus stations, train stations and airports.

Equally, if a child accompanied by an adult other than their parents, the child (and the accompanying adult where relevant) typically will be referred to child protection bodies or guardianship services for an assessment. In some countries, child protection actors are present at the border to facilitate this.

The initial scale and speed of arrivals of children from Ukraine meant that any normal child protection procedures available for the process of identification of a child as unaccompanied or separated from their parents or screening for risk (and referral to child protection services) were difficult to apply.

Children travelling entirely alone can be referred by border guards to specialised reception or child protection agencies. Unlike in other mass inflows, many children had valid identification documents, and age assessment did not typically pose a problem for authorities. However, referrals did not systematically happen at all borders, given the scale of arrivals. It is not clear how many children arrived entirely alone.

Registration of people crossing the border from Ukraine took place for the purpose of the application of the TPD, given that the TPD applies in this instance only to those who crossed the border after February 24, 2022.

Once children had moved on from the border, in particular where they were travelling with an accompanying adult, the opportunity to assess their situation did not inevitably arise again or proved difficult to achieve in practice.

Some children may have remained under the radar, in the sense that they were never registered for TPD and they may not have registered in the national system for civil law purposes (for example registering as a resident with municipal authorities). Moreover, unlike other international protection instruments, the TPD does not contain provisions requiring assessments of special needs of vulnerable applicants or beneficiaries to be undertaken. An EU requirement to undertake such assessments might have assisted in ensuring that children were identified as unaccompanied or separated, after they were registered as beneficiaries of temporary protection.

Given that Ukrainian nationals benefit from the freedom to cross borders within Europe, some children moved on from the borders into other countries, without further formal follow up.

The Temporary Protection Platform (TPP), to which all Member States have access, was set up for the

purposes of allowing the Member States to identify cases of double registration (i.e., registration for temporary protection in more than one Member State). As such, the TPP was not conceived and designed explicitly for sharing registration and identification information for the purposes of child protection. However, the Commission has recommended to the Member States to register in the TPP the identity of the adults accompanying 'separated' children who arrive from Ukraine – meaning family members or adults who were formally or informally authorised by the parents to temporarily care for the child in the EU as well as established Ukrainian guardians. By registering such information, the authorities of the Member States who have access to the TPP would also be able to identify certain anomalies – such as cases where the accompanying adult changes from one Member State to another – and make the necessary verifications, to make sure that the child is safe. At present, not all Member States follow this recommendation of the Commission.

### Legal questions raised

Authorities and stakeholders working with children continue to be confronted with challenging legal questions.

- ▶ How best to identify a child on their territory who is unaccompanied or separated?
- ▶ Who exercised parental responsibility for these children in Ukraine before their evacuation or flight?
- ▶ If an adult is accompanying them, what responsibility does that adult have under Ukrainian law? For example, do they have permission from the parent or adult or institution legally responsible for them in Ukraine to travel with the child? Have they received the responsibility for day-to-day care? Have they received legal responsibility for the child in relation to specific decisions or more generally, and for what time period?
- ▶ How may this be recognized by the responding country? Which authority recognizes the relationship, on which legal basis and what kind of documentation may be necessary?
- ▶ When does a person/authority in the responding country need to be vested with legal responsibility for a child and for what purpose?
- ▶ Do the children need to be appointed a guardian from the responding country *to ensure support and assistance to the child in specific legal proceedings, informed by local knowledge*, in particular access to protection and ultimately as regards finding a comprehensive secure and sustainable solution?
- ▶ Are complementary forms of support and assistance in place in the responding State for certain purposes, including through the support of guardianship services to inform, support and assist a child, and/or potentially to support the accompanying person acting as a custodian or caregiver for a child deprived of parental care?
- ▶ Where children have several persons exercising some form of powers and responsibilities, or supporting and assisting them, who is responsible for what, and in what ways do they need to coordinate?
- ▶ Are custodial and caregiving, and assistance and support, arrangements being monitored over time (in terms of their purpose and whether the best interests of the child are still being fulfilled)?

- ▶ Can custodial and care, and assistance and support, arrangements be adjusted if changes occur in the individual circumstances of the child, their family, the guardian/custodian or caregiver in Europe or in light of changes in the situation of Ukraine?
- ▶ What forms of support and assistance including guardianship for the children will be available when finding comprehensive, secure and sustainable solutions?
- ▶ How is the child consulted on the arrangements? Does the child have a say in validating an arrangement? Can a complaint lead to a change in guardianship or care arrangement? How?
- ▶ What new questions confront guardians in light of the novel circumstances of the situation in Ukraine, e.g. whether a child may return to Ukraine during school holiday periods and who takes this decision?

## 3.2 The legal framework in responding countries for identifying children without parental care and providing support and assistance to them

The obligation to provide special protection and assistance to a child without parental care under Article 20(1) of the CRC often arises from national child welfare and child protection laws. National family law also usually addresses particular aspects of the child's private life, including the responsibility exercised by parents as regards care and custody of children. Where a child is *from another country*, international protection and immigration instruments typically will also apply to their situation and provide specific procedural safeguards for unaccompanied and separated children. **This chapter focuses largely on the latter safeguards.**

As described in chapter 2, international protection and immigration instruments either apply on their own or alongside the national child welfare and child protection laws. In some countries, the applicable procedures and entitlements of an unaccompanied and separated child to special protection and assistance are provided *primarily* under the laws concerning international protection and migration procedures. In other countries, regardless of their immigration status, children will also (and sometimes primarily) access rights and entitlements directly under national child welfare, health and education laws during their stay in a country.

Where a child from another country is viewed as unaccompanied (see below), EU laws concerning immigration and international protection procedures typically provide for the provision of support and assistance to the child, in large part through the appointment of a guardian.

### 3.2.1 Identifying a child as unaccompanied or separated under the laws of responding States

Unaccompanied children outside their country of origin or habitual residence are defined in CRC Committee General Comment 6 as *children [...] who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.* (paragraph 7)

The same General Comment defines *separated children as children [...] who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.* (Paragraph 8)

Typically, EU international protection and immigration instruments contain a definition of an unaccompanied child which relates to whether they are accompanied by an adult who is "*responsible*" for them, whether by law or practice of the Member State concerned; it does not refer to parents or relatives specifically. They do not contain a distinct definition of separated child.

“a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;”

– Art. 2(e) Reception Conditions Directive; Art. 2(j) Dublin Regulation; Art. 2(f) Family Reunification Directive; Art. 2(e) Asylum Procedures Directive; Art. 2(f) Temporary Protection Directive; Art. 2(l) Asylum Qualification Directive

It is clear from this definition that the question of responsibility, support and assistance will be triggered not only upon the child’s arrival from Ukraine or identification but should be considered periodically thereafter in line with changes to the circumstances of the child and the overall situation.

However, EU laws do not explicitly define the *scope* of responsibility relevant to this question nor do they regulate the *procedural steps* by which such responsibility is established. These issues are a matter of national law, as described further below.

### 3.2.2 Children arriving alone or in the company of an adult who does not bear responsibility for them

In cases where these EU laws apply, children arriving alone (or not in the company of adults who bear responsibility for him or her whether by law or by the practice of the Member State concerned) should be assessed to be unaccompanied (see box above).

It appears that, in some situations, children from Ukraine who were travelling alone were not treated as unaccompanied, due to the fact that they remained in contact with their parents.

However, identifying a child to be unaccompanied – even where they have a parent in another jurisdiction – is clearly anticipated by the definitions in EU international protection law and international guidance. The child is unaccompanied *in the responding country* and needs local support and assistance there precisely because the parent is absent from the child’s daily life and will lack knowledge of the systems in the responding country. Despite their access to

temporary protection, the situations of these children remain very uncertain in the responding country and they need help to navigate local procedures in which they are or may become involved. A guardian may need to be appointed locally by the responding State (a “locally appointed guardian”), in line with its legal obligations to unaccompanied children under immigration and international protection laws.

This does not mean that parents located in other countries do not exercise any form of parental authority for them. Indeed, in this context, this regular contact may also facilitate their parents’ contact with local guardians in responding countries and their involvement in the arrangements and decisions affecting them. This is a welcome and important feature of the situation, but also involves new questions of what decision making around the child is informed by, and how it concerns the different adults involved.<sup>15</sup>

### 3.2.3 Children arriving accompanied by adults who bear some responsibility for them

Where a child from Ukraine is with an accompanying adult, under EU international protection laws, the nature of the responsibility exercised by the accompanying adult is the key element to determine whether the child is unaccompanied (see box in section 3.2.1 above). This will be determined by national law.

Procedures for identifying and assessing these children may raise considerable challenges in the context of children from Ukraine to whom the TPD was applied. As noted, in some countries, registration with authorities for temporary protection or registration with municipal or local authorities in a responding country did not trigger an assessment of these children’s situation. Where there are no explicit provisions on procedures for when and how the responsibility of an accompanying adult is assessed, it can lead to uncertainties and inconsistencies, giving rise to significant risks to children.

### Giving effect in responding countries to responsibility and protection measures put in place by parents or authorities under Ukraine law

An important first step is to identify what responsibility arrangements have been put in place by parents or Ukrainian authorities. The HCCH 1996 Child Protection Convention is extremely useful in this respect as it identifies the law applicable to the responsibility exercised by the accompanying

adult. The applicable law will provide information as to the nature of the responsibility and how it was established. However, national agencies and stakeholders responding to this situation are not always familiar with its application in this context of displacement.

Under the HCCH 1996 Child Protection Convention, States should give effect to responsibility arrangements and measures of protection put in place for children under Ukrainian law.

## The HCCH 1996 Child Protection Convention

Law applicable by authorities having jurisdiction: When exercising their jurisdiction under Arts 6, 11 and 12, judicial or administrative authorities will apply their own or the law of another State with which the situation has a substantial connection (see Art. 15)

Law applicable (other rules):

- The attribution or extinction of parental responsibility (*i.e.*, parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives of a specific child (Art. 1(2)) by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child (Art. 16(1)).
- The attribution or extinction of parental responsibility (*i.e.*, parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives of a specific child (Art. 1(2)) by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect (Art. 16(2)).
- Parental responsibility (*i.e.*, parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives of a specific child (Art. 1(2)) which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State (Art. 16(3)).
- The exercise of parental responsibility (*i.e.*, parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives of a specific child (Art. 1(2)) is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence (Art. 17).

**Article 23:** A guardianship arrangement put in place by a judicial or administrative authority in Ukraine shall be recognised by operation of law in all other Contracting Parties to the HCCH 1996 Child Protection Convention.

**Article 40:** (1) The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.

(2) The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.

(3) Each Contracting State shall designate the authorities competent to draw up the certificate.



However, responding countries in some cases have found it difficult to establish whether, and what kind of, responsibility had been confided in the accompanying adults by parents under Ukrainian law. Getting information on the type of arrangements put in place, and recognising them under law, as well as assessing their scope, posed some procedural challenges to authorities in responding countries. Some powers were formally provided by parents in writing; in other cases, it was necessary to contact parents in Ukraine to confirm the existence and scope of arrangements. Some countries did not accept written documents from parents, but only accepted documents provided by Ukrainian courts.

Ukrainian consular authorities are playing a role in helping responding States understand and obtain official documents issued by Ukraine on the attribution of responsibility and decisions on protection measures. However, their capacity to assist was inevitably strained in an emergency situation of this kind.

The Permanent Bureau (*i.e.*, Secretariat) of the HCCH published an Information Note<sup>16</sup> on the topic of children deprived of their family environment due to the armed conflict in Ukraine: cross-border protection and intercountry adoption.

There has been increased information made available on the types of legal arrangements put in place before children leave Ukraine via the [European Judicial Network](#). The European Council of Notaries (CNUE) has published a form<sup>17</sup> enabling parents to express their wishes regarding the journey of their child leaving Ukraine and the exercise of parental responsibility as detailed below.

In accordance with the recommendations of the HCCH on children's consent to travel, the notary form provides for important safeguards during the child's stay abroad. To be used in full or in part depending on the situation, the form's sections relate to: (1) the identity of the child; (2) the information on parents

in case the child is not accompanied by both; (3) the permission for a child to leave Ukraine with an accompanying person; 4) the transfer of custody of the minor (extension of custody by parents or *de facto* guardianship) and (5) authorization to exercise legal and factual supervision of the child abroad. Provision is made to indicate the time period for the exercise of any of these permissions. In accordance with Ukrainian national law requiring certification by a notary or another authority to confirm the signatures of persons allowing a child to leave the country; such a requirement was included in the CNUE's notary form.

### Assessing the purpose, scope and duration of responsibility arrangements

Whilst giving effect to the measures discussed in section 3.2, responding States should also assess whether children should receive supplementary support and assistance from a locally appointed guardian for the purposes of international protection laws, or indeed whether the accompanying adult should be provided with support under national child welfare and child protection obligations.

The answer to the first question depends on the purpose, scope and duration of the responsibility granted by parents or arising otherwise under Ukrainian law. As noted above, the question of what is sufficient responsibility (in terms of scope, purpose and duration) for the purposes of EU laws concerning international protection and immigration procedures is a question of national law. However, it clearly relates to whether there is a need for the type of support and assistance envisaged for unaccompanied children under the relevant EU laws.

There are several arrangements under which adults are confided with different types of responsibility and it is important to distinguish between them. Responsibility arrangements are not defined uniformly under national laws in each country, but they often are closely associated with the following concepts:

#### Parental responsibility

The term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Art. 1(2) of the HCCH 1996 Child Protection Convention

**Alternative care**

Alternative care may take the form of formal and care informal care. UN Guidelines for Alternative Care, Guideline 29(b).

**Formal care**

All care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures; UN Guidelines for Alternative Care, Guideline 29 (b)(ii).

**Informal care**

Any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body; UN Guidelines for Alternative Care, Guideline 29 (b)(i).

Consequently, accompanying adults may bear responsibility for children in a way that is akin to a parent. However, they may be confided with responsibility for more limited issues or for a more limited period of time. For example, accompanying adults' powers and responsibilities may largely concern transporting the children from danger, or the provision

of day-to-day care for a limited period of time.

As can be seen from the above description, the term guardian may be used to refer to an adult is appointed to act in the place of a parent under family laws.<sup>18</sup> In the context of international protection and immigration laws, the term may be used in a different way.

The CNUE notarial form (section 5.2)<sup>19</sup> contains the possibility to indicate a range of powers that an accompanying adult may have, including to:

*clarify all questions relating to the child which may arise during his or her stay abroad, including the registration of the child at the place of residence; make appointments for visits to doctors, health care, treatment and other facilities to ensure an adequate state of health of the child, admission to hospital, consent to operations, vaccinations and other medical measures; education and post-school education of the child, and also to organize the attendance of other educational institutions in order to ensure and promote the education and development of the child; carry out all procedures for processing and obtaining documents of all kinds on behalf of our child; submit applications to register and obtain the special status of a person under temporary protection or to be recognised as a refugee (including asylum applications); submit applications, requests, petitions of all kinds to public authorities and individuals, and to seek legal and other advice; apply for and receive public social benefits and private support of all kinds; apply and receive documents of all kinds confirming the existence of a visa, passport, identity card, insurance policies and other documents, as well as the granting of social benefits, insurance benefits etc.; carry out and ensure the return of the child to Ukraine at the end of his / her stay abroad; Other (please specify).*

Some countries may examine the extent and way in which the child and accompanying adults remain in contact with their parents in Ukraine or other countries. They may be prepared to recognise the child as being accompanied by an adult effectively exercising parental responsibility for them, if there is a continuous and stable contact between the

accompanying adults and the child's parents in Ukraine or other countries.

In contrast, the authorities may decide that the parents (and accompanying adults) have a limited understanding of local international protection procedures given that they are outside the country and the authorities will then assess the need for

a locally appointed guardian to support and assist the child. In certain situations, the need for a local guardian may also arise where parents and children's interests and wishes are viewed as in conflict. This may occur, for example, where a parent wishes a child to relocate to another country to be with a relative, and the child prefers to stay where they are currently located.

Unaccompanied children may also be viewed as under the day-to-day care of accompanying adults, with a locally appointed guardian in place. Whereas Article 16(1) of the TPD specifically envisages the necessary representation of these children "by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation", Article 16(2) goes on to provide that:

During the period of temporary protection Member States shall provide for unaccompanied minors to be placed: (a) with adult relatives; (b) with a foster-family; (c) in reception centres with special provisions for minors, or in other accommodation suitable for minors; (d) with the person who looked after the child when fleeing

In certain circumstances, the responding State itself may decide to appoint the accompanying adult from Ukraine to act as a temporary guardian under its own national civil law and exercise responsibility for them within their jurisdiction. Any such procedures should take careful account of the views of parents in Ukraine and the views of the child.

This is also contemplated in the bilateral agreement that was put in place by Lithuania and Ukraine.<sup>20</sup> Art.4.3.4 of the agreement provides that a Lithuanian temporary guardian (curator) should be appointed for every child under Lithuanian law, "while maintaining to the possible extent scope of functions and powers of the legal representative of the child, who was provided and determined in accordance with the legislation of Ukraine".<sup>21</sup> The guardian and legal representative take mutual decisions.

## Support and oversight

More generally, the situation of children with accompanying adults is an issue that should be the subject of ongoing attention from national child protection services. The European Commission

Communication on the implementation of the TPD "One year on"<sup>22</sup> furthermore notes:

*Stakeholders also signal that, months after arrival in the EU, relations between children and their Ukrainian guardians are starting to deteriorate as these arrangements were often conceived as temporary. This will pose new challenges to child protection services in the Member States. Some Member States took early steps to prevent this trend by appointing local guardians to support and guide the Ukrainian guardians.*

More broadly, national child protection procedures should apply to ensure these care arrangements are not unsuitable and that caregivers have any necessary support from the State. This is a question of national law and will typically begin with an assessment of whether there are any risk indicators in relation to the arrangements in place and/or what support might be needed. For example, such risks – and need for support – might arise if the accompanying adult is a grandparent in poor health.

It was reported in Thematic Consultations undertaken in this Study that the scrutiny of the circumstances and the suitability and capacity of accompanying adults to take care of the child has sometimes been less intense than would be required in the situation of similar informal care arrangements for the receiving country's national children. This situation means that adequate support for accompanying adults or complementary support for children may not be in place.

National child protection procedures which apply to provide oversight and prevent or address any risks arising out of alternative care arrangements for national children should also fully apply to identify and respond to difficulties arising out of any arrangements for these children from Ukraine while on their territory. The question of access to child protection services, with a particular focus on children evacuated from alternative care, is further considered in chapter 4 below.

### 3.3 Role of the locally appointed guardian under EU laws

EU instruments do not make uniform provision on how guardianship is provided. The profiles in the Legal Compendium indicate the obligations contained in each instrument, with an overview below:

#### Provisions on definition of guardians and their appointment

##### Temporary Protection Directive

- Appointment: Art. 16(1) The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.
- Definition: None

##### Asylum Reception Directive and Asylum Procedure directive

- Appointment: Article 24 (RCD), Article 25 (APD)
- Definition: Art. 2(j) 'representative': means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive;
- Article 2 (j) RCD and Article 2(n) APD respectively

##### Asylum Qualifications Directive

- Appointment: Art. 31(1) As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.
- Definition: None

##### Anti-Trafficking Directive

- Appointment: Article 16(3) Member States shall take the necessary measures to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking in human beings.
- Definition: None

##### Return Directive

- Appointment: Art. 10(1) Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child. (2) Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.
- Definition: None

### Provisions on definition of guardians and their appointment

#### Recast Dublin Regulation

- Appointment: Art. 6(2) Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation.
- Definition: Art. 2(k) representative' means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Regulation with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out its duties in respect of the minor, in accordance with this Regulation.

#### Refugee Convention:

- Appointment: none
- Definition: none

As can be seen from the table above, EU legal instruments use the terms “representative” and “guardian” in international protection laws in relation to adults appointed to support and assist children. In some countries, the term representative is typically used in relation to the person who may exercise legal capacity for the child, where this is necessary, in legal procedures. However, there is no uniform use of these terms either at EU level or in countries in Europe. EU policy commitments such as the Communication on the Protection of Children in Migration<sup>23</sup> typically refer to the obligation to put in place a representative or a guardian as “guardianship”.

It is worth noting that the TPD contains an obligation on the provision of guardianship in Article 16 (1) that is the same as the obligations present in the other first generation EU international protection instruments. Whilst this obligation subsequently was strengthened in revisions of other EU instruments (and indeed is currently the subject of a proposal for further strengthening in the ongoing revision of the Common European Asylum System), the TPD – which had never been applied at the time of the revision – was not subsequently revised. As an example, the revision of the guardianship provisions in other EU instruments had provided that there should typically be no conflict of interest between a child and the guardian.<sup>24</sup>

Given this first-time application of TPD, provisions for its implementation are less developed. Practical problems, including resource constraints to undertaking any assessments of a child’s circumstances, played a significant role.

The overview of EU laws shows that receiving countries have an obligation to appoint an adult to assist and represent an unaccompanied child in relation to particular dimensions of their situation addressed in a legal instrument (reception, procedures, Dublin transfers, post qualification, trafficking). Nothing prevents different adults being appointed as guardians to address different dimensions of the same child’s situation, although this is not common.

Broadly speaking, the essential role of a guardian across these dimensions of their situation is similar under each of these laws, namely, to assist and represent an unaccompanied minor in procedures provided for with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Guardians should also have the necessary competence and training.

### Implementation of EU provisions

While the key elements of the guardianship obligation may take different forms at national level, extensive guidance on its application exists. The UNCRC, specifically through its General Comments 6, 22 and 23, clarifies the content of specific rights related to guardianship for unaccompanied children. The Fundamental Rights Agency has furthermore issued important guidance in its Handbook on guardianship for children deprived of parental care. The Council of Europe has also issued Recommendation CM/Rec(2019)11 of the Committee of Ministers to Member States on Effective guardianship for unaccompanied and separated children in the context of migration.

Guardian under international protection and immigration laws refers to a person who is appointed or designated to support, assist and, where provided by law, represent unaccompanied or separated children in processes concerning them. Where an institution or organisation is appointed or designated as a guardian to support, assist and exercise the legal capacity for a child, it should designate a natural person to carry out the duties of guardian as set out in these guidelines. The guardian acts independently to ensure that the child's rights, best interests and well-being are guaranteed. The guardian acts as a link between the child and all other stakeholders with responsibilities towards him or her. This operational definition takes into account that the term used, as well as the function and manner of appointment of a guardian, vary from jurisdiction to jurisdiction.

– COE Recommendation (2019)<sup>11</sup> on effective guardianship for unaccompanied and separated children in the context of migration, Explanatory Memorandum, (p. 12)

Guardians are responsible for safeguarding the best interests of the child, ensuring the child's overall well-being and exercising legal representation to complement a child's limited legal capacity. (p. 54) A guardian is an independent person who safeguards a child's best interests and general well-being. To this effect the guardian complements the limited legal capacity of the child. The guardian acts as a statutory representative of the child in all proceedings in the same way that a parent represents his or her child.

– FRA Handbook on guardianship for children deprived of parental care (p. 15)

However, depending on the national procedures and systems, the tasks of the guardian for an unaccompanied child may range from a very full role, such as appointing someone to provide parental responsibility, to a much more limited role, such as to acting as the child's representative where necessary to access services in the responding countries. In many countries, a guardian is also often tasked to support the child in re-establishing family links and/or

maintaining contact with parents or family in another country. Importantly the guardian's role should include ensuring support and assistance to the child in relation to accessing the international protection status that is appropriate to their circumstances. Importantly, the role of the guardian should include provision of support to children in any best interests procedures which will precede any measures that lead to comprehensive secure and sustainable solutions.

The PAS [Report](#) of the European Guardianship Network recognises that:

In some systems, guardians play a central role in fulfilling the parental responsibility a State owes to a child who is deprived of parental care and takes decisions, as a parent might, on care plans and arrangements (e.g. the Netherlands). In other countries, the guardian's role primarily concerns supporting and assisting the child and acting as a link to other actors involved in discharging key responsibilities towards these children (e.g. Denmark). In most if not all countries, the guardian complements the child's legal capacity if it is limited, and thus can ensure applications for status determination are made as appropriate. In some countries, the guardian's role primarily focuses on supporting the child in engaging with the procedural questions that face them; in other countries, the guardian's role also concerns ensuring the child has support and assistance in relation to their reception and care. In all countries, the role of the guardian is distinct from those actors who provide legal counsel and representation, where this is available.

It is clear from consultations that countries still struggle with the role of guardianship for children displaced from Ukraine, either because of uncertainty as to their role or capacity constraints. The availability of temporary protection may mean that unaccompanied and separated children will be

viewed as having more limited need for support and assistance from a local guardian.

It is the case that many children will not need the same level of support and assistance in accessing temporary protection as is required for

unaccompanied children who are involved in the often more complex and lengthy procedures when applying for international protection. However, the question remains as to whether a child's right to support and assistance for other purposes or at a later stage is properly recognised. For example, if they find themselves at risk of exploitation, or in the event of a family reunification process or if they need ultimately to find a comprehensive, secure and sustainable solution when temporary protection expires.

### 3.4 Forms of guardianship

Different models of guardianship exist in different countries, shaped by international law obligations and by the manner in which unaccompanied and separated children are cared for in the country. Consequently, there exist differences between the way in which guardianship is organised nationally and sometimes even locally, which causes a further difficulty in how this essential safeguard is made available to children.

There may also be several different models of responsibility, support and assistance for unaccompanied children within one country, sometimes depending on the procedure in which a child is involved or sometimes depending on how a local area is organizing services.

In responding to the situation in Ukraine, States have faced challenges in adapting their existing systems to meet the needs, and to develop cooperation with Ukrainian authorities and stakeholders. In some countries, there is currently limited State capacity to ensure child protection services can examine the situation of children and provide guardianship. In addition, some countries were already struggling to provide guardianship to unaccompanied children from other countries already in their jurisdiction.<sup>25</sup> This has also been highlighted in the CoE SRSG fact-finding missions and related reports.<sup>26</sup>

Where responding countries had more limited experience in receiving unaccompanied children, systems to put in place these arrangements need to be further developed or strengthened. However, positively, where children are eligible for temporary protection, this means that there is no examination of the claim needed, which can alleviate the initial workload for guardians who support and assist the child during such procedures.

Authorities have also had to consider what role guardians may have in relation to new questions posed by situations of displacement. For example, this occurred where children or their caregivers wished to return to Ukraine for short periods (as has happened for certain children during school holidays). This poses many different kinds of questions, including may concern who takes the decision that it is safe for a child to return.

How guardianship processes should be developed or adapted to fulfil the rights of these children is being actively considered. Constraints in resources, often pre-existing, but exacerbated by the scale of arrivals from Ukraine, need to be acknowledged and addressed in innovative ways.

In the "Spotlight on practices regarding guardianship for unaccompanied and separated children arriving in the EU from Ukraine," the European Guardianship Network highlighted practices regarding guardianship for unaccompanied and separated children arriving from Ukraine into the EU in order to share experience and contribute to improvements in the support provided this group of children. Its network meetings continue to exchange on the way on which guardianship organisations work to meet the challenges of moving from emergency situations to more sustainable support for these children. This includes active outreach to communities and strengthening guardianship.

The European Commission has published Frequently Asked Questions on Unaccompanied and Separated Children fleeing from war in Ukraine. In its [Communication](#)<sup>27</sup> on the Implementation of the Temporary Protection Directive one year on, the European Commission also noted that it collaborated closely with the European Guardianship Network, which collected and made available good practices developed in the Member States in relation to the reception and care for vulnerable children. FRA and the EUAA have also published a [Practical Tool](#) for Guardians on Temporary protection for unaccompanied children fleeing Ukraine.

The European Union Agency for Fundamental Rights (FRA) has produced valuable information on how guardianship is organised in “Guardianship systems for unaccompanied children in the European Union: developments since 2014,” which it has updated in 2022. “The Council of Europe is currently undertaking an implementation review report on Recommendation CM/Rec(2019)11 on effective guardianship for

unaccompanied and separated children in the context of migration.” The European Guardianship Network ([www.egnetwork.eu](http://www.egnetwork.eu)) uses a set of standards which provide principles for how guardianship should be organised, and it has an assessment system (ProGuard Assessment System) to allow stakeholders to reflect on how to strengthen and adapt their systems.

### 3.5 The need for coordination of different roles and responsibilities between different adults

Where children have several persons exercising some form of powers and responsibilities, or supporting and assisting them, it will be necessary to address who is responsible for what, and in what ways they need to coordinate at particular times.

It is a complex question which will involve consideration of family laws, child protection and international protection laws simultaneously. Significant legal uncertainty arises where authorities are not accustomed to considering the role of different adults connected with the child and what

that means in terms of care, support and assistance for different purposes. Indeed, the use of the term guardian in different ways for different purposes in family and child welfare law and for international protection laws also generates uncertainty. This issue should be considered carefully in each jurisdiction to avoid any uncertainty as to which persons exercise responsibilities for the child in relation to which issues. The HCCH 1996 Child Protection Convention will assist in this regard.

### 3.6 Recommendations

- ▶ Further guidance from the European Commission on responsibility support and assistance arrangements could build on recent experience. It should provide further clarification on the application of key procedural safeguards for children without parental care, in particular, on information, support and assistance. Alternatively, it could be included in an updated version of the FAQs or guidance.
- ▶ Further information on care arrangements put in place in accordance with the law of Ukraine should be disseminated to relevant stakeholders in Member States.
- ▶ Further information should be made available on how national guardianship systems are responding to the situation of children from Ukraine. This could assist in exchange of good practice and challenges. Such information may be gathered in monitoring and reporting activities of the Council of Europe, EUAA and FRA, as well as UNHCR.
- ▶ Regional guidance should be developed to assist in identifying and assessing the different forms of responsibilities which typically may be exercised by different adults for children. This should consider the scope and purpose of different responsibilities. This should also provide information on a potential role of local guardians appointed in responding States, if necessary, and the support and assistance they may provide to children, and to adults accompanying children.
- ▶ Appropriate processes should be put in place by States for national child protection services to identify risks arising out of situation of children and accompanying adults from Ukraine, with a view to supporting these arrangements where they are appropriate and to replace them where they are not appropriate.
- ▶ Any future international or regional guidance, or model Standard Operating Procedures, should place guardianship as central concerning how actors with different responsibilities for these



children liaise and cooperate.

**Elements of such guidance, or standard operating procedures, should ensure that:**

- Guardians should play a central role in liaising with parents, relatives and national authorities in the responding State to ensure that decision-making, and implementation of decisions, is in their best interests.
- In the event that children are returning to Ukraine to parents, relatives or new situations, guardians should play a central role in ensuring the child is informed and that their voice is heard in best interests procedures preceding such returns, including through access to legal counselling and representation.
- Guardians should play a critical role in assisting children in return and reintegration, particularly in light of any particular vulnerabilities they may have, by planning and preparing the return in a proper way, including ensuring educational and health information from the responding State is available to parents/guardians in Ukraine.
- Cross border cooperation between guardians to promote transfers of care and custodial responsibility for children to authorities elsewhere should be strengthened, e.g. for reunification with relatives elsewhere in Europe.

► More generally, measures should be taken to strengthen national guardianship systems with the aim of providing guardianship to all unaccompanied children.

- The Fundamental Rights Agency should be invited to issue an addendum to its Handbook on guardianship for children deprived of parental care to cover the issue of children who benefit from temporary protection. This addendum could address the issues in more detail and based on recent experience.
- Provision for different types of guardianship to deal with different kinds of caseloads and different situations should be considered
- Provision for how guardianship organisations can support accompanying adults should be considered.
- Contingency planning for particular crisis situations, such as in times of mass influxes should be prioritised.
- The opportunity for inter-agency work and case management should be prioritised.
- The EUAA's annual monitoring of the implementation of the Common European Asylum System<sup>28</sup> should include a focus on these elements in national guardianship systems for children seeking international protection.
- The Council of Europe's ongoing assessment of the implementation of its CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration could immediately inform the recommendations

from any fact-finding mission by the CoE Special Representative of the Secretary General on Migration and Refugees (SRSG),

- Member States should adapt the EUAA FRA resource for guardians on temporary protection and promote its use by local guardians, including through specialized training on the topic.
- The European Guardianship Network should continue to exchange and share on challenges and good practices in relation to responding to the novel situation of children arriving from Ukraine, where necessary through additional funding for exchange of experience between practitioners.
- The European Commission's Initiative in 2024 to strengthen integrated child protection systems could assist in encouraging practical measures of support, including guidance and funding, to ensure improvements to inter-agency and child-centred case management involving guardians and other actors.
- Guardians should continue to promote continuity and stability for children to the best extent possible, including contact with family and relatives in Ukraine. This could include using tools to support future planning, informed by the Council of Europe Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors.



## Chapter 4.

# Ensuring that children displaced from Ukraine are protected from violence, abuse, neglect and exploitation while in responding States, with a particular focus on children from alternative care settings in Ukraine

Alongside international protection, States have a responsibility to provide children without parental care with protection from violence, abuse, neglect and exploitation in their jurisdiction under their national child protection laws. Article 2 of the UNCRC prohibits all forms of discrimination when a responding state is protecting the rights of a child in its jurisdiction and the UN CRC reminds states that this principle of non-discrimination is fundamental and applies to children in the context of international migration.<sup>29</sup> Consequently, all displaced children should fall within the scope of national child protection laws.

As we have seen, the scale and speed of the arrivals, and the freedom of movement between responding countries in the EU, has meant that there is a real risk that the situation of children is not fully assessed, supported or monitored by national child protection systems. As described in Chapter 3, especially in the early chaotic weeks at the onset of the war, the identity of displaced children may not have been registered on arrival into host countries and/or their presence may not have been made known to national child protection authorities. Some have remained under the radar since then for various

reasons. With the influx of displaced children and families, initial concentration may have been placed on accommodation needs, instead of individual child protection needs. Some of these challenges would be reduced through the appointment of a guardian (as addressed in Chapter 3).

This chapter has a particular focus on addressing the needs and rights of children from alternative care in Ukraine. It considers difficult legal questions in relation to how responding States and the adults accompanying them, alongside authorities in Ukraine, should work together to support, supervise and monitor their situation.

## 4.1 Background context

Since 24 February 2022, an estimated 4,296 children from institutional care in Ukraine have been evacuated to responding countries for their protection, typically under bilateral arrangements with responding countries or privately arranged. They have been accompanied by adults from Ukraine who remain in active contact with institutions and local authorities in Ukraine. The Ukrainian authorities are actively engaged in seeking ways to ensure their protection in responding countries and have expressed the wish that they be kept together in groups, with a view to facilitating their return as soon as it is safe to do so.

National authorities in responding countries have been working with Ukraine and the accompanying adults to ensure reception and care. Ukraine had initially sought to put in place Memoranda of Understanding with some countries but very few were agreed. Political declarations have also been used to create an understanding of how the situation of these children is addressed.

Their protection from risk is a priority area precisely because of their particularly vulnerable situation. They are in alternative care settings, often in large groups, and are displaced from a country at war. (Some children in alternative care in Ukraine have left in smaller groups of up to 14 children with foster families.) Some of these children have acute needs, arising from disabilities, physical or mental health concerns or special educational needs. They may be children of an ethnic minority such as Roma, which can add to their vulnerability. Moreover, in general terms, children in large groups may be at risk of neglect, exploitation, abuse or violence (including between peers).

The tremendous challenges faced by foster family parents, or adults accompanying children in institutional settings, and the child protection services in responding countries are also evident.

Article 19 of the UN CRC implies that States should undertake a wide range of steps as required to ensure the protection of children and extensive guidance exists as to how they should do so.<sup>30</sup> Such measures are not limited to responding to actual risk and harm, but extend to prevention measures, in particular, through adequate support and necessary supervision for the caregiving environment in which the children

find themselves. It is critical to consider these full range of measures when dealing with children evacuated from alternative care settings in Ukraine, who are in an acute state of vulnerability.

Child protection is often a complicated task, because it typically engages several actors and procedures relevant to different aspects of the child's situation. The authorities and guardians concerned with these children's situation carry a shared obligation to protect these children from harm and should work together to do so. Fulfilling these obligations requires coordination amongst different sectors and authorities, including, for example, child protection services, health and justice agencies across different levels (local, national and transnational). This is no easy task legally or practically.

This chapter illustrates how these difficulties in defining and establishing such coordination is all the more pronounced when it involves different actors with different roles from two States. They each are acting under their own laws and this requires that the tensions or gaps between these laws are identified and addressed.

The HCCH 1996 Child Protection Convention and bilateral agreements can prove helpful as to give effect to parental responsibility and child protection measures (as has been described in chapter 3), as well as addressing conflicts of laws and facilitating cooperation between authorities. However difficult questions of interpretation remain as to how they apply in the current situation, and indeed the answers may vary, depending on the particular circumstances of a child.

What is clear is that several actors need to work together to ensure that protection measures are in place, such as individual assessments of the situation of children. Such assessments must involve the children themselves. It also requires independent support and assistance being available for children, including legal counselling and assistance where necessary.

Alongside challenges, there are clear building blocks to help put in place guiding principles and appropriate procedures to work together. In addition, several positive factors arise out of the arrangements put

in place. These include the fact that Ukraine, as the country of origin, is providing information and data about the children. Ukrainian consular authorities abroad and other officials still in Ukraine are playing an active role in the protection of these children. There is an active commitment both in Ukraine and responding countries to policies that commit to deinstitutionalisation and to finding more inclusive, community-based care arrangements for these children. The groundwork for proper procedures

and cooperation for future planning can root in collaborative procedures and mutual trust developed by child protection authorities and actors in responding countries to address immediate risks to them.

### Legal questions raised

Authorities and stakeholders face a series of challenging legal questions to ensure the protection of children evacuated from alternative care in Ukraine.

- What alternative care arrangements exist in Ukraine and what Ukrainian laws are relevant to the situation of these children?
- What responsibilities are borne by Ukraine authorities and accompanying adults whilst the children are in responding States?
- What responsibilities arise for national authorities in responding countries for these children?
- How do authorities and actors cooperate to fulfil their shared obligations?
- How are child protection concerns for particular children identified and addressed in specific cases?
- How are the rights of sometimes marginalised groups of children met, including children with disabilities and Roma children, in line with their rights under relevant international instruments?
- What measures are needed to avoid serious risks arising for children, including abuse, exploitation and trafficking?
- How are individual assessments undertaken in relation to all actions concerning these children?
- How Ukrainian caregivers are supported, in what ways, for what purposes and by which authorities? What safeguards are in place to avoid any conflicts of interest arising between accompanying adults and the children in their care? What mechanisms for oversight are in place?
- How is information and independent assistance provided to the child, to ensure that their voices are heard? The nature of the child's dependency on the adults who take care of them needs to be carefully considered in this regard. This could include legal information and assistance.

## 4.2 Understanding Ukrainian alternative care arrangements and Ukrainian child protection law

It is essential to have a basic understanding of Ukrainian law and how it is generally applied to unaccompanied or separated children, orphans, children deprived of parental care or children in alternative care. It will assist in understanding how legal responsibility for children is generally structured in Ukraine, which is important context for host countries when recognising the arrangements in place, using the HCCH 1996 Child Protection Convention. It forms an important part of the holistic information needed to understand any child protection history before a child's arrival in a responding country. This could become relevant information for best

interests assessments. These children, unlike those in recent comparable migration flows involving unaccompanied children have been for the most part been evacuated by the Ukrainian government and other actors due to the current hostilities. Ukraine continues to have functioning executive, administrative and judicial systems, that continue to take steps to protect children. The Cabinet of Ministers and the Coordination Headquarters for the Protection of Children's Right Under Martial Law<sup>31</sup> continue to make resolutions and decrees relating to the protection of these children, including provision for the evacuation of children residing in or enrolled

in residential care or in foster care. The Ukrainian government is exercising diplomatic powers to ensure that these new decrees and Ukrainian law more generally are respected in responding countries<sup>32</sup>.

It is also important to note that the Ukrainian government commenced a programme of decentralisation of services in 2014<sup>33</sup> but this was disrupted by the hostilities in Eastern Ukraine since 2014 and was not formally completed until 2020. Decentralisation of child protection services and the introduction of community social workers was not fully functional by the time of the invasion in February 2022. Despite the ongoing war, the respective law was adopted by Parliament on July 28, 2022, after which modifications were proposed by the President. The draft law thus remains to be finalised, and its implementation may be affected by further reforms.

#### 4.2.1 Glossary of key Ukrainian terms regarding children in alternative care

**Child** – a person under the age of 18

**Minors** – children up to the age of 14

**Juveniles** – children between 14 and 18

**Orphan** – a child both of whose parents have died

**A child deprived of parental care** – on account of being abandoned, their parents being in prison, incapable of caring for them through illness or being found to be incapable or unwilling to protect them or deprived of their parental rights

**Children without status** – social orphans who have been placed in institutional or other forms of alternative care with the consent of their parents

**Adopted children** – a child who is an orphan or deprived of parental care who has been adopted in a civil court in Ukraine under Ukrainian law<sup>34</sup>. Their adopted parents have legal and parental responsibility for them.

**Adoptive parent** – a parent who is the process of adopting a child who is an orphan or deprived of parental care. But all international adoptions have been paused whilst martial law applies in Ukraine<sup>35</sup>

**Tutelage** – taking legal responsibility for the care and upbringing of a child who is an orphan or deprived of parental care up to the age of 14, usually assumed by a relative

**Alternative care** – a formal or informal arrangement that aims to ensure the protection and well-being of children who are orphans or deprived of parental care or without status

**Custody** – the legal basis on which the state takes responsibility for a minor (that is a child under 14 years of age) who is deprived of parental care

**Custodian** – term for the administration of an institution in which a minor is placed or an individual, mainly who is in a family relationship with children under the age of 14, who are orphans or have been deprived of parental care

**Care** – the legal basis on which the state takes responsibility for a juvenile (that is a child between the ages of 14 and 18) who is deprived of parental care

**Care Giver** – term for the administration of an institution in which a juvenile is placed

**Guardianship** – taking legal responsibility for the care and upbringing of a child who is an orphan or deprived of parental care, usually assumed by a relative

**Children's Services** – department at regional or local authority level with responsibility for children

**Community social worker** – trained social worker working at a community level

**Guardianship Authority** – term used where a children's services department is responsible for adults, who are acting as guardians for children

**National Social Services** – the national level department responsible for children

**Contact** – the right of parents and other relatives to communicate with a child who does not live with them

#### 4.2.2 Alternative care arrangements

The alternative care system in Ukraine is complex and includes nine different types of residential care and the involvement of three different ministries. The Ministry of Health is responsible<sup>36</sup> for 38 institutions, which are generally described as special baby homes for children between the ages of 1 and 3 years old, but some children remain there up to the age of 6<sup>37</sup>. The Ministry of Social Policy is responsible for 131 (17%) of institutions that provide for children who are orphans or deprived of parental care and who

also have disabilities. The Ministry of Education and Science is responsible for 605 (78%) of the institutions<sup>38</sup> that are generally for children who are orphans or deprived of parental care, but who do not have any disabilities or whose disabilities are mild and do not include mobility impairments. They are also responsible for military academies and academies for children deemed to be high achievers.

#### Types of institutional care in Ukraine include:

**Institutional care** – care taking place in larger residential settings that are not built around the needs of the individual children and are not close to a family or small group situation.

**Specialised baby homes** – run by the Ministry of Health for children who are orphans or deprived of parental care between the ages of 0 and 3 or sometimes up to the age of 6

**Boarding schools** – residential institutions for children who are orphans or deprived of parental care – run by the Ministry of Education and Science, which may be fully or partly residential and where the child’s parents may have consented to their voluntary placement there

**Special boarding schools** – for deaf children, children with hearing disorders, diminished vision, cerebral palsy, mild and severe speech disorders, mental disabilities, developmental delay, or special educational needs, who have been assessed as being able to access Level 1 education provided at primary and basic secondary level – run by the Ministry of Education and Science

**Sanatorium boarding schools** – cater for children with neuropsychiatric, disorders, scoliosis and musculoskeletal disorders, cardiovascular disorders, chronic non-specific respiratory diseases, chronic non-specific disorders of the digestive system, diabetes, minor or inactive TB run by the Ministry of Social Policy

**Schools for social rehabilitation** – for children who have been convicted of crimes usually from ages 11–14

**Education and Rehabilitation Centres** – family centered day services for children with special needs and their families

**Private institutions** – funded and managed by private organisations and Jewish and Christian (often Evangelical) faith groups

#### Types of community-based care in Ukraine

**Foster family**<sup>39</sup> – a family or an unmarried person, who is approved by the State administration of the region or the executive committee of the city council/districts to bring up from one to four children-orphans or children deprived of parental care in their own home under guardianship and who will be provided with an allowance for doing so. (During the period of martial law, they are also permitted to take in respective children on terms of temporary accommodation, however within the stipulated maximum number of children).

**Family-type home/orphanage**<sup>40</sup> – a couple or an unmarried person who is approved and trained to be a parent/educator for a group no less than 5 and up to 10 children who are orphans or deprived of parental care under guardianship and who is provided with an allowance and suitable accommodation for doing so (During the period of martial law, they are also permitted to take in respective children on terms of temporary accommodation, however within the stipulated maximum number of children).

**Small Group House**<sup>41</sup> – a social protection institution for children who are orphans or deprived of parental care, including children with disabilities in conditions close to that of a family to prepare them for an independent life, assist them to return to their biological family or placement in a family form of care. Such homes can accommodate up to 10 children or 8 children with life-limiting life conditions, including disabilities. Placements of orphans and children with life-limiting conditions are prioritised. Children attend local schools.

**Patronage**<sup>42</sup> – A temporary form of placement for up to six months for a child because of difficult life circumstances of the child, her parents or other legal representatives of the child. Usually, such child has not been granted the status of an orphan or a child deprived of parental care. An adult in the patronage family will have undergone a special training course but does not have the status of the child’s legal representative.

When children started arriving in responding countries from alternative care settings in Ukraine, it was often assumed by authorities in many responding countries that such children had been placed in care as orphans

or as children who had protection needs. A report in 2015 by Hope and Homes for Children found that only 5.1% of children in residential care had been deprived of parental care by a court or a child protection authority because of parental abuse or neglect, while in 78.5% of cases parents had voluntarily placed their children in care. This was usually due to the parent's own illness, incapacity, poverty or a lack of community-based facilities for children with disabilities and the lack of support for their parents in their community.

Consequently, children placed in alternative care may also have previously enjoyed regular contact with their birth parents and this may or may not be continuing.

In addition, it was often assumed that all children attending institutions in Ukraine were resident on a full-time basis. But of the 104,729 children who had contact with an institution, 48,071 were resident on a full-time basis. The other 56,658 were enrolled and attended for educational purposes.<sup>43</sup>

The adverse consequences for children brought up in institutional care is widely known and agreed upon. A study of the child protection system in Ukraine found that institutional care did not pay attention to a child's individual needs and often tended to underestimate their capabilities and deny them the opportunity to participate in decisions about their futures.<sup>44</sup> Less attention was paid to the steps being taken to reform the alternative care system in Ukraine. While the path to reform had not always been a smooth one, Ukraine's National Strategy for Reforming the System of Institutional Care and Upbringing of Children 2017 – 2026, its Action Plan for the first Stage of this Plan in 2017 and then the Action Plan for the second Stage in June 2020 were all positive developments. But the plans were not successfully implemented due to a number of different factors including the financial consequences of the Russian annexation of Crimea and parts of Eastern Ukraine in 2014, the on-going conflict in those areas, the costs of a transition to community-based provision and a lack of sufficient funding for new service provision.<sup>45</sup> There was also opposition from some authorities at the region and community level, who believed that the closure of institutions would have an adverse effect on the local micro-economy of employment and services, in a system where central government funding was provided by institution and not by child.<sup>46</sup> As a consequence, some children were later excluded

from the deinstitutionalisation plans<sup>47</sup> and a Prime Ministerial Order<sup>48</sup> excluded special boarding schools, education and rehabilitation centres and sanatoriums from the strategy.

This attracted much criticism<sup>49</sup> from the NGO sector and, in particular, the Ukrainian Child Rights Network. UNICEF also urged the Government of Ukraine to continue with the de-institutional reform in line with the approved National Strategy.<sup>50</sup> But it was arguably two unforeseen international events which accelerated the plans for reform. The first was the COVID-19 pandemic which led to thousands of children in residential care being sent home to live with their own families. The second was the Russian invasion of 24 February 2022, which resulted in 38,882 of the 48,071 children who were resident in institutions on a full-time basis, being returned to their homes and 4,296 being evacuated abroad.<sup>51</sup> Furthermore, in a project undertaken by Partnership for Every Child, supported by UNICEF Ukraine and in co-operation with the Ministry of Social Policy of Ukraine, National Social Services of Ukraine, the Ministry of Education and Science and the Ministry of Health, it was recorded that of the 13,047 child returnees assessed, 1,051 were found to be in need of some form of additional support and only 126 children required protection.<sup>52</sup>

This is not to say that merely closing institutions in Ukraine will create a sustainable child protection system. The prevalence of institutional care and the fact that the primary connection for parents who were struggling to provide appropriate care for their children was with an institution and not a wider child protection system had meant that the necessary range of services were not available at a local community level.

Ukraine had been undergoing a programme of decentralisation<sup>53</sup> of child protection services in the years leading up to the invasion of 24 February 2022. This was formally completed in 2020 and community social services started to be rolled out in 2021. But the need to recruit and train social workers meant that this system was not fully functioning by the time of the invasion.

Civil society experts see the development of a system of community social workers throughout Ukraine as essential to the development of a child protection system that does not depend on institutions and supports parents to care for their own children.<sup>54</sup>



This is particularly the case where the children in question have disabilities and the parents suffer from poverty and/or their own vulnerabilities.

On 2 February 2023, Ukrainian President Vladimir Zelensky and EU President Ursula von der Leyen confirmed that the EU would be assisting Ukraine to continue its reform to its children's foster care and protection system.<sup>55</sup> This will include a €10 million package of aid including capacity building, training and a twinning project to share lessons learnt during previous transitions from institutional care to community-based or foster care. This approach was echoed in the Keynote Speech for the Conference 'Unseen Heroes: Empowering Women and Protecting Children within Russia's War on Ukraine – What Lies Ahead?' hosted by the (EP) Vice President Pina Picierno and the EP Intergroup on Children's Rights.<sup>56</sup>

The Council of Europe is also working with Ukraine, as a Member State, to agree standards for a reformed child protection system. It recognises that Ukraine will require financial support and also help in continuing to develop new policies. On 14 March 2023 it held a Conference of the Council of Europe Project 'Protecting the Rights of Ukrainian Children During and in Post War Conflict'. On the 17th of May a CoE Summit held in Reykjavik issued a declaration on the situation of children in Ukraine.<sup>57</sup>

Furthermore, the EU stated that the European Commission has established the Reconstruction Platform and allocated funding for fast recovery activities as well as the development of a modern alternative care strategy in Ukraine.<sup>58</sup> The EU Member States and other European countries, including Ukraine, have made dedicated efforts to promote deinstitutionalisation to ensure the well-being and development of children.

### 4.2.3 The Ukrainian legal system and the legal context for child protection in Ukraine

#### Current executive, administrative and judicial systems

The Verkhovna Rada continues to consider and pass new laws. The Cabinet of Ministers of Ukraine acts as its executive branch and has the legal authority to issue resolutions, decrees and orders that have mandatory force.

The administration of laws and decrees is devolved to regions, districts, communities and military administrations that have been set up in some parts of the Donetsk and Luhansk regions in Eastern Ukraine. Where local administrations are unable to act, as a result of hostilities, measures have been put in place for other administrations to act on their behalf.<sup>59</sup> Each level of local government will have its own children's services department, which may at times be referred to as a guardianship and custody service.

The court system continues to function, despite on-going hostilities. There are three instances of the judiciary system in Ukraine. The first instance is the lowest one and consists of the local courts of general jurisdiction (these courts consider civil and criminal cases, also including cases on administrative offences), commercial courts and administrative courts. The second instance includes appellate courts of general jurisdiction (dealing with the civil cases, criminal cases, and cases on administrative offences), appellate commercial courts and appellate administrative courts. The highest instance of the judiciary system in Ukraine is the Supreme Court, which has five different divisions – Criminal Cassation Court, Civil Cassation Court, Administrative Cassation Court, Commercial Cassation Court, and Grand Chamber.

The courts in Ukraine are used by individuals and legal entities to protect their rights, freedoms, and interests.

There are no separate family courts in Ukraine, thus family disputes are handled by the local courts of general jurisdiction. When hearing a case, they apply the principles of the UNCRC, the Constitution of Ukraine, International Multilateral or Bilateral Agreements of Ukraine, EHRC case law, the Ukrainian Family Code, the Ukrainian Civil Code, and other applicable Ukrainian laws, for example, such as Law of Ukraine "On International Private Law" of June 23, 2005, 2709-IV.<sup>60</sup> The Ukrainian courts rely mainly upon mentioned legislation, however despite the absence of the formally recognised doctrine of precedent in Ukraine, they are obliged to take into consideration and follow the case law of the Supreme Court, including the legal conclusions contained in its decisions, decrees, and rulings<sup>61</sup>.

## Child protection law

Child protection law in Ukraine is based on the Constitution of Ukraine, the UNCRC and relevant specialized laws, for instance the Law on Protection of Childhood.<sup>62</sup>

Ukraine is a civil law jurisdiction and there are some provisions relating to children contained in the Civil Code of Ukraine,<sup>63</sup> however, the primary source in this regard is the Family Code of Ukraine 2002.<sup>64</sup> The court proceedings are regulated by the Civil Procedural Code of Ukraine<sup>65</sup>.

Part 4 of Article 5 of the Family Code of Ukraine states that the care of a child by their family takes priority but, if a child is deprived of appropriate parental care, the state assumes a protective role for the child. This mirrors Article 52 of the Ukrainian Constitution<sup>66</sup> which states that the maintenance and upbringing of orphans and children deprived of parental care is entrusted to the State.

There are a number of core specialized child protection laws. These include:

- ▶ the Law of Ukraine “On Protection of Childhood 2001”,<sup>67</sup> which provides much of the terminology used in relation to the status of individual children.
- ▶ the Resolution of the Cabinet of Ministers of Ukraine “On issues of the activities of custody and care authorities related to the protection of the rights of the child” No. 866 2008,<sup>68</sup> which establishes the order and the procedure of the activities of the respective custody and care authorities with regard to the protection of the child rights in Ukraine.
- ▶ the laws regarding education, including the Law of Ukraine “On Education” 2017.<sup>69</sup>
- ▶ the Law of Ukraine “On the basic principles of youth policy” 2021.
- ▶ the Law of Ukraine “On ensuring organizational and legal conditions for social protection of orphans and children deprived of parental care” 2005,<sup>70</sup> which defines legal, organizational, social principles and guarantees of state support for orphans and children deprived of parental care.
- ▶ the Law of Ukraine “On authorities and services on children affairs and special establishments for

children” 1995,<sup>71</sup> which defines the legal bases of activities of authorities and services for children and special institutions for children, which are entrusted with the implementation of social protection and prevention of offenses among persons who have not reached the age of eighteen.

There is also a number of the respective decrees of the President of Ukraine, aiming for the protection of the children and their rights in Ukraine, including a Decree of the President of Ukraine No. 568/2022 dated August 8, 2022, “On Coordination Council on issues of the protection and safety of the children.”<sup>72</sup>

## Relevant laws passed since 24 February 2022

Martial law<sup>73</sup> was declared on 24 February 2022 and, as a consequence, most men of between 18 and 60 were not allowed to leave Ukraine and became liable for military service.<sup>74</sup> As a consequence, many men were not permitted to accompany their wives, children or other relatives leaving or being evacuated from Ukraine.

Since 24 February 2022, the Cabinet of Ministers of Ukraine has assumed responsibility for measures to protect children being evacuated or at risk and passed a number of decrees.

These include:

- ▶ Decree No. 264 of 12 March 2022 on amendments to the Rules for crossing the state border by citizens of Ukraine.<sup>75</sup>

Article 313 of the Ukrainian Civil Code permitted children aged between 16 and 18 to leave Ukraine without the written authority of a parent. But since 12 March 2022, the Cabinet of Ministers of Ukraine decreed that orphans under 18 years, children deprived of the parental care under 18 years may cross the border of Ukraine only if they are accompanied. The same also goes for children who had been voluntarily placed in institutional care or patronage. All other children (ie children who are not orphans or deprived of alternative care) upon reaching the age of 16 may travel outside of Ukraine unaccompanied.

In the context of the current martial law, children under 16 can leave Ukraine with one parent, a grandmother, grandfather, adult brother or sister,

stepmother, or stepfather without the written authorization of either or both parents but the relative should be in possession of evidence of the family relationship, such as birth and marriage certificates<sup>76</sup>.

Where a child has a serious illness, it will also be necessary to obtain a certificate from the relevant medical advisory commission that has been certified by the health care institution. Where the child has a disability, additional documents will also be required.<sup>77</sup>

This decree provided that the underaged (under 18 years) orphans and children deprived of parental care from different kinds of institutions should cross the border of Ukraine accompanied by the legal representative or other person authorized by such representative presenting passport of the citizen of Ukraine of the child or birth certificate of the child (if there is no passport), as well as the order on the departure of the child abroad signed by the director of the respective institution.

The same relates also to children without status who had been voluntarily placed in institutional care or patronage, as their departure from Ukraine should be accompanied by a person authorised by an order from the institution, a decision of a guardianship authority or military administration or, in the case of patronage, an order from the relevant children's services department.

Later guidance indicates that the order for children without status who have disabilities can be made by a person, who has replaced a director of an institution, and that the National Social Service can give permission instead of a local or military authority.<sup>78</sup>

There are a number of additional requirements where a child with disabilities or a medical condition is leaving Ukraine.<sup>79</sup>

- ▶ Decree No. 302 of March 17, 2022, "On establishment of Coordination Headquarters for the Protection of Children's Right Under Martial Law".

This is a temporary consultation and advising authority of the Cabinet of Ministers of Ukraine established to coordinate activities of the central and local executional authorities purposing to protect children rights during a war.

- ▶ Decree No. 349 of March 22, 2022, "On the Amendments to Certain Decrees of the Cabinet of

Ministers for the Protection of Children's Rights in the Period of Emergency or Martial Law"<sup>80</sup>.

This Decree enables relatives, including godparents, to assume guardianship for children who become orphans or deprived of parental care for the duration of martial law. It also enables children to be transferred between institutions and foster care during the period of martial law or be placed on a temporary basis in foster care or family type orphanages.

- ▶ Decree No. 447 of April 15, 2022, "On the Amendments to the Order of the activities of the custody and care authorities with regard to the protection of the child rights".

This Decree improved the order of establishing a status of the child as orphan or as one that is deprived of parental care.<sup>81</sup>

- ▶ Decree No. 794 of July 7, 2022, "On some issues of the return of children temporarily relocated (evacuated) outside of Ukraine for the purpose of obtaining temporary protection during martial law in Ukraine"<sup>82</sup>.

It established the order of necessary actions that should be adopted by the responsible authorities to ensure the protection and possible return of the temporary relocated or evacuated children back to Ukraine. The specific procedure of such possible return is established by the Order of the return to Ukraine of the children deprived of parental care, which are citizens of Ukraine adopted by the Decree No. 569 of April 23, 2003.<sup>83</sup> In particular, orphans and children deprived of parental care – citizens of Ukraine who for various reasons stay outside Ukraine are subject to return to Ukraine, if there are no grounds for their adoption or transfer under custody (guardianship) abroad. The respective Order also provides that children born and left in maternity hospitals abroad are to be returned to Ukraine if there are grounds for their acquisition of Ukrainian citizenship by birth.

- ▶ Decree No. 546 of June 1, 2023, "On temporary relocation (evacuation) of the children and persons, who reside or enrolled in institutions of various types, forms of ownership and subordination for 24-hour stay, and their return."<sup>84</sup>

This Decree established Order, which defines a mechanism for ensuring the safety of children and

persons who reside or are enrolled for a 24-hour stay in institutions of various types, forms of ownership and subordination during martial law by taking, if necessary, measures for their temporary relocation (evacuation), providing accommodation, proper care, upbringing, as well as return to their place of habitual residence (stay), and in case of departure outside Ukraine – to Ukraine.

Ukraine has not signed or ratified the Hague Convention on Intercountry Adoption<sup>85</sup> which applies in most responding countries. Therefore, adoption of Ukrainian children by non-Ukrainian nationals can only take place under Ukrainian law. On 13 March 2022 the Ministry of Social Policy confirmed that it would not be approving any intercountry adoptions under Ukrainian law whilst martial law remained in place.<sup>86</sup>

However, since February 24, 2022, there were some changes in the legislation regulating adoption in Ukraine. Decree No. 618 of the Cabinet of Ministers of Ukraine dated May 24, 2022, amended the Procedure for conducting adoption activities and supervising the observance of the rights of adopted children.

In particular, these changes concerned the introduction of the procedure for the mandatory transfer of an adopted child to the adoptive parents in the presence of an official of the consular institution of Ukraine in the event of its temporary relocation (evacuation) outside of Ukraine during the state of emergency or war in Ukraine, provided that the specified (introduced in connection with changes) package of documents is produced.

Subsequently, on May 31, 2022, the Cabinet of Ministers adopted changes, among other things, regarding the digitization of the adoption process.

These changes are aimed at improving the adoption procedure in terms of the possibility to use the Unified State Web Portal of Electronic Services (“Diya”). In addition, a single electronic data bank on orphans and children deprived of parental care and families of potential adopters, guardians, custodians, adoptive parents, foster parents, maintained in the Unified Information and Analytical System “Children”, should be refined.

## The application of relevant international law in Ukraine

Article 9 of the Ukrainian Constitution states that international treaties ratified by the Verkhovna Rada are binding as part of Ukrainian national law. One such treaty is the 1996 Hague Child Protection Convention, described in Chapter 3<sup>87</sup> and further below.

Currently the Convention is used in Ukraine in relation to when a court decides on issues of jurisdiction (Articles 5 and 7). However, it should be noted that the special order of the application and implementation of the said 1996 Hague Child Protection Convention is still absent, which affects its proper application inside Ukraine. In contrast, Ukraine is a party to another important Hague Convention – on the Civil Aspects of International Child Abduction of 25 October 1980 and there is a special Order of the execution of the mentioned Convention 1980 in Ukraine established by the Decree of the Cabinet of Ministers of Ukraine No. 952 of July 10, 2006<sup>88</sup>.

The Ukrainian Central Authority also has a role in liaising with other central authorities in responding countries in relation to information about children, who have left or been evacuated from Ukraine, where legal disputes arise involving them. Since January 1, 2023, the current Central Authority is the national social service of Ukraine.<sup>89</sup> Ukrainian diplomats also have the power under Articles 5(h) and 37(b) of the Vienna Convention on Consular Relations<sup>90</sup> to assist certain Ukrainian children who have been displaced to responding countries.

As will be further described below, certain bilateral agreements between Ukraine and responding countries may also affect the respective responsibilities and powers of these countries.

### 4.3 Addressing the role and responsibilities of authorities and actors acting under the laws of Ukraine and responding countries respectively, and the cooperation between them

As described above, the scope and nature of Article 19 UNCRC makes it clear that there is a *shared obligation* for all relevant actors to protect children. GC 13 recognises the need for actors to work together to protect children.<sup>91</sup> Child protection relies on the coordination of actors with different roles, responsibilities and powers towards children; determining the role that each actor plays to protect children is an essential step to achieving this.

As noted above, HCCH 1996 Child Protection Convention plays an important role in the recognition and continuance of arrangements put in place for children in alternative care by courts or authorities in Ukraine. HCCH Child Protection 1996 also provides important rules governing the basis on which countries will exercise jurisdiction to adopt any new or additional child protection measures that may be necessary, in light of the circumstances of the child.

At the time of writing, there has been limited case law and practice in relation to how its provisions may be used when disputes arise about the responsibility for children from Ukraine in responding countries.

It also remains to be seen how provisions concerning *the supervision by a public authority of the care of a child by any person having charge of the child*, which falls within the scope of the HCCH 1996 Child Protection Convention (Article 3), might apply.

General Comment 13 recognises the necessity for transnational cooperation. In particular, paragraph 76 notes in relation to cross-border cooperation that “cooperation is also needed to address child protection issues which cut across national borders such as: cross-border movement of children – either unaccompanied or with their families – either voluntarily or under duress (for example due to conflict, famine, natural disasters or epidemics)”.

HCCH 1996 Child Protection Convention also provides provisions on how authorities should cooperate. The Guidance issued by the HCCH on the application of the HCCH 1996 Child Protection Convention to unaccompanied and separated children notes that it is a well-established principle that the law applicable

to “measures taken to protect [the child upon his or her arrival in the responding State], is the law of the forum, namely the law of the State in which the child is present. However national law cannot in and of itself facilitate the degree of international judiciary and administrative cooperation that is necessary for the implementation of protection solutions with cross border elements... It is only through the application of an international instrument such as the HCCH 1996 Child Protection Convention that these tools of cooperation become available”.

Other bilateral agreements between Ukraine and refugee hosting countries on cooperation may also be relevant and these are described below.

#### 4.3.1 Giving effect in responding countries to the child protection measures put in place for children under Ukrainian law

In this situation, the HCCH 1996 Child Protection Convention mechanisms for recognition (Article 23), by a responding State, of measures ordered by judicial or administrative authorities in Ukraine and to give effect, in responding States, to parental responsibility (i.e., parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives of a specific child) (Article 16) put in place in Ukraine have proven very valuable.

The purpose and scope of these measures of protection ordered by judicial or administrative authorities in Ukraine and parental authority, guardianship or legal representative arrangements under Ukrainian law will influence whether and what measures of responsibility and assistance should be put in place under the national laws of responding countries. As has been described in chapter 3, this is an issue that will vary depending on the individual situation of the child and in light of changing circumstances.

It appears that most children arriving in groups have been treated as falling under the primary responsibility of Ukrainian alternative care institutions or the local

authorities in Ukraine who are responsible for them. States then need to consider what support the caregivers need and what national measures should be in place for identifying and responding to risk.

There are no specific provisions in the TPD addressing the situation of children evacuated from alternative care. As discussed in chapter 3, there may be some cases where some children (accompanied by adults from Ukraine) might be regarded as unaccompanied for the purpose of EU temporary protection procedures. For example, in the instance of children evacuated from alternative care settings in Ukraine, this question of whether a child is accompanied by an adult who is responsible for them might need to be carefully considered in situations where a child was placed in a day-to-day care arrangement under Ukraine law, but parents retained responsibility for key decisions in their regard (a child “without status”). In such cases, it may be that the child will be appointed a guardian in the responding State. One aspect of the guardian’s role would be to liaise with parents on any local procedures that concern the child. In all circumstances, when decisions about the future of the child are taken, the parents’ role and rights under Ukrainian law would need to be given effect and respected in accordance with Articles 16 and 23 of the HCCH 1996 Child Protection Convention.

Of course, as described in chapter 3, this would not exclude concurrent recognition by the responding country of the placement of the children in the care of accompanying caregivers from Ukraine under Ukrainian law. These placement measures should also be recognised under the HCCH 1996 Child Protection Convention (Article 23). These accompanying caregivers would continue to exercise their responsibilities for the child as defined under Ukrainian law. Article 16 of the TPD also contemplates such placement orders, alongside the appointment of a guardian where necessary.

There should be a paper trail that authorities in responding countries can follow in relation to these children. Liaison with consular officials has proved to be useful in a number of responding countries. This is in keeping with the powers accorded to diplomats under articles 5(h) of the Vienna Convention on Consular Relations<sup>92</sup>, as one of the functions of an accredited consular official under Article 5(h) of the Convention is to safeguard the interests of minors, particularly when they are subject to guardianship

or trusteeship. Adults accompanying these children are obliged to register them at the relevant Ukrainian consulate on arrival and, in turn, the Consulate has to inform National Social Services in Ukraine<sup>93</sup>.

Certain bilateral agreements between Ukraine and responding countries will also be relevant to the question of guardians.

For example, Poland and Ukraine were also able to rely on an existing treaty between the two states that had been in place since 1993<sup>94</sup>. This treaty concerns legal assistance and legal relations in civil and criminal matters. This allowed Poland to recognise guardianship granted in Ukraine as well as accompanying documents coming from Ukraine.

Ukraine has also entered into a bilateral agreement on cooperation in the field of protection of children affected by the Russian war in Ukraine with Lithuania.<sup>95</sup> Art.4.3.4 of that agreement provides that a Lithuanian temporary guardian (curator) should be appointed for every child under Lithuanian law, “while maintaining to the possible extent scope of functions and powers of the legal representative of the child, who was provided and determined in accordance with the legislation of Ukraine.” The guardian and legal representative take mutual decisions.

Also of relevance is Consular Agreement between Ukraine and Italy, December 2016. Article 50 of this agreement (Protection of Minors and Incapacitated Persons) notes that “Consular officers shall have the right to receive any statement concerning adoptions and the protection of the rights and interests of minors and other incapacitated persons who are nationals of the sending States, and for this purpose may, if necessary, in accordance with the law of the State of residence and international agreements in force for Contracting Parties to the present Convention, take steps to appoint the curators or guardians of such persons and to supervise the exercise of their mandate.” The application of this latter provision has recently been reviewed by the Italian Court of Cassation (judgment on appeal registered 16703/2022, dated June 13, 2022).

#### **4.3.2 Jurisdiction of responding country to take child protection measures**

Children arriving in responding States on a temporary basis subject to the TPD, from alternative care

settings in Ukraine, will likely all have their habitual residence in Ukraine. On this basis the HCCH 1996 Child Protection Convention will apply. (Should the situation of any child lead to their habitual residence becoming an EU Member State, similar provisions of the Brussels II B Regulation will apply.)

*Article 5* of the HCCH 1996 Child Protection Convention serves as the primary basis for jurisdiction and provides that the judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

*Article 6* provides for jurisdiction to be exercised by a responding country in relation to refugee or internationally displaced children and it is based on the presence of the children in a Contracting State.

The Handbook on the HCCH 1996 Child Protection Convention notes that the use of the phrase "internationally displaced children" is intended to be sufficiently broad to surmount limits that individual States may place on the definition of "refugee". It notes that these children may often be "unaccompanied or separated and they often require arrangements for their protection that are of a durable nature, even in the absence of a situation of urgency. This is why the Convention provides general jurisdiction to the Contracting State where such children are present (Article 6), as opposed to limited jurisdiction that applies only in situations of urgency (Article 11) or where provisional measures with limited territorial effect are required (Article 12)."

The HCCH Note on The Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children notes that "Given the particular circumstances of the children whose situation is captured under Article 6, relying on the general jurisdiction attributed to the authorities of the Contracting State of habitual residence (Article 5) would be impossible or ineffective because such children may have severed every connection with that State, or it would be unrealistic to seek a measure of protection from the State of habitual residence, regardless of whether a parent or family member is still residing there."<sup>96</sup>

### Some reflection points emerge at this stage

In many cases concerning children evacuated from alternative care in Ukraine, the connection with Ukraine has not been severed. The judicial and administrative authorities outside the occupied territories appear to be operational. If the habitual residence of these children is still in Ukraine and the judicial and administrative authorities in Ukraine are operational and effective, these authorities may seek to exercise general jurisdiction over these children (Article 5).

The authorities of the State where the child is present may also seek to exercise general jurisdiction under Article 6. In some circumstances, refugee hosting countries may also exercise limited jurisdiction to order (a) urgent measures of protection (Article 11) and, (b) measures of protection of a provisional character with limited territorial effect (Article 12).

It is worthwhile noting that this situation has been identified and addressed in the recent judgment of the Italian Court of Cassation (judgment on appeal registered 16703/2022, dated June 13, 2022). That judgment also notes that Article 13(1) addresses any conflicts that might arise where two countries seek to exercise jurisdiction under Articles 5-10, namely:

The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

Further guidance on the application of the HCCH 1996 Child Protection Convention in this specific setting could be very valuable to avoid legal uncertainty and risk to children.

Moreover, such guidance should carefully take account of those responsibilities of the national authorities of the responding State which lie outside the scope of the HCCH 1996 Child Protection Convention such as, for example, to decide on immigration or asylum issues which are particularly relevant in relation to the future of these children and which may also have an impact on their protection in responding countries.

### 4.3.3 Cooperation between Ukrainian authorities and guardians and child protection authorities and guardians in responding countries

Legal questions have arisen on the ways in which Ukrainian authorities and guardians appointed by Ukrainian authorities or parents and relatives communicate and cooperate with national child protection authorities in responding countries. There is a growing need to maintain communication for a variety of purposes, including undertaking individual assessments, the improvement of reception facilities, the provision of additional support and/or supervision and monitoring mechanisms. Ukrainian authorities and staff have often been reluctant to be engaged by child protection procedures in responding countries and there have been challenges to relationship building between Ukrainian professionals and those working for national authorities of receiving States. What initially was deemed as an emergency evacuation of children for a short time, has now become a protracted situation with no definite end yet in sight. Protection needs are arising for these children which require closer co-operation between the staff who accompanied the children from Ukraine and national child protection systems.

There are several ways in which accompanying adults, authorities in Ukraine and national authorities in responding countries work together to ensure that the best interests of the child shapes decision making in their regard.

The HCCH 1996 Child Protection Convention is once more valuable in this regard, as are bilateral agreements between Ukraine and responding States. In particular, its cooperation provisions might serve as inspiration for the development or strengthening of cooperation in relation to matters that fall outside its scope.

The HCCH 1996 Child Protection Convention puts in place a system of Central Authorities tasked with discharging the duties which are imposed by the Convention and Article 30 provides that these "Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention." Central Authorities shall take appropriate steps to provide information as to the laws in force of, and services available in, their States relating to the protection of children.

As noted in the HCCH Guidance, the Central Authority of the State of origin of the child or the Central Authority of a third State could be requested to provide information in a case where the child could be returned to his or her State of origin or relocated to a third State.<sup>97</sup> Central authorities may also cooperate when assistance is needed in locating a child that appears to be present on the territory of the requested State and in need of protection. Furthermore, Article 34 provides that "[w]here a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another contracting State which has information relevant to the protection of the child to communicate such information."

Article 35 also provides for "mutual assistance between the competent authorities of the Contracting States for the implementation of measures of protection. Such assistance will often be necessary, in particular in case of removal of the child or of his or her placement in an appropriate establishment, situated in a State other than that which has taken the measure of placement."

#### Information Exchange

It is worth noting that Article 34 of the HCCH 1996 Child Protection Convention does not impose a duty to furnish the requested information. The Guidance indicates that "doing so will therefore depend on the good will of the authorities of the requested State and the mutual trust between both States and on the substantive and procedural law applicable. The decision to share available information may also depend on the rules governing the confidentiality of the information in the requested State." Article 37 is also relevant in this regard and provides that "an authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person [...] in danger, or constitute a serious threat to the liberty or life of a member of the child's family."

#### Other relevant provisions

Other provisions of the HCCH 1996 Child Protection Convention, including Article 32 and Article 33, will be of relevance when considering cooperation. Article 33 is clearly of particular relevance to the situation of children being moved from alternative



care settings in one country to another country in normal circumstances.<sup>98</sup> However, its application in an emergency setting and rapid international displacement may not be workable without further guidance or adapted procedures within Central Authorities. The Permanent Bureau of the HCCH is currently exploring the role of Article 33 of the HCCH 1996 Child Protection Convention in future situations of displacement. This would enable a State, such as Ukraine, to liaise with another Contracting State to the HCCH 1996 Child Protection Convention about the placement of children from alternative care. It would be able to do so through a dialogue with that State's Central Authority or other competent child protection authority. This would avoid reliance on ad hoc arrangements made through different government bodies or NGOs and enable the child's best interests to be assessed.

The Central Authorities in responding countries will continue to play an important part in exchanging information with the Central Authority in Ukraine in relation to individual children and orders that are already in place. Their ability to do so has been augmented by an increased level of lawyers and social workers being assigned to different Central Authority units.

### Cooperation under other agreements

As noted above, there are several political declarations which are put in place by Ukraine or responding States and are pertinent in this regard, as well as bilateral agreements which either existed before the war or were put in place upon the onset of the war.

Regarding bilateral arrangement in place between Ukraine and responding countries, it is important to note that the HCCH 1996 Child Protection Convention "does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument" (Article 52(1)). Furthermore, the HCCH 1996 Child Protection Convention "does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention" (Article 52(2)).

### Poland-Ukraine Declaration (2022)

The Parties expressed the wish to strengthen cooperation and develop cooperation between the Parties, in facilitating voluntary returns; exchanging experience and information; registering children; halting ongoing adoption procedures; providing free legal aid; providing legal information in a way and language the child understands; providing high quality care for groups of children in institutions and taking all possible measures to preserve the close contact of groups of children from one institution. As noted above, Poland and Ukraine were also able to rely on an existing treaty between the two states that had been in place since 1993<sup>99</sup>. This concerns legal assistance and legal relations in civil and criminal matters.

### Lithuania-Ukraine Agreement (2022)

As the extent of the invasion became clear in February 2022, the government of Ukraine entered into a formal [agreement](#) with Lithuania so that it could take temporary responsibility for some Ukrainian children. The content of the Agreement highlights the dominant concerns that the Ukrainian authorities had about evacuating vulnerable children. These mirrored those shared by other states in similar situations of mass evacuations of vulnerable children. It feared that children would go missing, be illegally adopted and not be returned to those with legal responsibility for them. Of interest is that the Agreement refers to Article 6 of the HCCH 1996 Child Protection Convention on "refugee children and children who are transferred internationally due to the unrest in their country". The agreement also provides that measures of protection ordered by judicial or administrative authorities in Ukraine and Lithuania should be recognised and respected by each other.

### Other commitments in relation to cooperation between Ukraine and responding countries

European Council Political Statement June 2022:

The political [statement](#) of the European Council on the protection of displaced children from Ukraine in the context of Russia's war of aggression against Ukraine in June 2022, noted, *inter alia*, the need for cooperation with Ukraine. The statement also encourages Member States to "ensure that all unaccompanied and separated children fleeing from

war in Ukraine, including children from Ukrainian institutions, are fully integrated into national child protection systems and benefit from all services and protection thereby provided, and that their reception is organized in line with the best interests of the children.”

### Council of Europe Reykjavik Declaration

Appendix II of the Reykjavik Declaration “United around our values” called on the Council of Europe to facilitate co-operation between States, the European Union and relevant international organisations, through an appropriate mechanism, in order to:

- ▶ exchange information on legal and policy frameworks regarding the situation, status and needs of children from Ukraine residing in its member States;
- ▶ advise on the reform of the Ukrainian child protection and care system;
- ▶ facilitate the sharing of relevant information, including information from the Network of Focal Points on Migration and, as far as possible, the co-ordination of measures taken with regard to the best interests of the children of Ukraine.

### Support for transnational cooperation in general

As noted above, support for transnational cooperation within the EU is provided by the EU Solidarity Platform. Of note, the Commission’s Communication on the implementation of the Temporary Protection Directive: One Year On, indicates that Inside the EU, the Solidarity Platform will support the coordination of the transfer of unaccompanied children to family and community-based care as needed.” The Council of Europe is currently setting up a Consultation Group on Children of Ukraine to facilitate the exchange of information and discussions on policies regarding Ukrainian children residing in other Council of Europe member States.

Cooperation between actors in Ukraine and responding countries is also being assisted by actions undertaken by the Ukrainian Parliamentary Commissioner for Human Rights and the European Network of Ombudsmen for Children and the International Federation of Social Workers. Lessons can also be learnt from the Ukrainian Children’s Care

Group and SOS Children’s Villages International.

Promising practices involving closer and better collaboration in some countries is also of note. For example, on a day-to-day level, professionals from responding countries and Ukraine have collaborated to maximise the contribution they can make to protecting the rights of children from alternative care and meeting their needs. At the same time, stakeholders who attended the thematic consultations or took part in bilateral discussions for this study have acknowledged the fact that, in many responding countries, there is an overall shortage of foster carers or suitable accommodation or at the very least a shortage of relevant interpreters and cultural mediators to deliver the services the children require.

For example, in Estonia, where foster carers from Ukraine did not have the necessary qualifications to be integrated into the national foster care system, they were recognised as part of the guardianship system. This ensured close working relationships and that the Ukrainian foster cares could provide a continuity of care to the children they were accompanying.

Close collaboration with foster carers and guardians from Ukraine also enabled responding countries to collect and exchange details about the children’s histories and maintain contacts with their parents and other family members. This is particularly important for children with disabilities, who previously maintained a relatively high level of contact with their families and where their disabilities may make change even more challenging.

In Germany, it was also recognised that Ukrainian foster carers, who were unfamiliar with the national community child protection systems, interpreted requests for information about unmet needs, as implicit criticism of the care they were providing. But when working relationships were developed, they would welcome information about unfamiliar systems and an understanding of the challenges they were experiencing without the support provided to foster carers in Ukraine. In several countries, it also became apparent that there were several adults who were in receipt of temporary protection who had skills that could be utilised as foster carers, interpreters or cultural mediators and thus took pressure off over-stretched foster care and child protection services.

## 4.4 Key measures to protect these children from violence abuse neglect and exploitation when in responding countries

As noted above, there are a range of steps and procedures involved in preventing and responding to protection of children from violence, abuse, neglect and exploitation. Some key measures, involving the authorities of responding countries, merit particular consideration in this situation.

Individual assessments should be conducted of each child's situation when in alternative care groups or foster families in responding countries. This provides the basis for ensuring adequate child protection measures are in place and that the child will access international protection which is appropriate to their situation. Responding States and authorities in Ukraine, as well as accompanying adults, should collaborate to ensure these occur.

Individual assessments should:

- ▶ Recognise that children in alternative care may have several intersectional vulnerabilities, including disability, gender, race, ethnic origin, religion and age.
- ▶ Ensure the participation of children in decisions relating to their best interests will be particularly important when they are in alternative care.
- ▶ Ensure the child's rights to survival and development is also a guiding principle.

The assessment on arrival needs to be as comprehensive as possible to counter any risks to the child and protect their best interests, particularly given the fact that subsequent registration opportunities may be missed or delayed. In addition, a failure to recognise hidden special needs and disabilities can mean that a child does not benefit from the assistance necessary to access immediate procedures and safeguards.

Basic information about the child should be available, as the Ukrainian government only permits children from alternative care to leave Ukraine if they are travelling with an adult who has been granted permission to leave with them, has documentary proof of this and also documentary proof of the child's identity and conditions for their evacuation have been met.

Information provided about the name of the institution or other form of alternative care that the child was living in prior to their removal also provide responding countries with a basic indication of the nature of any disabilities or other special needs that a child may have. Additional documentation may also be available if a child is suffering from a medical condition or a disability.

During individual assessments, the children themselves should be assisted to participate in decisions made about them, taking into account their age and stage of development. This is of particular importance when a child is in alternative care, as they may have little experience of making their own views known and these views being taken into account.

### Particular issues that may need to be explored in individual assessments include:

- ▶ The facilities available in responding countries may not replicate those provided in Ukraine;
- ▶ The trauma of the invasion and the evacuation may have given rise to the child having additional special needs;
- ▶ Children may have special needs which are not usually encountered in the refugee hosting State;
- ▶ Children will no longer have the wider network of medical and community support they may have relied upon in Ukraine;
- ▶ Children will be deprived of the contact they may have enjoyed with a birth parent on a regular basis;
- ▶ Where does family, culture and community weigh in the balance?;
- ▶ Parents applying for custody in responding country.

Article 23 of the CRC recognises the right of any child with special needs to dignity and the obligation of countries of destination to promote the self-reliance of children with special needs and their right to active participation in the community. The Committee of the Rights of the Child has also recommended that States implement the necessary policies and programmes for migrant children with special needs. These rights are confirmed in the UN Convention on the Rights of Persons with Disabilities which states that States Parties shall take all necessary measures to ensure the full enjoyment of children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

### Addressing discrimination

Children from the Roma community have been discriminated against in responding countries and similar risks may arise for Roma children from alternative care. There may also be individual children from Russian speaking areas, who are at risk of discrimination. The antiracism body of the Council of Europe, the European Commission against Racism and Intolerance (ECRI), has started to look into potential discriminatory issues after the war of aggression by the Russian Federation in its country [monitoring](#) reports and also made a [statement](#) on the issue in 2022.

### Support to accompanying adults

Under Article 19 UN CRC, national authorities have an obligation to ensure that caregivers for children have such support and assistance to prevent risk of harm.

For example, adults accompanying children in groups precisely have a need for support from national authorities in responding countries to protect children, given the fact that they are outside of Ukraine and may rely heavily on access to accommodation, health and education services, inter alia, in the responding countries.

National child protection systems need to consider carefully how best to fulfil their obligations, whilst experiencing capacity issues concerning psychosocial care, interpreters, local professional guardians, cultural mediators or an evaluation of the child's legal status prior to evacuation from Ukraine.

### Responding State's role as regards risks posed by adults caring for them

A responding country will need to undertake a measure of protection when a child is at serious risk of harm, abuse or exploitation, including from adults who are caring for them.

The standard and burden of proof of such a risk is likely to vary between countries but in all cases, transparency about any allegations being made is necessary and any adult accused of causing serious harm should be provided with legal representation and any necessary cultural and language support.

The type of measure of protection should be commensurate with the risk and could vary from seeking a change in guardianship arrangements to introducing additional support and supervision by the national child protection authorities. The adjudication of any assertion of risk will require great care. If it is proposed to appoint a new guardian, it will also be necessary to involve the relevant Ukrainian authorities including consulates.

### Decisions on returns of children in alternative care

As noted above, despite UN advisories against returns at this time, there have been some transfers of children back to Ukraine, initiated for groups of children in a sudden way. It is not clear whether and in what way decisions on these transfers involved child protection services in the responding countries. This is a very sensitive issue politically and a complex area legally.

Any returns which risk harm to children and do not ensure their best interests are a primary consideration should not take place.

The fact that these children precisely need – and are provided with – international protection, de jure or de facto, in responding countries, in light of a war, raises legal questions concerning the responsibility of responding countries to put in place necessary procedural safeguards for the children before return.

Furthermore, responding States have obligations to prevent risk of serious harm to the children under their national child protection laws. For example, they

may consider urgent and provisional measures to delay any transfers pending a best interests procedure which demonstrates that return is in line with the best interests of the child.

It is also evident that several actors need to work together to ensure that assessments of the best interests of these children, properly guides these decisions. Such assessments must involve the children themselves. It also requires independent support and assistance being available for children,

including legal counselling and assistance where necessary. Mechanisms to do so need to be further developed urgently. Of note, in July 2023, UNHCR published its position<sup>100</sup> on Voluntary Return to Ukraine of Refugee Children without Parental Care, including Unaccompanied Children and Children Evacuated from Care Institutions in Ukraine.

Chapter 6 below further deals with finding comprehensive, secure and sustainable solutions for children without parental care, after the war.

## 4.5 Recommendations

- ▶ Judicial and administrative authorities in responding States should understand how the guardianship and foster care systems work in Ukraine in order to be in a better position to assess the current needs of children and to better coordinate the care arrangements put in place in Ukraine with the national care arrangements available in the responding State. Such information should be disseminated widely.
- ▶ Guiding principles should be developed to assist in strengthening collaboration between the authorities in Ukraine responsible for children evacuated from alternative care, accompanying adults and national child protection agencies in responding countries.
- ▶ An information note informing on how the HCCH 1996 Child Protection Convention mechanisms can assist with liaison between various stakeholders.
- ▶ Ukrainian guardians and foster parents should be provided with the necessary support, including training, to adhere to the standard of child protection required in the responding country they find themselves in.
- ▶ Liaison should be established between the Ministry of Social Policy in Ukraine, Ukrainian consuls and the Central Authorities in order for transnational procedures to be developed should it be necessary to remove a child from the responsibility of an accompanying adult.
- ▶ Judges and lawyers who practice in international family law should be invited to prepare further guidance about the application of the HCCH 1996 Child Protection Convention and bilateral arrangements to children who have been internationally displaced from alternative care.

- ▶ Authorities in responding countries should establish a closer dialogue with Roma experts employed by the Council of Europe, UNICEF ECARO and others to ensure that trust in established to enable children from Roma community are heard.
- ▶ Inside the EU, the Solidarity Platform's efforts to support the coordination of the transfer of unaccompanied children to family and community-based care as needed should be encouraged and supported.

Recommendations in relation to children from alternative care in Ukraine – related to finding comprehensive sustainable and secure solutions (linking with chapter 6):

- ▶ Guidance should be provided by experts working with children in institutional care as to how these children can benefit from proposals being developed to reform child protection systems for Ukrainian children, especially in relation to any potential return of the child.
- ▶ Guidance should be developed in order to enable actors from the emerging Ukrainian child protection system to work alongside responding countries' national child protection professionals to provide Ukrainian children with the most comprehensive protection.
- ▶ The possibility of returning children to family or community-based provision in Ukraine should be explored as the first option as opposed to return to institutions from which they were evacuated.



## Chapter 5.

# Accessing the international protection procedure appropriate to the individual needs of the child

### International Protection versus Child Protection

“The need for **international protection** arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution, threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or different situations of violence. Other risks may stem from: famine linked to situations of armed conflict; natural or man-made disasters; as well as being stateless. Frequently, these elements are interlinked and are manifested in forced displacement.”<sup>101</sup>

**Child protection** is the prevention of, and response to, exploitation, abuse, neglect, harmful practices and violence against children.<sup>102</sup> Child protection measures typically arise from child welfare, child protection or family laws. The measures involved are often undertaken by public authorities. They involve a series of actions and may include access to services such as accommodation, health and education. This chapter is largely concerned with the forms of international protection that are available to children under public law protection instruments. Child protection has been discussed in chapter 4.

## 5.1 Background context

In an unprecedented way in Europe, countries responding to the war in Ukraine have offered access to international protection, including through new temporary protection instruments, which have allowed many persons arriving from Ukraine to receive immediate shelter and support.

Whilst providing access to temporary protection is an enormously positive undertaking by States, it is also important to ensure that unaccompanied and separated children, as well as children evacuated from alternative care, can access the form of international protection that is most appropriate to address their needs and to secure their rights in the short-term and in the longer term. This is because some children may have specific circumstances that entitle them to other forms of protection and different solutions. For example, a stateless child not only has a right to

protection, but also the right to acquire a nationality. Other children may be victims of trafficking, who require special protection and who may be able to access a status that provides a legal pathway to longer-term stability and safety. Some forms of international protection can be enjoyed concurrently.

Access to the most appropriate international protection procedure will directly influence many dimensions of a child’s situation and their ability to fulfil their rights now and in the future. The supports, procedural safeguards and services available to unaccompanied and separated children may differ between procedures, as do the authorities with responsibility to take decisions in their regard.

In the short-term, the applicable international protection procedure could also affect the

opportunities and ways in which a child may be able to reunite with family.

In the longer term, a child's international protection status may affect decisions that will impact on their future prospects. If the individual needs and rights of a displaced child for the form of international protection most appropriate to their situation is not assessed,

they may not only suffer significant risks now, but it may also undermine their access to important legal procedures in the future. This might include whether support and assistance can be accessed in order to identify a comprehensive, secure and sustainable solution for them in line with their individual best interests.

## 5.2 Legal and practical issues in focus

### 5.2.1 The application of the EU Temporary Protection Directive

Temporary protection is a form of international protection, the application of which has been triggered in the EU to respond to persons fleeing the war in Ukraine. The activation of temporary protection by the Council of the European Union on 4 March 2022 was broadly welcomed. Temporary protection ensures the right to reside and access services, including access to accommodation, education and healthcare, in the EU for many of the persons displaced from Ukraine for a temporary period. Currently, temporary protection is available until March 2024, with a possibility of its extension by a Council decision until March 2025.

**Temporary Protection:** is a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection (Council Directive 2001/55/EC).

Due to its nature, temporary protection does not provide long-term continuity and stability for a child. Uncertainty as to the availability of temporary protection until March 2025 should be avoided by a rapid decision on its extension.<sup>103</sup> Countries outside the EU, like Moldova, have also put in place "temporary protection" or specific short-term schemes. Uncertainty for children without parental care is particularly detrimental as it undermines their

development at a crucial period and creates conditions of uncertainty which may expose them to risk.

#### Not all children are eligible for TPD

Whilst temporary protection instruments are being used in a widespread way, *not all children are eligible for temporary protection* because they do not meet the criteria set out in the TPD and national implementing legislation. For example, this may be because they were already residing abroad before 24 February 2022 or because they were asylum seekers from other countries who had not yet been granted international protection or permanent residency by the Ukrainian authorities. Notably, some EU Member States have already broadened the scope of their application of temporary protection.<sup>104</sup>

#### Some children experience difficulties accessing TPD

At the same time, other children may be *unable to prove that they are eligible for a variety of different reasons*, including a lack of identity documents or proof of permanent residency in Ukraine.

Additionally, certain children may experience particular problems and challenges when trying to access either temporary protection or other forms of international protection. Children who are entitled to temporary protection should in principle not face significant difficulties in accessing temporary protection, but this may occur depending on when and how support and assistance is put in place for them. For example, some countries require guardians to be in place ahead of any registration for the purposes of temporary protection. This has meant that some unaccompanied and separated children experience practical challenges because they have not yet had a guardian appointed (or recognised) and may encounter difficulties in



registering for temporary protection without a guardian.

As a further example, some Roma children may experience racism and discrimination when trying to access temporary protection or other forms of international protection. This may also be the case for children who are members of the LGBTQIA+ community. Negative attitudes towards these groups may influence the application of the law and the ability of individuals to access protection in some States.

**Children from alternative care in Ukraine** will be entitled to temporary protection under the Temporary Protection Directive or similar mechanisms. Given that they have travelled from an institution or foster care in Ukraine, their nationality and their date of arrival in a responding country is unlikely to be in doubt. However, it is unclear whether individual children are always registered, as foster carers may register as the principal recipient of temporary protection and children from institutional or foster care may be living in accommodation provided by non-governmental organisations under private arrangements.

## The need for international protection in addition to child protection measures

Some unaccompanied children from Ukraine may be taken into the national child protection system under national child protection laws. Access to the national child protection system typically will allow children to access accommodation and the immediate services they need. Therefore, some children may not be registering or applying for Temporary Protection or another form of international protection because they believe that they have sufficient protection as children until they become 18. This was also reported as a particular risk for groups of children evacuated from alternative care in Ukraine (see chapter 4).

Where a child is not formally a beneficiary of temporary protection or another form of international protection, they may not be able to access the support and safeguards provided to beneficiaries of such protection. This may also mean that they are unable to access potential transfers to other countries (e.g. for family reunification or through a voluntary relocation scheme). As the situation extends further into a second year of temporary protection, it will be important to ensure that children's rights to family contact and development are supported in the mid-term, so as to support comprehensive, secure and sustainable solutions for them in the future.

Without access to support and assistance under a form of international protection, some children are left in limbo, where their immediate care needs may possibly be addressed, but mid-and longer-term solutions are not explored or secured for them.

In contrast a child who registers for temporary protection may not be fully accessing the national child protection system in some responding countries. This study finds that both are important and that children have the right to avail of both international protection procedures and national child protection measures including procedural safeguards.

### 5.2.2 Pathway to protection and the availability of other forms of international protection

It is important to recognise that access to international protection is not only dependent on a decision taken in a specific procedure, but usually will encompass a continuous spectrum of decisions and actions concerning the child, which should all be underpinned by best interest assessments.

#### Preconditions: a pathway to protection

The possibility to access international protection begins with the legal framework ensuring the following preconditions: access to the territory, proper identification (e.g. as a child and as unaccompanied or separated), referral to the appropriate authorities, registration (e.g. at the border, in the child protection system, for Temporary Protection and for family tracing)<sup>105</sup> and individualised vulnerability screening including risk assessment.<sup>106</sup>

Deciding on the right pathway for each child at the earliest moment typically demands an assessment of the individual circumstances of the child and a best interests assessment to identify particular needs. This is not always available in responding countries.

In practice, it can be complicated for the child, and those supporting children, to identify and access the appropriate legal pathway, including through relocation procedures to other countries where these are available. This is a challenge that is often common to all unaccompanied children, no matter which country they come from. However, as noted in previous chapters, it is a challenge that may be characterised by some specific features in cases of children from Ukraine.

### Identification and registration

Moreover, as noted in chapter 2 above, freedom of movement across borders (such as visa liberalisation in the EU for Ukrainian nationals) has meant that some children who fled Ukraine may not always be identified, registered and assisted to make an application for protection. For example, children between the ages of 16 and 18, who were previously permitted by the Ukrainian authorities to leave Ukraine on their own are no longer allowed to leave Ukraine alone.<sup>107</sup> These adolescents, who left alone at the start of the conflict and before the change in law may well be travelling between, and through, responding countries. With limited contact with the authorities, they may be less likely to understand the benefits of different forms of protection and/or may choose to avoid protection if they feel it may hamper their onward journey. These children, who remain “under the radar” and do not access either local child protection systems or international protection procedures, may become increasingly at risk of exploitation and abuse during their journeys. Similarly, without specific measures in place, victims of trafficking may remain unidentified and unable to access protection and assistance.

Even when a child is identified and registered, because of widespread access to temporary protection, clear information and case management systems may not be in place to alert relevant professionals to the various procedures through which children from Ukraine may have the opportunity to seek international protection depending on their individual circumstances. This may be particularly

the case if these children are in alternative care (see chapter 4).

Such comprehensive case management systems are typically assisted by individual assessment procedures triggered when a child falls within the scope of the international protection procedures (for example Article 7 of the Asylum Procedures Directive or Articles 12, 14 and 16 of the Trafficking Directive). The TPD does not provide for such an assessment.

However, the importance of individual assessments to assist all the actors with responsibilities for a child to liaise and cooperate to ensure that the right decisions are taken for the child is increasingly recognised in legal procedures and policy commitments.

### Lack of suitable international protection procedures

In some countries, the legal framework is lacking procedures to identify and respond to specific international protection needs. For example, there may be no Statelessness Determination Procedure<sup>108</sup> or no procedure to recognise a child as a victim of trafficking (in particular, in the absence of a criminal prosecution of the traffickers).

### 5.2.3 Access to other forms of international protection

Even when a child is able to access temporary protection, there may also be a question as to whether they should access another form of international protection.

As described above, the circumstances of some children may mean that international protection procedures, other than temporary protection, would be more appropriate to their situation from the outset. It is possible for some forms of ‘international protection’ to be enjoyed concurrently – for example, an individual can be a refugee and simultaneously a stateless person. Consequently, the automatic availability of temporary protection is very welcome but should not exclude access to the various procedures available to address different international protection needs.

### Temporary Protection and access to the asylum procedure

The TPD does provide that “persons enjoying temporary protection must be able to lodge an application for asylum at any time” and that “the examination of any asylum application not processed before the end of the period of temporary protection shall be completed after the end of that period” (Article 17, TPD). Recital 10 of the TPD also affirms that temporary protection should be compatible with Member States’ international obligations as regards refugees and Recital 18 provides that “Rules should be laid down to govern access to the asylum procedure in the context of temporary protection in the event of a mass influx of displaced persons, in conformity with the Member States’ international obligations and with the Treaty.”

However, the TPD remains unclear with regards to how temporary protection and being an asylum seeker co-exist in practice.

There are apparent contradictions within the TPD in relation to applying for asylum whilst temporary protection applies, with the further difficulty that States are not given clear guidance but rather provided with discretion.

TPD Article 6 (the termination of temporary protection provision) does not include applying for asylum as a basis upon which TP should be terminated. However, Article 19(1) states that Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while applications are under consideration.

After examination of their asylum application, if another status is not granted, Article 19(2) TPD provides that Member States shall provide for that person to enjoy or to continue to enjoy temporary protection for the remainder of the period of protection.

It is a concern that Member States do not have guidance on how to apply these provisions in the best interests of the children concerned and that, therefore, children who seek asylum may not benefit from temporary protection at the same time, depending on the Member State’s application of the TPD.

### UNHCR’s supervisory role

Under paragraph 8 of its [Statute](#), UNHCR’s function is to protect refugees including by promoting the conclusion of international refugee instruments, supervising their application, and proposing amendments thereto. This function is mirrored in Article 35 of the [1951 Refugee Convention](#) in which States undertake to cooperate with UNHCR in the exercise of its functions, including in particular by facilitating its duty of supervising the application of the provisions of the Convention.

In line with its supervisory responsibilities, UNHCR provides authoritative guidance on international refugee law and can support the interpretation of the rights of these children as refugees. UNHCR has issued extensive guidance on the issue of children seeking international protection, with key documents noted in the *Compendium on Law and Guidance*. Of particular significance in relation to a child’s access to international protection are UNHCR’s [Guidelines on International Protection No. 8: Child Asylum Claims](#).

### Wide range of protection statuses

In principle, the fact that there are a range of different types of protection statuses (see Chart 1 below), including temporary protection, that could be (simultaneously) available is welcome. Additionally, different non-harmonised national protection statuses are also available across Europe.<sup>109</sup>

**Chart 1: Overview of the types of protection that may be available to children fleeing Ukraine**

Legal basis	Status: children concerned
<ul style="list-style-type: none"> <li>▪ EU Temporary Protection Directive</li> <li>▪ National laws</li> </ul>	<p><b>Temporary Protection:</b> Children registered under the EU TPD or equivalent national schemes.</p>

Legal basis	Status: children concerned
<ul style="list-style-type: none"> <li>▪ 1951 UN Refugee Convention</li> <li>▪ 1967 Protocol relating to the Status of Refugees</li> <li>▪ EU Qualification Directive</li> <li>▪ European Convention on Human Rights</li> <li>▪ National laws</li> </ul>	<p><b>Refugee Status:</b> A child who qualifies as a refugee under the Refugee Convention as someone who is unable or unwilling to return to their country of origin or habitual residence owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.</p>
<ul style="list-style-type: none"> <li>▪ EU Qualification Directive</li> <li>▪ National laws</li> </ul>	<p><b>Subsidiary Protection:</b> A ‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.</p>
<ul style="list-style-type: none"> <li>▪ UN Palermo Protocol to Protect, Suppress and Punish Trafficking in Persons Especially Women and Girls, supplementing the United Nations Convention against Transnational Organized Crime</li> <li>▪ CoE Convention on Action against Trafficking in Human Beings</li> <li>▪ EU Anti-Trafficking Directive</li> <li>▪ National laws</li> </ul>	<p><b>Protection for a victim of trafficking:</b> The general definition of trafficking reads “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation”. But, where the person is a child, it is not necessary to identify and prove the means used by their trafficker or to show that the child did not consent to being trafficked.</p> <p>Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.</p>
<ul style="list-style-type: none"> <li>▪ 1954 UN Convention relating to the Status of Stateless Persons</li> <li>▪ National laws</li> </ul>	<p><b>Recognition as stateless:</b> A stateless child is not considered as a national (citizen) by any State under the operation of its law.</p>
<ul style="list-style-type: none"> <li>▪ Principle of non-refoulement</li> <li>▪ UN Convention on the Rights of the Child</li> <li>▪ National laws (including asylum laws and laws concerning foreign nationals and immigration)</li> </ul>	<p><b>Non-harmonised national protection status:</b> Grounds for protection and residence status will depend on the provisions set out in national laws.</p>
<ul style="list-style-type: none"> <li>▪ 1961 Convention on the Reduction of Statelessness</li> <li>▪ National laws (including nationality laws)</li> </ul>	<p><b>Grant of nationality / Citizenship:</b> A child born on the territory, who would otherwise be stateless, or a child who has been recognised as stateless, when national law provides for facilitated naturalization in such cases.</p>

For example, a child may be able to benefit from protection under the 1954 Convention relating to the Status of Stateless Persons or the CoE Convention on Action against Trafficking in Human Beings and the EU Trafficking Directive, depending on their circumstances. Victims of child trafficking could also apply for international protection, as members of a particular social group, under the Refugee Convention and it may be that some applications have already been made on this basis.<sup>110</sup>

The question of whether some children might be considered as eligible for other forms of international protection, including recognition as a refugee, should also be considered; however, in all cases, it should be based on the individual circumstances of the applicant. International protection status may offer more appropriate and longer lasting protection in many countries, which may in itself be necessary, depending on the situation of the child.

In addition, the particular and additional characteristics of children from alternative care, may also entitle them to other forms of international protection. For example, a child who may have been trafficked, or be at risk of being trafficked, may be entitled to a residence permit under the EU Directive on preventing and combatting trafficking in human beings and protecting its victims or the Council of Europe Convention on action against trafficking in human beings. They may also be able to show that they are members of a particular social group of children who have been trafficked and that they are entitled to protection under the Refugee Convention. This is the one area in which there have been some anecdotal reports of applications for asylum by children in alternative care.

The heightened risk of child trafficking, when children are internationally displaced, is well recognised and child trafficking is also known to occur to, from and within Ukraine.<sup>111</sup> Institutions in Ukraine contained a significant number of children with disabilities and there is an increasing amount of information about the vulnerability of people with disabilities to being trafficked. A history of institutionalization is also a recognized indicator of vulnerability to being trafficked.

This has resulted in a widespread concern about the risks facing children with the characteristics of those in alternative care. For example, The EU Strategy on Combatting Trafficking in Human Beings recognises

the vulnerability of children in migration, persons with disabilities and people from ethnic minority backgrounds, such as those belonging to marginalised Roma Communities. These are all possible characteristics of children from alternative care. The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) has also noted the vulnerability of children from institutions and from the Roma community in the context of the war in Ukraine, the EU has explicitly recognised that children evacuated from alternative care institutions are at particular risk of being exploited by traffickers.<sup>112</sup>

There are a number of factors that may be preventing the identification and prosecution of individual cases where Ukrainian children have been trafficked. Consultations within this study have suggested that the Roma population has a high level of distrust of those in authority and a low level of understanding of the characteristics of child trafficking.<sup>113</sup> Evacuation routes also pass through countries where the trafficking of Roma children is a recognised phenomenon and anti-Roma racism is also widespread.<sup>114</sup> Moreover, child trafficking of any kind is often a hidden crime and investigation and prosecution of human traffickers may take months, or even years.

It is also the case that many responding States have yet to establish a means to assess the risk of child trafficking for children from alternative care. It is also the case that, although Europol and EMPACT recognise the risk of children from Ukraine being trafficked, they have not to date highlighted the risk for children from institutions. But civil society organisations have contributed to the current evaluation of the EU Anti Trafficking Directive by proposing a number of amendments designed to protect children from institutions and also children with disabilities.<sup>115</sup> The Lanzarote Committee is also currently exploring the issues of children in institutional care and their vulnerability to sexual exploitation.<sup>116</sup>

The significant number of children in alternative care in Ukraine, who are from the Roma community<sup>117</sup> and who may lack civil registration documentation, also suggests that a number of these children may be entitled to protection under the UN Statelessness Conventions. This may particularly be the case when the nationality assigned to them historically is contested or they have been able to cross a border

in the early days or weeks after the Russian invasion without being individually registered or assessed. But without assistance and support from dedicated Roma workers it is unlikely that such applications for statelessness determination procedures, where they exist in host countries, will be made.

Ukrainian law relating to conscription is complex and it is possible that some Ukrainian children in alternative care may be called up when or after they become 18. Some of them are likely to be exempt from conscription due to disability but in other cases they will need expert legal advice to understand their legal options.

### Implications for a child in accessing the most appropriate form of international protection

Accessing the appropriate international protection procedures may have significant implications for a child and their future prospects.

Different forms of international protection may give access to different safeguards and entitlements. For example, asylum or subsidiary protection status within the EU may provide longer-term protection than temporary protection, where the individual circumstances of a child require it. In relation to children who have been trafficked, the EU Anti-Trafficking Directive requires States to take necessary measures to establish durable solutions for unaccompanied children who are trafficked.

As a further example, in some responding States, transnational procedures exist that may provide a legal pathway for some children to reach better protection or to rapidly reunite with their families in another country. The ways in which a child is able to access such a transnational procedure, ideally with the support of their guardian and legal assistance, may depend on the procedure in which they entered the national system, or on their current status. Even where temporary protection may provide immediate protection to the child, early legal counselling is important.

### Right to family reunification

It appears that the provisions for family reunification under the TPD have not been relied on because many children and family members arriving from

Ukraine have benefitted from freedom of movement. Most families have been able to make independent arrangements to reunite. However, for those persons experiencing difficulty in tracing family members or in making such independent arrangements, the provisions remain relevant. The TPD allows for family reunification under Article 15 in the cases where a family member enjoys temporary protection in a different Member State.

Article 15 of the TPD does not permit child beneficiaries of temporary protection to reunite with their family members – ‘family members’ are defined as the spouse, unmarried partner, minor unmarried child and other close relatives of the sponsor who were wholly or mainly dependent on the sponsor in the country of origin. In the future, the Family Reunification Directive<sup>118</sup> may apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, which provides for entry and residence for the sponsor’s spouse and minor children. (Currently, under Art 3 of the EU Family Reunification Directive, sponsors who have temporary protection are excluded from the Directive’s provisions.) The provisions on family reunification applicable to the subjects of our Study are detailed in the comparative table and profiles compiled in the *Legal Compendium on Law and Guidance*. The CoE’s handbook on family reunification for refugee and migrant children – standards and promising practices serves as a useful resource.

### Access to support, assistance and other entitlements

In the initial period of international displacement, most children have had rights to access accommodation, support, education and healthcare, irrespective of the different legal status assigned to them. In some national contexts, there are significant variations in terms of access to education, depending on the form of protection granted.

The support and assistance available to children, including guardianship and access to free legal aid and legal assistance, is also important for the purpose of securing long-term legal status and options for a comprehensive, secure and sustainable solution.

For other children, significant differences in entitlements and rights may come to light in some national contexts when temporary protection ends. For example, the recognition of a child as a refugee or a stateless person, instead of and in addition to as a temporary protection beneficiary, may allow the child to apply for facilitated naturalisation in the responding country and this may lead to a comprehensive, secure and sustainable solution for the child. Moreover, some non-harmonised national protection statuses may allow a child to remain when it is found to be in their best interests. In some national systems, the child may eventually be able to convert their initial status into a longer-term status, for example, if they decide to pursue vocational training.

### 5.2.4 Child-sensitive procedures

International and European laws on asylum and international protection typically include obligations to provide assistance and support to ensure that children can access proper international protection procedures. The profiles in the *Legal Compendium on Law and Guidance* provide an overview of the different safeguards and supports in place under different instruments. Such legal provisions typically concern guardianship, child-friendly information, child-friendly interview techniques, legal counselling and assistance as well as other procedural safeguards such as access to interpreters and cultural mediators when needed.

Such measures may vary greatly depending on the child's status or the procedure in which they find themselves. There may also be a significant difference between the treatment and support provided to an unaccompanied child versus a separated child or one who is in alternative care. For example, an unaccompanied child will usually receive the support of a local guardian, who is familiar with the national system and who can assist them to navigate any necessary legal procedures (see chapter 3). Procedures will also often be adapted depending on the child's age.

In contrast, under the TPD, children are not entitled to the same kinds of assistance and support (e.g. free legal assistance and representation, an interpreter and a cultural mediator and to interviews conducted by appropriately trained officials).

#### Measures of support and assistance

- independent, qualified guardian
- legal information, counselling and assistance
- professional interpreter
- cultural mediator

#### Other procedural safeguards<sup>119</sup>

- specific procedural and evidentiary safeguards
- child-friendly information
- data protection
- prioritisation of application
- burden of proof on the examiner
- right to express their views and have them given due weight
- reliable and up-to-date country of origin information
- written, reasoned decision

#### Focus on child-friendly information

Unfortunately, clear information on all of the available international protection procedures is not always available to children who have fled Ukraine. The resources and handbooks from the Council of Europe such as the Handbook on access to rights, child-friendly information and procedures for children in migration<sup>120</sup> could be promoted and applied to address such gaps.

#### Focus on guardians

The appointment of a guardian for unaccompanied and separated children may be a necessary procedural step in some countries to ensure that an application for a particular procedure can be made. But regardless of whether a guardian is formally needed for the purposes of addressing legal capacity, a local guardian is often the key source of information, support and assistance typically needed to help a child access the right procedure.

The child's guardian should also support the child to access free quality legal assistance in order to assess the child's international protection needs and to assist them throughout any legal procedures. This is necessary both in light of the legal complexities as well as to ensure independent advice from a qualified legal assistance provider. Guardians may

play an important role in liaising with adults with other responsibilities for the child on this issue, including parents in Ukraine.

Chapter 3 describes the challenges in the provision of guardianship to children without parental care, displaced from Ukraine.

### Focus on legal assistance provision

Access to free qualified legal assistance<sup>121</sup>, provided at an early point, is an important safeguard for internationally displaced children. It is crucial that children are provided with legal information and legal assistance in case it is deemed necessary for them to apply for international protection or to be assisted in other legal procedures. For example, it is also important for children to be given legal advice regarding the timing of any application for asylum, especially if this may affect whether they can enjoy temporary protection in the interim.

An overview of the provisions guaranteeing legal counselling and legal assistance to asylum seekers and trafficked persons in EU law is available in the *Legal Compendium on Law and Guidance*. Except for the TPD and the Qualifications Directive, EU instruments concerning asylum and international protection procedures (e.g. Asylum Procedures Directive, Reception Directive, Anti-Trafficking Directive, Dublin, Return Directive) include articles on the provision of legal counselling and legal representation.

This legal report illustrates the need for legal assistance providers to have specialised knowledge of the range of laws and procedures that may apply to the situation of children from Ukraine, across several bodies of law. It is also important to facilitate the ability of legal assistance providers to liaise with families and relatives in other countries.

#### UNICEF Child Notices

UNICEF National Committees in the Netherlands, Belgium and Sweden, developed a methodology guidance<sup>122</sup> for child-specific country of origin reports. These country reports (Child Notices) describe the situation of children in a country of origin. This includes legal and practical information on education, health care, child protection, armed conflict, juvenile justice and risks. These Child Notices are meant to provide more information about the child rights situation in countries from which children have fled or have been trafficked to Europe.

The information collected should be used to:

- Obtain background information on the situation of children in the country of origin.
- Identify potential (child and gender-specific) forms and manifestations of persecution.
- Identify other factors relevant to decisions as to whether remaining in the host country or return is in the best interests of the child, including local responses to returnees.
- Provide input for a Best Interests Determination; to ensure decisions concerning children have been given due consideration to the best interest of the child.

Child Notices of this kind in relation to Ukraine, and particular regions thereof, could provide valuable assistance to decision-makers in addition to other evidence and assessments that could inform the determination of the best interests of individual children.

### Transnational cooperation

Transnational cooperation with authorities or organisations in other countries will often be necessary, in particular, to seek information in relation to the child's situation or the circumstances of their family or community. The question of purposes, forms and counterparts in transnational cooperation is considered further in chapter 6 on comprehensive,

sustainable and secure solutions.



## 5.3 Recommendations

- ▶ The European Commission should prepare a proposal for a Council Implementation Decision on the extension of the TPD until March 2025 as a matter of urgency.
- ▶ The European Commission should continue to encourage a broad application of TPD to all children displaced from Ukraine.
- ▶ States should exercise discretion in applying the TPD – in order to respect the best interests of the child when considering the application of temporary protection. They should also allow temporary protection to be maintained when a child applies for another form of protection.
- ▶ While temporary protection measures should be bolstered, it is important simultaneously to ensure that each individual child's protection needs are assessed and that children are able to access other international protection procedures as appropriate. States should amend laws as necessary to ensure this.
- ▶ States should establish and strengthen specific laws and Statelessness Determination Procedures to identify and to protect stateless children. Stateless children should be recognised and States should facilitate their naturalisation (Art. 32, 1954 Convention).
- ▶ States should establish and strengthen specific laws and procedures to identify and protect child victims of trafficking.
- ▶ Lessons learned from previous ad hoc relocation schemes (SOPs, BIA) should be further developed and applied for smooth transnational cooperation.
- ▶ States should improve legislative and practical measures for identification, registration, vulnerability screening, assessments and referral for children without parental care.
- ▶ States should proactively ensure that children without parental care have access to procedures concerning temporary protection or another form of appropriate international protection.
- ▶ Clear information to authorities, guardians and lawyers on available international protection procedures in each country will assist access.
- ▶ Displaced children should be entitled to free quality legal assistance for all relevant procedures (e.g. application for international protection or family reunification).
- ▶ Pathway planning should be prioritised with an interagency approach to BIA ensuring that the child has legal information and assistance to identify and to navigate through appropriate procedures.
- ▶ Child-centred procedures should be established to ensure that their circumstances are assessed properly and their views are elicited and taken into account. Child friendly information should also be available.
- ▶ Regional support should be in place to develop and deliver specialised training for legal assistance providers. This can build on work done by civil society organisations providing legal assistance and recent workshop of EUAA and projects of the Council of Europe.



## Chapter 6.

# Future planning: Ensuring comprehensive, secure and sustainable solutions through best interests procedures, supported by transnational cooperation

## 6.1 Background context

A **comprehensive, secure and sustainable solution** is one that, to the greatest extent possible, caters to the long-term best interests and welfare of the child and is sustainable and secure from that perspective. The outcome should aim to ensure that the child is able to develop into adulthood, in an environment that will meet his or her needs and fulfil his or her rights as defined by the Convention on the Rights of the Child.<sup>123</sup>

The question of when a comprehensive secure and sustainable solution should be considered for a child displaced from Ukraine can occur at different moments and in different ways, depending on the situation of the child and the procedures in which they are involved.

The need for longer-term solutions may arise already during the war for some children depending on their circumstances. As seen in chapter 5, the question of avenues other than temporary protection may arise immediately, for example, if children are stateless or trafficked, or in need of other forms of international protection which can provide a path to long term residence or citizenship in some countries.

Some children who are not eligible for temporary protection or other forms of international protection

may find themselves in an irregular situation and at risk of deportation procedures to third countries.

Moreover, prior to the cessation of temporary protection, the question of return to Ukraine may also be posed for some children, because of their personal circumstances or their caregiving situation.

In the future, when the war ends and martial law no longer applies, there is the hope that there will be large-scale returns of children to return to their families and communities. It is also the case that the war is likely to have caused significant destruction, disrupting the lives of some children and their families and communities more radically. This will become more pronounced, the longer the war lasts and may affect the possibilities and conditions for return. The situation of a child without parental care may require specific arrangements to be put in place or measures of support. It may also be difficult for some families to provide for children in Ukraine in the short-term due to the devastation caused in some areas during the war.

Some children may have become orphaned during the war. Where this is the case, any planning for their future will have to consider whether there are any family members in responding countries or in Ukraine who could assume legal responsibility for the child.

If no such person can be located, different forms of alternative care possibilities will have to be considered in responding countries or Ukraine. Challenges may also arise when a child has been able to access life-changing medical treatment or support to meet special needs that may not be yet available in Ukraine.

Family reunification with relatives in other countries or integration in the responding country, may need to be envisaged for some children, sometimes in the longer term. Alternative outcomes should include mid-term solutions, such as allowing children to finish education or training courses in responding countries. As the conflict continues, children are transitioning into adulthood which is another key stage for considering such procedures.

Particular considerations are likely to arise in relation to children who were evacuated from alternative care in Ukraine. When the hostilities in Ukraine escalated, most Ukrainian institutions sent the children back to live with their families, just as they had done during the COVID-19 pandemic. Ukrainian families are being trained to become foster parents, who may foster children who become orphaned during the war or who may return from where they were evacuated abroad. This opens the debate and the opportunity for deinstitutionalisation and other forms of alternative care for children in the Ukraine in the future.<sup>124</sup>

Older children may express a wish to remain in a responding country. In some circumstances, children

may have been with a relative or accompanying adult in a responding country and want to remain with them rather than returning to their parent(s) in Ukraine. Procedures need to be available to resolve conflicts, taking into account parental responsibilities and the need to ensure the views of the child are taken into account.

Some unaccompanied and separated children may be close to completing their education or training in responding countries and wish to continue to completion. If they have pursued vocational training in the responding country this may have opened a pathway for them to change their residence status.

In contrast, as many Ukrainian children are currently at the stage of learning the language of the responding country, some children may have elected to continue their education online in Ukrainian. This may be particularly the case if a child is approaching the time of qualifying exams or the completion of a stage of their education.

In some cases, arrangements for an individual child may take the form of immediate or mid-term arrangements. Visa free travel for three-month periods between Ukraine and the EU may mean that pendular movement could continue for some time after the cessation of hostilities. Arrangements that have emerged in recent times might continue with families separated for parts of the year but allowing parents to travel to children and children to travel to parents to be together during holidays.

## 6.2 Relevant legal framework when considering comprehensive secure and sustainable solutions

Currently, it is very uncertain what procedures to consider the best interests of the child will apply when the question of returns arises. The application of international protection and immigration laws, alongside family and child protection laws, must be thought about carefully. Equally, new procedures which could lead to alternative outcomes may need to be developed within Europe.

The absence of a single procedure, during which all possible outcomes for the child might be considered, poses a legal difficulty. International and European law instruments concerning international protection

and migration typically focus on a specific issue. For example, a decision for a child who is outside their country of origin or habitual residence might be triggered by a law which addresses the specific situation of resettlement, or relocation or, in the case that international protection ends, a possible forced return. Rarely is there a procedure at national level to find a comprehensive secure and sustainable solution to their situation, in light of all the options that might be available across the spectrum of laws.

The question of what responsibilities different actors either to decide, review, support or help implement

arrangements will vary, depending on the child's circumstances. Depending on the individual situation of each child, including their family situation and whether they have a locally appointed guardian, different decision-making processes will be involved. Private arrangements for return may be put in place, and the role of child protection services and or guardians in responding countries in relation to such arrangements is uncertain.

In all circumstances, international guidance emphasises the need for the best interests to shape all actions in their regard.

In particular, General Comment no 14 of the Committee on the Rights of the Child, General Comment No 9 and General Comments no 22/23 provide that any best interests procedure would need to consider a range of different factors, including safety, family ties, health and educational needs, specific special needs and disabilities, continuity and stability. The views of the child and their family or caregiver should also be taken into consideration and given due weight. Any risks to the child should to be identified, assessed and addressed. This includes both individual risks and wider environmental risk factors. For example, UNHCR Executive Committee Conclusion on Children at Risk – No. 107 (LVIII)<sup>125</sup> – 2007 recognises that:

*forced displacement, return to post-conflict situations, integration in new societies, protracted situations of displacement, and statelessness can increase the vulnerability of children generally.... States are urged to take appropriate steps to ensure that unaccompanied or separated children are not returned prior to the identification of adequate reception and care arrangements.*

Also of note in these Conclusions:

(g) that States, UNHCR and other relevant agencies and partners work in close collaboration to prevent children from being put at heightened risk, and respond, as necessary, through the general prevention, response and solution measures listed non-exhaustively below:

– Within the framework of the respective child protection systems of States, utilize appropriate procedures for the determination of the child's best interests which facilitate adequate child participation

without discrimination: where the views of the child are given due weight in accordance with age and maturity; where decision makers with relevant areas of expertise are involved; and where there is a balancing of all relevant factors in order to assess the best option;

### 6.2.1 Relevant international protection and immigration laws

Several provisions in the temporary protection instruments will be of particular relevance to the question of future planning for children. Articles 20-23 of TPD apply to return during the period of temporary protection and to return upon the cessation of temporary protection. However, whereas the TPD contains provisions on return in this instance, there is no experience to date in their application.

Because of their individual circumstances, some children may need to continue to access some form of international protection in the future, making the international and European laws in this regard very relevant, including statelessness instruments and trafficking instruments. Notably, at EU level, the most recently adopted Directive dealing with the situation of unaccompanied children, the EU Trafficking Directive, does contain an explicit obligation on finding durable solutions, namely that: *Member States shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child* (Article 16).<sup>126</sup>

Family reunification laws will be important to some children and their families. Within the EU, it is uncertain to what extent they will be applied to children who were beneficiaries of temporary protection. Currently they apply to beneficiaries of international, rather than temporary protection.

Equally, instruments allowing for long term resident permits typically do not count periods of time in the responding country during which an applicant was a temporary protection beneficiary. Similarly, where the availability of long-term resident permits become available to adults and their children, a question arises as to whether they will be available to children who have been in their care for protracted time under private arrangements.

It should be noted that Ukraine has not signed or ratified the HCCH 1996 Child Protection Convention<sup>127</sup> which applies in most responding countries. Therefore, adoption of Ukrainian children by non-Ukrainian nationals can only take place under Ukrainian law. On 13 March 2022 the Ministry of Social Policy confirmed that it would not be approving any intercountry adoptions under Ukrainian law, whilst martial law remained in place<sup>128</sup>.

As noted above, new laws may be developed at national level in some countries to provide solutions for children that might be in their best interest, for example, permits relating to continuing education.

## TPD

The TPD does not provide specific decision-making procedures for children without parental care, if they return ahead of, or post, cessation of temporary protection. Articles 20-23 contain general provisions pertinent to return to beneficiaries of temporary protection.

Article 21 provides that: Member States shall take the measures necessary to make possible the voluntary return of persons enjoying temporary protection or whose temporary protection has ended. The Member States shall ensure that the provisions governing voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity.

In discussing voluntary return, the TPD does not address the necessary procedures that should accompany voluntary return for a child without parental care, namely one that ensures a transfer of care and custodial responsibilities in some formal way.

It also provides that: The Member State shall ensure that the decision of those persons to return is taken in full knowledge of the facts. The Member States may provide for exploratory visits.

The implementation of this safeguard in the case of children without parental care needs to be considered by Member States. Clearly, fulfilling this obligation for children without parental care requires clear information, support and assistance. It should require that children have also received independent legal information on the implications of return. Moreover, the question of the role and responsibility of any

guardian put in place for the child under the Temporary Protection Directive, or national child protection procedures (see further below), may need to be further regulated in national law.

The provision which anticipates that Member States may provide for exploratory visits is worthy of closer consideration might be interesting to encourage exploratory visits that might be very helpful when assessing the child's best interests. Such visits could be of particular use in relation to exploratory visits to institutions in Ukraine before return.

## EU Return Directive

These provisions of the TPD also need to be interpreted in light of subsequently relevant laws and guidance, including the EU Return Directive within the EU, which was adopted subsequent to the Temporary Protection Directive. In this regard, Article 20 of the TPD provides:

When the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply, without prejudice to Articles 21, 22 and 23.

In the case of unaccompanied children, the EU Return Directive provides that:

Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

It also provides that: Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

Additionally, Article 5 of the Return Directive states that when implementing the Directive, Member States shall take due account of: (a) the best interests of the child; (b) family life; (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement.

In recent years, guidance from the Commission has increasingly recognized that in the case of

unaccompanied and separated children, States should indeed seek to establish durable solutions that are in the best interests of the child. It also addresses the question of what adequate reception facilities might mean.

The Commission Return Handbook<sup>129</sup> (revised in September 2017) notes that: “Durable solutions are crucial **to establish normality and stability** for all minors in the long term. Return is **one of the options** to be examined when identifying a durable solution for unaccompanied minors and any Member State’s action must take into account as key consideration the best interests of the child. (our emphasis)

This is further analysed and described in joint Guidance to respect children’s rights in return policies and practices, produced by UNICEF, IOM, OCHCR, Child Circle, ECRE, PICUM and Save the Children.<sup>130</sup>

This guidance encourages States to put in place legal possibilities to achieve alternative outcomes to return where this is in the best interests of the child in line with the UN normative framework.

CJEU jurisprudence also underlines the need for the best interests of the child to be considered before any return arrangements are made.

#### **Case C-441/19 TQ v Staatssecretaris van Justitie en Veiligheid CJEU judgment**

The Court found that, before taking any return decision, States should undertake a general and in-depth assessment of the situation of an unaccompanied child, taking due account of the best interests of the child. This would include ensuring that adequate reception facilities are available in the State of return. Failure to do so would mean that a child could be subject of a return decision, but they could not be removed, and the Court recognised that this situation would “be contrary to the requirement to protect the best interests of the child” given that children would be “placed in a situation of great uncertainty” as to their legal status and future.<sup>131</sup>

## **6.2.2 National child protection and family laws**

As described in the analysis of the general legal framework in Chapter 2, the presence of children in some countries may have fallen primarily under the purview of national child protection and welfare measures.<sup>132</sup>

Some children may have been resident in a responding country under national child protection measures, but not as a beneficiary of temporary protection. Such laws should contain obligations to ensure that any potential risk factors or protection concerns are identified and that safeguards are put in place when necessary for children. The critical question is whether States will apply these safeguards in an appropriate way when future plans for children displaced from Ukraine are made by them or for them.

In particular, national child protection or family law measures should be available to assess or support private arrangements to transfer children between countries where these are put in place by those exercising legal responsibility for the child under Ukraine law, such as parents. These may address how a transfer should be confirmed, supervised or supported by authorities, including authorities or guardians in responding countries in line with the child’s best interests, and should ensure that the child’s views are heard.

Best interests procedures should also be in place, when child protection and family law measures are involved to consider the steps and decisions needed as regards any transfer arrangements.

This has been recognised in the Fundamental Rights Agency’s Guide entitled Children deprived of parental care found in an EU Member State other than their own: A guide to enhance child protection focusing on victims of trafficking.<sup>133</sup> This report focused on children who are EU nationals; consequently it addressed the form best interests procedures should take in the context of national child protection and family measures, i.e. when transfer of national EU children who have been trafficked between Member States in the EU may need to be considered and arranged in line with their best interests. This guidance provides very useful practical guidance on key steps that need to be undertaken by practitioners.

## 6.3 Transnational cooperation

What is unusual in this situation is that children are not fleeing from risks posed by the Ukrainian authorities, but rather Ukraine is actively seeking to ensure protection of these children outside of Ukraine.

The need and the general opportunity for cooperation between authorities in Ukraine and in responding countries is clear. However, the basis, means and procedures for such cooperation is at present less clear.

### Elements of the best interests which rely on transnational cooperation

Elements of a best interests procedure which rely on transnational cooperation include:

- ▶ Family tracing, facilitating contact, restoring and maintaining family links where this is in the best interest of the child
- ▶ Information on the circumstances of the child's family in Ukraine
- ▶ Information on the situation and services available in the home community, including access to child protection, services for child victims of crime or trafficking, access to education, physical and mental health services
- ▶ Information concerning the child's circumstances (including previous care arrangements, and guardianship decisions), in line with data protection and privacy requirements
- ▶ Information on circumstances of family members outside of Ukraine
- ▶ Available/necessary return and reintegration support
- ▶ Monitoring and supervision mechanisms

Cooperation may depend on the development of data exchange protocols, with due regard for data privacy and data protection obligations in responding countries.

### Forms of transnational cooperation in individual cases

The importance of transnational cooperation to ensure that there is no conflict, but rather cooperation, to inform relevant decision making, to recognise decision-making powers and to support their implementation in both responding countries and Ukraine is vital.

As has been discussed in chapter 3 and 4, in the case of situations where decisions have been taken in one country to transfer children to care and custodial arrangements in another country, the HCCH 1996 Child Protection Convention mechanisms might prove useful to give effect to child protection measures put in place under the law of responding states or Ukraine. The application of the Brussels II B Regulation may also be relevant to certain cases where children do not fall under the HCCH 1996 Child Protection Convention because they have their habitual residence in an EU Member State.

There are a number of existing transnational civil and family law mechanisms which will apply in relation to certain procedures. These include Central Authorities, and judicial and administrative authorities under the HCCH 1996 Child Protection Convention, the European Judicial Network (EJN) and the International Hague Network of Judges (IHNJ) of the HCCH.

### Bilateral agreements

Bilateral agreements between Ukraine and responding countries covered by Article 52 of the HCCH 1996 Child Protection Convention may also have a role, to the extent that they include additional safeguards.

### European Networks

There are also a number of civil society or informal networks which operate in this field, such as the International Social Services, Missing Children Europe, the European Guardianship Network and, the European Disabilities Network, who may be in a position to provide relevant information that would assist in cross border cases of these kinds.



## 6.4 Child-sensitive procedures

As described in chapter 5, child-sensitive procedures are essential to ensuring respect for children's rights including the right to be heard and consideration of the best interests of the child.

Children without parental care have rights to child-sensitive procedures in decision making in relation to comprehensive, secure and sustainable solutions. Such procedural safeguards are all the more significant in these decisions which are so important to children, not only in relation to how the decision itself is taken but also in relation to measures for its implementation. This includes, in particular:

- Child friendly information
- Support from a guardian who will ensure their views are heard and their best interests are considered
- Access to quality legal assistance
- Access to interpreters
- Access to cultural mediators
- A written decision in relation to any measures taken in their regard
- A right to ask for any decision to be reviewed

Currently, it is clear that:

- ▶ There are no uniform obligations relating to provide procedural safeguards exist in EU legal instruments, such as the TPD, Return Directives.
- ▶ Procedural safeguards that exist are general and sometimes limited.
- ▶ Rarely is there clear information available and provided to the child in a comprehensive way.
- ▶ The role of guardians is uncertain.
- ▶ There is limited provision of legal assistance for children during temporary protection, despite the fact that they face many uncertainties, in particular as temporary protection becomes more protracted.
- ▶ The need for specialised legal knowledge is clear given the different bodies of law involved.
- ▶ The European Council has also encouraged EU MS to provide free legal aid or assistance to the Ukrainian children enjoying temporary protection in their respective territory in relation to all procedures related to the temporary protection or its cessation, in accordance with the national law and procedures of each Member State in its June 2022 [Political statement on the protection of displaced children from Ukraine in the context of Russia's war of aggression against Ukraine](#).
- ▶ Safeguards such as interpreters and cultural mediators will be particularly important in the instance of procedures concerning potential returns. These largely are regulated in national law, rather than regional law.

## 6.5 Towards common principles for comprehensive child-centred decision-making procedures

The legal analysis demonstrates the importance of achieving a comprehensive approach to the child's situation, based on a best interests procedure, in relation to these critical decisions for their futures. Any solution needs to address the child's individual needs as regards different dimensions of their life, including (a) any forms of international protection appropriate for them, (b) care and family reunification issues, (c) and their rights and needs to protection from risk of

violence, abuse, neglect or exploitation. However, best interests procedures prior to transfers of children between countries remains underdeveloped across Europe.<sup>134</sup>

These decisions are often handled by different authorities, who often practice in separate silos. Child protection actors may not have a clear role or mandate to contribute to the best interests procedure

concerning international protection or residence status. Immigration authorities are less aware of what/how child protection measures should be deployed to ensure their needs are met before, during and after decision making in their regard. There may be no consensus in the responding country about who should coordinate the process to determine the best interests of a child from Ukraine.

There may be no consensus about the extent to which Ukrainian adults accompanying the child or the Ukrainian authorities should be involved in the procedure.

As noted above, the possibility of private arrangements to transfer children between countries means that it may be challenging for local guardians and child protection authorities to ensure an assessment of the situation of the children and any risks to them, as well as of measures which may be needed to support them. This also means that the child protection services in Ukraine will not receive sufficient information on children who are at risk, either because of vulnerabilities to them or because of the situation in their families or communities, in order to support them on their return.

### **Towards a comprehensive, child-centred approach**

Much consideration has been given to how such best interests procedures in general should be undertaken, including in the General Comments of the UNCRC, Guidance from UNHCR, Guidance from UNHCR/ UNICEF in *Safe and Sound*, as well as Guidance from UNICEF, OHCHR, IOM, Child Circle, ECRE, PICUM, Save the Children.

It should be underlined that how these procedures are designed must depend on national laws and procedures, and the responsibilities that are held by different bodies. Elements of authoritative guidance include:

- ▶ Multidisciplinary, inter-agency procedures, involving all of the agencies which have responsibilities for the child
- ▶ Individual assessments of the child's situation to be undertaken
- ▶ Information gathering processes on the situation of the child, their family, their community

- ▶ Support for the child by guardians and legal assistance in any situations where this might be necessary to the child
- ▶ The child's views are heard
- ▶ Parents and/or other adults with responsibilities for the child should also be heard

Findings from the best interests procedure undertaken in this way can then inform any relevant decision making in their regard by the independent body (bodies) who has authority to apply the relevant law(s)

Failure to ensure the involvement of children may mean that children do not accept arrangements in their regard. It could provoke the risk that some children decide to leave any accommodation or support provided to them in a responding country and put themselves at risk of exploitation and/or being trafficked.

Any best interests procedures should also take into account the specific protection needs and rights of children, in particular those from Roma, Jewish, Russian, LGBTQ+ or other minority communities, including protection from any racism or discrimination that may have an adverse impact on the process. Other General Comments and authoritative guidance are noted in the Compendium of Law and Guidance. However, there may be a lack of knowledge and understanding amongst professionals of the prevalence of child trafficking, racism against children from minority communities and discrimination against children from the LGBTQ+ community in responding countries and in Ukraine. Expert advice about vulnerabilities relating to special needs or a disability may be difficult to access or too expensive.

There are specific challenges and needs in relation to the provision of legal assistance in transnational procedures.<sup>135</sup> A particular focus should be to connect the work of guardians and legal assistance providers in responding countries and in Ukraine.<sup>136</sup>

The multidisciplinary interagency approach arises from the fact that no one authority has the knowledge, capacity or experience to address the situation of children without parental care from Ukraine. Child protection services will bring the essential knowledge and skills to assess the child's circumstances. However, they will not be familiar with the legal

criteria pertinent to particular international protection and immigration laws. They may be less familiar with how to address children from third countries, and may have limited experience in cross border cases, as they may arise rarely. They do not always have the legal authority to take certain decisions, e.g. to grant a residence permit for continuing education. In contrast immigration authorities typically will not have adequate knowledge of the critical child protection issues that arise in these cases, and the measures required to address them properly. In the case of children from Ukraine, expertise from family law specialists would allow for these aspects of the child's situation that may arise and need to be addressed.

It will be important to consider that:

- Some situations involve the need for best interests assessments with careful case management (for example where family reunification is planned by the family, and a risk and vulnerability assessment should be undertaken and plans drawn up to support the transfer of care and custodial arrangements and provide support to the child),
- Some situations will involve the need for a more formal best interests determination procedure, in the face of the need for a detailed review of the child's situation and complex or sensitive issues arising that may pose risk to a child.

Given the scale of the situation it will be important to find effective means to address a large caseload and specialised services that might be useful to doing so. Sources of inspiration for child-centred inter-agency case coordination models might be taken from the Barnahus ([www.barnahus.eu](http://www.barnahus.eu)) referenced in the EU Strategy on the Rights of the Child the Council of Europe Strategy for the Rights of the Child (2022-2027). Importantly these allow for an integrated, specialised and under one roof approach to case management and a model of this kind might be indicated for cases where there is a need to do a detailed best interests procedure.

### Independent decision making

In an ideal scenario, the best interests procedure would inform a formal decision to be taken by an *independent* body, such as a juvenile court, with the possibility of a review process. This would ensure that there are no conflicts of interests that might

influence decision making, including where services might take decisions that are based on competing (and understandable interests) such as resource constraints in the system.

### Need to strengthen transnational cooperation in individual cases

Any best interests procedure should be rooted in appropriate and well-developed transnational cooperation, in particular, to ensure collaborative processes in relation to decision making and support for implementation of decisions.

There is a clear need – and ongoing initiatives – to explore how to strengthen transnational cooperation mechanisms. For example, the work of central authorities under the HCCH 1996 Child Protection Convention may need to be better supported for cases of this kind. The potential involvement of actors such as liaison officers in Ukraine should be considered.

Valuable exchange of experience between UN agencies such as UNHCR, IOM, UNICEF and stakeholders engaged in responding to the situation should further feed into structured thematic meetings in platforms such as the EU Solidarity Platform and the soon to be established Council of Europe Group on children from Ukraine.

Inspiration might be drawn from relocation procedures which have been developed in the context of voluntary relocation schemes between EU States for unaccompanied children. The features of particular interest in these schemes involve how countries should cooperate before and during transfers of unaccompanied children.

Whilst they arise in a very different legal context (in particular, in situations where children are not legally permitted to move independently), and serve different purposes, they nonetheless offer an example of the kind of procedures which might be useful to support transfers and reintegration of children to Ukraine, where this is in their best interests. The EUAA, Commission and others have been working on standard operating procedures, which include best interest procedures. Recent meetings held by the EUAA facilitated an exchange of information between the Dublin Network and the Vulnerability Experts Network of the EUAA.

Guiding principles should underpin further development of transnational cooperation mechanisms in relation to best interests procedures. These could build on lessons learned on relocations, including through ensuring that they are:

- ▶ Published and widely available;
- ▶ Developed in cooperation with stakeholders involved in supporting and assisting children in responding countries and in Ukraine
- ▶ Include procedural safeguards for children including legal assistance and guardianship in relation to the BIP
- ▶ Address cooperation to prepare decision making and the actual transfer, but also includes cooperation that addresses support and assistance to the children, and cooperation between stakeholders, to prepare the arrangements that need to be put in place for them after the transfer.

Further important resources:<sup>137</sup>

- ▶ FRA study and recommendations on relocation
- ▶ UNHCR/UNICEF/IOM recommendations
- ▶ CoE SRSG's recommendations from the fact-finding missions

One important aspect to be underlined is the need to explore how a multi-disciplinary, inter-agency procedure will feed into decision making procedure arises.

Also relevant is the FRA guidance on Children deprived of parental care found in an EU Member State other than their own, described above. Similar guidance would be very valuable to practitioners and legal professionals engaged in these cases.

In the case of children in alternative care, collaboration models should include parents, Ukrainian guardians and foster carers, the emerging and transitional Ukrainian child protection system, experts in child trafficking, disability and the Roma community.

There should be clear provision for the way in which child protection services contribute to this issue, in particular, given the groundwork they will have undertaken in terms of assessing the child's circumstances, and/or putting in place measures to

support the child, including facilitating and supporting the role of guardians and parents in the child's life during their displacement.

The need for such solutions for children from alternative care arises from the following factors:

- ▶ International displacement from family and/or community
- ▶ Damage to the infrastructure in Ukraine which was previously provided to meet their individual needs
- ▶ The commitment by the Ukrainian government to complete the process to move them from institutional care to community-based care, including family-based care
- ▶ The substantial number of these children who have disabilities and/or intersectional vulnerabilities

The UNCRC, UNCRPD and guidelines relating to alternative care indicate that family reunion should be prioritised. When considering solutions that may be applicable to individual children, the possibility of returning them to live with their own families has been increased by the increasing emphasis paid by Ukrainian central authorities on deinstitutionalisation and de-decentralisation, referred to above. Probably more significant is the fact that many children were returned from institutional care to their own families since the invasion on February 2022 and that regional authorities are now working with Ukraine to ensure that family and community based care becomes the default provision in Ukraine in the future.

The fact that the majority of children from institutional care have returned home to places where the children from institutional care have been evacuated or have fled to responding countries may mean that new care arrangements will be under development. This raises important questions about what preparations need to be made in the short and medium term when these children are in responding countries with a view to providing them with a comprehensive, secure and sustainable solution in the long term.

Of note in this regard is Decree No. 546 of June 1, 2023, "On temporary relocation (evacuation) of the children and persons, who reside or enrolled in institutions of various types, forms of ownership and subordination for 24-hour stay, and their return"<sup>138</sup> which provides that.

- ▶ “The return of children in residential care who were evacuated shall be undertaken upon the cessation of martial law (paragraph 21), with only a limited number of exceptions possible and alternatives to return by exploring other options for the temporary care of children in another country need to first be explored (paragraph 22).
- ▶ All requests for the return of children need to be submitted by Heads of Facilities to regional administrations (paragraph 24) and conditions in the area of return need to be assessed and determined as being safe by both local and national authorities (paragraph 25). Orders for the return of children shall be issued by Regional Authorities if conditions are determined to be safe and if certain conditions are met, including the validation of the National Social Services.
- ▶ Two Orders that need to be set up by the MoSP, the Ministry of Reintegration and the MoI, prior to which returns will not be possible, as these Orders are procedural requirements to request the exceptional return of children before the end of Martial Law. As of June 30, 2023, these orders have not yet been finalised.

One issue will be what process will be necessary when a child is an orphan or has been deprived of parental care because parents have gone missing, are in prison or have physical or mental conditions that render them incapable of caring for the child.

Where a child is already suffering from developmental delay, a failure to put in place a plan to meet the additional needs arising from the trauma of flight and displacement may have very serious consequences for their ability to develop skills necessary to live any sort of independent life as an adult. Therefore, carrying out a best interests assessment focused on their ability to develop into adulthood may be a priority even though the situation in Ukraine remains unstable.

Any consideration of return will have to take into account:

- ▶ the situation of immediate or extended family members in Ukraine;
- ▶ assistance that could be provided to family members to resume care for an individual child;

- ▶ the existence of different community-based forms of alternative care;
- ▶ international assistance that may be available to extend this sector of care.
- ▶ there will need to be some element of continuity with the past
- ▶ safety of the situation in Ukraine

## Recommendations

- ▶ International and European bodies should develop and promote guiding principles on a best interests procedure that should take to ensure comprehensive secure and sustainable solutions. This could be based on the range of case scenarios that arise, with a view to demonstrating the interaction of different procedures under international protection, family law and child protection laws and the different roles and responsibilities of actors and authorities involved.
- ▶ Laws or schemes should be adopted which can ensure longer term residence in responding countries for children without parental care, if their best interests require
- ▶ States should also allow access to education and vocational training and work to allow continuity and stability for children. If necessary, long-term residence schemes should be developed to facilitate access to education and work.
- ▶ The European Commission should draft and publish guidance to encourage States to extend the benefit of the Family Reunification Directive and Long-Term Residence Directive to children who were beneficiaries of temporary protection.
- ▶ States should extend national family reunification schemes. The extensions should ensure that persons who are/were beneficiaries of temporary protection fall within their scope, that periods of residence whilst a beneficiary of temporary beneficiary are covered, that children without parental care can sponsor family members to reunite with them.
- ▶ European and national bodies and actors should develop and provide clear information to authorities, guardians and lawyers on available international protection procedures so that they can inform and support children. Furthermore, they should ensure

the provision of free quality legal assistance for displaced children in all relevant procedures.

- ▶ Expert stakeholders at international and national level should support developing models for transnational cooperation ahead of transfers, and practical guidance to practitioners.
- ▶ States, or the European Commission at regional level, should organise a pool of child protection liaison persons in Ukraine, to serve as a point of contact in gathering information relating to decision making on return and implementation in line with the best interests of the child.
- ▶ UNICEF, in cooperation with Ukraine, and child protection CSOs in Ukraine should take action to enhance knowledge on the situation for children in different regions of Ukraine, to inform best interests assessment and ensure measures to support return and reintegration are out in place.
- ▶ The Permanent Bureau (*i.e.*, Secretariat) of the Hague Conference is undertaking the development of a HCCH 1996 Child Protection Convention Country Profile for all Contracting States to 1996 Convention including Ukraine. The Permanent Bureau could be invited to draft an information note to inform on how the HCCH 1996 Child Protection Convention mechanisms can assist liaison between authorities with different responsibilities for refugee children who are displaced in different scenarios.



## Chapter 7.

# Recommendations

## 7.1 Aim and purpose of the recommendations

The recommendations aim to help national and regional policy makers, agencies and stakeholders to navigate significant legal challenges for children without parental care displaced from Ukraine arising under international or European laws, or from their application.

They propose ways in which to remove or reduce these challenges, through action at national or regional levels. This depends on the issues involved, and what bodies have competence to act or a particular role to play. They connect with ongoing initiatives and actions at international and regional level which are focussed on protecting children displaced from Ukraine.

They address key challenges that exist at the time of publication of the report, acknowledging that the factual and policy situation is evolving all the time. The recommendations draw largely on thematic consultations in April 2023 and recognise that numerous regional actors are working on related topics in parallel and that these continued to develop, even as drafting was taking place.

### What type of actions are concerned?

The recommendations recognize that there is a need to encourage short, mid and long-term approaches to progress. Depending on the jurisdiction concerned, this might involve initiating reform of laws and procedures in the mid to long term. Such system change may be necessary but it will take time. In the short term, it will be important to employ new procedures and practices as the driving force for progress (and these may initially be built from the ground up in terms of SOPs and case management tools, building on a significant body of similar work, for example, in relation to relocation).

More generally, given the urgency of the situation, the recommendations consider the possibility for interpretative guidance on specific issues. Practical measures to support better implementation of the law may also be needed to reduce uncertainties and address gaps. This could include further development of individual case management processes, use of practical resources such as expert seminars with judicial and legal practitioners and professional networking. The work of the EU and UN agencies, the CoE and HCCH may be particularly important in this regard.

The recommendations also encourage a system strengthening approach as follows:

- ▶ Encourage stakeholders to continue moving from crisis response to sustainable actions. This will include moving beyond emergency responses (which addressed acute immediate risks to children) to adapting existing systems and processes so that they can ensure (1) ongoing identification of children, (2) monitoring and assessments of needs, (3) the provision of support and (4) monitoring of the situation of displaced children.
- ▶ Promote actions that strengthen the integrated child protection system which should be at the forefront of responding to the situation of these children. In particular, promote multi-disciplinary and inter-agency procedures to ensure coordination between the different authorities and actors involved. This should allow for both child protection and international protection procedures to be better connected and mobilized.
- ▶ Promote development of specialized knowledge and competence in light of the specific situation of these children. This will assist authorities and practitioners to deepen and extend knowledge of the different laws, and interactions between them.



There are considerable resource challenges to face. It will be important to fund innovative projects in relation to support, assistance and case management, in particular, in light of the scale of the challenges in some countries. This should be designed to build on existing regional resources and networks such as the European Guardianship Network, the European Judicial Network, the Council of Europe (National Help eDesks). It could include specialist networks addressing specific issues. It should promote existing legal assistance initiatives, including those supporting the use of a pro bono model

### Building on Existing Resources

Implementing the recommendations should draw on key resources in the field also described in the *Compendium of Law and Guidance*. UN Guidance on protecting children in international migration: As noted throughout the legal analysis in this Report, guidance provided by international and European bodies which are based on the UNCRC can provide important interpretative principles that can underpin action and ensure consistent approaches when applying different

procedures. References to this Guidance is set out in the Compendium of Law and Guidance. Ongoing initiatives to strengthen integrated child protection systems should also be referenced, including in times of emergency and crisis.

Guidance on how best to strengthen the implementation of children’s rights through general measures of implementation (UNCRC Art 4; General Comment No 5) may usefully underpin recommendations for progress, in particular, in light of the scale, duration and impact of the war. This guidance refers to the need for law reform and judicial enforcement of the rights of children, as well as awareness-raising, training and education on children’s rights. Resource allocation and “making children visible in budgets” is underlined, alongside monitoring and data-collection. The role of statutory children’s rights institutions, the participation of civil society and international cooperation are also noted, as well as the ratification and application of other relevant international standards.

## 7.2 Overview of Key Recommendations

The following table provides an overview of key recommendations, drawing from the pool of recommendations for action provided in relation to each priority area.

CROSS-CUTTING RECOMMENDATIONS	
<b>Promote continuity and stability for displaced children without parental care: extend the duration of temporary protection</b>	
<p><b>Recommended actions:</b></p> <p>Extend temporary protection within the EU until March 2025; extend temporary protection instruments in all responding States</p>	<p><b>Elements of action:</b></p> <ul style="list-style-type: none"> <li>▪ EC to prepare a proposal for a Council Implementation Decision on the extension of TPD until March 2025 as a matter of urgency</li> <li>▪ States amend national laws and policies as necessary</li> </ul>
<b>Leading actors:</b> European Commission, Council of the European Union, States	

## CROSS-CUTTING RECOMMENDATIONS

**Improve the protection of children without parental care during displacement from Ukraine: provide general guidance on priority measures****Recommended actions:**

Develop and publish Guidelines for EU Member States on protection of children without parental care

**Elements of action:**

- EC should draft up Guidelines that address key measures on the protection of children in order to enhance clarity on the interpretation of the EU's provisions on children in line with the Charter of Fundamental Rights.
- In addition or as an alternative, Commission to update EC FAQ on Unaccompanied and Separated Children fleeing from war in Ukraine – FAQs on Registration, Reception and Care
- Could draw on any concluding observations and recommendations of the Committee on the Rights of the Child relating to the application of the UN CRC to children without parental care from Ukraine during the ongoing monitoring cycles

**Leading actors:** European Commission DG Home and DG Justice, in consultation with UN and EU agencies, Council of Europe, and civil society organisations

**Recommended actions:**

Develop additional practical tool for practitioners on procedural safeguards for children without parental care from Ukraine

**Elements of action:**

- Comprehensive guidance might be undertaken by FRA/EUAA, or it could be inspired by, several FRA and EUAA resources for practitioners.
- It could draw in particular on the FRA guidance "Children deprived of parental care round in an EU Member State other than their own: A guide to enhance child protection focusing on victims of trafficking". This handbook, which covers the application of child protection, family laws and certain international protection instruments, could be tailored to address the issues for children displaced from Ukraine..
- This could include case scenarios to ensure that the variations in the application of the laws depending on different situations in which children find themselves are evident

**Leading actors:** Potentially FRA, in follow up to its upcoming bulletin on children displaced from Ukraine, and/or the EUAA

**CROSS-CUTTING RECOMMENDATIONS**

**Enhance knowledge of the application of the HCCH 1996 Child Protection Convention to children without parental care, displaced from Ukraine**

**Recommended actions:**

Draft and publish a detailed information note on the application of the 1996 Convention to children from Ukraine

**Elements of action:**

- This detailed information note would address different aspects of the Convention which can assist authorities in working together in these cross-border cases.
- It would amplify existing HCCH guidance and focus on specific features of displaced children.
- It could include specific case scenarios and be valuably deployed in seminars between judges and in training of lawyers and guardians.

**Leading actors:** HCCH

**Strengthen the role of the national child protection systems of responding countries in relation to children without parental care from Ukraine, through technical exchange**

**Recommended actions:**

Exchange and share challenges and good practices in technical exchanges between European States on thematic issues, such as:

- the response of child protection systems to emergency situations, from initial response to sustainability
- ensuring that children in Ukraine have effective access to integrated child protection systems, including through the timely provision of psychological support tailored to their specific needs and paying particular attention to the rights and needs of children with disabilities;
- lessons learned from the situation of children without parental care, displaced from Ukraine

**Elements of action:**

- Building on FRA child protection mapping, CBSS child protection report on resilient child protection systems, EU Child Rights Strategy, Council of Europe Child Rights Strategy.
- It should involve key European networks active in child protection, such as Eurochild, Missing Children in Europe, European Network on Statelessness, ECRE, Save the Children, the European Guardianship Network
- Feeding into: Commission DG Justice consultation on integrated child protection systems, and recommendations from the Commission scheduled for 2024
- Could inform: A meeting report to include observations on lessons learned for States and practitioners
- Could inform: a thematic meeting on child protection measures at Solidarity Platform including perspectives from those delivering services (CSOs et al)

**Leading actors:** European Commission, convening Member States, in particular through DG Justice Child Rights Coordinator, and including Council of Europe, Council of Baltic Sea States, FRA, UN agencies, relevant stakeholders, Council of Europe (Consultation Group on Children of Ukraine)

**RESPONSIBILITY, SUPPORT, ASSISTANCE AND GUARDIANSHIP****Improve assessments of responsibility arrangements for children without parental care from Ukraine****Recommended actions:**

Draft and publish an Information sheet on the nature, scope and purpose of different responsibility arrangements for children under Ukraine law for the purpose of identifying and assessing them, as well as the responsibility arrangements that may arise in responding countries

**Elements of action:**

- Follow up to this Legal Report and national research

**Leading actors:** DG Justice, European Commission

**Strengthen national guardianship systems for children without parental care from Ukraine****Recommended actions:**

Draft an addendum to the FRA Guidance for guardians to address the issue of children without parental care when internationally displaced

**Elements of action:**

- Such an addendum could address new aspects of guardianship, including temporary guardianship in situations of mass influx, complementary forms of guardianship and the role of guardianship bodies; it could also include support to accompanying adults, in particular, when providing kinship care

**Leading actors:** EU Fundamental Rights Agency

**Recommended actions:**

Actively assess and monitor guardianship for children deprived of parental care from Ukraine

**Elements of action:**

1. Could Inform recommendations from any field visits by the CoE SRSG on Migration and Refugees to strengthen support and assistance to children without parental care from Ukraine
2. Can draw from elements of recent EUAA/FRA Practical Tool for Guardians
3. May require additional funding to do so; could include further dedicated exchange between members and country-level workshops or study visits

**Leading actors:**

1. Council of Europe: follow up the assessment of the implementation of the CoE Recommendation CM/Rec(2019)11 to Member States on Effective guardianship for unaccompanied and separated children in the context of migration Council of Europe
2. EUAA: monitoring of implementation of the temporary protection directive should include a specific focus on the extent to which support and assistance has been provided to children without parental care benefitting from temporary protection or international protection
3. EGN: adapt the ProGuard assessment tool of the European Guardianship Network to include the issue of children without parental care when internationally displaced European Guardianship Network

**RESPONSIBILITY, SUPPORT, ASSISTANCE AND GUARDIANSHIP**

**Support guardians for unaccompanied and separated children**

**Recommended actions:**

Promote the use of the Practical tool for guardians -Booklet series developed by EUAA and FRA through its adaptation to national contexts

**Elements of action:**

- Encourage exchange on, and promoting, the use of EUAA/FRA resources

**Leading actors:** European Guardianship Network

**Recommended actions:**

Review and adapt the Council of Europe life project recommendation and Handbook to the particular situation and needs of children from Ukraine.

**Elements of action:**

- This would be based on Council of Europe Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors and its related handbook and good practices.
- It could provide a useful tool for national agencies to work on life projects with children, to produce continuity and stability, and to contribute to future planning.

**Leading actors:** Council of Europe, European Guardianship Network

**IMPROVE ACCESS TO APPROPRIATE INTERNATIONAL PROCEDURES**

**Strengthen procedures which ensure access to appropriate international protection procedures**

**Recommended actions:**

Recommendations to States on how to ensure that children have access to international protection that is appropriate to their circumstances

**Elements of action:**

This could include recommendations on a range of national actions of a legislative, procedural or practical nature. For example, it would include action to:

- improve identification, registration, vulnerability screening, assessments and referral
- strengthen practices to identify and protect child victims of trafficking
- improve child-sensitive statelessness determination procedures
- enhance child-centred procedures, including to ensure access to legal assistance
- Best interests procedures to ensure that the circumstances of children are assessed properly and their views are elicited and taken into account

**Leading actors:** European Commission, Council of Europe, UN agencies

## IMPROVE ACCESS TO APPROPRIATE INTERNATIONAL PROCEDURES

### Exchange of good practice on child friendly case management

#### Recommended actions:

Exchange of good practice (or development of guidance) on child friendly case management

#### Elements of action:

- This would be tailored to address pathway planning process, including an interagency approach to best interests procedures as well as guardian ensuring that child has legal information and assistance to identify and to navigate through appropriate procedures.
- This would include practice on the involvement of interpreters and cultural mediators

**Leading actors:** EUAA and FRA, building on existing resources

### Improve information on available international procedures

#### Recommended actions:

Develop and provide clear information to authorities, guardians and lawyers on available international protection procedures so that they can inform and support children

#### Elements of action:

- Continue to promote and use resources from EUAA by tailoring them to national legal framework

**Leading actors:** EUAA, CoE, States, European Guardianship Network, Legal community

### Improve legal assistance provision

#### Recommended actions:

Ensure the provision of free quality legal assistance for displaced children in all relevant procedures (e.g. application for international protection or family reunification in the future)

#### Elements of action:

- Promote recognition of the need for quality and free legal assistance,
- European Commission could also promote and fund innovative practices to provide specialized legal assistance, including through a pro bono model
- Provision of training tailored to the legal questions arising for children without parental care from Ukraine

**Leading actors:** States, Legal community, including Council of Bars and Law Societies of Europe (CCBE), KIND Europe, PILnet, law clinics and pro bono law firms, European Commission, Council of Europe

**CHILDREN FROM ALTERNATIVE CARE IN UKRAINE**

**Strengthen transnational cooperation with Ukraine in relation to children in alternative care**

**Recommended actions:**

Develop guiding principles to assist in strengthening collaboration between the authorities in Ukraine responsible for children evacuated from alternative care in Ukraine and national child protection agencies in responding countries

**Elements of action:**

- Guiding principles could recognize the respective responsibilities that arise, facilitate the provision of support and appropriate reception to accompanying adults and children, and strengthen the collaboration between the different actors exercising responsibility for them
- Such guidance could address key measures for the protection of these children, including individual assessments, safeguards against risk, and access to support services, access to guardianship and legal assistance where appropriate.

It could build on:

- Resources on good practice and lessons learned at national level (including through UNICEF national research in this area)

**Leading actors:** International or European body, such as UN CRC, the European Commission, the Council of Europe CGU, UN agencies, Ukraine, expert organisations

**Recommended actions:**

Develop guidance (and training) on standards of care provided by guardians and foster carers should be provided on a national level in order to prevent harm that could be avoided

**Elements of action:**

- In such guidance, responding countries should take into account the particular needs of children with disabilities, as articulated in the UNCRPD and strategies being developed at Council of Europe and EU level that relate to children with disabilities
- Guardians and foster carers should be provided with the necessary support and training to understand and be able to implement standards of child protection required in responding country
- Liaison should be established between the Ministry of Social Policy in Ukraine, Ukrainian consuls and Hague Convention Central Authorities in order for transnational solutions to be developed where there is a proposal to remove a child from a guardian or foster carer in cases of serious harm to the child

**Leading actors:** States

## TOWARDS COMPREHENSIVE SECURE AND SUSTAINABLE SOLUTIONS

## Develop guiding principles on a best interests procedure

**Recommended actions:**

Develop guiding principles on a best interests procedure to inform decision-making on comprehensive secure and sustainable solutions, including possible voluntary return to Ukraine

**Elements of action:**

- The purpose of these guiding principles would be to establish a common understanding of the best interests procedures needed, in line with different situations and the various decision-making processes which will apply under international protection, family law and child protection laws.
- It will underline the procedural safeguards that should be in place for children, including guardianship, legal assistance and the right to be heard.

**Leading actors:** International or European body, such as UN CRC, the European Commission, the Council of Europe, Ukraine, UN agencies

## Strengthen transnational cooperation between responding countries and Ukraine

**Recommended actions:**

Develop models for transnational cooperation ahead of transfers, and accompanying guidance

**Elements of action:**

- Build on existing guidance and lessons learned
- It could draw in particular on the FRA guidance “Children deprived of parental care round in an EU Member State other than their own: A handbook to enhance child protection focusing on victims of trafficking.” This handbook addressed the different bodies of law that apply, and could be tailored to the issues for children displaced from Ukraine
- It could also be based on case scenarios, to demonstrate different situations, including also how respect for parental responsibility is achieved, with any necessary safeguards and support and supervision from state actors
- It could be informed by previous experience in relocation, through documenting and identifying lessons learned from transnational procedures involving children, including previous ad hoc relocation schemes (EUAA)
- There is much to learn and inspire good practice from practical exchanges, such as the one held by EUAA in May 2023

**Leading actors:** Commission, Council of Europe, Ukraine authorities, EUAA; EU FRA; HCCH PB; States: UN agencies, expert stakeholders



**TOWARDS COMPREHENSIVE SECURE AND SUSTAINABLE SOLUTIONS**

**Enhance information on situation within Ukraine and services available to support return and reintegration**

**Recommended actions:**

Take action to enhance knowledge on the situation for children in different regions of Ukraine, properly to inform best interests assessment and ensure measures to support return and reintegration are out in place

**Elements of action:**

- Could be based on Child Notice methodology developed by UNICEF

**Leading actors:** UNICEF, in cooperation with Ukraine, and child protection CSOs in Ukraine

**Recommended actions:**

Organise a pool of child protection liaison persons in Ukraine, to serve as a point of contact in gathering information relating to decision making on return and implementation in line with the best interests of the child

**Elements of action:**

- Based on practices in relation to other transnational procedures involving children, including liaison officers sometimes involved in the case of Dublin procedures

**Leading actors:** European Commission (if at a regional level), States

Guidance should be developed to ensure children evacuated from institutional care benefit from reform of child protection systems for Ukrainian children

**Elements of action:**

- The possibility of returning children to family or community-based provision in Ukraine should be explored as the first option as opposed to return to institutions from which they were evacuated

**Leading actors:** Commission, Council, UN agencies, experts working with children with disabilities and children in institutional care

**Ensure availability of alternative procedures to ensure appropriate comprehensive, secure and sustainable solutions**

**Recommended actions:**

- Develop guidance to encourage States to extend the benefit of the Family Reunification Directive and Long-Term Residence Directive to children who were beneficiaries of temporary protection
- Extend national family reunification schemes for the future, post cessation of the TPD
- Allow access to education and vocational training/work to allow continuity and stability for children

**Leading actors:** European Commission, States

# Bibliography

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- ▶ European Commission, Communication to the European Parliament and the Council on Temporary Protection for Those Fleeing Russia's Aar of Aggression against Ukraine: One Year On (2023) [link](#)
- ▶ European Commission, Frequently Asked Questions on Unaccompanied and Separated Children Fleeing from War in Ukraine (2022) [link](#)
- ▶ European Commission, Recommendation 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (2017) [link](#)
- ▶ European Commission, Communication to the European Parliament and the Council on the Protection of Children in Migration (2017) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52017DC0211>
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- ▶ European Migration Network, Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway: EMN Synthesis Report (2018) [https://emn.ie/files/p\\_201808090907072018\\_emn\\_sythesis\\_unaccompanied\\_minors\\_09.08.2018.pdf](https://emn.ie/files/p_201808090907072018_emn_sythesis_unaccompanied_minors_09.08.2018.pdf)
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# Endnotes

- <sup>1</sup> <https://www.unhcr.org/emergencies/ukraine-emergency>
- <sup>2</sup> In early May 2022, UNICEF, Eurochild and Child Circle collaborated on a [Discussion Paper](#) on guardianship, care arrangements and custodial responsibility for unaccompanied and separated children fleeing Ukraine and arriving in the EU. UNICEF and Eurochild also undertook a mapping exercise examining the law and policies at national level for children in alternative care and unaccompanied and separated children from Ukraine in 13 countries across Europe.
- <sup>3</sup> While all European countries have ratified the CRC, not all have ratified the optional protocols referenced in this report.
- <sup>4</sup> Once a convention comes into effect, its impact on ratifying Member States depends on the type of national legal system in place. In some jurisdictions, individuals can rely on international conventions directly in national courts; in other jurisdictions this will occur only if a national act ensures that a convention has domestic effect. Under EU law, regulations are binding legislative acts and must be applied in their entirety across the EU. EU directives are legislative acts that set out obligations that all EU countries must achieve but it is up to individual countries to devise their own laws on how to achieve these obligations. EU decisions are binding on those to whom it is addressed and are directly applicable.
- <sup>5</sup> Amongst the cases of particular interest to this study are *Rahimi v. Greece*, ECHR No. 8687/08, 2011; CJEU, C-112/20, *M. A. v État Belge*; CJEU Case C-441/19 TQ v *Staatssecretaris van Justitie en Veiligheid*.
- <sup>6</sup> <https://fra.europa.eu/en/publication/2022/handbook-european-law-child-rights>
- <sup>7</sup> This includes within the Reference Group of international and regional policymakers established to contribute to the review of these legal issues during the Study.
- <sup>8</sup> See for example the report by UNHCR on "[The Implementation of the Temporary Protection Directive: six months](#)" on and the experience of members of the European Guardianship Network's [Spotlight on practices regarding guardianship for unaccompanied and separated children arriving in the EU from Ukraine](#).
- <sup>9</sup> General Comment CRC No 13 (2011): The right of the child to freedom from all forms of violence
- <sup>10</sup> UNICEF's CPSS [benchmarks](#) also relevant.
- <sup>11</sup> See also Recommendation Rec(2005)5 on the rights of children living in residential institutions, establishes overall guiding principles to be applied whenever a child is placed outside the family, particularly in a residential institution. Recommendation CM/Rec(2010)2 on deinstitutionalisation and community living of children with disabilities calls on member States to take appropriate legislative, administrative and other measures to replace institutional care with community-based services within a reasonable timeframe and through a comprehensive approach. The Council of Europe also issued a Guidance on family-based care for unaccompanied and separated children adopted by the Steering Committee for Human Rights (CDDH) in 2021.
- <sup>12</sup> [Temporary protection for those fleeing Russia's war of aggression against Ukraine one year on.pdf \(europa.eu\)](#)
- <sup>13</sup> Reykjavik Declaration "United around our values" at the of the Fourth Summit of Heads of State and Government
- <sup>14</sup> Potential thematic issues to be covered in the work of CGU include: improving receiving states' knowledge of legal and policy frameworks under Ukrainian law for children including those who are without parental care; preparing or presenting existing protocols on the identification or establishment of legal responsibility for children, including guardianship arrangements and placement in alternative care; access to services, in particular social and child protection services, access to education; the provision of support for children with special needs. The CGU will also be a venue to inform of the developments in respect of any reforms of the Ukrainian child protection, social services, or alternative care systems.
- <sup>15</sup> For example, the proximity of Ukraine and ease of movement under visa liberalization measures and through the application of the TPD in the EU allows for some pendular movement. This means that some children may return to Ukraine for short periods of time or some parents may enter responding countries to visit children, typically in school holidays. How decision-making on these issues involves local guardians is one of the new types of questions posed.
- <sup>16</sup> <https://assets.hcch.net/docs/0f9c08e9-75d0-4497-8ca0-12c595aa6845.pdf>
- <sup>17</sup> <https://enn-rne.eu/crossCheckUkrainianChildren>
- <sup>18</sup> The Explanatory report on the HCCH 1996 Child Protection Convention explains that "The definition given is broad. It covers at the same time responsibility concerning the person of the child, responsibility concerning his or her property and generally the legal representation of the child, whatever be the name which is given to the legal institution in question, parental responsibility, parental authority, paternal authority as well as guardianship, curatorship, legal administration, tutelle, curatelle. The rights and responsibilities to which reference is made are those that belong to the father and mother under the law with a view to raising their children and ensuring their development, whether the question involved is custody, education, determination of the residence of the supervision of the child's person and in particular his or her relationships. The term powers has to do more specifically with representation of the child. The responsibility is exercised normally by the parents but it may be exercised in whole or in part by third persons under conditions set by the domestic legislation in case of death, incapacity, unsuitability or unfitness of the parents or in case of the abandonment of the child by his or her parents."
- <sup>19</sup> This list will appear in the online form when clicking on "Scope" followed by "The authorization to exercise supervision and care of the child abroad".

- <sup>20</sup> [Agreement](#) between the Ministry of Social Security and Labour of the Republic of Lithuania and the Ministry of Social Policy of Ukraine on cooperation in the field of protection of children affected by the war in Ukraine due to the Russian Federation's armed aggression (2022)
- <sup>21</sup> *Ibid.*
- <sup>22</sup> [Communication](#) from the Commission to the European Parliament and the Council on Temporary protection for those fleeing Russia's war of aggression against Ukraine: one year on (2023), p.8.
- <sup>23</sup> Communication from the Commission to the European Parliament and the Council on the Protection of Children in Migration [COM/2017/0211](#)
- <sup>24</sup> For example, Article 24 of the Reception Conditions Directive (Directive 2013/33/EU) notes that "Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives."
- <sup>25</sup> EGN (2022 ) [Spotlight](#) on practices regarding guardianship for unaccompanied and separated children arriving in the EU from Ukraine. This report states that as example in Belgium a backlog of cases meant that there was a waiting list for the appointment of guardians. Belgium also noted some cases where a guardian was appointed, but the child had moved to another Member State or returned to Ukraine. In other cases, it came apparent that one of the parents was in responding country, which caused that a guardian had been appointed whilst it was no longer necessary.
- <sup>26</sup> See <https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/country-reports>
- <sup>27</sup> *Ibid.* This Communication takes stock of the Temporary Protection Directive's implementation over one year, building on the Communication 'Welcoming those fleeing the Russian aggression towards Ukraine: Ready Europe to meet the needs' adopted on 23 March 2022. It provides insight into how the EU managed to enable and coordinate a genuine whole-of-society response to the largest displacement on European soil since the Second World War. It also identifies priority areas where continued efforts are needed to guarantee the rights provided for in the Directive.
- <sup>28</sup> Under Article 14 of the [Regulation](#) on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, 'The Agency, in close cooperation with the Commission, shall establish a monitoring mechanism for the purpose of monitoring the operational and technical application of the CEAS in order to prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems.'
- <sup>29</sup> UNCRC General Comment No. 22 on the general principles regulating the human rights of children in the context of international migration, paragraph 21
- <sup>30</sup> General Comment no 13 (2011) The right of the child to freedom from all forms of violence.
- <sup>31</sup> Decree of the Cabinet of Ministers No. 302 of March 17, 2022, <https://cis-legislation.com/document.fwx?rgn=138736>
- <sup>32</sup> See, for example, The Vienna Convention on Consular Relations (adopted 24th April 1963, entered into force 19th March 1967) 500 UNTS 261 <https://www.refworld.org/docid/3ae6b3648.html>
- <sup>33</sup> Concept of Reforming Local Self-Government and Territorial Structure of Power (Cabinet of Ministers, April 2014) and Strategy for Regional Development (approved August 2014)
- <sup>34</sup> Ukraine is not a party to the Hague Convention on Intercountry Adoption and strict local rules apply.
- <sup>35</sup> See statement by the Ukrainian Ministry of Social Policy on Intercountry adoptions <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ukraine-ministry-of-social-policy-statements-on-child-safeguards.html>
- <sup>36</sup> The numbers of institutions referred to here are approximate as it is recognised that much has changed since February 2022
- <sup>37</sup> [Behind-the-Mask-of-Care-Hope-and-Homes-for-Children-Ukraine.pdf \(hopeandhomes.org\)](#)
- <sup>38</sup> Confirmed by the Ukrainian Parliamentary Commission for Human Rights for the Rights of the Child [PowerPoint Presentation \(enoc.eu\)](#),
- <sup>39</sup> As regulated by the Family Code 2002 and the Decree of the Cabinet of Ministers of Ukraine No 565 of April 26, 2002, On Approving the Statute of the Foster Family
- <sup>40</sup> As regulated by the Family Code 2002 and the Decree of the Cabinet of Ministers No. 564 of April 26, 2002, On Approving the Statute of Family Type Orphanage
- <sup>41</sup> Decree of the Cabinet of Ministers No. 926 of October 31, 2018, On Approving of the Model Regulations on a Small Group House
- <sup>42</sup> Family Code of Ukraine 2002 and Decree of the Cabinet of Ministers of Ukraine No 893 of August 20, 2021, On Some issues of Protection of Children's Rights and Providing the Services of Patronage over a Child
- <sup>43</sup> Bilateral conversation, Partnership for Every Child, Ukraine
- <sup>44</sup> [HRW \(2023\) 'We must provide a home not rebuild orphanages'](#)
- <sup>45</sup> Bilateral Discussion with [Partnership for Every Child Ukraine](#)
- <sup>46</sup> [HRW \(2023\) 'We must provide a home not rebuild orphanages'](#)
- <sup>47</sup> Resolution No. 586 of 01.06.20 law on the procedure for enrolment of children for all-day stay in institutions that provide institutional care and education
- <sup>48</sup> No. 35645/0/1-20
- <sup>49</sup> [Press release: "Ukrainian Child Rights Network" calls on the Government of Ukraine to ensure the rights of the child – Ukrainian Child Rights Network](#)
- <sup>50</sup> [UNICEF urges the Government of Ukraine to continue with](#)

the Deinstitutionalization Reform in line with the approved National Strategy

- <sup>51</sup> <https://www.unicef.org/ukraine/documents/02-06-2022-CiAC-monitoring-report>
- <sup>52</sup> <https://www.unicef.org/ukraine/documents/02-06-2022-CiAC-monitoring-report>
- <sup>53</sup> Concept of Reforming Local Self-Government and Territorial Structures of Power, Cabinet of Ministers, April 2014 and Strategy of Regional Development 2015 – 2020, August 2014
- <sup>54</sup> HRW (2023) “We Must Provide a Family, Not Rebuild Orphanages”; [Partnership with Every Child](#)
- <sup>55</sup> [Statement by President von der Leyen at the joint press conference with Ukrainian President Zelenskyy \(europa.eu\)](#)
- <sup>56</sup> [Keynote Speech \(europa.eu\)](#)
- <sup>57</sup> Council of Europe (2023) Heads of State and Government from Council of Europe member states united to take action on the situation of children of Ukraine
- <sup>58</sup> European Commission, “[Reconstruction of Ukraine](#)”
- <sup>59</sup> In order to establish the state policy on the temporarily occupied territories Ukrainian Parliament adopted in 2014 a Law On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine dated 15.04.2014 No. 1207-VII. In accordance with the part 3 of Article 17 of this law, in case it is impossible to carry out activities in the temporarily occupied territory, the location of state bodies established in accordance with the Constitution and laws of Ukraine is determined by the Cabinet of Ministers of Ukraine. Basically, it means that if citizens of Ukraine from occupied territories enter areas controlled by Ukrainian government and need to obtain some state services, they can do it at the place of their current stay or living. The said Law has been updated several times since its adoption in 2014. The first amendments to it since the beginning of full-scale invasion and war on 24 February 2023 were made on 15 March 2023. The Ministry of Reintegration of Temporary Occupied Territories of Ukraine since 22 December 2022 keeps and from time to time updates a list of the territories on which hostilities are (were) conducted or which are temporarily occupied by the Russian Federation.
- <sup>60</sup> The official translation into English is available at <https://zakon.rada.gov.ua/laws/show/2709-15?lang=en#Text>
- <sup>61</sup> Part 4 of the Article 263 of the Civil Procedural Code of Ukraine <https://zakon.rada.gov.ua/laws/show/1618-15?lang=en#n8001>
- <sup>62</sup> The Law of Ukraine “On Protection of Childhood 2001”
- <sup>63</sup> The Civil Code of Ukraine 2004 <https://www.ebrd.com/downloads/legal/core/ukraine.pdf>
- <sup>64</sup> The Family Code of Ukraine 2002 <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5d667af64> The last updated version in English is available at <https://zakon.rada.gov.ua/laws/show/2947-14?lang=en#Text>
- <sup>65</sup> Civil Procedural Code of Ukraine 2004 <https://www.wipo.int/wipolex/en/text/187648> The last updated version in English is available at <https://zakon.rada.gov.ua/laws/show/1618-15?lang=en#n8001>
- <sup>66</sup> The Constitution of Ukraine 1996 (amended 2020) <https://www.refworld.org/pdfid/44a280124.pdf> The last updated version in English is available at <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text>
- <sup>67</sup> Available in English at <https://www.global-regulation.com/translation/ukraine/571378/on-the-protection-of-childhood.html>
- <sup>68</sup> Available in English at <https://cis-legislation.com/document.fwx?rgn=24777>
- <sup>69</sup> also available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/en/866-2008-%D0%BF?lang=en#Text>
- <sup>70</sup> Available in English at <https://zakon.rada.gov.ua/laws/show/2145-19?lang=en#Text>
- <sup>71</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2342-15#Text>
- <sup>72</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/20/95-%D0%B2%D1%80?lang=en#Text>
- <sup>73</sup> Available in Ukrainian at <https://www.president.gov.ua/documents/5682022-43581>
- <sup>74</sup> Decree of the President No 64/2022 <https://rm.coe.int/1680a5b03f>
- <sup>75</sup> There are now a number of exceptions to this general rule Visit Ukraine – Departure of men abroad in 2023: what has changed for military servicemen, Ukrainian Cabinet’s New Conscription Rules: War-critical Workers May Avoid Draft (kyivpost.com)
- <sup>76</sup> UA version is available at <https://zakon.rada.gov.ua/laws/show/264-2022-%D0%BF#n11>
- <sup>77</sup> Visit Ukraine – How can Ukrainians travel abroad with a child? Rules and prohibitions
- <sup>78</sup> Note regarding the crossing of the state border by children, persons with disabilities and persons accompanying them in a state of emergency of martial law, Ministry of Social Policy of Ukraine & SURGe 2022 available in English at <https://shorturl.at/altFL>
- <sup>79</sup> Note regarding the crossing of the state border by children, persons with disabilities and persons accompanying them in a state of emergency of martial law, Ministry of Social Policy of Ukraine & SURGe 2022 [https://bettercarenetwork.org/sites/default/files/2022-03/ukraine\\_mosp\\_guidance\\_on\\_border\\_crossings\\_of\\_children\\_and\\_persons\\_with\\_disabilities\\_unofficial\\_eng\\_version.pdf](https://bettercarenetwork.org/sites/default/files/2022-03/ukraine_mosp_guidance_on_border_crossings_of_children_and_persons_with_disabilities_unofficial_eng_version.pdf)
- <sup>80</sup> *ibid*
- <sup>81</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/349-2022-%D0%BF#Text>
- <sup>82</sup> This decree added to the Order of the activities of the custody and care authorities a number of articles that regulate currently the procedure of establishing a status for the children as orphan or a child deprived of the parental care during the effect of the martial law or state of emergency. It also provided that during the state of the martial law or emergency it is not necessary for the caregivers (relatives of the children or their godparents) to undergo special training in the social services centers in order to accept orphans or children deprived of parental care under their guardianship.
- <sup>83</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/794-2022-%D0%BF#Text>
- <sup>84</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/569-2003-%D0%BF#Text>

- <sup>84</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/en/546-2023-%D0%BF?lang=uk#Text>
- <sup>85</sup> It is also the case that adoption is not addressed in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children which Ukraine is party to
- <sup>86</sup> A statement by the Ukrainian Ministry of Social Policy on Intercountry adoptions <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/Ukraine-ministry-of-social-policy-statements-on-child-safeguards.html>
- <sup>87</sup> Ibid. In summary overview, a decision as to who has parental responsibility for a child from Ukraine will be based on the decision taken previously under Ukrainian law as to any granting of parental or legal responsibility and any such decision relating to parental responsibility subsists in the responding country. (Articles 16-17) A measure of protection taken in Ukraine before the child is evacuated should be recognised by operation of law in a responding state (Article 23), without the need for any legal or administrative action being taken in that country to confirm that measure. However, decrees and orders made by Ukraine since 24 February 2022 require documentation to be sent with children being evacuated from alternative care. Measures of protection include granting or restricting parental responsibility for a child, placing them in guardianship or curatorship or placing them in foster care or an institution. Article 3)
- <sup>88</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/952-2006-%D0%BF?lang=en#Text>
- <sup>89</sup> <https://nssu.gov.ua/en>
- <sup>90</sup> The Vienna Convention on Consular Relations (adopted 24th April 1963, entered into force 19th March 1967) 500 UNTS 261 <https://www.refworld.org/docid/3ae6b3648.html>
- <sup>91</sup> General Comment No 13 notes that “States parties, furthermore, shall ensure that all persons who, within the context of their work, are responsible for the prevention of, protection from, and reaction to violence and in the justice systems are addressing the needs and respecting the rights of children.”
- <sup>92</sup> [Vienna Convention on Consular Relations, 1963 \(un.org\)](#)
- <sup>93</sup> Note regarding the crossing of the state border by children, persons with disabilities and persons accompanying them in a state of emergency of martial law, Ministry of Social Policy of Ukraine & SURGe 2022 [https://bettercarenetwork.org/sites/default/files/2022-03/ukraine\\_mosp\\_guidance\\_on\\_border\\_crossings\\_of\\_children\\_and\\_persons\\_with\\_disabilities\\_unofficial\\_eng\\_version.pdf](https://bettercarenetwork.org/sites/default/files/2022-03/ukraine_mosp_guidance_on_border_crossings_of_children_and_persons_with_disabilities_unofficial_eng_version.pdf)
- <sup>94</sup> Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters (1993)
- <sup>95</sup> Ibid.
- <sup>96</sup> The Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children, (HCCH) paras 24-28
- <sup>97</sup> Ibid, p. 119.
- <sup>98</sup> Article 33 provides that (1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care. (2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child’s best interests.
- <sup>99</sup> Agreement between the Republic of Poland and Ukraine on legal aid and legal relationships in civil and criminal matters, done at Kiev on 24 May 1993
- <sup>100</sup> Refworld | Voluntary Return to Ukraine of Refugee Children without Parental Care, including Unaccompanied Children and Children Evacuated from Care Institutions in Ukraine
- <sup>101</sup> UNHCR, “Persons in need of international protection,” June 2017
- <sup>102</sup> UNICEF, *Child Protection Strategy 2021-2030*
- <sup>103</sup> ECRE, [Joint Statement: Extend the Current Temporary Protection Regime for Displacement from Ukraine until 2025](#), 19 May 2023
- <sup>104</sup> UNHCR, “The implementation of the Temporary Protection Directive Six Months On” (2022); ECRE, [Joint Statement: “Extend the Current Temporary Protection Regime for Displacement from Ukraine until 2025”](#) (2023); EUAA, “Providing Temporary Protection to Displaced Persons from Ukraine: A Year in Review” (2023)
- <sup>105</sup> UNICEF [Guidance on refugee and migrant children](#)
- <sup>106</sup> UNHCR-IDC’s [Vulnerability Screening Tool](#) – “Identifying and addressing vulnerability: a tool for asylum and migration systems” (2016); PICUM’s “[Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies](#)”
- <sup>107</sup> Initially, Article 313 of the Ukrainian Civil Code permitted children aged between 16 and 18 to leave Ukraine without the written authority of a parent. However, on 12 March 2023, the Cabinet of Ministers of Ukraine decreed that, until a child became 18, they could cross an international border without a guardian and provided for a process by which an adult travelling with them could apply to be their temporary custodian (add reference).
- <sup>108</sup> European Network on Statelessness, [Statelessness Index](#); European Network on Statelessness, [Statelessness and the Ukraine crisis response](#)
- <sup>109</sup> European Migration Network, [Comparative Overview of National Protection Statuses in the EU and Norway](#), May 2020
- <sup>110</sup> Some applications from Ukrainians have been received since 23 February 2022 but data has not at yet been disaggregated on the basis of age [Analysis of Measures to Provide Protection to Displaced Persons from Ukraine: Situational Report | European Union Agency for Asylum \(europa.eu\)](#)
- <sup>111</sup> UNODC (2020) [Global Report on Trafficking in Persons](#). Even prior to the war, Ukrainians were being trafficked, both internally and internationally. The number one country where Ukrainian victims of trafficking were identified is Russia with some 1369 cases identified between 2017 and 2020 in Russia alone. According to IOM in 2021 Ukrainian citizens were among the top five Non-EU victims identified in the EU, and that was before the escalation of hostilities in March 2022.
- <sup>112</sup> As noted in the EU [Common Anti-Trafficking Plan](#) to

address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine: *Unaccompanied minors and children evacuated from care institutions are also at particular risk of being exploited by traffickers.*

<sup>113</sup> Stakeholders' views, Thematic Consultation April 28, 2023 Legal Study

<sup>114</sup> Stakeholders' views, Thematic Consultation April 28, 2023 Legal Study

<sup>115</sup> As examples, the European Disability Federation Forum authored a submission on the issue of the risks due to disability and Hope and Homes authored a submission on the issue of the risks in institutions as did many other civil society organisations in response to the request for submissions for the evaluation of the Directive.

<sup>116</sup> The current monitoring round of the Lanzarote Committee focuses on ensuring that children are protected against sexual abuse in their circle of trust, i.e. by someone they trust or who exercises authority or influence over them. This necessarily includes institutional settings. The following documents and recommendations of the Lanzarote Committee are worth noting: the Lanzarote Committee's Statement on protecting children from sexual exploitation and sexual abuse resulting from the military aggression of the Russian Federation against Ukraine; the Lanzarote Committee's request to the Russian Federation to submit by 10 July 2023 a special report responding to 7 urgent questions concerning the implementation of its Convention obligations with regard to the vulnerable situation of the Ukrainian children unlawfully transferred or deported to its territory or areas temporarily controlled or occupied by it (link to the corresponding news item); Section II.2.3 "Ensuring safe reception facilities and longer term placement" of the Special Report on protecting children affected by the refugee crisis from sexual exploitation and sexual abuse; Recommendations 23, 24 and 25 made in this context as well as the examples of follow-up given by some Parties to these recommendations; Declaration on protecting children in out-of-home care from sexual exploitation and sexual abuse in 2019. A Special Report on "Protecting children affected by the refugee crisis from sexual exploitation and sexual abuse" was also adopted in 2017.

<sup>117</sup> European Roma Rights Centre (2021) *Blighted Lives: Romani Children in State Care*

<sup>118</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

<sup>119</sup> See also: UNHCR, [Guidelines on International Protection No. 8: Child Asylum Claims](#) under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08 ; UNHCR and UNICEF, [Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe](#), October 2014

<sup>120</sup> <https://www.coe.int/en/web/children/projects>

<sup>121</sup> See more on the criteria for quality legal assistance in KIND-Child Circle's "[Advancing Protection for Unaccompanied Children in Europe by Strengthening Legal Assistance](#)" (2021); KIND-Child Circle's "[Stepping Stones to Safety: Strengthening Key Procedural Safeguards for Unaccompanied Children in Transnational Procedures within the EU](#)" (2021); See also UNICEF ECARO, *Provision of legal aid to children on the move in Europe and Central Asia*

<sup>122</sup> [https://www.unicef.nl/files/unc\\_methodology\\_guide\\_child\\_notice\\_en\\_final\\_web.pdf](https://www.unicef.nl/files/unc_methodology_guide_child_notice_en_final_web.pdf)

<sup>123</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, available at: <https://www.refworld.org/docid/5a1293a24.html>, footnote 9.

<sup>124</sup> Ukraine (with UNICEF and the EU's support) is also currently implementing an entire Care Reform, which includes: developing, strengthening and supporting family-based alternative care arrangements; building integrated community-, home- and family-based services to prevent separation and support children in family-based alternative care (foster families); closing institutions.

<sup>125</sup> <https://www.unhcr.org/publications/conclusion-children-risk>

<sup>126</sup> [Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA](#), Recital (23) Particular attention should be paid to unaccompanied child victims of trafficking in human beings, as they need specific assistance and support due to their situation of particular vulnerability. From the moment an unaccompanied child victim of trafficking in human beings is identified and until a durable solution is found, Member States should apply reception measures appropriate to the needs of the child and should ensure that relevant procedural safeguards apply. The necessary measures should be taken to ensure that, where appropriate, a guardian and/or a representative are appointed in order to safeguard the minor's best interests. A decision on the future of each unaccompanied child victim should be taken within the shortest possible period of time with a view to finding durable solutions based on an individual assessment of the best interests of the child, which should be a primary consideration. A durable solution could be return and reintegration into the country of origin or the country of return, integration into the host society, granting of international protection status or granting of other status in accordance with national law of the Member States.

<sup>127</sup> It is also the case that adoption is not a measure addressed in the HCCH 1996 Child Protection Convention to which Ukraine is a State Party.

<sup>128</sup> A statement by the Ukrainian Ministry of Social Policy on adoption Ukraine Ministry of Social Policy Statements on Child Safeguards and Intercountry Adoption

<sup>129</sup> Commission Recommendation 2017/2338 of 16 November 2017 establishing a [common 'Return Handbook'](#) to be used by Member States' competent authorities when carrying out return-related tasks

<sup>130</sup> Guidance to respect children's rights in return policies and practices: Focus on the EU legal framework, [https://picum.org/wp-content/uploads/2019/09/2019\\_Guidance\\_childrens\\_rights\\_in\\_return\\_policies.pdf](https://picum.org/wp-content/uploads/2019/09/2019_Guidance_childrens_rights_in_return_policies.pdf)

<sup>131</sup> See further analysis of implications of judgment in [Spotlight on the Best Interests of the Child in Returns of Unaccompanied Children & Reflections for the New Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy](#) ([eumigrationlawblog.eu](http://eumigrationlawblog.eu))

<sup>132</sup> These may have included the appointment of an agency to exercise parental responsibility or a supervisory or a support role. It could also include provisions concerning the role of



a guardian appointed to the child in this regard. In some countries, decision making or supervision or support for such arrangements for the child may be placed in the hands of a court in the responding country.

<sup>133</sup> <https://fra.europa.eu/en/publication/2019/children-deprived-parental-care-found-eu-member-state-other-their-own>

<sup>134</sup> European Migration Network, [Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway: EMN Synthesis Report: \(Member\) States all consider the best interest of the child when it comes to the care, integration or return of unaccompanied minors. However, few of them have specific laws, policies or practices in place to guide this process when applying care or integration measures. Around half of the \(Member\) States have legal or policy provisions mandating the obligation to assess the best interests of the child during the return procedure.](#)

<sup>135</sup> EU FRA, *Relocating unaccompanied children: applying good practices to future schemes*, 2020,

<sup>136</sup> See also chapter 5 and KIND and Child Circle's "[Stepping Stones to Safety](#): Strengthening Key Procedural Safeguards for Unaccompanied Children in Transnational Procedures within the EU" (2021).

<sup>137</sup> See also Child Circle and Missing Children Europe – Key recommendations for EU action concerning the ongoing initiative to relocate unaccompanied children from Greece; FRA Relocating unaccompanied children: applying good practices to future schemes; FRA Practical Guidance Infographic; UNICEF, UNHCR, IOM – Minimum Child Protection Standards for Identification of Unaccompanied and Separated Children to be Relocated from Greece to other countries in the EU; IOM and UNICEF – Principles and Approaches to Guide the Relocation and Integration of UAC from Greece to other EU Member States; Webinar: Relocation of Unaccompanied Children from the Greek Islands: Experiences, Guidance, Tools for Best Practice – Hosted by Child Circle, Missing Children Europe, Oxfam & Refugee Rights Europe; Webinar: Promoting Child-centred Relocation of Children in the EU, Now and in the Future – Hosted by Child Circle & Missing Children Europe

<sup>138</sup> Available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/en/546-2023-%D0%BF?lang=uk#Text>

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