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06/05/2019

**STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)**

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**DRAFTING GROUP ON MIGRATION AND HUMAN RIGHTS  
(CDDH-MIG)**

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**Future work of the CDDH-MIG 2020-2021  
Potential priorities, topics and formats**

**Invitation for written feedback**

## I. CONTEXT

In line with the Terms of Reference given by the Council of Europe Committee of Ministers for the biennium 2018-2019, the Drafting Group on Migration and Human Rights (CDDH-MIG) concluded at its 6<sup>th</sup> meeting a handbook on the effective implementation of alternatives to immigration detention. The handbook is based on the comprehensive Analysis [The legal and practical aspects of effective alternatives to detention in the context of migration](#).

Upon conclusion of the handbook, the CDDH-MIG asked the Rapporteur and Secretariat to draft a brief outline (2-3 pages) of concrete options for potential future work to be conducted in the biennium 2020-2021, and invite written feedback to further inform ultimate decisions on the matter. Future work should be of practical use and support to Council of Europe member States, with added value in the field and with reasonable prospects for a constructive outcome.

Pursuant to the above, this document outlines a few potential topics that could be addressed in the next biennium. In line with previous discussions within the CDDH-MIG and the Council of Europe Steering Committee for Human Rights (CDDH), the options are split into two headings: (A) Alternatives to Immigration Detention (follow-up to work carried out so far); and (B) Reception and Accommodation of Refugee and Migrant Children (new work altogether). The options listed are far from exhaustive and any suggestions for other topics and/or combination of options laid out are welcome. A brief description of each issue is provided below, followed by an invitation for written feedback. To facilitate swift answers and their evaluation, the topics/formats should be prioritized by numbering them (page 5), but space is also given for any further suggestions/comments (page 6). The deadline for written feedback is 4 June 2019 by email to [DGI-CDDH@coe.int](mailto:DGI-CDDH@coe.int)

## II. POTENTIAL OPTIONS

### (A) Follow-up to work already pursued on Alternatives to Immigration Detention

#### 1. Option one: CM Guidelines on Alternatives to Detention in the Context of Migration

As noted, the CDDH-MIG has already produced a comprehensive and widely referenced Analysis on alternatives to immigration detention. It has now also concluded a user-friendly handbook on the effective implementation of alternatives. The HELP-unit of the Council of Europe is furthermore planning to produce by the end of 2019 an e-learning HELP-course based on the Analysis and the handbook. One of the options remaining would be to build further upon the existing work and conclude it by drafting Committee of Ministers' *Guidelines* on Alternatives to Detention in the Context of Migration. This possibility has already been voiced within the CDDH-MIG and the CDDH but an ultimate decision is pending.

### (B) New work on Reception and Accommodation of Refugee and Migrant Children

At the 5<sup>th</sup> meeting of the CDDH-MIG, the former Special Representative of the Secretary General on Migration and Refugees, Mr Tomáš BOČEK, encouraged the CDDH-MIG to address the reception and accommodation of children in its future work in line with the [Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe \(2017-2019\)](#). In light of the priority of first concluding a handbook on alternatives to immigration detention, Mr Boček noted in particular that work on reception and accommodation might be pursued in the biennium 2020-2021, and that its precise scope and format could be at the

discretion of the CDDH-MIG/CDDH. In this context, Mr Boček drew attention to the following outcome the *Action Plan* calls for:

[...] “A *draft Recommendation on appropriate standards for the reception and accommodation of refugee and migrant children (in open structures, i.e. in a non-custodial environment)*”. [...] (p.13)

Pursuant to the above, a [preliminary draft feasibility study](#) on potential work in this area was prepared for the 6<sup>th</sup> CDDH-MIG meeting. There, the following potential options were highlighted:

## **2. Option two: Alternative family-based care for unaccompanied/separated children**

Long-promoted as the preferred accommodation option for unaccompanied and separated children, alternative care principles promote deinstitutionalisation in favour of family-based care (such as kinship care and/or foster care etc.). However, its practice is far from commonplace. The European Union Agency for Fundamental Rights (FRA) has, for example, noted that foster care was only available in 12 EU member States and was not available or extremely rare in 16 EU member States. In 2017, the European Commission noted that while 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.

Some issues that could be addressed might be: (a) *Dissemination 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, these might be successfully transposed both within a country and amongst other countries; (b) *Need for monitoring and support*: It is important for informal placements to be monitored and supported to reduce any risk to children. Regional and project-based approaches, although positive, may not necessarily be integrated within the child protection system and may lack appropriate safeguards; (c) *Training and support to foster families*: Special support for foster families 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.

## **3. Option three: Reception conditions and accommodation for children with families**

At the Council of Europe level, there has been an evolving emphasis on the right to family life on the one hand (Article 8 of the European Convention on Human Rights), 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*. 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.

The challenges to the implementation of measures designed to accommodate children with families may partly be synthesised as follows: (a) *Lack of sufficient and effective open accommodation*, resulting in authorities resorting to detention; (b) *Poor living conditions for children and families*; (c) *An absence of (or insufficient) best interests of the child assessment* and lack of involvement of child protection authorities when a child is faced with the prospect of being detained with its parents; (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/or (ii) the imperative priority to avoid detention of children being resolved in the detention of one parent.

#### 4. Option four: Mechanisms for assessing the best interests of the child

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/separated children. 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. At the United Nations level, the 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, 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. In the European Union context, although the best interests of the child principle has been incorporated in relevant secondary legislation, member States may benefit from further guidance as to the content of such assessments.

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As noted previously, the four options above are only possible suggestions in light of (a) work carried out already in the field of alternatives to immigration detention and (b) the Council of Europe *Action Plan on Protecting Refugee and Migrant Children in Europe*. Any other suggestions are of course welcome when responding to the informal enquiry on the following page.

### III. WRITTEN FEEDBACK ON POTENTIAL OPTIONS – INFORMAL ENQUIRY

#### **Deadline for response: 4 June 2019**

- (i) **TOPIC:** Please rank the topics in order of preference (with 1 being top priority):

- \_\_\_\_\_ *Alternatives to Immigration Detention (CM Guidelines as follow-up)*  
 \_\_\_\_\_ *Alternative family-based care for unaccompanied and separated children*  
 \_\_\_\_\_ *Reception conditions and accommodation for children with families*  
 \_\_\_\_\_ *Mechanisms for assessing the best interests of the child*  
 \_\_\_\_\_ *Other topic(s)*

If another topic is chosen as priority, kindly indicate which topic(s) you would like the CDDH-MIG to focus on in the upcoming biennium in the field of migration and human rights:

- (ii) **FORMAT:** Please rank the format of the topic according to order of preference (with 1 being top priority):

- \_\_\_\_\_ Committee of Ministers Recommendation  
 \_\_\_\_\_ Committee of Ministers Guidelines  
 \_\_\_\_\_ Handbook  
 \_\_\_\_\_ Guide to Good Practice and/or Compilation of Good Practice  
 \_\_\_\_\_ Analysis (similar to CDDH Analysis on alternatives)  
 \_\_\_\_\_ Other format(s)

If another format(s) is chosen, kindly indicate which format(s) you would like the CDDH-MIG to focus on in the upcoming biennium in the field of migration and human rights:

**Kindly send your response to the CDDH-Secretariat by email to [DGI-CDDH@coe.int](mailto:DGI-CDDH@coe.int) with a copy to [lilja.gretarsdottir@coe.int](mailto:lilja.gretarsdottir@coe.int) by 4 June 2019.**

If you have further suggestions/comments please add these on the following page.

**Further suggestions and/or comments:**