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FEASIBILITY STUDY
ON THE RECEPTION CONDITIONS FOR REFUGEE AND MIGRANT CHILDREN

Preliminary Draft

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1. INTRODUCTION

1.1. The Institutional Context: The Council of Europe Action Plan

1. The Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019), adopted by the Committee of Ministers in May 2017 (“the Action Plan”), identifies three pillars, with a particular focus on unaccompanied children:

- a) Ensuring access to rights and child-friendly procedures;
- b) Providing effective protection; and
- c) Enhancing the integration of children who would remain in Europe.¹

2. The objectives of the Action Plan are to focus on “issues that have not yet received sufficient attention by the Organisation’s strategic partners” and “issues in respect of which solutions are needed over which all Council of Europe member States can claim ownership”.²

3. The Action Plan specifies that the Council of Europe would adopt a cooperative approach with the European Union, the United Nations (and their competent agencies), relevant Non-Governmental Organisations (“NGOs”) and other key stakeholders to “ensure complementarity and [to] bring about collective initiatives whenever necessary”.³

4. Under the “Providing effective protection” pillar of the Action Plan, the following specific measures are *inter alia* identified:

[1] “To ensure appropriate shelter for children and their families during emergencies and mass arrivals.

[...]

A draft recommendation on appropriate standards for the reception of refugee and migrant children (in open structures, i.e. in a non-custodial environment) (for the 2018-2019 period).⁴

[...]

[2] To avoid resorting to the deprivation of liberty of children on the sole ground of their migration status.

[...]

Guidance on alternatives to immigration detention and/or a compilation of good practices to be submitted to the Committee of Ministers.”⁵

1.2. CDDH-MIG: Discussion on its future work

5. At the 5th meeting of the Steering Committee for Human Rights (“CDDH”) Drafting Group on Migration and Human Rights (“CDDH-MIG”), the Special Representative of the Secretary General on Migration and Refugees, Mr Tomáš BOČEK, informed the Group of the status of the Action Plan. He noted that all activities foreseen for 2017 had been successfully developed for all three priorities: Children’s access to their

¹ Council of Europe (2017), Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019), Committee of Ministers, 127th Session of the Committee of Ministers, Nicosia, 19 May, (“Action Plan”), p.6.

² Ibid.

³ Ibid.

⁴ Ibid., p.13.

⁵ Ibid., p.14.

rights and child-friendly procedures, effective protection from different forms of violence and enhanced integration. He “*encouraged the Group to address the reception conditions of children in the near future, as invited by the CDDH and agreed in the Action Plan by the Committee of Ministers. He noted, in particular, that the work would not need to be concluded in 2019 but could extend into the following biennium, and that the scope and format of the work could be at the discretion of the Group and the CDDH*” (Report of the 5th meeting, 23 – 25 October 2018, § 7).

6. As to its future work, the “*Group agreed that the first priority would be the conclusion of the draft handbook, but potential guidelines on alternatives to immigration detention as well as work on reception conditions for children would simultaneously be explored*” (Report, § 8)

7. At its 90th meeting, the Steering Committee for Human Rights (CDDH) “*welcomed the progress made by the CDDH-MIG and endorsed the proposal of the Group for its priorities and future work*” (Report of the 90th meeting, 27–30 November 2018, § 47).

1.3. Possible next steps

8. The purpose of this document is to identify and outline a few potential key topics and approaches relating to the above mentioned first subject / measure referred to in the Action Plan (shelter for children and their families during emergencies and mass arrivals / recommendation on reception conditions for refugee children and migrant children). In this field, CDDH-MIG could have added value in its future work. As regards the second subject / measure of the Action Plan (avoid detention of children / guidance on alternatives to detention), an Analysis on “The legal and practical aspects of effective alternatives to detention in the context of migration” was adopted by the CDDH on 7 December 2017 (“CDDH Analysis”).⁶ The Analysis sets out a comprehensive collation of the human rights standards in relation to alternatives to immigration detention with a particular focus on the protection of vulnerable persons, especially children. It underscores, *inter alia*, member States’ obligations to consider alternatives to detention in the context of migration. The elaboration of Guidelines on alternatives to immigration detention could, to a very large extent, be based on the CDDH-Analysis that is already concluded and endorsed, thereby providing a solid basis already for the work.

9. The objective of this feasibility study on reception conditions is not to produce a definitive list of options in the field. Rather, the aim is to facilitate discussion within the CDDH-MIG as to the potential format and focus of its work, ensuring that any approach taken will help address remaining gaps and be of support to Council of Europe member States.

10. Against this backdrop and in light of the Council of Europe priorities in the field, three distinct options are identified and explored:

- a) Alternative family-based care for unaccompanied/separated children (first option);
- b) Reception conditions and accommodation for children with families (second option); and

⁶ Council of Europe (2017), Human Rights and Migration, *Legal and Practical aspects of effective alternatives to detention in the context of migration – Analysis of the Steering Committee for Human Rights (CDDH) Adopted on 7 December 2017* (“CDDH Analysis”).

- c) Mechanisms for assessing the best interests of the child (sub-option in conjunction with first and/or second option).

11. It is recognised, of course, that the subject of reception conditions covers plenty of other issues and that the above options are far from being exhaustive. The CDDH may decide to opt for other topics altogether and/or a combination of the topics laid out.

2. CDDH ANALYSIS

12. The CDDH-Analysis has shown that the obligation to consider alternatives to detention can be rendered nugatory if alternative measures do not exist in practice. To this end, the Analysis acknowledges that the effectiveness of alternatives to detention extends beyond a member State's knowledge of its legal obligations to also include the exchange of "practical know-how and concrete methods in the field that up to now have proven their value".⁷ In terms of work beyond the CDDH Analysis, it is noted that member States "could benefit from stronger support in their endeavours as regards addressing persisting challenges in implementing alternatives effectively".⁸

13. The Analysis identifies a number of protection gaps for unaccompanied children, including "ineffective guardianship mechanisms, age assessment procedures, mechanisms to ensure the child's best interests, and limited or non-existing places in specialised facilities for children."⁹

14. Other bodies within the Council of Europe are addressing the issue of guardianship for unaccompanied children, age assessment and child-friendly information and procedures.

15. The CDDH-MIG, therefore, should focus on other important aspects in the field of reception conditions for migrant and refugee children. In what follows, three options are proposed as potential areas of concern where the CDDH-MIG could add value in the field.

3. ALTERNATIVE FAMILY-BASED CARE FOR CHILDREN

16. Long-promoted as the preferred accommodation option for unaccompanied and separated children, alternative care principles promote deinstitutionalisation in favour of family-based care. Notwithstanding the prevalence of Council of Europe, United Nations and European Union standards and guidelines on the use of alternative family-based accommodation for unaccompanied or separated children, its practice has been far from commonplace, with most living in residential care.¹⁰ The European Union Agency for Fundamental Rights ("FRA") has noted that foster care was only available in 12 EU member States and was not available or extremely rare in 16 EU member States.¹¹ In 2017, the European Commission noted "[w]hile the use of family-based care/foster care for unaccompanied children has expanded in recent years and has proven successful and cost effective, it is still under-utilised".¹²

⁷ CDDH Analysis, op. cit., para 267.

⁸ Ibid., p.10; see further para 4.

⁹ Ibid., para 268.

¹⁰ European Union Agency for Fundamental Rights (2017), Fundamental Rights Report 2017, Publications Office of the European Union, Luxembourg ("FRA Fundamental Rights Report (2017)"), p.184; De Ruijter de Wildt, L; Melin, E; Ishola, P; Dolby, P, Murk, J; and van de Pol, P (2015), *Reception and Living in Families – Overview of family-based reception for unaccompanied minors in the EU Member States*, Stichting Nidos, Utrecht, p. 127.

¹¹ Ibid.

¹² Communication from the Commission to the European Parliament and the Council, *The protection of children in migration*, COM(2017)211 final, 12 April 2017, p. 8.

3.1. Issues in the practical application of alternative family-based care

17. Synthesising significant comparative research to date, some of the underlying challenges to the more widespread use of alternative family-based accommodation have included:

- a) **Insufficient places** for unaccompanied or separated children, including practical challenges to recruiting foster families;¹³
- b) **A lack of integration with child protection systems:**¹⁴ There seems to be a recurring disjunction between child protection systems and migration and asylum systems.¹⁵ This has led, in some countries, to the care of unaccompanied children being developed outside of the system that applies to national children, resulting in differences in treatment and standards applied based on whether the child is a migrant or from the host country.¹⁶
- c) **Lack of vertical and horizontal integration within child protection systems:** Even within child protection systems, responsibilities and budgets may be shared across multiple ministries and across national, regional and local laws and authorities – as well as being directed to specific groups of children. This can result in:
 - i. variances in legislation¹⁷ and policy¹⁸ across a single country;
 - ii. coordination challenges - where, for example, a central authority nationally coordinates child protection and service providers;¹⁹
 - iii. lack of express support for developing foster care;²⁰
 - iv. difficulties in measuring cost effectiveness.²¹

These variances may have an impact on the provision of alternative family-based care to unaccompanied and/or separated children.

- d) **The localisation of practices:** Good practices in relation to the placement of unaccompanied children in foster care may remain known only in local spheres. With coordinated efforts, however, these might be successfully transposed both within a country and amongst other countries.²²
- e) **The need for monitoring and support:** It is important for informal placements to be monitored and supported to reduce any risk to children.²³ Further, regional and project-based approaches, although positive, may not

¹³ De Ruijter de Wildt *et al.* (2015), op. cit., p.127.

¹⁴ FRA Fundamental Rights Report (2017), op. cit., p.183; De Ruijter de Wildt *et al.* (2015), op. cit., p.128.

¹⁵ FRA Fundamental Rights Report (2017), op. cit., p. 184; De Ruijter de Wildt *et al.* (2015), op. cit., p. 127.

¹⁶ FRA Fundamental Rights Report (2017), op. cit., p.183; De Ruijter de Wildt *et al.* (2015), op. cit., *supra*, p.128.

¹⁷ European Union Agency for Fundamental Rights (2015), [Mapping child protection systems in the EU – National legislative framework](#), February 2015.

¹⁸ European Union Agency for Fundamental Rights (2015), [Mapping child protection systems in the EU – National policy framework \(action plan or strategy\)](#), February 2015.

¹⁹ European Union Agency for Fundamental Rights (2015), [Mapping child protection systems in the EU – Central authority with national coordinating role](#), February 2015.

²⁰ De Ruijter de Wildt *et al.* (2015), op. cit., pp. 7 & 128; Note also the varying degrees of autonomy between national, regional and local levels identified in European Union Agency for Fundamental Rights (2015), [Mapping child protection systems in the EU – Decentralised child protection responsibilities](#), February, 2015.

²¹ De Ruijter de Wildt *et al.* (2015), op. cit., p. 128.

²² *Ibid.* See also the recommendation for transnational exchange in O'Donnell, R, & Hagan, M (2014), [CONNECT – Identification, reception and protection of unaccompanied children: Project report](#), p. 95.

²³ De Ruijter de Wildt *et al.* (2015), op. cit., p. 7.

necessarily be integrated within the child protection system and may lack appropriate safeguards.²⁴

- f) **Consideration of the cultural needs of the child:** The cultural needs of the child form part of the consideration of the child's best interests. Placing an unaccompanied child with families of a different ethnicity may at times result in cultural differences, communication difficulties and result in an unsuccessful placement.²⁵ However, this is far from being a foregone conclusion.
- g) **Training and support to foster families:** Special support and training for foster families of the same or a different ethnicity to the child is needed to ensure the success of foster placements, especially in light of the child's cultural needs as well as any trauma and vulnerabilities that the child may be experiencing.²⁶

18. Projects, reports and initiatives on the use of alternative family-based care for unaccompanied children in Europe may be placed into four categories:

- a) Mapping and comparative analyses;²⁷
- b) Compilation of good practices;²⁸
- c) Standard setting;²⁹ and
- d) Forthcoming EU-funded projects.³⁰

²⁴ FRA Fundamental Rights Report (2017), op. cit., p. 185.

²⁵ De Ruijter de Wildt *et al.* (2015), op. cit., pp. 7-8.

²⁶ FRA Fundamental Rights Report (2017), op. cit., p.185; De Ruijter de Wildt *et al.* (2015), op. cit., p.8.

²⁷ Reports which have focused on mapping and comparative analyses include:

- a) CONNECT — O'Donnell, R, & Hagan, M (2014), [CONNECT – Identification, reception and protection of unaccompanied children: Project report](#).
- b) Stichting Nidos, SALAR and CHTB — De Ruijter de Wildt *et al.* (2015) op. cit.
- c) European Council on Refugees and Exiles (2016), [No Longer Alone: Advancing Reception Standards for Unaccompanied Children \(NLA\)](#).
- d) European Migration Network (2010), [Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study \[Synthesis report\]](#), 2010.
European Migration Network (2014), [The use of detention and alternatives to detention in the context of immigration policies – Synthesis Report for the EMN Focused Study](#), 2014.
European Migration Network (2018), [Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway](#), July 2018.

²⁸ Reports which have focused on the compilation of good practices include:

- a) D'Addato A, Giraldi M, Van Der Hoeven C and Fontal A (2017), *Let Children be Children: Lessons from the Field on the Protection and Integration of Refugee and Migrant Children in Europe*, Eurochild and SOS Children's Villages International, Brussels.
- b) Keith, L & Levoy, M (2015), *Protecting undocumented children: Promising policies and practices from governments*, Platform for International Cooperation on Undocumented Migrants (PICUM), Brussels.

²⁹ Reports which have focused on standard-setting or guidelines include:

- a) European Asylum Support Office (2018), *EASO Guidance on reception conditions for unaccompanied children: operational standards and indicators*, Publications Office of the European Union, Luxembourg.
- b) Van Wijk, J, & Murk, J (2011), *Care for Unaccompanied Minors – Minimum standards, risk factors and recommendations for practitioners*, ENGI – Guardianship in practice – Final report, European Network of Guardianship Institutions, Utrecht.
- c) Quality 4Children (2007), *Quality 4Children Standards for Out-of-Home Child Care in Europe*, Quality 4Children, Innsbruck.
- d) Corlett, D, with Mitchell, G, Van Hove, J, Bowring, L, Wright, K (2012), *Captured Childhood*, International Detention Coalition, Melbourne
- e) Child Protection Working Group (2012), *Minimum standards for child protection in humanitarian action*, Child Protection Working Group.

19. Each of the projects and initiatives compiled so far seem to entail certain limitations in their scope:

- a) None of the projects cover the entire geographic scope of the Council of Europe member States. The projects are predominantly focused on the European Union.
- b) The projects' material scope varies from the very specific (such as alternative family-based care) to reception more broadly (including residential care).

20. Whilst the projects and initiatives commonly identify relevant international and European standards, a number of them do not objectively identify what is considered "good practice" or "best practice" in relation to the placement of unaccompanied children in alternative family-based care. Nor do they consistently make reference to relevant social work, social science or psychology scientific literature. In the absence of objective standards of "good practice" there is a risk that practices are identified, compiled and promoted as "good" but which may be inconsistent with the latest empirical research and practice.

21. That said, considering the challenges identified in the initiation and expansion of family-based care, the forthcoming EU-funded projects hold promise to address the issues of supporting foster parents, increasing the knowledge base and capacity building of stakeholders and professionals, as well as increasing the quality and quantity of family-based care available.

3.2. Potential contribution by the Council of Europe

22. The Council of Europe could make normative, conceptual and practical contributions to the field of alternative family-based care for unaccompanied children.

23. The **normative** contribution of the Council of Europe could be, for example, to advance law and policy cohesion between the migration and child protection contexts. Building upon its normative authority and jurisprudence, it could work to support States in ensuring the primacy of the status of the child as a child as well as advancing a whole-of-government approach in the field of migration and asylum in member States within their margin of appreciation.

24. The **conceptual** contribution the Council of Europe could be to:

- a) re-conceptualise the accommodation and reception of unaccompanied children beyond the migration and asylum sphere to a universal child protection issue. The conceptualisation of child reception and accommodation as a child protection issue may facilitate discussion outside of a highly politicised migration discourse. This could potentially broaden the dissemination of good

³⁰ Forthcoming projects from the European Union funded under the European Commission DG Justice and Consumers include:

- a) FORUM (FOR Unaccompanied Minors: transfer of knowledge for professionals to increase foster care);
- b) SAFE (Supporting un-Accompanied children with Family-based care and Enhanced protection);
- c) PROFUCE (Promoting Foster Care for Unaccompanied Children in Europe).
- d) FAB (Fostering Across Borders);
- e) ALFACA II (Implementing sustainable Alternative Family Care for unaccompanied Children).

European Commission (2018), [Abstract of selected proposals, Directorate-General Justice and Consumers](#), 8 January 2018, Brussels.

practices and the range of invested stakeholders (such as service providers, National Human Rights Institutions (“NHRIs”), Ombudspersons and national Children’s Commissioners, as appropriate) and influencers to bring fresh momentum to achieving tangible results, consistent with a whole-of-society approach.

25. The **practical** contribution the Council of Europe could be to:

- a) deepen, expand and exchange knowledge of good practices -including best interests of the child considerations – from beyond local, regional and EU contexts to the entirety of the Council of Europe member States;
- b) complementing a normative compilation of standards with empirical research to establish objective standards against which practices can be assessed.

26. The Council of Europe could be well placed to make these contributions through, for example, a standard setting instrument, practical guidance and/or comprehensive compilation of good practices and norms. This could occur with a view to improving knowledge and exchange of practical know-how amongst member States, thereby expanding the geographic reach of practices. This may potentially include but be not limited to:

- a) Monitoring, recruiting, supporting and training alternative family-based carers;
- b) Decision-making (including participation of the child in decisions that affect him/her);
- c) Best interests of the child assessments and determinations.

27. Normative and empirical standards would need to be objectively established with the assistance of experts in relevant fields, against which practices may be assessed.

4. RECEPTION AND ACCOMMODATION OF CHILDREN WITH FAMILIES

28. In the United Nations sphere there is a clear emphasis on the centrality of the family, particularly for a child in a migration and refugee context. Several principles have been enunciated that the requirement not to detain children also extends to family members. In addition, family unity should be preserved and children with their families should be accommodated in a community setting, with support provided to the families as a means of ensuring the welfare and protection of a child.

29. In the context of reception and detention of children, there has been an evolving emphasis in the Council of Europe sphere on the right to family life on the one hand (Article 8 of the European Convention on Human Rights (“the Convention”)), and the prohibition of inhuman and degrading treatment on the other (Article 3 of the Convention), such that the circumstances in which detaining children together with their family members has been greatly narrowed. In this area, the jurisprudence of the European Court of Human Rights (“the Court”) has arguably advanced beyond the Committee of Ministers’ Recommendation (2003)⁵ and Twenty Guidelines on Forced Returns.

30. In the European Union context, the EU Charter of Fundamental Rights provides for the right to respect for family life³¹ as well as for a child to maintain a personal relationship on a regular basis and direct contact with his/her parents.³² Legal, economic and social protection for the family is also ensured by the Charter.³³ These rights and protections arise when, *inter alia*, member States are implementing Union law.³⁴ The EU secondary legislation, contemplates the detention of families³⁵ which, if consisting of a child or children, are to be detained as a measure of last resort.³⁶ The Return Directive contains a general requirement that member States are to take into account family life in the implementation of the Directive.³⁷ Under the Recast Reception Conditions Directive, family unity must be maintained as much as possible (with the applicant's agreement) if the applicants are provided with housing.³⁸

4.1. Issues in the practical application of reception of children with families

31. The challenges to the implementation of measures designed to accommodate children with families may be synthesised as follows:

- a) **An underutilisation of alternatives to detention generally** – including a lack of sufficient and effective alternative measures, resulting in authorities resorting to detention;³⁹
- b) **Extremely poor living conditions for children and families;**⁴⁰
- c) **An absence of a best interests of the child assessment or the involvement of child protection authorities** when a child is faced with the prospect of being detained with its parents;⁴¹
- d) **Tensions** between:
 - i. the principle of family unity and a parent(s) being subject to detention being resolved by detaining children with their parent(s); and/or⁴²
 - ii. the imperative priority to avoid a child being detained being resolved in the detention of one parent;⁴³

³¹ Charter of Fundamental Rights of the European Union, OJ C 326/02, 26 October 2012, ("EU Charter"), Article 7.

³² EU Charter, Article 24(3).

³³ EU Charter, Article 33.

³⁴ EU Charter, Article 51(1).

³⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) ("Recast Reception Conditions Directive"), Article 11(4); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 ("Return Directive"), Article 17(2).

³⁶ Recast Reception Conditions Directive, Article 11(2); Return Directive, Article 17(1).

³⁷ Return Directive, Article 5(b).

³⁸ Recast Reception Conditions Directive, Article 12.

³⁹ FRA Fundamental Rights Report (2017), op. cit., pp. 130-133; FRA European Legal and Policy Framework on immigration detention of children (2017), op. cit., p.57; European Commission (2016), *10th European Forum on the rights of the child – The protection of children in migration – background document*, p.6; Council of Europe (2017), Committee of Ministers, *Thematic Report on migrant and refugee children Prepared by the Special Representative of the Secretary General on migration and refugees*, 10 March, SG/Inf(2017)13.

⁴⁰ Council of Europe (2017), Committee of Ministers, *Thematic Report on migrant and refugee children Prepared by the Special Representative of the Secretary General on migration and refugees*, 10 March, SG/Inf(2017)13.

⁴¹ FRA Fundamental Rights Report (2017), op. cit., p. 56.

⁴² Ibid.

⁴³ Ibid.; Council of Europe (2017), Commissioner for Human Rights of the Council of Europe, *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Switzerland from 22 to 24 May 2017*, CommDH(2017)26, 17 October, Strasbourg, para 158.

e) **The use of closed facilities for children with families.**⁴⁴

32. As regard projects and reports on the reception of children with families and their care in Europe, these may be placed into three categories:

- a) Mapping and comparative analyses,⁴⁵
- b) Compilation of good practices,⁴⁶ and
- c) Standard setting.⁴⁷

33. Most of the existing projects and initiatives are predominantly European Union-focused. None of them covers the entire geographic scope of the Council of Europe member States. Additionally, whilst the projects and initiatives commonly identify relevant international and European standards, there is an absence of clarity as to what is considered “good practice” in relation to the reception or provision of accommodation for children with families. References to relevant social work, social science or psychology scientific literature could also be enhanced in this regard. In the absence of an objective standard of “good practice” there is a risk that practices are identified, compiled and promoted as “good” that may be inconsistent with the latest empirical research and practice.

34. The existing projects and initiatives demonstrate the need for further work in the field. Enhanced best interests of the child assessments would help resolve tensions between the right to family life, the imperative priority not to detain children and the principle of family unity in a migration or refugee context.

4.2. Potential contribution by the Council of Europe

35. The strategic contributions that the Council of Europe could make to the field of accommodation and reception of children and their families are normative, conceptual and practical.

36. The **normative** contribution of the Council of Europe could be to:

- a) advance the normative understanding on the child’s right to family life, and the maintenance of family unity in the context of the child’s parents or family members;

⁴⁴ FRA Key migration issues: one year from initial reporting (2016), October, op. cit., p. 8.

⁴⁵ Projects and reports which have focused on mapping and comparative analyses include:

- a) European Migration Network (2014), [*The use of detention and alternatives to detention in the context of immigration policies – Synthesis Report for the EMN Focused Study*](#), 2014.
- b) De Bruycker, P (ed.), Bloomfield, A, Tsourdi, E, Pétin, J (2015), [*Alternatives to Immigration and Asylum Detention in the EU – Time for Implementation*](#), Odysseus Network, January, 2015.
- c) See, for example, FRA, European legal and policy framework on immigration detention of children, 2017; FRA Fundamental Rights Report (2017), op. cit., p. 130-133; FRA Key migration issues: one year on from initial reporting (2016), October, op. cit., p. 8; FRA Periodic data collection on the migration situation in the EU – November Highlights (2018), op. cit., p. 16.

⁴⁶ Projects and reports which have focused on the compilation of good practices include:

- a) United Nations (2015), UNHCR, *Options Paper 1: Options for government on care arrangements and alternatives to detention for children and families*, pp. 15-16.
- b) Eurochild and SOS Children’s Villages International — ⁴⁶ D’Addato A, et al. (2017), op. cit.

⁴⁷ Reports which have focused on standard setting include:

- a) European Asylum Support Office (2016), *EASO guidance on reception conditions: operational standards and indicators*, Publications Office of the European Union, Luxembourg, p. 8.
- b) Child Protection Working Group (2012), op. cit.

- b) reflect on the Council of Ministers' Recommendation (2003)⁵ on the measures of detention of asylum seekers and the Twenty Guidelines on Forced Return to ensure their updated relevance for children in the context of migration, and/or advance potential Guidelines on Alternatives to Immigration Detention for Children.

37. The **conceptual** contribution the Council of Europe could be to:

- a) re-conceptualise the issue of placing children at the centre – that is, creating a conceptual shift from 'the accommodation and reception of *families* with children' to 'the accommodation and reception of *children* with families';
- b) advance the concept that families are the source of well-being of their children in a migration and refugee context and address the issue of how/where their responsibilities as primary caregivers can best be achieved;
- c) advance the topic of the reception and accommodation of children beyond the migration and asylum sphere to a universal child welfare issue.

38. The **practical** contribution the Council of Europe could be to:

- a) deepen, expand and exchange knowledge of good practices (including best interests of the child considerations) to the entirety of the Council of Europe member States;
- b) complement a normative compilation of standards with empirical research to establish an objective standard against which practices can be assessed;
- c) identify or develop tools or mechanisms to assist States in the resolution of the tension between the right to family life, the maintenance of family unity and the right to liberty in circumstances where detention might otherwise arise;
- d) promote the use of best interests of the child assessments when parents or accompanying family members are possibly subject to a detention decision.

39. The Council of Europe might be well placed to make these contributions through, for example, a standard setting instrument, practical guidance, compilation of good practices in Council of Europe member States in the field of reception and accommodation of children with families. This would occur with a view to improving knowledge and exchange of practical know how amongst member States, thereby expanding the geographic reach of practices.

5. MECHANISMS FOR ASSESSING THE BEST INTERESTS OF THE CHILD

40. At the United Nations level, the unequivocal position that detention is not in the best interests of a child is well-established. The 2017 Joint General Comment 3 urges States to not only apply a best interests of the child assessment beyond the detention context *simpliciter* but to determine the most suitable *type* of accommodation for a child whether unaccompanied or with his or her family.

41. In the Council of Europe context, the Court has strongly embraced the best interests of the child as the touchstone to very significantly reduce the avenues for the detention of children. However, there appears to be some scope for guidance in the

content and circumstances for conducting best interests assessments when determining the type of accommodation.

42. In the European Union context, although the best interests of the child principle has been incorporated in relevant secondary legislation, as in the Council of Europe context member States may benefit from further guidance as to the content of such assessments, particularly in the absence of a prohibition on the detention of children.

5.1. Issues in the application of the best interest of the child principle

43. Lack or insufficiency of best interests of the child assessments in relation to the accommodation for children is a cross-cutting issue that affects both accompanied and unaccompanied children. This has *inter alia* been reflected in the 2017 Joint General Comment 3 as being inclusive of both accompanied and unaccompanied children in the Committees' urgings on the application of a best interests assessment in relation to the type of accommodation. Further, the lack of best interests assessments in the context of detaining children with families has been noted in the European Union sphere. In 2017, the FRA noted that it found, as a matter of law or practice,

“no evidence that a best-interests assessment is conducted in each individual case or that child protection authorities are involved” when authorities are considering detaining a child with his or her family, or to separate family members.⁴⁸

44. Accordingly, the protection, content and use of best interests of the child assessments is a keystone issue in the field of accommodation and protection of children in a migration and refugee context, affecting both accompanied and unaccompanied children.

45. Projects and initiatives from relevant partners and stakeholders in the field of the best interests of the child include - but are not limited to - mapping and standards setting.⁴⁹

46. Each of the projects and initiatives represent limitations in their scope:

- a) None of the projects cover the entire geographic scope of the Council of Europe member States. The majority of the projects have a European Union focus.
- b) The projects' material scope does not include (or does not focus on) the best interests of the child in the context of accommodation and/or detention.
- c) The projects' personal scope varies such that there is a differentiation between being inclusive of children with families to those that focus solely on unaccompanied and separated children.

⁴⁸ FRA Detention paper p. 56

⁴⁹ See, for example:

- a) European Union (2019), EASO, *EASO Practical guide on the best interests of the child in asylum procedures*, Publications Office of the European Union, Luxembourg.
- b) United Nations (2008), UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, Geneva, May.
- c) United Nations (2014), UNHCR and UNICEF, *Safe & Sound – what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, Geneva, October, see, for example, p. 26.

47. Given the transversal nature of the best interests of the child in the context of accommodation and reception of both unaccompanied and separated children and children with families, there appears to be a need for guidance to member States on the application of the best interests of the child in this particular context, with application to both unaccompanied and separated children and children with families.

5.2. Potential contribution by the Council of Europe

48. The Council of Europe could make a normative, conceptual and pragmatic contribution to the effectiveness of best interests of the child mechanisms in the context of the type of accommodation for unaccompanied children and families with children in a migration or asylum context.

49. The **normative** contribution of the Council of Europe could be to advance law and policy coherence between migration and child protection contexts and actors. This could promote the best interests of the child being considered in relation to the accommodation and reception of all children as well as advancing a whole-of-government approach in member States within their margin of appreciation.

50. The **conceptual** contribution of the Council of Europe could be to:

- a) take a role in reconceptualising accommodation and reception of children as a child protection, care and welfare issue by advancing the best interests of the child principle as the keystone consideration for children in this specific context;
- b) support member States and stakeholders to move beyond the position that the detention is not in a child's best interests to a more robust, active and nuanced application of the principle and what types and characteristics of accommodation satisfy the principle; and
- c) advance more broadly mainstream principles of child welfare and protection to children and families with children in a migration and asylum context. As noted in Section 6 above, this may also present opportunities to engage a broader range of stakeholders beyond the migration and asylum sphere.

51. The **practical** contribution of the Council of Europe could be to:

- a) make a strategic contribution to deepening, expanding and exchanging knowledge and good practices amongst the Council of Europe member States;
- b) complementing a normative compilation of standards with empirical research to establish an objective standard against which practices can be assessed; and
- c) develop tools, frameworks and/or training modules to assist member States to meet their obligations in considering the best interests of the child in relation to accommodation and reception.

52. The Council of Europe could make these contributions through, for example, a standard setting instrument, practical guidance, compilation of good practices in member States on the best interests of the child assessments in the accommodation and reception context. This could occur with a view to improving knowledge and exchange of know how amongst member States. This may also include an examination of the training and

qualification requirements of personnel making such assessments or frequently assessing the needs of children in a migration or asylum context.

53. Normative and empirical standards should be objectively established with the assistance of experts in relevant fields such as law, social work, social science and psychology, against which practices may be assessed.

6. FINAL REMARKS ON FUTURE WORK

54. As a potential field of future work, the Council of Europe might envisage exploring the following issues:

- a) alternative family-based care;
- b) accommodation and reception of children with families;
- c) the application of the best interests of the child in the context of accommodation and reception of both unaccompanied and separated children and children with families;
- d) all three options (a) to (c) together (thereby creating a focus on the role of family in the reception and accommodation of children but which would not include residential care);
- e) all three options (a) to (c) together and including residential care (most comprehensive option).

55. In light of the above, the future work could, *inter alia*, take the format of a:

- a) standard setting instrument (i.e. guidelines, recommendation, etc.);
- b) compilation of norms and best practices evaluated against objective criteria;
- c) practical handbook which could potentially complement the current work on alternatives to immigration detention under consideration.

56. Other options for future work of CDDH-MIG could be identified and elaborated upon, including education and specialised care arrangements (such as, for example, for child victims of trafficking) and/or provision of targeted services and appropriate safeguards. Should any of the options listed in this study not be of interest, other such topics could be further identified.

57. As indicated in the introduction, the objective of this study is to facilitate discussion amongst CDDH-MIG members but not to provide a definitive option for future work in the field. Consequently, the potential field and format of the future work will be the result of exchange between CDDH-MIG and CDDH-members and may well go beyond the preliminary options listed in this study.

58. Finally, in its reflections on the format of the work, attention should be drawn to the fact that in the Action Plan on Protecting Refugee and Migrant Children in Europe, it is noted in particular that a draft CM Recommendation should be produced. While it has since been said that the CDDH may opt for another type of instrument, the explicit reference in the Action Plan is to a draft Recommendation. Should the CDDH decide on a step-by-step approach on the reception and accommodation of children, one way of

fulfilling the request for an instrument could be to simultaneously pursue Guidelines on the Alternatives to Immigration Detention of Children. This could be based on the CDDH-Analysis that is already concluded and endorsed, thereby providing a solid basis already for the work. Producing such Guidelines on children in particular could be a simpler continuation as the CDDH-MIG has done so much work in the field of alternatives already. This might also be done in parallel to any other long-term work on the reception and accommodation of children in the context of migration. Whichever topic is chosen on reception and accommodation, it is clear that this will unavoidably a laborious process and both the topic and format of the work should be chosen with care.