

## CHAPTER THREE

### International legal protection of children who are deprived of their family environment

#### **3 International legal protection of children who are deprived of their family environment**

##### **3.1 Introduction**

##### **3.2 International protection of children who are deprived of their family environment**

###### **3.2.1 Treaty law**

- (i) 1989 Convention on the Rights of the Child**
- (ii) 1990 African Charter on the Rights and Welfare of the Child**
- (ii) 1993 Hague Convention on Inter-country Adoption**

###### **3.2.2 Soft law**

- (i) 1986 UN Declaration on Foster Care and Adoption**
- (ii) 2003 CRC General Comment No 3 and Recommendations from the General Day of Discussion**
- (iii) 2005 Council of Europe Recommendation on the Rights of Children in Residential Care**
- (iv) 2009 UN Guideline for the Alternative Care of Children**

##### **3.3 Articles 20 of the CRC and 25 of the ACRWC: Analysis**

###### **3.3.1 Understanding family and family environment**

- (i) Culturally diverse understanding of ‘family’**
- (ii) Structural understanding of a ‘family’**
- (iii) Subjective elements of a ‘family’**

###### **3.3.2 Children covered by the articles**

###### **3.3.3 The relationship between ‘special protection and assistance’ and ‘alternative care’**

###### **3.3.4 Purpose and scope of ‘special protection and assistance’**

###### **3.3.5 Alternative ‘family care’ or ‘alternative care’?**

###### **3.3.6 Fundamental principles and rights-based approach**

- (i) Prioritisation of supporting the family**
- (ii) Best interests of the child**
- (iii) Equality and non-discrimination**
- (iv) Survival and development**
- (v) Child participation**
- (vi) Monitoring and evaluation**



### **3.4 Alternative forms of care**

#### **3.4.1 Kinship care**

#### **3.4.2 Foster care**

#### **3.4.3 Cluster foster care**

#### **3.4.4 *Kafalah***

#### **3.4.5 Adoption**

#### **3.4.7 Inter-country adoption**

#### **3.4.8 Supervised independent living arrangement for children**

### **3.5 Child-headed households: an emerging form of care?**

#### **3.5.1 Recognising child-headed households**

#### **3.5.2 Recognising and supporting child-headed households in different African states**

#### **3.5.3 A child-headed family or a placement of alternative care?**

#### **3.5.4 Protection of children in child-headed households: a rights-based approach**

### **3.6 Conclusion**

### 3.1 Introduction

Children who are deprived of their family environment are entitled to alternative care, and special protection and assistance. As has been explored in detail in chapter two, many African states have traditionally relied heavily on informal forms of child care practice. Formal alternative care provisions have consequently often been considered as largely irrelevant to meet African social needs.<sup>1</sup> Such beliefs and attitudes may have contributed to the lack of enforcement and implementation of the right to alternative care, and special protection and assistance enshrined in the CRC and the ACRWC, especially in the context of the HIV epidemic in southern Africa.<sup>2</sup> The failure of the CRC Committee and the African Committee of Experts on the Rights and Welfare of the Child to adopt any explicit general comment or explanation regarding the interpretation and implementation of the right to alternative care, and special protection and assistance, may also have contributed to the lack of understanding of state obligations under the relevant articles. Nevertheless, the exponential increase of children who are deprived of their family environment in various parts of Africa, and, especially, the recent movement to recognise various new forms of alternative care of children, including child-headed households, necessitate that greater importance be given to properly understanding and implementing the right to alternative care, and special protection and assistance of children who are deprived of their family environment.

In addition to articles 20 of the CRC and 25 of the ACRWC, and other related provisions of these two treaties, there are other international instruments aimed at assisting states to fulfil their obligations towards children in need of alternative care. The 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 UN Declaration on Foster Care and Adoption), the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption (1993 Hague Convention on Inter-Country Adoption), the

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<sup>1</sup> H H Semkiwa, *et.al.*, *HIV/AIDS and child labour in the United Republic of Tanzania: a rapid assessment*, No 3, International Labour Organisation (2003) 7; J Kaliyati *et al.*, *HIV/AIDS and child labour in Zimbabwe*, No 2, International Labour Organisation (2002) 16.

<sup>2</sup> H H Semkiwa *et al.*, 2003 (as above) 7.

2005 Council of Europe Recommendation on the Rights of Children Living in Residential Institutions (the 2005 Council of Europe Recommendation) and 2009 UN Guidelines for the Alternative Care of Children (the 2009 UN Guidelines for the Alternative Care) are a few pertinent examples. These instruments are important as they provide detailed standards and principles in relation to children in alternative care thus filling the gap left by international legal provisions.

This chapter explores the question of state responsibilities towards children who are deprived of their family environment by examining the contents of international treaties and guidelines. It explores the advantages and disadvantages of conventional alternative care options in detail and examines the recent development of legally recognising child-headed households as a care option. The chapter is divided into six sections. Following this introductory section, section 3.2 introduces international instruments regarding the alternative care placements of children who are deprived of their family environment, including the CRC, the ACRWC, the 1986 Declaration on Foster Care and Adoption, the 1993 Hague Convention on Inter-Country Adoption, the 2003 General Comment and relevant recommendations made as part of a General Day of Discussion by the CRC Committee, the 2005 Council of Europe Recommendations on the rights of children living in residential institutions and the 2009 UN Guidelines for the Alternative Care of Children. It should be noted that the purpose of the section is to introduce major international instruments relating to the rights of children, especially in alternative care placements, rather than to provide a detailed analysis of the contents. The Council of Europe Recommendations is a regional instrument and only applicable to the 47 member states of that intergovernmental body. However, it is an important example for other regions illustrating the importance of protecting the rights of children in institutionalised care. Section 3.3 explores relevant articles of the CRC and the ACRWC protecting children who are deprived of their family environment in more detail and discusses the principles of a rights-based approach in relation to alternative care placements. In order to analyse state obligations and the scope of the articles, provisions and standard of earlier identified international guidelines and recommendations are used extensively. Section 3.4 introduces different alternative care options, including kinship care, foster care and adoption. Section 3.5 focuses on child-headed households as an emerging form of care. The section also explores how child-headed

households are defined and recognised in legal and policy frameworks in different African states, in particular, examples of Southern Sudan, Namibia and Uganda have been highlighted. Section 3.6 is the concluding section of the chapter.

## **3.2 International protection of children who are deprived of their family environment**

### **3.2.1 Treaty law**

#### **(i) 1989 Convention on the Rights of the Child**

The CRC is the major global instrument on children's rights. It has been ratified by all countries, except Somalia and the US. The idea to create a convention on children's rights was first introduced in 1978 by Poland.<sup>3</sup> Many states were originally against the idea of creating a separate binding instrument devoted to children.<sup>4</sup> The main argument was that a separate instrument was redundant as major international human rights instruments, such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were also applicable to children.<sup>5</sup> Besides the general wording of 'rights of everyone', which includes children, children are specifically mentioned in all three instruments. In the UDHR, article 25(2) provides special care and assistance to childhood.<sup>6</sup> In the ICCPR, article 23(4) protects children at times of marital dissolution and article 24 is devoted to children's right to non-discrimination, and to a name and nationality. In the ICESCR, article 10(3) protects children from economic and social exploitation and article 12(2)(a) requires state parties to devise provisions to reduce infant mortality rate and to achieve healthy development of children.

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<sup>3</sup> N Cantwell, 'Chapter one', S Detrick (ed), *The United Nations Convention on the Rights of the Child: a guide to the travaux preparatoires*, Martinus Nijhoff (1992) 20.

<sup>4</sup> N Cantwell, 1992 (as above) 20.

<sup>5</sup> M D Seitles, 'Effect of the Convention on the Rights of the Child upon street children in Latin America: a study of Brazil, Colombia and Guatemala' (1997) 16 *In the Public Interest* 171; P Miljeteig-Olssen, 'Advocacy of children's rights - The Convention as more than a legal document' (1990) 12 *Human Rights Quarterly* 148.

<sup>6</sup> W H Bennett, 'A critique of the emerging Convention on the Rights of the Child' (1987) 20/1 *Cornell International Law Journal* 17; Bennett also mentions article 26 on education to specifically applicable to children, but the article is general rather than child-specific. Also article 26(3) deals with parental right to choose the type of education for their children, not children's right to participate in choosing the kind of education he or she wishes to receive.

Despite the objections, an open-ended working group of the UN Commission on Human Rights was formed to draft a convention based on the model convention proposed by Polish delegate.<sup>7</sup> The lack of enthusiasm at the beginning of the drafting period was evidenced by the low number of states attending the drafting session.<sup>8</sup> Even during the drafting period, the concerns regarding the creation of a separate universal convention on children continued to be raised. It was only from 1983 that the interest in the drafting of the CRC began to grow among states. The growing interest was reflected in the growing number of states participating in the drafting sessions.<sup>9</sup> However, unfortunately, due to logistical reasons, only a few countries from the developing world could consistently participate in drafting sessions.<sup>10</sup> It was only towards the end of the drafting session that many developing states, particularly states with Islamic law, started to actively participate.<sup>11</sup> After a long and arduous drafting process, the Convention was finally adopted on 20 November 1989.

The normative value of the CRC is that it is a legally binding instrument that is exclusively devoted to children. Although the ICCPR and ICESCR are applicable to all human beings including children, as Miljeteig-Olssen points out, such fact is generally ‘taken for granted in the minds of authorities, policy-makers’ as well as the public.<sup>12</sup> The Convention is the culmination of struggles and efforts towards the recognition of children as rights-holders and the adoption of a rights-based approach to matters relating to child development, welfare and protection. As subsequent developments in the field of children’s rights, such as the development of Optional Protocols I and II and other regional initiatives, show, the CRC provided the ‘momentum’ for the continued advancement of a children’s rights regime.

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<sup>7</sup> N Cantwell, 1992 (n 3 above) 21.

<sup>8</sup> N Cantwell, 1992 (n 3 above) 23, In the early period of drafting no more than 30 states participated. See N Cantwell, 1992 (n 3 above) 21.

<sup>9</sup> C P Cohen, ‘The role of the United States in the drafting of the Convention on the Rights of the Child’ (2006) 20 *Emory International Law Review* 187.

<sup>10</sup> L J LeBlanc, *The Convention on the rights of the child* (University of Nebraska Press, 1995) 33 & 34.

<sup>11</sup> L J LeBlanc, 1995 (as above) 35.

<sup>12</sup> P Miljeteig-Olssen, 1990 (n 5 above) 149.

Among 41 substantive articles, articles 20 and 21 of the CRC are of particular importance for the purpose of the thesis. Article 20 of the CRC provides children who are deprived of their family environment with a right to alternative care, and special protection and assistance. The article specifies the children who are entitled to alternative care, and special protection and assistance; it lists possible forms of alternative care; and it sets out the basic principles to be observed during the process of placing children in alternative care. While article 20 provides for alternative care in general, article 21 of the CRC specifically provides for inter-country adoption. Both articles are discussed in detail in the later sections of this chapter.

### **(ii) 1990 African Charter on the Rights and Welfare of the Child**

The ACRWC, which was adopted in 1990, is the most comprehensive regional instrument on children's rights. The ACRWC was created as a response to the CRC to represent an 'African' concept of children's rights.<sup>13</sup> Although the wording of both instruments is similar in many respects, the ACRWC is designed to reflect 'virtues of the African cultural heritage, historical background and the values of the African civilisation'.<sup>14</sup>

Of the 31 substantive articles of the ACRWC, articles 24 and 25 are of particular importance for the purpose of the thesis. Article 24 deals with inter-country adoption and article 25 provides for the right to alternative care, and special protection and assistance to children who are deprived of their family environment or are parentless. The articles are discussed in detail in the later sections.

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<sup>13</sup> D M Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157; D Olowu, 'Protecting children's rights in Africa: a critique of the African Charter on Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127.

<sup>14</sup> Preamble of the ACRWC, See A Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: *Raising the gauntlet*' (2002) 10 *International Journal of Children's Rights* 180.

### (iii) 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption

The 1993 Hague Convention on Inter-Country Adoption was created in recognition that the dramatic increase in inter-country adoptions caused complex human and legal problems, and because there was insufficient domestic and international law regulating inter-country adoption.<sup>15</sup> The Convention is designed to meet four broad areas of concern: 1) the need to establish legally binding standards regarding inter-country adoption; 2) the need to develop a system of supervision to ensure such principles are respected; 3) the need for the establishment of a channel of communication between the sending country and the receiving country; and 4) the need for cooperation between sending and receiving countries.<sup>16</sup> The aim of the 1993 Convention reinforces four fundamental principles in relation to inter-country adoption: 1) respect for the best interests of the child; 2) ensuring the adoptability of the child; 3) principles of subsidiarity; and 4) the requirement to obtain informed consent from all stake-holders, including the child concerned, if applicable.

The scope of the Convention is limited to adoptions that create a permanent parent-child relationship.<sup>17</sup> Therefore, it is not applicable for transnational foster care, which may be found in emergency situations or transnational *kafalah*. One of the important features of the Convention is that it is also applicable to all cases where competent government authorities (central authorities) have agreed to proceed with adoption before the child turned 18 years old.<sup>18</sup> Therefore, the Convention continues to provide protection to young persons who attained the age of 18 years while waiting for the adoption process to be finalised. In order to ensure that inter-country adoption takes place in accordance with the best interests of the child, the Convention endeavours to prohibit any financial consideration to be involved in any stages of inter-country adoption. Article 4(d)(4) specifically states that payment or compensation of any kind should not be used in inter-country adoption and article 32 emphasises that no

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<sup>15</sup> G Parra-Aranguren, *Explanatory report on the Convention on the protection of children in respect of inter-country adoption*, HCCH Publications (1994) available at: <http://hcch.evision.nl/upload/exp133e.pdf>, para 6 [accessed: 24 April 2010].

<sup>16</sup> As above, para 7.

<sup>17</sup> Art 2(2) of the 1993 Hague Convention on Inter-Country Adoption.

<sup>18</sup> Art 3 of the 1993 Hague Convention on the Inter-Country Adoption.



financial gain should be made to any parties involved in inter-country adoption. Article 29 goes as far as prohibiting the meeting of prospective adoptive parents and natural parents of the child before it is determined that the child is ‘adoptable’, unless competent authorities determine otherwise.<sup>19</sup>

The Convention also deals with the complicated scenario of a ‘failed adoption’. Article 21 foresees a situation where an adoption is to be finalised in a receiving country after the transfer of a child to the receiving country but the competent authorities determined that the continued placement of the child with the prospective adoptive parents was not in the best interest of the child. Under the Convention, contracting state parties are required to provide temporary care with a view to eventual adoption to a different adoptive parent(s), or if it is not possible, long-term care. The central authority of the sending countries should be informed of all the new development and an adoption to different parents cannot take place until the central authority of the sending countries is fully informed of the new prospective parents. Article 21(2) stipulates that, having regard to the age and degree of maturity of the child, the consent of the child should be obtained in relation to any measures to be taken. The return of the child should take place only as a last resort, if it is in the interests of the child.<sup>20</sup>

Although the article provides a broad framework of action in the case of ‘failed adoption’, it is not clear on two issues. First of all, the term, ‘long-term care’ is not clearly defined. It is possible that ‘long-term care’ may indicate care in the family environment where possible, but the article is silent on the types of long-term care to be provided. Secondly, as mentioned before, the return of the child should be used as a last resort under the article. The explanatory report on the Convention states that the return of the child should take place only when ‘all measures to find alternative care in receiving countries having been exhausted and any prolonged stay of the child in that state is no longer for his or her welfare and interests’.<sup>21</sup> The Convention is not

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<sup>19</sup> Art 29 of the 1993 Hague Convention on Inter-Country Adoption, unless the adoption is taking place within the family and unless the contact is compliance with the conditions established by the competent authority of the State of origin.

<sup>20</sup> Art 21(1)(c) of the 1993 Hague Convention on Inter-Country Adoption.

<sup>21</sup> G Parra-Aranguren, 1994 (n 15 above) para 371.

clear whether ‘all measures to find alternative care’ may include the institutionalisation of such children. Children would have been awarded stronger protection in such a difficult situation if the wording of the Convention had specified the meaning of ‘long-term care’ and had required that the procedure to place children in alternative care should be assessed a case-by-case basis giving the paramount importance to the best interests of the children. Furthermore, the Convention is silent on other important issues such as the nationality of the child in a ‘failed adoption’ case. Since the child is not formally adopted in the receiving country, he or she does not have the nationality of the receiving county. If the child were to be placed in long-term alternative care in the receiving county, depending the age of the child, it may be advisable that there is an established procedure to naturalise the child when he or she is old and mature enough to give informed consent regarding the issue.

Despite remaining gaps in the 1993 Convention, it is an important instrument regulating the complex procedure of inter-country adoption with an aim to protect children’s rights before and during the process of inter-country adoption. The 1993 Convention is particularly relevant for Africa as an increasing number of children are being deprived of their parental care and family environment in the context of the HIV epidemic and inter-country adoption is increasingly regarded as one of the ways to provide permanent care to children.<sup>22</sup> The CRC Committee, recognising its importance on safeguarding children’s rights in the inter-country adoption process, on numerous occasions urged states, including African states, to ratify the 1993 Hague Convention.<sup>23</sup>

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<sup>22</sup> See B D Mezmur, ‘Inter-country adoption as a measure of last resort in Africa: Advancing rights of a child rather than a right to a child’ (2009) 6/10 *Sur-International Journal on Human Rights* 83.

<sup>23</sup> Concluding observation of the CRC: Equatorial Guinea (CRC/C/15/Add.245: 3 Nov 2004) para 43; Concluding observation of the CRC: Gabon (CRC/C/15/Add.171: 3 April 2007) para 38(e); Concluding observation of the CRC: The Gambia (CRC/C/15/Add.165: The Gambia) para 39; Ghana (n 18 above) para 43; Concluding observation of the CRC: Senegal (CRC/C/SEN/CO/2: 20 Oct 2006) para 35(b); Concluding observation of the CRC: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006) para 43; Togo (n 18 above) para 43; Concluding observation of CRC: Tanzania (CRC: CRC/C/TZA/CO2) para 38; Concluding observation of the CRC: Rwanda (CRC/15/Add. 234) para 43; Concluding observation of CRC: Nigeria (CRC/C/15/Add.257: 13 April 2005) para 43(e); Concluding observations of CRC: Malawi (CRC/C/15/Add.174: 2 April 2002) para 40(e); Concluding observation of the CRC: Benin (CRC/C/BEN/CO/2: 20 Oct 2006) para 45(c); Concluding observation of CRC: Botswana (CRC/C/15/Add.242: 3 Nov 2004) para 43(b); Concluding observation of CRC: Central African Republic (CRC/C/15/Add.138: 18 Oct 2000) para 51; Concluding observation of the CRC: Cameroon (CRC/C/15/Add.164: 6 Nov 2001) para 39(c); Concluding observation of CRC: Cape Verde (CRC/C/15/Add.168: 7 Nov 2001) para 42;

### 3.2.2 Soft law

Apart from the CRC and the ACRWC, there are international declarations, guidelines and General Comments to help states to understand their obligations under the treaty provisions. There are three important soft laws for the purpose of the thesis: (i) 1986 UN Declaration on the Social and Legal Principles relating to the Protection and Welfare of the Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; (ii) 2003 CRC General Comment on HIV/AIDS and the rights of the child; and (iii) 2009 UN Guidelines for the Alternative Care of Children. In the following section, each of the instruments are discussed and examined to give fuller analysis to the relevant articles of the CRC and the ACRWC.

#### (i) 1986 UN Declaration on Foster Care and Adoption

The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally (the Declaration on Foster Care and Adoption) was adopted in 1986 by the UN General Assembly to provide a set of principles to be respected in foster and adoption placement. The Declaration, which is based on existing international human rights instruments, firmly asserts that children need to grow up in the care and under the responsibility of their own parents and in ‘an atmosphere of affection, of moral and material security’.<sup>24</sup> In line with article 9 of the CRC, which affirms that children should not be separated from their parents unless such separation is in the best interest of the child, the Declaration restates that the parental care should be given priority.<sup>25</sup> It is only when parental care is unavailable or inappropriate, that foster care, adoption

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The Republic of the Congo (CRC/C/COG/CO/1: 20 Oct 2006) para 4; Concluding observation of CRC: Ethiopia (CRC/C/ETH/CO) para 49(c); CRC Concluding observation: Ethiopia (CRC/C/15/Add.144) para 43; Concluding observation of CRC: Zambia (CRC/C/15/Add.206: 2 July 2003) para 43; Concluding observation of the CRC: Burkina Faso (CRC/C/15/Add.193: 9 Oct 2002) para 35; Concluding observations of CRC: Djibouti (CRC/C/15/Add.131: 28 June 2000) para 38; Concluding observation of CRC: Madagascar (CRC/C/15/Add.218: 27 Oct 2003) para 44; Concluding observation of CRC: Sierra Leone (CRC/C/15/Add.116: 24 Feb 2000) para 53. Currently, only 10 countries in Africa have ratified the Convention. Those countries include Burkina Faso, Burundi, Cape Verde, Guinea, Kenya, Madagascar, Mali, Mauritius, Seychelles, South Africa and Togo as of July 2010.

<sup>24</sup> Preamble of the 1986 UN Declaration on Foster Care and Adoption.

<sup>25</sup> Art 3 of the 1986 UN Declaration on Foster Care and Adoption.

or, if necessary, care in institutions should be considered.<sup>26</sup> However, despite the importance of prioritising parental care, the Declaration does not contain provisions requiring states to provide appropriate support and assistance to the parents of children who, without such assistance and support, may not be able to provide adequate care.

Importantly, article 5 of the 1986 UN Declaration on Foster Care and Adoption states that the best interest of the children should be *the* paramount consideration in *all* matters relating to the placement of a child outside of their family environment.<sup>27</sup> In the CRC, although the best interest of the child is one of the pillars of the Convention, the obligation to give ‘*the* paramount consideration’ to the best interests of the child is only mentioned in relation to article 21 on inter-country adoption.

Another important feature of the 1986 UN Declaration is article 16, which stipulates that the relationship between the child to be adopted and the prospective adoptive parents should be observed by child welfare agencies or services prior to the adoption. Although the wording of the article does not indicate domestic or inter-country adoption, the absence of the differentiation could be interpreted to encompass both domestic and inter-country adoption. Article 16 should be read together with article 14 of the Declaration, which provides that in considering possible adoption placements, persons responsible for them should select *the most appropriate environment* for the child.<sup>28</sup> Observing interactions between the child to be adopted and the prospective adoptive parents may be an important element in determining the most appropriate environment. Furthermore, it may be particularly useful if the child is old enough to express his or her views and wishes with regard to the prospective adoption. It may be noted that there is no similar observation requirement for foster care placements. Subjecting only adoption to such requirement can be explained by the permanency of adoption. Unlike foster care, which is subject to a regular monitoring and evaluation on which basis the placement can be revoked, adoption is permanent and is not subject to a regularly monitoring and evaluation. Naturally, due

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<sup>26</sup> Art 4 of the 1986 UN Declaration on Foster Care and Adoption.

<sup>27</sup> Art 5 of the 1986 UN Declaration on Foster Care and Adoption. The emphasis is mine.

<sup>28</sup> Art 14 of the 1986 UN Declaration on Foster Care and Adoption. The emphasis is mine.

to the permanent nature of adoption, more rigorous checks and evaluations of adoptive parents may be required prior to adoption. However, considering that children in foster care may also be vulnerable to abuse and maltreatment by their foster parents, or that children may not be fit in their foster care environment for various reasons, the opportunity for the children to meet and interact with their potential foster parents may help reducing instances of breakdown of foster placements.

### **(ii) 2003 General Comment and relevant recommendations from the 2005 General Day of Discussion**

The issue of children who are deprived of their family environment has been mentioned by the CRC Committee on several occasions since 1998. However, it was only in the 2005 General Day of Discussion that the CRC Committee led a substantial discussion on the children who are deprived of their family environment. In this section, the recommendations and comments by the CRC Committee on children in need of alternative care are discussed chronologically.

In 1998, the CRC Committee held a General Discussion Day on the theme of the rights of children in the context of HIV and AIDS. The focus of the discussion was centred on five themes: 1) identifying and understanding the impact of the HIV epidemic on children; 2) promoting the rights of children, especially non-discrimination and participation in the context of the epidemic; 3) identifying best practices in prevention of HIV and care of children affected and infected by HIV; 4) promotion of child-oriented policies, strategies and programmes; 5) promotion of the national strategic plans and policies on children based on international guidelines on human rights and HIV/AIDS.<sup>29</sup> The CRC Committee emphasised the importance of adopting a holistic rights-based approach to HIV and AIDS related policy and programmes and stressed the importance of making better use of the existing legal framework on children's rights.<sup>30</sup> Although not binding, the 1998 General Discussion was important for promoting children's rights in the context of HIV and AIDS as

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<sup>29</sup> CRC Committee, General Day of Discussion on Children Living in a World with HIV/AIDS, CRC/C/80 (1998) para 213.

<sup>30</sup> CRC Committee, 1998 (as above) paras 227-228.

many influential bodies, including UNICEF, UNAIDS and UNDP, were gathered together to discuss children's issues in the context of the HIV epidemic from a children's rights perspective. Nevertheless, the discussion gave little attention to children who are orphaned by AIDS, except to recommend that strategies to address the 'growing number of orphans that the epidemic was causing must target all orphans in the community.'<sup>31</sup>

Following from the 1998 discussion, in 2003, the CRC Committee developed a general comment on children's rights in the context of the HIV epidemic. The Committee advocated that a holistic child rights-based approach be employed in all HIV and AIDS responses and strategies including the distribution of information on HIV-prevention, HIV counselling and testing, mother-to-child-transmission, and HIV/AIDS research programmes.<sup>32</sup> Importantly, the Committee also took the opportunity to raise concern over the increasing number of children who are orphaned by AIDS. With regard to children who are orphaned by AIDS, the CRC Committee emphasised six issues: 1) The Committee further recommended that children orphaned by AIDS and children from affected families, including child-headed households, be given special attention and emphasised the importance of providing legal, economic and social protection to affected children;<sup>33</sup> 2) the Committee emphasised the importance of birth registration for children affected by HIV/AIDS;<sup>34</sup> 3) the Committee urged states to ensure the inheritance and property rights of children who are orphaned are protected;<sup>35</sup> 4) the Committee recognised the important role played by extended families and communities in providing care to children who are orphaned by AIDS and urged states to provide the necessary assistance to extended families taking care of such children;<sup>36</sup> 5) it emphasised that children should grow up in a family environment and recommended that states provide, as far as possible,

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<sup>31</sup> CRC Committee, 1998 (as above) para 227.

<sup>32</sup> CRC Committee, General Comment No 3 (2003) HIV/AIDS and the rights of the child, CRC/GC/2003/3, para 5.

<sup>33</sup> CRC Committee, 2003 (as above) para 31.

<sup>34</sup> CRC Committee, 2003 (as above) para 29.

<sup>35</sup> CRC Committee, 2003 (as above) para 32.

<sup>36</sup> CRC Committee, 2003 (as above) para 33.

family-type alternative care;<sup>37</sup> and 6) the Committee stated that institutionalised care should be used as a measure of last resort and measures of protection against all forms of abuse and exploitation should be put in place.<sup>38</sup>

Although it was not the first time that the CRC Committee raised the issue of child-headed households,<sup>39</sup> the specific mentioning of child-headed households in a general comment was significant as it acknowledged the existence of and precarious situations of child-headed households. Nevertheless, the Committee merely *encouraged* states to provide support, ‘financial and otherwise, when necessary’ to child-headed households. It is unfortunate that the CRC Committee did not issue a stronger statement requiring states to reduce or prevent the occurrence of child-headed households or requiring states to commit maximum assistance to such households if the formation of such household is unavoidable.

In 2005, the CRC Committee devoted its Day of General Discussion to ‘children without parental care’. During the discussion, there were several concerns raised, including the increasing number of children who are separated from their parents and who are placed in institutions, and the lack of data on children in informal care or children who are without care, such as street children.<sup>40</sup> The Committee emphasised the importance of preventing children from being separated from their parents by

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<sup>37</sup> CRC Committee, 2003 (as above) para 34.

<sup>38</sup> CRC Committee, 2003 (as above) para 35.

<sup>39</sup> The CRC Committee noted the increasing number of child-headed households on numerous occasions: CRC Concluding Observation: South Africa (CRC/15/Add.122: 22 Feb 2000); Concluding observations of CRC: Burundi (CRC/C/15/Add.133: 16 Oct 2000); Concluding observations of the CRC: DRC (CRC/C/15/Add.153: 9 July 2001); Concluding observations of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observations of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observation of CRC: Zambia (CRC/C/15/Add.206: 2 July 2003); Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005); Concluding observation of CRC: Ethiopia (CRC/C/ETH/CO/3); CRC CO: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006); Concluding observations of CRC: Kenya (CRC/C/KEN/CO/2: 2007); Concluding observation of CRC: Eritrea (CRC/C/ERI/CO/3: 2008); Concluding observations of CRC: Malawi (CRC/C/MWI/CO/2: 2009); Concluding observations of CRC: Mauritania (CRC/C/MRT/CO/2: 2009); and Concluding observations of CRC: Mozambique (CRC/C/MOZ/CO/2: 2009). The CRC Committee urged the states to reduce and prevent the occurrence of child-headed households (South Africa) and recommended all necessary measures to assist such households (Lesotho, Zambia, Kenya, Uganda, Ethiopia, Swaziland, Mauritania and Eritrea).

<sup>40</sup> CRC Committee, Day of General Discussion: children without parental care, 12-30 September 2005, CRC/C/153 paras 654 & 681.

providing appropriate support and assistance to parents.<sup>41</sup> In case the separation is unavoidable, family-type alternative care should be given a priority.<sup>42</sup> The Committee's recommendation to develop an international standard on protection and care of children without parental care led to the development of the 2009 UN Guidelines for the Alternative Care of Children, which is discussed below.<sup>43</sup> Although it is important that the Committee has devoted its day of general discussion to the issue of children who are in need of alternative care, it is regrettable that children who are affected by the HIV epidemic have received only scant mention in the discussion. While children who are affected and infected by HIV are described as 'especially vulnerable children',<sup>44</sup> the issue of the increasing number of children who are deprived of their family environment in the context of the HIV epidemic, including children in child-headed households, was not discussed in detail. Nevertheless, the Committee recognised the importance of children growing up in their own community and recommended that the most vulnerable families in the community should be supported, so that alternative measures to institutionalised care could be found within the community.<sup>45</sup>

### **(iii) 2005 Council of Europe Recommendation on the Rights of Children Living in Residential Care**

The Council of Europe Recommendation on the Rights of Children Living in Residential Care was adopted by the Committee of Ministers on 16 March 2005 to further protect the rights of children in residential care. While the 2005 Recommendation recognises the family as a natural environment for children to grow up, the Council of Europe Recommendations foresees that in some cases, residential care of children might be necessary. The Recommendation provides for the basic principles of providing out-of-home care to children and the standards of care in institutions as well as the rights of children in residential care.

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<sup>41</sup> CRC Committee, 2005 (as above) para 649.

<sup>42</sup> CRC Committee, 2005 (as above) para 665.

<sup>43</sup> CRC Committee, 2005 (as above) para 649.

<sup>44</sup> CRC Committee, 2005 (as above) para 670.

<sup>45</sup> CRC Committee, 2005 (as above) para 674.



An important feature of the Recommendation is that it is very comprehensive. It provides basic principles and guidelines regarding the determination to place children in residential care, standards of care in residential care, including the rights of children in residential care, and aftercare provisions. It clearly sets out that the primary objectives of residential care are the protection of the best interests of the child and to enable the child to integrate or re-integrate as soon as possible into society. In order to achieve the successful integration of the child into society, the Recommendation provides for appropriate aftercare support to children leaving institutions. It also provides that an individual care plan should be designed to prepare children for living outside the institution in the future. These are very important elements as the ultimate goal of any alternative care including residential care is to prepare children for a smooth transition from childhood to independent adulthood.

The Recommendation further recognises the important role played by private bodies, such as NGOs or faith-based organisations, in providing residential care. Nonetheless, it holds states responsible for the standard of care provided by private bodies. In order to ensure the requisite standard of care, the Recommendation requires that all residential care facilities be accredited and registered with the competent public authorities and stipulates the establishment of an efficient system of monitoring and external control of residential institutions. It further provides that children have the right to submit complaints to an identifiable, impartial and independent body. Enabling children in residential care to lodge complaints is essential as there is a high risk of abuses and maltreatment of these children going unnoticed.<sup>46</sup> However, the Recommendation does not specify how such body will operate, including the procedure through which children can make complaints, especially for younger children, or how the complaints will be examined and dealt with once the allegations are found to be correct. Although the basic principles of the Recommendation clarify that residential care should only be used as a last resort for the shortest possible period, it does not specifically address the development needs of children under five and how such young children can be cared for in a residential setting.

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<sup>46</sup> See, C Csaky, *Keeping children out of harmful institutions*, Save the Children UK (2009).

The Council of Europe Recommendation is a regional instrument and only applicable to member states of the Council of Europe. However, it serves as an important example to other regions, especially in Africa, where the CRC Committee often observed the frequent resort to institutionalised care.<sup>47</sup> Although all the rights enshrined in the CRC are equally applicable to children in residential care, the specific needs and vulnerability of such children justify the reiteration of certain rights more specific to their situation.

#### **(iv) 2009 UN Guidelines for the Alternative Care of Children**

In 2004, UNICEF and International Social Service (ISS),<sup>48</sup> in its working paper on children without parental care, called for the development of international guidelines on the alternative care for children without parental care.<sup>49</sup> In the paper, ISS and UNICEF raised concerns over, among other aspects, the inappropriate use of

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<sup>47</sup> Concluding Observation of the CRC: Equatorial Guinea (CRC/C/15/Add.245: 3 Nov 2004) para 38, although the Committee welcomes the existence of institutions to accommodate increasing number of children who are orphaned but it emphasises that institutionalised care should be a temporary measure of last resort; Concluding observation of the CRC: Eritrea (CRC/C/15/Add.204: 2 July 2003) para 35; Concluding Observation of the CRC: Lesotho (CRC/C/15/Add.147: 21 Feb 2001) para 37; Concluding Observation of the CRC: Gabon (CRC/C/15/Add.171: 3 April 2007) para 37; Concluding observations of the CRC: The Gambia (CRC/C/15/Add.165: The Gambia) para 36; Concluding observation of the CRC: Guinea Bissau (CRC/C/15/Add.177: 13 June 2002) para 32(a) & 32(b); Concluding observation of the CRC: Senegal (CRC/C/SEN/CO/2: 20 Oct 2006) para 32; Concluding observation of the CRC: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006) para 40; Concluding Observation of the CRC: South Africa (CRC/C/15/Add.122: 22 Feb 2002) para 25; CRC Concluding observation: Rwanda (CRC/C/15/Add. 234) para 40; Concluding observation of CRC: Nigeria (CRC/C/15/Add.257: 13 April 2005) para 42; Concluding observation of CRC: Mali (CRC/C/MLI/CO/2: 3 May 2007) para 41; Concluding Observation of the CRC: Malawi (CRC/C/15/Add.174: 2 April 2002) para 39; Concluding observation of CRC: Angola (CRC/C/15/Add.246: 3 Nov 2004) para 34; Concluding observation of CRC: Benin (CRC/C/BEN/CO/2: 20 Oct 2006) para 42; Concluding Observation of the CRC: Central African Republic (CRC/C/15/Add.138: 18 October 2000) para 48; Concluding observation of CRC: Cameroon (CRC/C/15/Add.164: 6 Nov 2001) para 38; Concluding observation of CRC: Liberia (CRC/C/15/Add.236: 1 July 2004) para 40(a) & (b); Concluding observation of CRC: Mozambique (CRC/C/15/Add.172: 3 April 2002) para 44(a) & (b); Concluding Observation of the CRC: Niger (CRC/C/15/Add. 159: 13 June 2002) para 40; Concluding Observation of the CRC: Sudan (CRC/C/15/Add.190: 9 October 2002) para 41; Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005) para 41; Concluding observations of CRC: Djibouti (CRC/C/15/Add.131: 28 June 2000) para 35.

<sup>48</sup> International Social Service (ISS) is an international organisation operating in 140 countries in the world providing legal advices and services to governments and organisations working with children in alternative care placements. See <http://www.iss-ssi.org/2009/index.php?id=1> [accessed: 3 June 2010].

<sup>49</sup> ISS & UNICEF, 'Improving protection for children without parental care: a call for international standard' (August 2004).

alternative care, the lack of protection of children in informal care, the lack of support to child-headed households and inadequate planning for the future of children in alternative care, and called for the development of comprehensive guidelines on standard of care for children in alternative care placements.<sup>50</sup> In response to the call, during the Day of General Discussion on children without parental care, the CRC Committee recommended that guidelines be developed to improve the implementation of article 20 of the CRC.<sup>51</sup> The initial draft was developed by an NGO working group, which was then submitted to the CRC Committee for further revision and comments.<sup>52</sup> In the following consultation stage, governmental bodies were encouraged to participate.<sup>53</sup> In August 2006, an inter-governmental meeting, a ‘Group of Friends’ led by the government of Brazil, was held in Brasilia to further develop the draft.<sup>54</sup> The broad-based consultation continued between 2007 and 2009, including a consultation meeting in Cairo hosted by the League of Arab States, a high panel discussion at the Human Rights Council and a series of intergovernmental consultations in early 2009.<sup>55</sup> The Guidelines were approved by the UN General Assembly on 20 November 2009.<sup>56</sup>

The UN Guidelines for the Alternative Care of Children aim to assist and encourage governments to better implement their responsibilities and obligations under the broader framework of the CRC in relation to providing alternative care to children. It aims to clarify ‘less clear areas’ of the CRC framework, as identified by Cantwell: (1) the relationship between ‘parental care’ and ‘alternative care’; (2) the obligations regarding ‘informal’ or ‘kinship’ care; (3) the application of the best interests of the child; (4) the goals of ‘alternative care’; and (5) the concepts of ‘suitability’ and

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<sup>50</sup> ISS & UNICEF, 2004 (as above).

<sup>51</sup> International Social Service factsheet on Guidelines for the Alternative Care of Children, available at: <http://www.iss-ssi.org/2009/assets/files/guidelines/Factsheet%20Guidelines%20Nov%202009.pdf> [accessed: 23 April 2010].

<sup>52</sup> As above.

<sup>53</sup> As above.

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> As above.

‘necessity’ in relation to alternative care placement.<sup>57</sup> It also deals with several contentious issues, such as the role of state in informal care; recognition of child-headed households; providing care to children of mothers in prison; the hierarchy of care options; residential care for under-3’s and de-institutionalisation.<sup>58</sup> Nevertheless, as Cantwell pointed out, there are issues that still needed to be clarified including the definition of ‘family’ and the question of the form in which to recognise child-headed households.<sup>59</sup>

### *General principles of the Guidelines*

The UN Guidelines are clear that alternative care should be used only when it is absolutely necessary and only in suitable forms to meet the individual needs of children.<sup>60</sup> One of the general principles of the Guidelines is to provide appropriate support measures to families to minimise resort to alternative care.<sup>61</sup> Paragraph 5 of the Guidelines clarifies that only when ‘the child’s own family is unable, even with appropriate support, to provide adequate care for the child’, does the state assume the responsibility over that child. The role of the state with regards to children who cannot be cared for in their own family environment include: 1) ensuring appropriate alternative care; 2) ensuring supervision of the safety, well-being and development of any child placement in alternative care, and 3) regularly reviewing the appropriateness of the care arrangement provided.<sup>62</sup> The Guidelines emphasise the importance of applying principles of children’s rights in all course of actions for children deprived of parental care, or at risk of being so deprived, and require all decisions regarding alternative placement to be made on a case-by-case basis.<sup>63</sup>

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<sup>57</sup> N Cantwell, Note on presentation at the Better Care Network (22 May 2008); N Cantwell, note on presentation at the Quality4Children European Congress, Austria (1-2 June 2005).

<sup>58</sup> 2009 UN Guidelines for the Alternative Care of Children; also pointed out by N Cantwell, 2005 (as above).

<sup>59</sup> As above).

<sup>60</sup> As above.

<sup>61</sup> Para 8 of the UN Guidelines for the Alternative Care of Children.

<sup>62</sup> Para 5 of the UN Guidelines for the Alternative Care of Children.

<sup>63</sup> Para 6 of the UN Guidelines for the Alternative Care of Children.

### *Understanding 'alternative care'*

One of the important features of the Guidelines is that it provides a broad definition of alternative care. Paragraph 28(b) of the Guidelines acknowledges that alternative care could be informal or formal care. *Informal care* is defined as 'any private arrangement provided in a family environment, whereby the child is looked after on an on-going or indefinite basis by relatives or friends or by others in their individual capacity' without the involvement of administrative or judicial authority or a duly accredited body.<sup>64</sup> It does not include care in private facilities. *Formal care* is defined as all care provided in a family environment, which has been ordered by an administrative or judicial authority, and all care provided in a residential environment including care in private facilities. Residential care provided in an unregistered children's home is included in formal care. In other words, 'informal care' can only be provided in a family environment and, therefore, it may be termed as 'informal family care'.

The Guidelines categorise five different forms of alternative care: 1) kinship care, defined as 'family-based care within the child's extended family or with close friends of the family known to the child' whether informal or formal;<sup>65</sup> 2) foster care, defined as 'situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care';<sup>66</sup> 3) other forms of family-based or family-like care placements;<sup>67</sup> 4) residential care;<sup>68</sup> and 5) supervised independent living arrangements for children.<sup>69</sup>

It may be noted that 'supervised independent living arrangements for children' does not necessarily include a 'child-headed' or 'sibling-headed household'.<sup>70</sup> Paragraph

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<sup>64</sup> Para 28(b) of the UN Guidelines for the Alternative Care of Children.

<sup>65</sup> Para 28(c)(i) of the UN Guidelines for the Alternative Care of Children.

<sup>66</sup> Para 28(c)(ii) of the UN Guidelines for the Alternative Care of Children.

<sup>67</sup> Para 28(c)(iii) of the UN Guidelines for the Alternative Care of Children.

<sup>68</sup> Para 28(c)(iv) of the UN Guidelines for the Alternative Care of Children.

<sup>69</sup> Para 28(c)(v) of the UN Guidelines for the Alternative Care of Children.

<sup>70</sup> In a correspondence with Ms M Dambach, Children's rights specialist, International Social Service, she stated that child-headed households did not fall under the independent living

36 of the Guidelines, under Part IV (entitled ‘Preventing the need for alternative care’) states that ‘support and services should be available to siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable of acting as the household head.’ The fact that the requirement to support sibling-headed household is included under the prevention of the need for alternative care suggests that ‘sibling-headed households’ are primarily viewed as a form of family rather than as a form of alternative care.

Considering that ‘kinship’ is primarily defined as a ‘blood relation’,<sup>71</sup> the inclusion of ‘the care by close friends of the family previously known to the child’ as ‘kinship care’ seems to be rather broad. The main concern of adopting a broad definition is that ‘kinship care’, whether it is informal or formal, is favoured over other forms of care on the assumption that children are better taken care of by their extended family members. However, informal care by unrelated friends of the family may put children at risk of being maltreated and abused in their care for several reasons. Firstly, informal care is harder to regulate and monitor than formal care. Secondly, other family members may be more willing to intervene in the cases of maltreatment or abuse of the child when the caregiver is also a member of the family. Finally, close friends of the deceased parents of the children may or may not be known to other members of the extended family, especially when the family had moved away from their community. Therefore, there should be adequate protection measures to protect children in all forms of informal kinship care, especially informal kinship care provided by unrelated individuals. The issue is further discussed in the following.

#### *Protection of children in informal care*

The Guidelines recognise the importance of informal care as a form of alternative care placement and require states to recognise the *de facto* responsibility of informal carers

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arrangement for children but were considered as a form of kinship care. (27 April 2010). This point will be discussed further in section 3.4 and 3.5 below.

<sup>71</sup> S Roalkvam, ‘The children left to stand alone’ (2005) 4/3 *African Journal of AIDS Research* 214.

for the child.<sup>72</sup> Under paragraph 78, states are obliged to devise special and appropriate measures to protect children in informal care, especially children in informal care provided by non-relatives, or by relatives previously unknown to the children or living far from the children's habitual place of residence. The Guidelines further require states to encourage and enable informal caregivers to formalise the care arrangement after 'a suitable lapse of time, to the extent that the arrangement has proved to be in the best interests of the child and is expected to continue in the foreseeable future'.<sup>73</sup> The wording seems to suggest that if the particular informal care arrangement is not in the best interests of the child, the child should be provided with a different form of care arrangement. Furthermore, if the informal arrangement is for a short term, it is not required to formalise the care arrangement.

Although it is important that the Guidelines formally recognise the role played by informal caregivers and the need to provide stronger protection to children in informal care, it may be desirable that the Guidelines provided a stronger emphasis on the formalisation of informal care arrangements. The Committee on numerous occasions expressed its concern over the prevalence of informal care and the difficulty of monitoring and regulating such care arrangement.<sup>74</sup> The Guidelines only require states to 'encourage' informal care arrangements to be formalised. Arguably, the Guidelines would have provided better protection for children in informal care, if it were legally required that informal care arrangement be formalised after a certain lapse of time.

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<sup>72</sup> Paras 55 & 77 of the UN Guidelines for the Alternative Care of Children.

<sup>73</sup> Para 55 of the UN Guidelines for the Alternative Care of Children.

<sup>74</sup> Concluding Observation of the CRC: Comoros (CRC/C/15/Add.141: 2000) para 30; Concluding Observation of the CRC: The Gambia (CRC/C/15/Add.165: 2001) paras 38-39; Concluding Observation of the CRC: Algeria (CRC/C/15/Add.269: 2005) para 45; Concluding Observation of the CRC: Burundi (CRC/C/15/Add.133: 2000) para 26; Concluding Observation of the CRC: South Africa (CRC/C/15/Add.122:2001) para 43; Concluding Observation of the CRC: Tanzania (CRC/C/15/Add.156: 2002) para 32; Concluding Observation of the CRC: Guinea-Bissau (CRC/C/15/Add.177: 2004) para 43; Concluding Observation of the CRC: Rwanda (CRC/C/15/Add.234: 2004) para 43; Concluding Observation of the CRC: Niger (CRC/C/15/Add.173: 2002) para 43; and Concluding Observation of the DRC (CRC/C/15/Add.153: 2001) para 45.

### *Provisions on aftercare*

Another striking feature of the 2009 UN Guidelines is the inclusion of provisions on aftercare. Paragraph 130 clarifies the ultimate aim of alternative care as the preparation of children to assume self-reliance and their full integration into the community. The Guidelines emphasise the importance of planning for the aftercare as early as possible to ensure an appropriate continuum of appropriate support for youth leaving alternative care. The Guidelines stipulate that ongoing education and vocational training opportunities and access to social, legal and health services should be provided to young adults leaving care or during aftercare. However, the possible duration of the aftercare period and the criteria to determine discontinuation of aftercare are not specified in the Guidelines.

The UN Guidelines for the Alternative Care of Children are an ambitious attempt to facilitate the implementation of state obligations under the CRC towards children who are deprived of their family environment. They do not only fill gaps in the CRC framework but, based on the framework, venture into issue areas that have not been previously considered, most notably by providing a continuum of care to young persons leaving alternative care placement, who are no longer protected under the CRC due to the age limit. The 2009 UN Guidelines are both a useful tool to determine state obligations under the CRC in relation to children in alternative care and a checklist against which a domestic legal and policy regarding children in alternative care can be assessed. However, in the area of child-headed households, the Guidelines would have taken a stronger position in defining, recognising and supporting such households. Although the Guidelines require states to provide support and assistance of child-headed households, they neither provide details of what criteria should be used to determine if children can form and remain in child-headed households, nor clearly define child-headed households. In the following section, the scope and contents of the articles of the CRC and the ACRWC on children who are deprived of their family environment are analysed against the background of the above cited instruments.



### 3.3 Articles 20 of the CRC and 25 of the ACRWC: Analysis

Articles 20(1) of the CRC and 25(1) of the ACRWC clearly establish that children who are deprived of their family environment and parental care are entitled to special protection and assistance.<sup>75</sup> The further sub-articles, articles 20(2) of the CRC and 25(2)(a) of the ACRWC, specifically provide for the state obligation to provide alternative care to such children and articles 20(3) of the CRC and 25(3)(a) of the ACRWC provide a non-exhaustive list of examples of alternative care.

In the following sections, the two articles will be analysed in detail and the differences of wordings in the two articles will be highlighted. Although the focus of the analysis is articles 20 of the CRC and 25 of the ACRWC, other closely related articles, such as the provisions dealing with inter-country adoption and periodic monitoring of the children in placement will be included in the discussion. The principles and guidelines

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<sup>75</sup> Art 20 of the CRC reads:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, *inter alia*, foster placement, *Kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Art 25 of the ACRWC reads:

1. Any child who is permanently or temporarily deprived of his family environment for any reasons shall be entitled to special protection and assistance;
2. State parties to the present Charter:
  - (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;
  - (b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.
3. When considering alternative family care of children and the best interest of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

developed in international instruments mentioned in section 3.2 further inform much of the discussion.

### 3.3.1 Understanding ‘family’ and ‘family environment’

The concepts of ‘family’ and ‘family environment’ are central to understanding the scope of the right to alternative care, and special protection and assistance. However, the lack of a ‘treaty definition of family’<sup>76</sup> may cause problems when there is a need to interpret the concept of ‘family’. Article 20(1) of the CRC provides that ‘a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.’<sup>77</sup> In order to determine what the term ‘family environment’ constitutes, the concept of ‘family’ should be clearly understood. Furthermore, under article 25 of the ACRWC, states are required to provide ‘alternative family care’ when children are deprived of their natural family environment.<sup>78</sup> What is considered as ‘family environment’ may not be legally recognised as such. For instance, should homosexual couples be allowed to foster or adopt children as they can provide a ‘family environment’? In South Africa, where a marriage between homosexual persons is legally recognised, the answer would be positive.<sup>79</sup> However, many other African states where homosexual acts are criminalised,<sup>80</sup> it may be unthinkable that such couple can be considered as suitable foster parents or prospective adoptive parents who are able to provide ‘family-type’ care. For instance, in Ghana and Southern Sudan, adoption of foster care by same sex couple is explicitly prohibited.<sup>81</sup>

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<sup>76</sup> G Van Bueren, *The International law of the rights of the child*, Martinus Nijhoff (1995) 68.

<sup>77</sup> Art 20 of the CRC.

<sup>78</sup> Art 25 of the ACRWC. (The emphasis on the text is mine.)

<sup>79</sup> *Minister of Home Affairs and Another v Fourie and Another*, CCT 60/04, 2006 (3) BCLR 355 (CC); *Lesbian and Gay Equality Project and others v Minister of Home Affairs and others*, CCT/10/05, 2006 (3) BCLR 355 (CC). Civil Union Act No 17 of 2006.

<sup>80</sup> All but 12 countries in Africa criminalise same sex relationship and only South Africa legally recognises same sex marriage in Africa. For more information, see [http://en.wikipedia.org/wiki/LGBT\\_rights\\_by\\_country\\_or\\_territory](http://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory) [accessed: 1 June 2010].

<sup>81</sup> Adoption by same-sex couples is prohibited in Ghana. For more information, see <http://adoption.state.gov/country/ghana.html> [accessed: 1 June 2010]; Sec 73(3)(c) and sec 83(3)(c) of the Child Act No 10 of 2008, Southern Sudan.

Understanding the concept of ‘family’ and ‘family environment’ is also crucial to addressing the question related to children in child-headed households. The need to interpret the concept requires the establishment of criteria to determine the existence of ‘family.’ A set criterion may prevent states from loosely interpreting their treaty obligations by providing sub-standard ‘family’ care or by giving the legal status of ‘family’ to child-headed households, which are not prepared to function as a ‘family’, thereby, excluding those children from benefiting under the right to special protection and assistance. In the following sections, the concepts of ‘family’ and ‘family environment’ are discussed in different dimensions, such as structural and subjective dimensions of a ‘family’ and ‘family environment’.

*(i) Culturally diverse understanding of family*

The concept of ‘family’ varies from one society to another. The family is a fundamental unit of a society, but determining what constitutes a ‘family’ is one of the most complicated socio-anthropological as well as legal questions. As Holy points out, many anthropological writings use the term ‘family’ without offering a clear definition.<sup>82</sup> The concept is fundamental, yet culturally diverse; readers are left to understand that it is based on their own cultural experience.<sup>83</sup> The term ‘family’, as Allan and Crow suggest, is used ‘routinely, normally without any need for reflection or self-awareness.’<sup>84</sup> Although the term itself may not offer much controversy, the ambiguous everyday usage of the sociological term could pose a problem when trying to analyse issues related to family.<sup>85</sup>

*(ii) Structural understanding of a ‘family’*

In 1949, Murdock came up with one of the most cited and best-known definitions of family.<sup>86</sup> In his study, Murdock defines ‘family’ as a ‘social group characterised by

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<sup>82</sup> L Holy, *The Anthropological perspective on kinship*, Pluto Press (1998) 52.

<sup>83</sup> L Holy, 1998 (as above) 52.

<sup>84</sup> G Allan & G Crow, *Families, households and society*, Palgrave (2001) 1; also see G P Murdock, *Social structure*, The Macmillan company (1949) 1.

<sup>85</sup> G Allan & G Crow, 2001 (as above) 1.

<sup>86</sup> A F Steyn, *Family structures in the RSA*, Co-operative research programme on marriage and family life, HSRC (1994) 5.

common residence, economic cooperation and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults.<sup>87</sup> Needless to say, since 1949, Murdock's concept of family has changed dramatically both in anthropology and law. Even the slightly broader definition of 'family' as 'a small kinship-structured group with the key function of nurturing socialisation'<sup>88</sup> begs the question as how to understand the term 'kinship.' Given that 'kinship' is largely understood as 'blood relations',<sup>89</sup> the definition leaves out families that may not necessarily be based on blood ties, such as conjugal families.

Despite the fact that the concept of family lacks not only an anthropological definition, but also a clear legal definition,<sup>90</sup> various human rights instruments uphold the family as 'the natural and fundamental group' and grant protection by the society and states.<sup>91</sup> However, the difficulty, if not impossibility, of adopting a universal definition of the term, has often been noted. The Human Rights Committee (HRC) observes, without offering a definition, that the term 'family' should be given 'a broad interpretation to include all those comprising the family as understood in the society of the state party concerned.'<sup>92</sup> This sentiment is also reflected in *Hopu and Bessert v France*, where the Committee observed:<sup>93</sup>

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<sup>87</sup> G P Murdock, 1949 (n 84 above) 1.

<sup>88</sup> I L Reiss offered the definition in an attempt to include all possible family structures. Cited in A F Steyn, 1994 (n 86 above) 5.

<sup>89</sup> See <http://oxforddictionaries.com/definition/kinship> [accessed: 30 June 2010]; <http://dictionary.cambridge.org/topics/family-relations-in-general/definition-of-kinship> [accessed: 30 June 2010].

<sup>90</sup> Family is defined as: 1) A group of persons connected by blood, by affinity, or by law, especially within two or three generations; 2) A group consisting of parents and their children; 3. A group of persons who live together and have a shared commitment to a domestic relationship. See B A Garner (ed), *Black's Law Dictionary*. However, these definitions are too general and broad to be applied without further interpretation.

<sup>91</sup> Art 23 (1) of the ICCPR; Art 17(1) of the American Convention on Human Rights; Art 16 of the UDHR; Art 18(1) of the African Charter states that the family 'shall be the natural unit and basis of society.'

<sup>92</sup> HRC, General Comment No 16: Article 17 Right to privacy (1988) para 5.

<sup>93</sup> *Hopu and Bessert v France* (1997) Communication no. 549/1993 CCPR/C/60/D/549/1993/Rev.1 para 10.3; Also see M Spulveda, T van Banning, G D Gudmundsdottir & C Chamoun, *Universal and regional human rights protection, Cases and commentaries*, University of Peace (2004) 340-341.

[T]he objectives of the Covenant requires that the term ‘family’ be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural tradition should be taken into account when defining the term ‘family’ in a specific situation.

The impossibility of drafting a standard definition of family is also noted in General Comment No 19 on article 23 of the ICCPR:<sup>94</sup>

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

Although the Committee leaves the interpretation of ‘family’ to member states, it nevertheless requires states to report on ‘how the concept and scope of the family is construed or defined in their own society and legal system.’<sup>95</sup>

The examination of various state reports and domestic legislation supports the diverse understanding of ‘family’ among member states. In many African states, the definition of family is based on a marital relationship. For instance, the law in Malawi presupposes that all families are based on marriage. However, in reality, female-headed households constitute 26 per cent of all ‘families’ in that country.<sup>96</sup> Also in Benin, under the Personal and Family Code, only monogamous marriage is recognised.<sup>97</sup> However, despite the legislative prohibition, polygamous marriages take place under customary law.<sup>98</sup> Such legally unprotected marriage could mean that women and children in customary polygamous marriages fall outside of state protection.<sup>99</sup>

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<sup>94</sup> HRC, General Comment No 19: Article 23 The family (1990) para 2.

<sup>95</sup> HRC, General Comment No 19 (as above), The Committee requires the states parties, where necessary, to indicate diverse concepts and forms of the family existing within a state and the degree of protection guaranteed to each.

<sup>96</sup> Consideration of reports submitted by state parties under article 16 of the Convention on the elimination of all forms of discrimination against women (CEDAW): Malawi, CEDAW/C/MWI/12-5 para 16.13.

<sup>97</sup> Concluding observations of the Human Rights Committee: Benin, CCPR/CO/82/BEN (01 December 2004) para 10.

<sup>98</sup> HRC, Concluding observations: Benin (as above) para 10.

<sup>99</sup> HRC, Concluding observations: Benin (as above).

Another example of legal interpretation of ‘family’ as a marriage-based group can be found in Uganda. The Initial State Report by Uganda in 2003, for example, defines a ‘family’ as a man and his wife, or wives, and children.<sup>100</sup> There are five different recognised marriage practices in Uganda: customary marriage, marriage under Islamic law, marriage in a Christian church, marriage before a chief administrative officer, and marriage under the Hindu faith.<sup>101</sup> Although family protection services are provided to all types of families, the law is limited as it does not recognise cohabitation of partners as a family, or other types of families that do not fit in the formula of husband, his wife, or wives, and children. Zimbabwe offers also a definition of ‘family’ based on marriage: registered customary marriage, civil marriage, and unregistered customary law union.<sup>102</sup>

The inclusion of an unregistered customary law union offers broader protection, but such marriage is recognised only in limited cases, for instance, in respect of the maintenance of a child and for inheritance purposes.<sup>103</sup> The family is understood in a slightly broader way in Kenya, where a family falls under three categories: extended, nuclear, and single parent families.<sup>104</sup> However, as in Uganda, unmarried cohabiting couples are not protected under the law.<sup>105</sup> It is clear that such a narrow understanding of ‘family’ in a legal setting fails to protect the interests of people who fall outside of the formal marriage-based family arrangements. It is regrettable as there is an increasing number of ‘families’ that fall outside of the scope of the classic understanding of ‘family’.<sup>106</sup>

As illustrated above, drawing a standard definition of ‘family’ is an arduous task. In addition to the complexity of the term, it may have negative repercussions, as it may

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<sup>100</sup> Initial Report of State Parties submitted by state parties under article 40 of the Covenant on civil and political rights: Uganda, CCPR/C/UGA/2003/1 (2003) para 483.

<sup>101</sup> CCPR Initial Report: Uganda (as above) para 490.

<sup>102</sup> Initial report of States parties due in 1992: Zimbabwe CCPR/C/74/Add.3 (29 September 1997) para 211.

<sup>103</sup> CCPR Initial report: Zimbabwe (as above).

<sup>104</sup> Second periodic report to the Human Rights Committee: Kenya, CCPR/C/KEN/2004/2 (27 September 2004) para 178.

<sup>105</sup> CCPR Second periodic report: Kenya (as above) para 183.

<sup>106</sup> CEDAW Concluding observation: Malawi (n 96 above).

limit the kinds of families that could be legally protected. In states where ‘family’ is understood as only based on marriage, other forms of family, such as female-headed, child-headed or grandparent-headed families may be left outside of legal protection granted to ‘family’. Therefore, the CRC Committee recommended that the concept of ‘family’ should be broadened to include different types of families such as the extended family, nuclear family, re-constructed family, joint family, single-parent family, common-law family and adoptive family.<sup>107</sup> The CRC Committee further recommended that more attention be given to the concept of ‘extended family’, especially the role of grandparents in providing care to children, which is ‘rarely acknowledged in domestic laws’.<sup>108</sup>

*(iii) Subjective elements of a family*

Interpreting article 16 of the UDHR, Lagoutte and Anason include both biological and sociological aspects of a ‘family’ in its definition.<sup>109</sup> Biological relationships, such as common ancestry, and social or legal unions, including marriage or adoption, are the major factors that determine a ‘family’.<sup>110</sup> This trend of conceptualising ‘family’ is reflected in a sociological understanding of ‘family’ as ‘an intimate domestic group made up of people related to one another by bonds of blood, sexual mating, or legal ties.’<sup>111</sup> Mere biological or legal ties are not enough to constitute a ‘family’. The ‘intimacy’ is an important element in ‘family’. The element of intimacy represents the functions of ‘family’. Biological and legal ties may explain the structure of family, but the emotional elements of family concern the ‘contents’ of family. Elmer outlines three significant aspects of family: ‘reproduction, nurture of children and mutual sympathetic understanding and helpfulness.’<sup>112</sup> Due to changes in the understanding of ‘family’ and ‘family life’, ‘reproduction’ or ‘nurture of children’ may not be the

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<sup>107</sup> CRC Committee, 2005 (n 40 above) para 644.

<sup>108</sup> CRC Committee, 2005 (as above) para 646.

<sup>109</sup> S Lagoutte & A T Anason, ‘Article 16’ in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement*, Martinus Nijhoff (1999) 338; Art 16 of the UDHR deals with the right to marry and found a family. Art 16(3) reads, ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’

<sup>110</sup> S Lagoutte *et al.*, 1999 (as above) 339.

<sup>111</sup> G Marshall, *The Oxford Dictionary of Sociology*, Oxford University Press (1998) 222.

<sup>112</sup> M C Elmer, *The Sociology of the family*, Ginn & Company (1945) 3.

universal aspects of family. The important point here is that the emotional ties, which Elmer describes as ‘mutual sympathetic understanding and helpfulness,’ is an essential element in ‘family’ and ‘family environment’.<sup>113</sup> The emotional elements based on the function of family provide ‘full mental and emotional life which will enable the child to become adjusted to his social surroundings and responsibilities’.<sup>114</sup> The emphasis on emotional elements can also be found in various legal decisions.

In *Wim Hendriks, Sr v The Netherlands*, the HRC interpreted the term ‘family’ as not solely dependent on the existence of marriage, but rather emphasised the importance of the bond between parents and child.<sup>115</sup> In order to fill the gap in the standard definition of ‘family’ and effectively incorporate different forms of the families, other criteria should also be considered. As the sociological definition requires, the other important element of family is intimacy, the determination of which is more complicated than other objective criteria.<sup>116</sup>

The subjective elements, such as ‘life together’<sup>117</sup> or ‘effectiveness of the relationships’,<sup>118</sup> are difficult to determine, but there are certain objective standards of verification. Nowak extends the understanding of the concept of ‘life together’ to include ‘economic ties or other forms of an intensive, regular relationship.’<sup>119</sup> The importance of an effective family life is also stressed in the Committee’s decision in *A.S v Canada*.<sup>120</sup> The author of the communication argued that the refusal by the Canadian authorities to permit her adoptive daughter to immigrate to Canada violated, *inter alia*, article 23 of the ICCPR, which ensures the protection of the family by the state.<sup>121</sup> The state party argued that in order to prove the breach of article 23 by the

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<sup>113</sup> M C Elmer, 1945 (as above) 7.

<sup>114</sup> M C Elmer, 1945 (as above) 7.

<sup>115</sup> *Wim Hendriks, Sr. v. The Netherlands*, Communication No. 201/1985, U.N. Doc. CCPR/C/33/D/201/1985 (1988) para 10.3.

<sup>116</sup> M Spúlveda *et al.*, 2004 (n 93 above) 340.

<sup>117</sup> M Nowak, *U.N. Covenant on Civil and Political Right: CCPR Commentary*, N.P. Engel Publisher (1993) 405.

<sup>118</sup> S Lagoutte & A T Anason, 1999 (n 109 above) 339.

<sup>119</sup> M Nowak, 1993 (n 117 above) 405.

<sup>120</sup> *A.S v Canada*, Communication No 68/1980: (Canada 31/03/81. CCPR/C/12/D/68/1980) Decision of the Human Rights Committee under the Optional protocol to the ICCPR.

<sup>121</sup> *A.S v Canada* (as above).



state, the applicant must prove that ‘an effective family life between the members of the family’ existed.<sup>122</sup> The Committee agreed with the state party and found no breach of article 23 by Canada as the applicant and the daughter had not lived together as a family and, therefore, the criterion of ‘effective life together’ had not been met.<sup>123</sup> A similar decision was reached in *Balaguer Santacana v Spain*, where the Committee emphasised that although the ‘family’ should be interpreted broadly, an emotional and inter-dependent relationship was necessary to constitute a ‘family’.<sup>124</sup>

The emphasis on the inter-personal relationship can also be found in the decisions of the European Court of Human Rights. The Court interpreted the ‘family life’ in article 8 of the European Convention of Human Rights to mean ‘not confined solely to marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside of the marriage.’<sup>125</sup> Such an interpretation of ‘family life’ is evident in *X, Y and Z v The United Kingdom*, where the Court recalled that the notion of family life goes beyond marriage and that one should consider the degree of ‘commitment’ that can be demonstrated by means other than marriage.<sup>126</sup>

An emphasis on subjective elements, such as emotional ties or the ‘life together’ criterion, has a particular importance when states are implementing the right to alternative care, and special protection and assistance. By emphasizing the emotive criterion of ‘family’ and ‘family environment’, states are prevented from simply putting children into the care of unscreened blood relatives. The study by the Centre for Health and Well-being at Princeton University found that orphaned children are significantly more disadvantaged than non-orphaned children in the same household in respect of school enrolment.<sup>127</sup> It was found that ‘the degree of relatedness between

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<sup>122</sup> As above, para 5.1

<sup>123</sup> As above, para 8.2.

<sup>124</sup> *Balaguer Santacana v Spain*, Communication No 417/1990, UN DOC CCPR/C/51/D/417/1990 (1994) para 10.2.

<sup>125</sup> Cited in S Lagoutte, ‘Surrounding and extending family life: the notion of family life in the case-law of the European Court of Human Rights’ (2003) 21/3 *Mennesker & Rettigheter* 295.

<sup>126</sup> *X, Y and Z v The United Kingdom*, Case no 75/1995/568/667 (1997) para 36; also see *Keegan v Ireland*, Application no 16969/90 (1994) The Court held that the family ties exist beyond the marriage relationship.

<sup>127</sup> A Case *et al.*, *Orphans in Africa: Parental death, poverty and school enrolment (revised version)*, Princeton: Centre for Health and Wellbeing, Princeton University (2004) 1-2.

orphans and their adult caregivers' plays a more important role in explaining this disadvantage than the socio-economic conditions of the household in which the children live.<sup>128</sup> This situation shows the importance of the subjective elements of 'family', which have a serious impact on the quality of care that children receive.

In the following section, based on the discussion on the interpretation of 'family' and 'family environment', the personal and objective scope of the articles, such as subjects of the right to alternative care, and special protection and assistance and underlying principles of alternative care, are analysed.

### 3.3.2 Children covered by the articles

In the drafting stage of the CRC, the term, 'parental care' and 'natural family environment' seem to have been used interchangeably. For instance, the basic working text of article 11(a) as adopted by the 1980 Working Group stated that the right to alternative care, and special protection and assistance, should be provided to 'children who are deprived of parental care'.<sup>129</sup> Article 11(b) obliges the state to provide an 'educational environment' to children who are deprived of their 'natural family environment' rather than 'alternative care' and article 11(c) only lists adoption and foster care. Unless sub-sections to article 11, (a) and (b) are intended to cover different sets of children, the usage of the terms 'parentless' and 'deprived of their natural family environment' under the same article suggests that those two terms were used as being synonymous.

During the working group session, the delegates contended that the phrase 'deprived of parental care' was limited and did not reflect the broader concept of kinship relations present in many different cultures.<sup>130</sup> After considering several suggestions,

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<sup>128</sup> A Case *et al.*, 2004 (as above) 5.

<sup>129</sup> Article 11 of the Draft CRC reads:  
a. A child deprived of parental care shall be entitled to the protection and assistance provided by the state.  
b. The States Parties to the present Convention shall be obliged to provide appropriate educational environment to a child who is deprived of his natural family environment or, on account of his wellbeing, cannot be brought up in such environment.  
c. The States Parties to the present Convention shall undertake measures so as to facilitate adoption of children and create favourable conditions for establishing foster families.

<sup>130</sup> S Detrick, 1992 (n 3 above) 300; for a detailed discussion on the process, see 298-301.

including ‘natural family environment’ and ‘biological family’, the term ‘family environment’ was adopted.<sup>131</sup>

The text adopted by the 1982 working group differentiates between the terms, ‘parentless’ and ‘deprived of their family environment’.<sup>132</sup> The working text of article 10(1) provided that children who are deprived of their family environment would be entitled to special protection and assistance. In the text, the deprivation of the family environment could be either permanent or temporary. The final text of article 10(2) provides alternative family care to children who are ‘parentless’, ‘temporarily or permanently deprived of their family environment’ or ‘who in his best interests cannot be brought up or be allowed to remain in that environment’.<sup>133</sup> Although the intention of the working group was to interpret the term ‘family environment’ to mean something more than ‘parental care’, the wording of the article seems to suggest that the relationship between family environment and parental care was not clearly defined at that stage. The current wording of the article was developed by the 1989 working group. The term ‘parentless’ was dropped and the term ‘children who are deprived of their family environment either permanently or temporarily’ was adopted.<sup>134</sup>

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<sup>131</sup> S Detrick, 1992 (as above).

<sup>132</sup> *Article 20 Children deprived of a family environment for: Legislative History of the Convention on the Rights of the Child (1978-1989)*, UN-SEC-HR/1996/SER.1/Article 20, para 59.

<sup>133</sup> The emphasis is mine. Article 10 of the Draft CRC reads:

1. A child permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance provided by the States.

2. The States Parties to the present Convention shall ensure that a child who is parentless, or who is temporarily deprived of his family environment, or who in his best interests cannot be brought up or be allowed to remain in that environment shall be provided with alternative family care which could include, *inter alia*, adoption, foster placement, or placement in suitable institutions for the care of children. When considering alternative family care for the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious or linguistic background.

Adopted by the Working Group at its ninth session (1987). Sec E/CN.4/1987/25, para 27, cited in S Detrick, 1992 (as above) 304.

<sup>134</sup> The changes in the draft version of article 20 of the CRC were made by the 1989 Working Group include ‘a child who is parentless’ was dropped; *kafalah* was added on the list of possible forms of alternative care and ‘if necessary’ was also added in front of ‘placement in suitable institutions for the care of children’. Also the expression ‘alternative family care’ was changed to ‘alternative care’. S Detrick, 1992 (as above) 304.

Cantwell and Holzscheiter correctly point out that the term ‘family environment’ is broader than ‘parental care’.<sup>135</sup> The role of extended family members or communities other than parents in child rearing has been recognised throughout the CRC. For instance, article 5 recognises responsibilities, rights and duties of extended family member or community ‘as provided by local custom’ in relation to care of a child. Article 18(1) acknowledges the primary responsibility of ‘parents or legal guardians’ in the upbringing of the child and article 18(2) obliges states to render appropriate assistance to parents or others who are responsible for the child in their performance to child rearing responsibilities. Article 27 also requires states to provide appropriate support to ‘parents and others responsible for the child’ to realise the right to an ‘adequate standard of living’. Such inclusive wording indicates that the CRC acknowledges ‘the wide variety of kinship and community arrangements within which children are brought up around the world.’<sup>136</sup>

Considering the intention of the drafters to avoid restricting the concept of ‘family’ to ‘parents’, Cantwell and Holzscheiter argue that states do not have an obligation under article 20 to ensure alternative care for a child who is not in the care of his or her parents but is being looked after by a member of extended family ‘whether spontaneously or at the behest of the parents.’<sup>137</sup> However, it should be noted that the ‘family environment’ referred to in article 20(2) of the CRC is ‘his or her family environment’, which is different from ‘a family environment’.<sup>138</sup> The distinction is extremely important as it highlights the contents or emotional or subjective elements of ‘family environment’ and not only the structural element of the family.

In chapter two, it was highlighted that children who are deprived of their family environment have primarily been cared for informally by extended family members. Although a broader understanding of ‘family’ and ‘family environment’ is necessary to accommodate different cultural connotations attached to the term ‘family’, it is

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<sup>135</sup> N Cantwell & A Holzscheiter, *A commentary on the United Nations Convention on the Rights of the Child article 20: children deprived of their family environment*, Martinus Nijhoff (2008) para 59-60.

<sup>136</sup> R Hodgkin & P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2007) 86.

<sup>137</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 70.

<sup>138</sup> As above, para 58. In article 25(1) of the ACRWC, it is ‘his family environment’.

important to acknowledge the potential vulnerability of children in informal foster care provided by a ‘wider circle of family’ with whom the child may not have a strong emotional attachment. Therefore, rather than automatically excluding children who are cared for by their extended families from benefiting from the right to special protection and assistance, the term ‘family environment’ should be interpreted on a case-by-case basis to determine whether the ‘family environment’ fully constitutes ‘his or her family environment’ and not just ‘any’ family environment.<sup>139</sup>

The wording of article 25 of the ACRWC is similar to that of article 20 of the CRC, but there are a few notable differences, which makes the scope of article 25 of the ACRWC broader than that of article 20 of the CRC. The ACRWC differentiates between a ‘child who is parentless’ and a child ‘who is deprived of his or her family environment’. The inclusion of ‘children who are parentless’ in article 25 of the ACRWC also indicates that not all children who are parentless are considered to be deprived of their family environment under the ACRWC. As the *travaux préparatoires* on the ACRWC is unavailable, it is hard to discern the reasons for differentiating between the two categories of children. ‘Children who are parentless’ may have been an unintentional insertion by the drafters of the ACRWC. However, due to the inclusion, article 25 of the ACRWC is applicable to children who are parentless. They do not have to be deprived of ‘their family environment’, which may be interpreted as *a possibility* of being cared for by the members of their extended family. In many African societies, children are at an unprecedented scale and speed becoming parentless due to AIDS-related illnesses.<sup>140</sup> Extended families are becoming increasingly unable and unwilling to care for children who are orphaned as the HIV epidemic depletes resources of communities and that of affected families.<sup>141</sup> The growing number of street children and unsupported child-headed households shows that securing informal family care by relatives is increasingly problematic.<sup>142</sup>

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<sup>139</sup> The concepts such as ‘family’ and ‘family environment’ are discussed in the following section.

<sup>140</sup> H H Semkiwa *et al.*, *HIV/AIDS and child labour in the United Republic of Tanzania : a rapid assessment*, Report No 3, International Labour Organisation (2003) 7.

<sup>141</sup> K Subbarao & D Coury, *Reaching out to Africa’s orphans: a framework for public action*, African Regional Human Development Series, World Bank (2004) 7; S Beckmann & P Rai, *HIV/AIDS, work and development in the United Republic of Tanzania*, ILO (2004) 10.

<sup>142</sup> K Subbarao & D Coury, 2004 (as above) 7.

Nevertheless, states have been slow to recognise, and respond to, the challenges children and over-saturated extended families are facing.<sup>143</sup> As mentioned before, it may be partly due to the belief in traditional care arrangements, which did not require government intervention.<sup>144</sup> Under the traditional arrangements, children who were parentless, more often than not, had family members to look after them and the need for state intervention in the matter of informal fostering and adoption had been minimal. Differentiating between children who are parentless and children who are deprived of their family environment automatically qualifies all children who have lost their parents, regardless of the existence of traceable relatives, to be eligible for special protection and assistance.

Furthermore, including children who are ‘parentless’ means that even though such children are being cared for by their extended family, the right to special protection and assistance is still applicable to those children by virtue of being deprived of their *parental care*. It gives a stronger protection to children who are deprived of their parental care in comparison to the CRC. The protection of children who are deprived of ‘parental care’ regardless of the informal care provided by extended family members is extremely important. As pointed out earlier, in some cases, children in informal care placements face discrimination, maltreatment and abuses at the hands of caregivers. Children’s vulnerability to abuses and maltreatment may increase due to the mere fact that they lack ‘parental care’.

### **3.3.3 The relationship between ‘special protection and assistance’ and ‘alternative care’**

One of the ambiguous aspects of the right to alternative care, and special protection and assistance, is the relationship between the concepts ‘special protection and assistance’ and ‘alternative care’. In this regard, article 20(1) of the CRC and article 25(1) of the ACRWC are almost identical. Both articles establish the responsibility of states to provide special protection and assistance to children who are, either temporarily or permanently, deprived of their family environment. Article 25(2)(a) of

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<sup>143</sup> *Children at the centre: A guide to supporting community groups caring for vulnerable children*, Save the Children-UK (2007) 1.

<sup>144</sup> H H Semkiwa *et al.*, 2003 (n 140 above) 7.

the ACRWC and article 20(2) of the CRC further state, again in similar fashion, that states have the responsibility to provide alternative care to such children. However, from the wording of the provisions, it is not clear how the term ‘special protection and assistance’ should be interpreted, or what the relationship is between the terms ‘special protection and assistance’ and ‘alternative care’. For example, two questions may be posed: Is alternative care *one form* of special protection and assistance or is it *a mechanism* through which special protection and assistance should be provided? Are those terms synonymous? Neither the *travaux préparatoires* nor commentaries on article 20 of the CRC offer clear guidance on the issue. Detrick pointed out that the steps to be taken by state parties for the implementation of the right to special protection and assistance are not specific in article 20, apart from obligations relating to providing appropriate alternative care.<sup>145</sup>

One way of understanding the relationship between the two concepts is to examine the CRC reporting guidelines to see if state parties have separate obligations under articles 20(1) and 20(2) of the CRC. The Committee developed guidelines to assist state parties when writing periodic reports, which state parties are required to submit to the Committee under article 44 of the CRC.<sup>146</sup> Under the section on ‘family environment and alternative care’,<sup>147</sup> state parties are required to provide information on nine related issue areas: parental guidance (article 5), parental responsibilities (article 18), separation from parents (article 9), family reunification (article 10), recovery of maintenance for the child (article 27), children deprived of their family environment (article 20), adoption (article 21), periodic review of placement (article 25), and abuse and neglect including physical and psychological recovery and social reintegration (articles 19 and 39).<sup>148</sup> In the section on ‘children deprived of their family environment’ state parties are required to provide information on five broad areas: 1) measures implemented to provide special protection and assistance; 2) measures implemented to provide alternative care to children who are deprived of

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<sup>145</sup> S Detrick, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff (1999) 335.

<sup>146</sup> Under art 44(1) of the CRC, state parties are required to submit reports on the implementation of the Convention within 2 years of the entry into force and thereafter every five years.

<sup>147</sup> General guidelines for periodic reports: 20/11/96. CRC/C/58 (Basic reference document) adopted by the Committee at its 343<sup>rd</sup> meeting (thirteenth session) on 11 Oct 1996, Sec 5.

<sup>148</sup> CRC General guidelines (as above) para 27.

their family environment; 3) measures to ensure that institutionalisation is used only if it is necessary; 4) monitoring of the situation of children placed in alternative care; and 5) respect for the guiding principles of the Convention when placing children in alternative care.<sup>149</sup>

The reporting guidelines differentiate between the measures to be adopted to ensure ‘special protection and assistance’ and the measures to be adopted to ensure ‘alternative care’. Two separate requirements seem to suggest that ‘special protection and assistance’ is not synonymous with ‘alternative care’. Furthermore, the CRC Committee recommended that ‘States Parties make every effort to implement fully the provisions of article 20(3) of the Convention’ *and* that ‘special protection’ be provided to children deprived of a family environment to include providing placements in suitable families, including child-headed families, foster families and adoptive families, and providing appropriate support and supervision to such families.<sup>150</sup> From these recommendations by the CRC Committee, it is clear that state obligation to provide ‘special protection’ is distinct from the state obligation to provide care in the form of foster care, adoption and *kafalah* and, as a last resort, institutionalised care under article 20(3) of the CRC. Therefore, ‘special protection and assistance’ should be interpreted more broadly and separately from ‘alternative care’.

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<sup>149</sup> CRC General guidelines (n 147 above) para 80 requires state parties to submit information on measures adopted to ensure

special protection and assistance to the child who is temporarily or permanently deprived of his or her family environment or in whose best interests cannot be allowed to remain in that environment;

alternative care for such a child, specifying the available forms of such care (*inter alia* foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of the child);

that the placement of such a child in suitable institutions will only be used if really necessary;

Monitoring of the situation of children placed in alternative care;

respect for the general principles of the Convention, namely non-discrimination, the best interests of the child, respect for the views of the child and the right to life, survival and development to the maximum extent.

<sup>150</sup> CRC Day of General Discussion: State violence against children, excerpted from CRC/C/97 (22 September, 2000) para 21; Also noted in ‘Article 20 children deprived of their family environment’, R Hodgkin & P Newell, 2002 (n 136 above) 282 (The emphasis is mine).



Understanding the obligation to provide ‘special protection and assistance’ differently from the obligation to provide ‘alternative care’ broadens the scope of these provisions. Children who are deprived of their family environment are not only entitled to alternative care but also special protection and assistance. The next questions would be: How should the right to ‘special protection and assistance’ be understood and interpreted? What are the state obligations under the right to special protection and assistance? To understand the obligations under the right to special protection and assistance, it is useful to start with the purpose of the right.

### **3.3.4 Purpose and scope of ‘special protection and assistance’**

The concepts of ‘special’ protection’, ‘special assistance’, or ‘special care’ have been used in various human rights texts. For instance, article 25 of the UDHR grants ‘special care and assistance’ to motherhood and childhood. Article 10 of the ICESCR provides mothers with special protection ‘during a reasonable period before and after childbirth’. Also, a number of African states protect children’s right to special protection and assistance in their constitutions. For instance, the Constitution of Cape Verde provides for the right to special protection to ill children, children who are orphaned or deprived of balanced family environment.<sup>151</sup> The Constitution of São Tomé and Príncipe gives young workers ‘special protection in order to render effective their economic social and cultural rights.’<sup>152</sup> In the CRC and the ACRWC, the wording of ‘special protection’ has been used, apart from in relation to children who are deprived of their family environment, in article 23(1) of the CRC, which recognises the right of children living with disabilities to special care and article 13(1) of the ACRWC, which provides ‘special measure of protection’ to children living with disabilities.

It seems clear that the right to ‘special protection’ is granted to children who are considered to be in a relatively more vulnerable situation compared to other children

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<sup>151</sup> Art 73(2) of the Constitution of Cape Verde, available at: [http://www.chr.up.ac.za/hr\\_docs/docs\\_country.html](http://www.chr.up.ac.za/hr_docs/docs_country.html) [accessed: 17 October 2009].

<sup>152</sup> Art 73(2) of the Constitution of Cape Verde & art 52 of the Constitution of São Tomé and Príncipe. The Constitutions of Burundi, Swaziland and Rwanda also mention special measures of protection. Constitutions are available at: [http://www.chr.up.ac.za/hr\\_docs/docs\\_country.html](http://www.chr.up.ac.za/hr_docs/docs_country.html) [accessed: 17 October 2009].

in general, such as young workers, children who are ill or children who are orphaned and have no adult caregiver. Their particular vulnerability requires ‘special protection and assistance’ in addition to their general need for protection. In a broad sense, the purpose of the right to special protection and assistance is to realise a full range of rights of children who are in particularly vulnerable situations by providing extraordinary measures and levels of protection and assistance.

An examination of the general comments on the above international provisions supports the above interpretation of the term, ‘special protection’. In the General Comment by the HRC on article 24 concerning children’s right to protection, the Committee stated that although article 24 of the ICCPR does not use the word, ‘special’, state parties are obliged to provide information on the measures taken to ensure that children enjoy their right to ‘special protection’.<sup>153</sup> The HRC categorically states that all civil rights enunciated in the Covenant are applicable to children. However, under article 24, state parties have an obligation to provide ‘greater protection to children than adults’ on the basis that children are relatively more vulnerable than adults due to their status as minors.<sup>154</sup>

A similar usage of the concept of ‘special protection and assistance’ can be found in article 23 of the CRC, dealing with children living with disabilities. Quoting article 23(1), the CRC Committee stated that the leading principle for the implementation of the Convention with respect to children with disabilities is the ‘enjoyment of a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.’<sup>155</sup> All the measures taken by states should aim towards realising this leading principle.<sup>156</sup> States should implement special measures of care to enable children with disabilities to enjoy conventional rights without discrimination. The Committee interpreted the state obligation to provide special protection under article 23(2) broadly, as including not only children with disabilities

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<sup>153</sup> HRC, General Comment No 17: Article 24 Rights of the child (07/04/89) para 2.

<sup>154</sup> HRC, General Comment No 17 (as above) para 2.

<sup>155</sup> CRC, General Comment No 9: The rights of the children with disabilities (2006) para 11.

<sup>156</sup> CRC, General Comment No 9 (as above) para 11.

but also the parents or others who are caring for the children in the scope of state responsibility.<sup>157</sup>

In other words, states do not only have an obligation to implement international treaty rights in general, but they also have an obligation to take ‘special measures’ to ensure that children with disabilities enjoy a full range of rights without discrimination. To borrow Pare’s words

The rights of vulnerable groups to special protection and non-discrimination ensure that they enjoy certain equality with the rest of a country’s population.<sup>158</sup>

The analysis of the General Comments seems to suggest that there are three layers to state responsibility in the realisation of human rights.

The first layer is a general responsibility of states to implement measures to protect human rights for all. The UDHR, ICCPR and ICESCR are instruments that provide and protect the human rights of all.

The second layer addresses the general vulnerability of certain groups of the population, such as women, children, migrant workers and refugees. The creation of international human rights instruments that are specific to certain group, such as the CRC, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or the Convention on the Rights of Persons with Disabilities, is a measure to provide further protection to the groups that are considered generally more vulnerable than others.

Taking children as an example, children’s status as minors makes them comparatively more vulnerable than adults. In order to address their general vulnerability, separate

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<sup>157</sup> CRC General Comment No 9 (as above) para 13 reads:

In order to meet the requirements of article 23 it is necessary that States parties develop and effectively implement a comprehensive policy by means of a plan of action which not only aims at the full enjoyment of the rights enshrined in the Convention without discrimination but which also ensures that a child with disability and her or his parents and/or others caring for the child do receive the special care and assistance they are entitled to under the Convention.

<sup>158</sup> M Pare, ‘Why have street children disappeared? - The role of international human rights law in protecting vulnerable groups’ (2003) 11 *International Journal of Children’s Rights* 10.

instruments are developed, which require state to implement measures that are specifically designed to realise children's rights. Such measure may be different from the measures provided in the first instance because children's status as minors requires a different level and type of protection. This point can be illustrated by the right to work. Article 6 of the ICESCR protects the right to work for everyone and article 7 provides for favourable working conditions. State responsibilities under these rights are general. Article 32 of the CRC, while it permits children to work, sets out stronger measures of protection including age limitations and appropriate regulations of working hours and conditions. It further urges states to establish penalties and other sanctions to enforce the article.

The third and final layer of the responsibility aims to protect the particularly 'vulnerable or marginalised groups' within generally vulnerable groups. Children living with disabilities present a good example. Children living with disabilities may face general vulnerability attached to being minor as well as a particular vulnerability attached to their disabilities. States have an obligation to enable such groups to enjoy a full range of rights despite their special vulnerabilities. For instance, article 28 of the CRC protects the right to education of every child. In addition to article 28, article 23, which protects the rights to children living with disabilities, recognises the special needs of children living with disabilities and urges states to provide and implement measures designed to ensure that children with disabilities have 'effective access to and receive education'.<sup>159</sup>

The purpose of providing alternative care goes beyond simply providing each child with a place to stay. It is important to note that 'alternative care' is provided to children who are deprived of their family care as 'substitute care'. It does not mean a secondary or lesser level of care. The 'care' provided to children, although 'alternative', means that persons other than the 'family' should perform as far as possible the same function as the care provided by children's natural families. In other words, alternative care should enable children to fully realise their rights and potential, and prepare them for a smooth transition to adulthood. In the same way, 'special protection and assistance' should provide support and protection through

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<sup>159</sup> Art 23(3) of the CRC.

extraordinary measures to ensure that children in particularly vulnerable situations may fully realise their rights and potential. For instance, a regular monitoring and evaluation of alternative care placements is one of the ‘special’ protection measures to ensure children are adequately cared for in out-of-home care placements. The measures of special protection and assistance cannot be applied singularly. The level of protection and assistance needed for children who are in kinship care, foster care, institutionalised care or child-headed household is different. Measures of special protection and assistance should be tailored individually to meet the needs of each child in different types of alternative care.

### 3.3.5 Alternative ‘family care’ or ‘alternative care’?

In relation to the type of alternative care, while the CRC obliges states to provide ‘alternative care’ to children deprived of their family environment, the ACRWC goes further and obliges states to provide ‘alternative *family* care.’<sup>160</sup> The expression ‘alternative family care’ is repeated in article 25(3) of the ACRWC. Although the linguistic difference between the two provisions is small, its practical implication could be significant. The requirement to provide ‘alternative family care’ could be interpreted in two ways.

Firstly, it could mean that all forms of alternative care provided under the ACRWC should resemble ‘family environment’. If the interpretation is accepted, the choices of formal alternative care, which states can provide under the ACRWC, would be limited to foster care and adoption. Pointing out the replacement of the term ‘solution’ in article 20(3) of the CRC with ‘alternative family care’ in article 25(3) of the ACRWC, Cantwell and Holzscheiter argued that under the ACRWC, a child deprived of their family environment should be placed in alternative *family* care rather than in some form of institutionalised care.<sup>161</sup> However, considering that institutionalised care is listed as one of the forms of alternative care in article 25(2), such strict interpretation is not contextual.

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<sup>160</sup> The emphasis is mine.

<sup>161</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 23.

Secondly, ‘alternative family care’ could simply be interpreted as requiring state parties to seek as far as possible alternative care that resembles ‘family care’ before placing a child in institutional care. Although this is a feasible interpretation, the ACRWC does not explicitly limit institutionalised care as being an option of last resort. Ironically, despite its emphasis on the ‘alternative family care’, article 25 includes a ‘placement in the suitable institution’ as a possible form of ‘alternative family care’ without qualifying it as a last resort. Furthermore, unlike the CRC, which recommends the placement in a suitable institution only ‘if [it is] necessary’, article 25 of the ACRWC does not stipulate such condition. Nevertheless, the absence of such a stipulation could be an unintentional oversight rather than an intentional omission.

Considering the possible interpretations of ‘alternative family care’, the obligation to provide ‘alternative family care’ under the ACRWC seems to require states to provide alternative care that resembles family care as far as possible with a view to gradually eradicate a non-family type of alternative care, such as institutionalised care.

### **3.3.6 A rights-based approach and fundamental principles**

A rights-based approach to children who are deprived of their family environment has three broad implications. Firstly, it means children who are deprived of their family environment have the right to alternative care, and special protection and assistance. States have legal obligations to provide appropriate and adequate measures to enable children to enjoy the full range of rights even if they lack parental and family care. Providing support and protection to those children is not a charitable action but a legal obligation.

Secondly, the rights-based approach helps to define the standards and types of state obligation, thereby preventing simply placing children in placements of care or enforcing uniform measures of protection and assistance that do not fulfil the purpose of the right to alternative care, and special protection and assistance. States should implement effective measures to monitor and regulate alternative care placements or other measures of special care and protection to ensure that children’s rights are fully respected and fulfilled. It also requires detailed examination of children’s needs on an

individual basis and finding a solution that reflects their best interests. The UN Guidelines for the Alternative Care of Children strongly emphasise that any actions taken regarding children who are deprived of their family environment should be tailored to meet the individual needs of children.<sup>162</sup>

Finally, applying a rights-based approach means respecting children's rights during all stages of providing alternative care, and special protection and assistance. From making a decision whether children are in need of alternative care, and special protection and assistance, during assessment and determination on what type of intervention is necessary, and to the final implementation stage, children's rights should be the fundamental basis. Also importantly, rights of children are in alternative care and receiving special protection and assistance should be fully respected.

In section 3.3.4, it was observed that the purpose of the right to special protection and assistance to children who are deprived of their family environment goes beyond providing alternative accommodation. It is to ensure that through the special protection and assistance, all other rights that are due to the children are fulfilled. To do so, it is imperative that the alternative care placement process is firmly based on the principles of the rights-based approach. In the following section, six pertinent principles of a rights-based approach are identified and explored. Those six principles are: 1) the respect for children's right to grow up with their parents; 2) best interests of the child; 3) equality and non-discrimination; 4) survival and development; 5) child participation and empowerment; and 6) monitoring and evaluation.

(i) *Respect for children's right to grow up with their parents*

One of the cardinal principles in relation to placing children in out-of-home care is that alternative care should be used only when it is absolutely necessary.<sup>163</sup> The recognition and emphasis placed on the family as the natural environment for the upbringing and development of children has been highlighted in various instruments,

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<sup>162</sup> Para 56 of the UN Guidelines for the Alternative Care of Children.

<sup>163</sup> See basic principles of the UN Guidelines for the Alternative Care; also see, basic principles of the Council of Europe Recommendations on the rights of children living in residential institutions.

including the CRC, the ACRWC, and the UN Guidelines for the Alternative Care.<sup>164</sup> In the preamble of the CRC and the ACRWC, it is recognised that ‘full and harmonious development of his or her personality, the child should grow up in a family environment, in an atmosphere of happiness, love and understanding’.<sup>165</sup> Both instruments give parents or others who are legally responsible for the child, the primary responsibility of ‘upbringing and development of the child.’<sup>166</sup> The primary responsibility of the states is to assist the parents and family to adequately care for their children. The responsibility to assist and protect the family is required not only under the CRC and ACRWC, but article 10 of the ICESCR also requires that states to provide ‘the widest possible protect and assistance’ to family especially ‘while it is responsible for care and education of dependent children.’<sup>167</sup> The CRC Committee pointed out that impoverished children over-represent children in alternative care in both developing and developed world, and required states to provide appropriate financial assistance, so that poverty alone should not be a reason for separating children from their parents.<sup>168</sup>

Children’s rights to be with their parents can only be compromised when the separation is in the best interests of the child, for instance a case where children are abused and maltreated by their parents despite appropriate state support to the parents. The general principle that children may only be removed from their family environment when that is in their best interests is also implicitly expressed in articles 20 of the CRC and the 25 of the ACRWC. Alternative care is applicable to children, who are deprived of their family environment, or who in their *best interests* cannot be allowed to remain in that environment. It is clear that the removal of the child is solely based on the consideration of their best interests. The fact that the sanctity of the family can only be eroded by the best interests of the child suggests the centrality provided to the elusive concept of the ‘best interests of the child’, to which I now turn.

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<sup>164</sup> For instance, preamble of the CRC recognises the family as a fundamental unit of society and a natural environment in which children should grow up and urges states to provide support to enable families to fulfil their responsibilities in the community.

<sup>165</sup> The wording of the ACRWC and CRC is similar.

<sup>166</sup> Art 18(1) of the CRC & Art 20(1) of the ACRWC.

<sup>167</sup> Art 10(1) of the ICESCR.

<sup>168</sup> CRC Committee, 2005 (n 40 above) para 658.



(ii) *Best interests of the child*

The concept of the best interests of the child is one of the most elusive, yet fundamental principles of children's rights.<sup>169</sup> The principle of the best interests of the child has been reflected in international human rights instruments since the 1959 Declaration of the Rights of the Child.<sup>170</sup> Principle 2 of the 1959 Declaration establishes that the best interests of the child should be 'the paramount consideration'. Later, the principle, albeit in a diluted form, was expressed in article 3(1) of the CRC and 4(1) of the ACRWC.<sup>171</sup> Children's right to have their best interests considered as a primary consideration is an underlying value of the CRC and ACRWC. It is also an umbrella right, providing a basis on which all other rights enshrined in the CRC and ACRWC should be interpreted and implemented.

Some scholars argue that the ACRWC imposes a higher burden to member states as it requires that the best interests of the child be *the* primary consideration rather than *a* primary consideration.<sup>172</sup> Furthermore, under article 4(1) of the ACRWC, the obligation to make the best interests of the child the primary consideration goes to 'any person or authority', which is broader than the CRC.<sup>173</sup> Nevertheless, both articles cover not only state-initiated actions but all actions concerning children.<sup>174</sup> Therefore, the articles are applicable not only to state provided-services, facilities and institutions, but also to all those responsible for the care and protection of children. The significance of the wide application is that, in many African states, a majority of

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<sup>169</sup> D Archard & M Skivenes, 'Balancing a child's best interest and a child's view' (2009) 17 *International Journal of Children's Rights* 1.

<sup>170</sup> P Alston, 'The best interest principle: Reconciliation of culture and human rights' (1994) 8 *International Journal of Law and the Family* 3.

<sup>171</sup> S Parker points out that the formulation of 'a primary consideration' in article 3 of the CRC is considerably weaker than 'the paramount consideration' in principle 2 of the Declaration. See S Parker, 'The best interests of the child: Principles and problems' 8 (1994) *International Journal of Law and the Family* 28.

<sup>172</sup> See Sec 3.2.2(iii) for detailed discussion on the issue.

<sup>173</sup> M Freeman, *A commentary on the United Nations Convention on the Rights of the Child, Article 3: the best interests of the child*, Martinus Nijhoff Publishers, London (2007) 21.

<sup>174</sup> R Hodgkin & P Newwell, 2002 (n 136 above) 42.

facilities and institutions providing services to children are not state initiated but are initiated by NGOs or individuals.<sup>175</sup>

How does the principle of the best interests of the child influence decisions in matters regarding children in need of alternative care? In order to answer the question, the right's formulation in relevant articles needs to be examined.

In article 20 of the CRC, the best interests of the child is mentioned only once in article 20(1). Under article 20(1), the best interests of the child should be considered when determining whether a child should be removed from his or her family environment. Cantwell and Holzscheiter pointed out that, unlike article 20 of the CRC, the best interest of the child is given more prominence in article 25 of the ACRWC. Article 25 of the ACRWC makes it an explicit requirement to consider the best interests of the child when considering alternative family care for the child as well as taking a decision to remove a child from his or her family environment.<sup>176</sup> Article 20(3) of the CRC does not contain the requirement to consider the best interests of the child while considering 'solutions'. It only requires states to consider the 'desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.' However, article 25(3) of the ACRWC includes 'the best interests of the child' to be considered when alternative family care is sought. It could be interpreted to mean that if it is in the best interests of the child, 'the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background' could be overruled. For instance, in cases where it is deemed to be in the best interests of the child to be provided with a permanent family care, an option of inter-country adoption may be considered more suitable than other non-permanent or non-family type national solutions under the ACRWC.

Freeman explains that the best interests of the child could be divided into two categories: current interests and future-oriented interests.<sup>177</sup> The current interests are

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<sup>175</sup> "Malawi: Illegal orphanages mushroom", *IRIN News*, available at: <http://www.irinnews.org/report.aspx?reportid=61374> [accessed: 01 March 2009], "Mozambique: Orphans getting caught in HIV cycle", *IRIN News*, available at: <http://www.irinnews.org/report.aspx?ReportId=82033> [accessed: 10 March 2009].

<sup>176</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 23.

<sup>177</sup> M Freeman, 2007 (n 172 above) 3.

often formulated in relation to experiential considerations, while future-oriented interests focus on ‘developmental considerations.’<sup>178</sup> When determining whether a child should be removed from his or her family environment, both the current interests of the child, for instance, the need for emotional security of being within their own family environment, and the future-oriented interests, such as the opportunities for development, should be taken into account. However, the mere fact that either set of interests is compromised should not be an automatic reason for the removal of a child from his or her own family environment. As discussed above, another fundamental principle with regard to placing children in alternative care is that the child’s right to parental care should be fully respected. If such compromise in either set of interests of the child can be corrected through appropriate state support and assistance to the parents, legal guardians or others who are caring for the child, the maximum efforts should be made to improving the quality of existing family care.

For example, poverty may be one of the major factors that could hinder the full realisation of the best interests of the child. Parents living in poverty may be unable to provide adequate emotional and social support to children due to the socio-economic challenges they face. Their economic difficulties may hinder children from accessing social services, such as health care or education, which inevitably have detrimental effects on their future interests. As the CRC Committee pointed out, parents living in poverty are discouraged from approaching authorities for help, because they fear that their children might be taken away and,<sup>179</sup> as mentioned in the previous section, children in poverty are overrepresented among the children who are separated from their parents both in the developing and developed world.<sup>180</sup> However, poverty and other material deprivation alone should not be the reason for separating children from their parents.<sup>181</sup> The Committee recommended that upholding article 27 of the CRC pertaining to an adequate standard of living, states parties should ensure that poverty as such should not be used as a justification to place children in out-of-home care.<sup>182</sup>

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<sup>178</sup> M Freeman, 2007 (as above) 3.

<sup>179</sup> CRC Committee, 2005 (n 40 above) para 658.

<sup>180</sup> CRC Committee, 2005 (as above) para 658.

<sup>181</sup> Paragraph 14 of the UN Guidelines for the Alternative Care of Children.

<sup>182</sup> CRC Committee, 2005 (n 40 above) para 659.

The determining the best interests of the child is often ‘indeterminate and speculative’ and requires ‘highly individualised choice between alternatives.’<sup>183</sup> The determination of the best interests of the child during the alternative care placement should be done on a case by case basis. The determination of the best interests of the child should also include identifying the obstacles to achieve the best interests of the child and the ways to correct such obstacles whether it is to provide support and assistance to the parents or care givers of the children or removing the children from their family environment.

(iii) *Equality and non-discrimination*

The right to non-discrimination in relation to the right to alternative care, and special protection and assistance, is two-fold. Firstly, children should not be discriminated against during the process of placement. Decisions to place children in a particular alternative care placement should be based on the best interests of the child without any political, religious and ideological pressure or prejudice.<sup>184</sup> Secondly, the right to non-discrimination of children in alternative placement should be fully respected and realised. For instance, Cantwell and Holzscheiter noted that children in institutionalised care placement often face discrimination and stigmatisation due to the negative connotation attached to such care. Children in any alternative care placements should not be denied access to appropriate education, health care or opportunities to practice their own culture and religion. Van Bueren argued that the principle of non-discrimination does not mean equal treatment to everyone.<sup>185</sup> She argues that states are under an obligation to provide special protection and assistance to vulnerable groups to ensure ‘equality’.<sup>186</sup>

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<sup>183</sup> N Thomas & C O’Kane, ‘When children’s wishes and feelings clash with their best interests’ (1998) 6 *International Journal of Children’s Rights* 138.

<sup>184</sup> B Gudbrandsson, ‘Rights of children at risk and in care’, Conference paper delivered at the Conference of European Ministers Responsible for Family Affairs, ‘Changes in Parenting: Children Today, Parents Tomorrow’, XXVIIIth Session (16-17 May 2006), Lisbon, Portugal, 22.

<sup>185</sup> G Van Bueren, ‘Of floors and ceilings: Minimum core obligations and children’ in D Brand & S Russell (eds) *Exploring the core contents of socio-economic rights: South African and international perspectives*, Protea Book House, Pretoria (2002) 188.

<sup>186</sup> G Van Bueren, 2002 (as above) 188.

(iv) *Survival and development*

Article 6 of the CRC and article 5 of the ACRWC protect children's right to life, survival and development. The concept of survival and development to the maximum extent possible is an ultimate goal of the CRC and ACRWC. All the articles in children's rights instruments are directly or indirectly geared towards realising the right to life, survival and development.

The right to survival is a fundamental right, which can be also found in other human rights instruments. Article 3 of the UDHR proclaims that 'everyone has the right to life, liberty and security of the person' and article 6 of the ICCPR protects the right to life of every human being and prohibits arbitrary deprivation of the right. According to Pais, states should take positive as well as negative measures to promote and protect children's right to life. Positive measures include 'diminishing infant and child mortality, combating diseases and rehabilitating health, providing adequate nutritious foods and clean drinking water.'<sup>187</sup> Furthermore, states should refrain from doing any actions that may intentionally deprive life, such as pronouncing the 'death penalty, extra-legal, arbitrary or summary executions or any situation of enforced disappearance.'<sup>188</sup>

The important aspect of the right to survival and development is that it goes beyond 'surviving.' Children have the right to 'development' as well as to 'survive'. Under the right to life, survival and development, states are under obligations to ensure that children grow up 'in a healthy and protective manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.'<sup>189</sup> The concept of 'development' in the article can be linked to article 29(1) of the CRC, which provides for the aims of education.<sup>190</sup> Under article 29(1) of the CRC, the aims of education are: 1) to develop

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<sup>187</sup> M S Pais, 'Convention on the Rights of the Child' in *Manual on human rights reporting: Under six major international human rights instruments*, OHCHR, Geneva (1997) 425.

<sup>188</sup> M S Pais, 1997 (as above) 425.

<sup>189</sup> M Nowak, *A commentary on the United Nations Convention on the Rights and the Child, Article 6: The right to life, survival and development*, Martinus Nijhoff Publishers (2005) 2.

<sup>190</sup> In the case of the ACRWC, article 11(2) provides for the aims of education.

the child's personality, talents and mental and physical abilities to their fullest potential; 2) to develop respect for human rights and fundamental freedoms; 3) to develop the child's own cultural identity, language and values; 4) to prepare the child for responsible life in a free society; and 5) to develop respect for the natural environment.

As Nowak noted, due to the fundamental nature of the right, the interpretation of article 6 'takes into account all the other human rights enshrined in the Convention.'<sup>191</sup> However, the rights that have particular relevance to the development of children can be summarised as the right to health (article 24), education (article 28), an adequate standard of living (article 27) and rest, leisure and play (article 31).<sup>192</sup>

The contents of the right to survival and development are particularly important in implementation of the right to alternative care, and special protection and assistance. One of the fundamental aims of providing alternative care, and special protection and assistance to children who are deprived of their family environment is to realise their right to survival and development outside of their own family environment. It is also a check list to determine the appropriate standard of alternative care and special protection and assistance. Nowak summed up the nature of state responsibility with regards to the right to life, survival and development by arguing that states have the general duty to create an environment conducive to realise the right to life, survival and development.<sup>193</sup> Apart from this general obligation, states have specific obligation to fulfil the right, firstly by '*respecting and facilitating* the responsibility of parents' by providing appropriate assistance.<sup>194</sup> As the degree of children's vulnerability increases, for instance, when children are deprived of their family environment, states obligation to *fulfil* becomes more important and states assume an active and direct responsibility to fulfil the right to life, survival and development.<sup>195</sup>

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<sup>191</sup> M Nowak, 2005 (as above) 2.

<sup>192</sup> M Nowak, 2005 (as above) 2.

<sup>193</sup> M Nowak, 2005 (as above) 38.

<sup>194</sup> M Nowak, 2005 (as above) 38 (The emphasis is mine).

<sup>195</sup> M Nowak, 2005 (as above) 38.

(v) *Child participation and empowerment*

Children's right to be heard is protected under article 12 of the CRC and article 4(2) of the ACRWC. The right to be heard and participation is one of the key rights of the children's rights instruments and one of the much emphasized principles in relation to alternative care placement. Children's right to participate in alternative care arrangements should be respected in all stages, including the determination of appropriate alternative care placement as well as in alternative care placements. For instance, article 4(d) of the 1993 Hague Convention on Inter-country Adoption specifically requires that children's opinions should be fully respected during the adoption process and that children's consent, where necessary, should be sought. The Council of Europe Recommendation on the rights of children in institutionalised care stipulates that children should be able to participate in decision-making processes concerning them and the living conditions in the institution.

State obligations under the right to be heard and participation go beyond providing opportunities for children to express their views. These obligations involve creating an environment where children can meaningfully participate in decision-making process. To do so, children should be provided with information and unbiased guidance on possible options and the foreseeable consequences arising therefrom.<sup>196</sup> Paragraph 6 of the 2009 UN Guidelines for the Alternative Care requires that children's view should be respected fully and duly taken into account in accordance with their evolving capacities. Furthermore, in order to enable children to make an informed decision, full information should be available for them in their preferred language.<sup>197</sup> It does not mean that children's views should be automatically endorsed, but rather that children's views should be given a due consideration and genuinely be able 'to influence the decisions to be taken'.<sup>198</sup> However, the CRC Committee was concerned that children's right to be heard and participate continues to be hampered by socio-political as well as economical barriers.<sup>199</sup> It was particularly concerned over

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<sup>196</sup> M S Pais, 1997 (n 187 above) 427.

<sup>197</sup> Para 6 of the UN Guidelines for the Alternative Care of Children.

<sup>198</sup> M S Pais, 1997 (n 187 above) 428.

<sup>199</sup> CRC Committee, General Comment No. 12 The right of the child to be heard, (CRC/C/GC/12) 20 July 2009, para 4.

the right to be heard and participate of children belong to marginalized and vulnerable groups.<sup>200</sup> The CRC guidelines on periodic reporting ask states to provide measures implemented to ensure that children's views are respected in accordance with article 12 of the CRC.<sup>201</sup>

(vi) *Periodic monitoring and evaluation*

Although neither article 20 of the CRC nor the 25 of the ACRWC specifies what 'special protection and assistance' entail, the obligation to provide 'special protection and assistance' is closely linked to article 25 of the CRC. Under the article, children in care placements designated by states, in other words, formal alternative placements have the right to have their placement periodically reviewed and evaluated.<sup>202</sup>

Article 25 of the CRC complements article 19, which provides protection to children from all forms of abuse or neglect in the care of parents, legal guardians or others who are caring for the child.<sup>203</sup> Article 25 has paramount importance to children as children are often vulnerable to exploitation in alternative care placement.<sup>204</sup> The CRC Committee noted the increasing use of institutionalised care for children who are deprived of their family environment in Africa.<sup>205</sup> Unfortunately, as the CRC

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<sup>200</sup> CRC Committee, General Comment No. 12 (as above) para 4.

<sup>201</sup> CRC Period Reporting Guidelines, CRC/C/58/Rev.1, para 28.

<sup>202</sup> Art 25 of the CRC reads: States parties recognize the right of a child who has been placed by the competent authorities for the purpose of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

<sup>203</sup> Art 19 of the CRC reads:

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.

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.

<sup>204</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) 6.

<sup>205</sup> Concluding Observation of the CRC: Comoros (CRC/C/15/Add.141: 2000) para 30; Concluding Observation of the CRC: The Gambia (CRC/C/15/Add.165: 2001) paras 38-39; Concluding Observation of the CRC: Algeria (CRC/C/15/Add.269: 2005) para 45; Concluding Observation



Committee pointed out on numerous occasions, in many African states, effective measures to monitor the standard of care and well-being of the child in alternative care placement were seriously lacking.<sup>206</sup>

Although the ACRWC does not provide for the periodic review of alternative care placement, article 16(2) of the ACRWC provides for the establishment of ‘special monitoring units’ as one of the protective measures.<sup>207</sup> Reading it together with article 16(1), which include ‘school authority and any other person who has the care of the child’ in the category of persons or entities to be subjected under article 16, it is possible to assume that alternative care placements could be subjected to special monitoring units.

The importance of implementing effective monitoring and evaluation measures is also noted in the UN Guidelines for the Alternative Care of Children. The Guidelines specify that an independent monitoring body should organise both scheduled and unannounced visits to all forms of formal alternative care.<sup>208</sup> Unfortunately, the responsibility of states to inspect and monitor the situations of children who are deprived of their family environment does not extend to informal kinship care. As discussed in section 3.2, the Guidelines require states to devise special and appropriate measures to protection of children in informal care, but they do not

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of the CRC: Burundi (CRC/C/15/Add.133: 2000) para 26; Concluding Observation of the CRC: South Africa (CRC/C/15/Add.122:2001) para 43; Concluding Observation of the CRC: Tanzania (CRC/C/15/Add.156: 2002) para 32; Concluding Observation of the CRC: Guinea-Bissau (CRC/C/15/Add.177: 2004) para 43; Concluding Observation of the CRC: Rwanda (CRC/C/15/Add.234: 2004) para 43; Concluding Observation of the CRC: Niger (CRC/C/15/Add.173: 2002) para 43; and Concluding Observation of the DRC (CRC/C/15/Add.153: 2001) para 45.

<sup>206</sup> As above.

<sup>207</sup> Art 16 of the ACRWC reads:

16(1) State parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

16(2) Protective measures under this article shall include effective procedures for the establishment of special monitoring unites to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment , and follow-up of instances of child abuse and neglect.

<sup>208</sup> Para 128 of the UN Guidelines for the Alternative Care of Children.

specify what measures should be taken. The reason behind excluding informal care from periodic monitoring and evaluation may be based on practicality. Informal care placement may not be notified to states and, therefore, periodic and organised inspection and monitoring may be difficult to enforce. Whatever the reason is, it is regrettable that inspection and monitoring requirements are not specifically required for informal care placements in the Guidelines, especially when the term ‘informal care’ is defined as broadly as to include care by non-relatives in their individual capacity.<sup>209</sup>

### 3.4 Forms of alternative care

Articles 20 of the CRC and 25 of the ACRWC provide for a non-exhaustive list of possible forms of alternative care. Article 20(3) of the CRC lists foster placement, *kafalah* of Islamic law, adoption and placement in suitable institutions as possible forms of alternative care. Furthermore, the list is not exhaustive as the term ‘*inter alia*’ allows the inclusion of other forms of alternative care as long as they reflect ‘the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background’.<sup>210</sup> Article 25(2)(a) of the ACRWC also lists foster placement and placement in suitable institutions as possible forms of alternative family care. The list is also not exhaustive as the term ‘among others’ similarly allows other non-listed forms of care. In the following section, eight forms of alternative care are discussed, namely 1) kinship care; 2) foster care; 3) cluster foster care; 4) *kafalah*; 5) residential or institutionalised care; 6) adoption; 7) inter-country adoption; and 8) independent living arrangement for children including child-headed household. The aim of the section is to explore the possible alternative care options for children who are deprived of their family environment as well as to examine whether recognising child-headed households rather than placing them in alternative care was indeed necessary. The suitability of each form of alternative care should be carefully examined on an individual basis.

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<sup>209</sup> Para 28(b)(i) of the UN Guidelines for the Alternative Care of Children.

<sup>210</sup> Art 20(3) of the CRC.

### 3.4.1 Kinship care

The concept of kinship care as defined in the UN Guidelines for the Alternative Care of Children has been introduced briefly in section 3.2. The concept of kinship care is not new. Informal kinship care, which can also be termed informal foster care has been the main mode of alternative care for children who are deprived of their parental care in traditional African societies as discussed in chapter two. Important elements of the definition of kinship care provided by the UN Guidelines for the Alternative Care of Children are: 1) Kinship care can be informal or formal; and 2) Kinship care is care provided by extended family members or close friends of the family known to the child.

The first point raises questions as to how formal kinship care is different from informal kinship care, and whether formal kinship care can be classified as foster care. The definition of formal care sheds light on the issue. Formal care is a type of care where a competent ‘administrative or judicial authority or duly accredited body’ has placed a child in certain form of alternative care, including residential care.<sup>211</sup> Therefore, if a competent ‘administrative or judicial authority or duly accredited body’ has placed a child in kinship care, it is formal kinship care. Informal kinship care would be where family members of the child or close friends of the family have decided the placement of the child under their care without involving public authorities. In that sense, formal kinship care is similar to foster care that public authority plays an important role in placing children in the care. However, the major difference is that kinship care, whether it is formal or informal, is necessarily provided by an individual who is previously known to the child.

Kinship care, a form of care provided by family members or close friends of the family, has certain advantages over other forms of alternative care. For instance, the prior acquaintance between children and the caregiver may provide emotional security to children. Also, the risk of children being abused or maltreated may be lowered as the caregiver is well-known to other members of the family making monitoring and intervention at the family level relatively easy. Furthermore, kinship care may be in

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<sup>211</sup> Para 28(b)(ii) of the UN Guidelines for the Alternative Care of Children.

the best option of care in terms of providing the child with his or her own cultural and linguistic environment.<sup>212</sup>

Nevertheless, there are inherent dangers of kinship care due to the familiarity among the caregiver, children and the parents or other family members of the children. In cases where kinship care is sought due to the parental neglect or the parents' inability to care for the child, based on the relationship between the kinship caregiver and the parents, unauthorised contact may be allowed between the child and the parents or conversely, authorised contact may be refused.<sup>213</sup> The children's views and wishes may also be ignored or given less weight in an informal decision making process; or there might be financial disincentive to return children to biological parents when the financial assistance attach to kinship care is much higher than those available to biological parents.<sup>214</sup>

One of the possible dangers of informal kinship care is related to the difficulty of legally monitoring and regulating such foster care. Abuses and maltreatment of children in informal care placements could go unnoticed relatively easily. As explored in chapter two, children in informal kinship care may be subject to abuse and maltreatment within the households, especially when there is a lack of monitoring mechanisms. The UNICEF report, *Enhanced protection for children affected by AIDS*, points out that although generally informal care arrangements are safe and appropriate, they could put children at risk of inadequate care, abuse or exploitation.<sup>215</sup> The risk increases where caregivers are relatives other than grandparents, siblings or are unrelated.<sup>216</sup> Furthermore, if kinship care is provided based on family obligation rather than genuine affection for the children, the risk of children being abused or maltreated inevitably increases.<sup>217</sup> Especially in cases where kinship care is provided due to parental death, other relatives may be reluctant to intervene even when the

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<sup>212</sup> Para 10 of the UN Guidelines for the Alternative Care of Children.

<sup>213</sup> N Cantwell, 2005 (n 57 above).

<sup>214</sup> N Cantwell, 2005 (n 57 above).

<sup>215</sup> *Enhanced protection for children affected by AIDS: A companion paper to the Framework for the Protection, Care and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS*, UNICEF (2007) 29.

<sup>216</sup> UNICEF, 2007 (as above) 29.

<sup>217</sup> *Caring for children affected by HIV and AIDS*, UNICEF-Innocenti (2006) 19.

children are maltreated or abused under the kinship care. Furthermore, it also revealed that in informal kinship care settings, siblings are often separated into different households because poor relatives cannot accommodate a large number of siblings.<sup>218</sup> Compared to foster care, which is highly regulated by state from the selection of suitable foster carers to monitoring of foster placement, there is less governmental involvement in kinship care.<sup>219</sup>

Although in many cases, children in kinship care, whether informal or formal, are safely and adequately cared for, considering the possible dangers of informal care, 'there is no less need to vet applicants, to examine the overall circumstances and the likely consequences' of the proposed kinship care.<sup>220</sup> As asserted in the *Caring for children affected by HIV and AIDS*, 'being looked after by family members is not sufficient to guarantee child's welfare, protection and ability to cope.'<sup>221</sup> Moving in with relatives may mean separating siblings and removing children from the familiar family home.<sup>222</sup> Furthermore, it should not be automatically assumed that kinship care would be available to children as long as extended families are supported. As studies show, in some cases, children are left in the void of care by extended families due to the complicated lineage issues.<sup>223</sup> It was pointed out that children who are born out of 'unmarried' couples, often due to unpaid *lobola*, are often unsupported by paternal relatives after the death of their parents.<sup>224</sup> They often lose support from their maternal relatives when they have moved away from the communities where their mothers had been born and are unable to return to their maternal communities due to the inability of the paternal relatives to pay back *lobola*.<sup>225</sup>

The importance of kinship care in providing adequate alternative care to children who are deprived of their family environment should not be overlooked. However, kinship

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<sup>218</sup> UNICEF, 2007 (n 215 above) 15.

<sup>219</sup> N Cantwell, 2005 (n 57 above).

<sup>220</sup> N Cantwell, 2005 (n 57 above).

<sup>221</sup> UNICEF-Innocenti, 2006 (n 217 above) 19.

<sup>222</sup> UNICEF-Innocenti, 2006 (as above) 19.

<sup>223</sup> S Roalkvam, 2005 (n 71 above) 216-217; L Jones, 'Children in poor urban settlements in Swaziland in an era of HIV/AIDS' (2005) 4/3 *African Journal of AIDS Research* 167.

<sup>224</sup> S Roalkvam, 2005 (as above); L Jones, 2005 (as above).

<sup>225</sup> S Roalkvan, 2005 (as above).

care should not be considered as automatically the best care option. Any decision regarding alternative care placement should be taken on a case-by-case basis while according the best interests of the child paramount importance.<sup>226</sup> The article 10 of the 1986 Declaration on Foster Care and Adoption also requires that foster placement of children be registered by law.<sup>227</sup> States should gradually eliminate informal care by registering all informal kinship carers to be able to periodically monitor and evaluate the standards of care.

### 3.4.2 Foster care

Foster care is defined as ‘situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care.’<sup>228</sup> As the definition suggests foster care can only be formal, because the involvement of a ‘competent authority’ in foster placement is one of the elements of foster care. Also, by definition, foster care differs from kinship care as foster care is care provided by individuals who are not family members of the child. Although the definition provided by the UN Guidelines for the Alternative Care of Children does not contain a time factor, conventionally, foster care is used as a temporary measure to provide care for children while an appropriate long term solution is being devised.<sup>229</sup> However, in many African states, foster care is nowadays increasingly used as a long-term measure to provide care for children who are orphaned by AIDS-related illnesses.<sup>230</sup>

Foster parents, unlike adoptive parents, do not have full parental rights and responsibilities over the fostered children. Foster parents have the responsibility to provide daily care and maintenance of the fostered child, but their powers are limited in a number of areas. For instance, foster parents cannot consent to operation or

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<sup>226</sup> Para 56 of the UN Guidelines for the Alternative Care of Children.

<sup>227</sup> Art 10 of the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.

<sup>228</sup> Para 28(c)(ii) of the UN Guidelines for the Alternative Care of Children.

<sup>229</sup> *Child Care and Protection*, Malawi Law Commission Discussion Paper (June 2004) 19.

<sup>230</sup> Malawi Law Commission, 2004 (as above).

medical treatment of the child when such operation or treatment may have serious implications for the health of the child; they further cannot consent to the marriage of the child; and they are not authorised to deal with any property belonging to the child.<sup>231</sup>

When placing a child in foster care, ‘desirability of continuity in a child’s upbringing and the ethnic, religious, cultural and linguistic background’ of the child should be taken into consideration.<sup>232</sup> This condition suggests that foster care by a member of the child’s community is more desirable than foster care by persons far removed from the community in which the child has been brought up. In order to ensure the ethnic, religious, cultural and linguistic background of the child is respected, paragraph 118 of the UN Guidelines for the Alternative Care of Children requires that accredited foster carers be identified in each locality who can provide children with care and protection while maintaining the family ties.

One of the main advantages of foster care is that children are cared for in a family environment with care providers who act as ‘substitute’ parents. The close environment would allow care providers to identify the needs of children and better respond to them. However, foster care does not guarantee permanency of care. Naturally, similar to other options, foster placement can be terminated if the placement is deemed not in the best interests of the child. Furthermore, the foster care placement can be terminated by a request of the foster parents and such terminations may lead to frequent changes of foster care placements, which negatively affect psychological well-being and development of children.<sup>233</sup> Children may also face ‘foster care drift’ where children go through multiple number of foster care placement without securing a permanent care.<sup>234</sup> Studies conducted on foster care placement show that the age and experience of foster parents, and age and previous experience of

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<sup>231</sup> <http://www.capegateway.gov.za/eng/directories/services/11575/17450#02> [accessed : 3 May 2010].

<sup>232</sup> Art 20(3) of the CRC and art 25(3) of the ACRWC.

<sup>233</sup> M Sallanas *et al.*, ‘Breakdown of teenage placements in Swedish foster and residential care’ (2004) 9/2 *Child and family social work* 141; also see J Strijker & T J Zandberg, ‘Breakdown in foster care’ (2005) 9/1&2 *International Journal of Child and Family Welfare* 76.

<sup>234</sup> G Cushing & S B Greenblatt, ‘Vulnerability to foster care drift after the termination of parental rights’ (2009) 19/6 *Research on Social Work Practice* 694.

foster children influence the success rate of the foster care.<sup>235</sup> Furthermore, for a large number of siblings in need of alternative care, foster care may not be appropriate as siblings may need to be separated. The negative impact of the separation of siblings on emotional and psychological well-being of the children has been highlighted in chapter one.<sup>236</sup> Despite the importance of foster care as a temporary measure of care and protection for children who are deprived of their family environment, the negative consequence of a series of short-term foster care placement on the emotional development of children and the possibility of separation of siblings should be fully considered before placing a child in foster care.

### 3.4.3 Cluster foster care

The UN Guidelines for the Alternative Care of Children do not specifically mention cluster foster care, but it could fall under ‘other forms of family-based or family-like care placements’.<sup>237</sup> Distinguishing cluster foster care and group care may be necessary. A ‘small group home’ is defined as ‘older children living with a core worker as a permanent substitute parent in a substitute family.’<sup>238</sup> However, ‘cluster foster care’ in South Africa can be understood as a placement of care where more than six children are cared for through a cluster foster care scheme provided by a non-profit organisation registered by the Provincial Head of Social Development.<sup>239</sup> While in a conventional foster care placement, maximum of six children can be placed in one household, unless children are related, but under the cluster foster care scheme, more than six children can be cared for by a multiple number of active members of the organisation providing the scheme.<sup>240</sup>

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<sup>235</sup> M Sallanas *et al.*, 2004 (n 233 above) 144.

<sup>236</sup> See sec 1.3.

<sup>237</sup> Para 28(c)(ii) of the UN Guidelines for the Alternative Care of Children.

<sup>238</sup> D M Swales *et al.*, *Applying the Standards: improving quality child care provision in East and Central Africa*, Save the Children- UK (2006) 4.

<sup>239</sup> Sec 183 of the Children’s Act. The South African model of cluster foster care is discussed in detail in chapter 4.

<sup>240</sup> *Children’s Act explained: Booklet 2 prevention, intervention and care*, Department of Social Development of the Republic of South Africa and UNICEF (2010) 25.



The functions of establishing group homes may vary from providing specialised care to children with special needs, including behavioural problems and disabilities in a non-institutionalised setting,<sup>241</sup> to providing care to a large number of children who are deprived of their family environment.<sup>242</sup> One of the main advantages of the cluster foster care or group homes is that it allows a group of children, who may not be appropriately cared for in conventional foster care placements, to be cared for in an alternative family-like environment rather than in an institutionalised setting. Group homes or cluster foster care may be a useful option in a context where a large number of children are losing both of their parents due to illnesses or conflicts as siblings can remain together in a group home with a designated care-provider(s). However, the problem of having to relocate children to a different household remains. A study in Uganda revealed that in many cases, children preferred to stay in their homes due to reasons such as fear of being rejected or abused by their relatives and the promise made to their parents to remain at home.<sup>243</sup> Also, in a group home or cluster foster care setting, the primary care-providers may change over time, which could hamper children's ability to form a secure relationship with their care-providers. Furthermore, the number of children to be cared for in group homes or cluster foster care and the role of care giver should be carefully defined as to avoid group homes or cluster foster care placements resembling residential care.

#### 3.4.4 *Kafalah*

*Kafalah* is an Islamic practice through which a family takes in a child on a permanent basis who is deprived of his or her family environment. However, unlike adoption, the child is not entitled to use the family name of the *kafalah* placement or inherit from the family.<sup>244</sup> *Kafalah* is included in the list of possible forms of alternative care in the CRC. Despite its potential to provide permanent family-based care to children in

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<sup>241</sup> P W Salsich, 'Group homes, shelters and congregate housing: deinstitutionalisation policies and the Nimby syndrome' (1986) 21 *Real Property, Probate and Trust Journal* 418.

<sup>242</sup> P H Wolff & G Fesseha, 'The orphanages of Eritrea: are orphanages part of the problem or part of the solution?' (1998) 155/10 *American Journal of Psychiatry* 1313.

<sup>243</sup> N Dalen *et al.*, 'They don't care what happens to us.' The situation of double orphans heading households in Rakai District, Uganda' (2009) *Bio-Medical Central Public Health* 325.

<sup>244</sup> G van Bueren, 1995 (n 76 above) xxi; for a detailed discussion on *kafalah*, see U M Assim, *The best interests of children deprived of a family environment: a focus on Islamic Kafalah as an alternative care option*, LLM dissertation, University of Pretoria (2009).

need of alternative care, *kafalah* is not specifically mentioned in the ACRWC. Recently, the UN Guidelines for the Alternative Care of Children placed much emphasis on *kafalah*. Paragraph 2(a) of the Guidelines includes *kafalah* as a permanent solution on par with adoption. Paragraph 112 also recommends that residential care should be used only in temporary measure to secure alternative family care such as *kafalah*. It is a welcome development as *kafalah* is an important child care practice in Africa due to a large number of countries in Africa that apply *Shari'a* law.<sup>245</sup> However, the concerns over the rights of children in *kafalah* system should be fully addressed. The CRC Committee, while noting the importance of *kafalah* in providing alternative care to children deprived of their family environment, strongly recommended that the system of *kafalah* should never compromise the rights of the child, including non-discrimination and their effective implementation.<sup>246</sup> Furthermore, the majority of countries that are most affected by the HIV epidemic are in southern Africa where Islamic laws are not applicable. Therefore, in such countries, *kafalah* practice has only a limited value as an alternative care option.

### 3.4.5 Residential or institutionalised care

Institutionalised care or residential care refers to the placement of children in institutions, including but not limited to orphanages or correctional facilities for children in conflict with the law. Institutionalised care has often been viewed negatively. Research on children in institutionalised care finds that, among other conclusions, children raised in institutions during the early development period show significantly impaired physical, cognitive, linguistic, socio-emotional and brain development compared to children who grew up in their own communities.<sup>247</sup> The reluctance to place children in institutionalised care is clear from the wording of the relevant treaty provisions. As Cantwell and Holzscheiter pointed out, institutionalised care is the only alternative care placements qualified by the term, 'if necessary', in

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<sup>245</sup> B Mezmur, 2009 (n 22 above) 87.

<sup>246</sup> CRC Concluding observation: Algeria (n 74 above) para 46.

<sup>247</sup> B Gudbrandsson, 2006 (n 182 above) 9; 'Children without parental care or at risk of losing it', SOS-KDI recommendation-background paper, available at: [http://www.europarl.europa.eu/hearings/20070417/libe/sos\\_children\\_en.pdf](http://www.europarl.europa.eu/hearings/20070417/libe/sos_children_en.pdf) [accessed: 2 Nov 2008] 5; C Csaky, *Keeping children out of harmful institutions: Why we should be investing in family-based care*, Save the Children UK (2009); K Browne, *The risk of harm to young children in institutional care*, Save the Children UK (2009).

article 20(3) of the CRC.<sup>248</sup> Both the CRC and ACRWC regard institutionalised care as the last resort when other alternative care placement is unavailable or inappropriate. Alarming, the CRC Committee on several occasions in its concluding observations noted the over-reliance on institutionalise care for children who are deprived of their family environment in many African states especially in the context of the HIV epidemic.<sup>249</sup>

Although it is generally accepted that institutionalised care has a negative impact on children, such findings cannot be easily generalised. In countries with a high level of poverty and high number of children in need of alternative care, unregulated foster care or other care arrangements may not necessarily be better than regulated and monitored institutionalised care. A study conducted in Malawi, in which a number of children in different orphanages and under foster care by relatives were interviewed, reported that children in orphanages were receiving better care in terms of education, health care and psycho-social support.<sup>250</sup> Interviews with both sets of children revealed that often children who are cared for by their relatives felt that their caregivers favoured their own biological children.<sup>251</sup> Another often cited criticism of institutionalised care is that the cost of keeping children in institutions is much higher than placing a child in foster care or community-based care. However, as the study in Malawi revealed, children in institutionalised care received much better material and health care than children in impoverished foster homes.<sup>252</sup> The question should not be ‘how much does it cost to keep a child in an institutionalised care or foster care?’ but ‘how much does it cost to keep a child in foster care at the same standard as

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<sup>248</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) 54.

<sup>249</sup> CRC Concluding observation: Ethiopia (CRC/C/15/Add.144) para 50; CRC Concluding observation: Tanzania (CRC/C/15/Add. 156) para 53; CRC Concluding observation: Guinea-Bissau (CRC/C/15/Add. 177) para 33; CRC Concluding observation: Morocco (CRC/C/15/Add.211) para 36; CRC Concluding observation: Rwanda (CRC/C/15/Add. 234) para 40.

<sup>250</sup> See B Zimmerman, Orphan living situation in Malawi: a comparisons of orphanages and foster homes (May, 2005) available at: [http://www.stanford.edu/dept/publicpolicy/programs/Honors\\_Theses/Theses\\_2005/Zimmerman.pdf](http://www.stanford.edu/dept/publicpolicy/programs/Honors_Theses/Theses_2005/Zimmerman.pdf) [accessed: 1 Nov 2008].

<sup>251</sup> B Zimmerman, 2005 (as above).

<sup>252</sup> As above 45.

institutionalised care?’<sup>253</sup> The contrasting findings demonstrate the difficulty of generalising the negative effects of institutionalised care.

Article 20(3) of the CRC and article 25(2)(a) of the ACRWC provide for a suitability test with regard to institutions. Suitability can be assessed in two ways: a general evaluation of the quality of facilities, or an evaluation of appropriateness of facilities for meeting the specific needs of the children.<sup>254</sup> There are several important regional and global guidelines on institutionalised care. Evaluating whether a certain facility meets the specific needs of an individual child should be determined on a case-by-case basis. In that case, article 3(1) of the CRC on the best interests of the child should be the primary consideration. Neither the CRC nor the ACRWC provide detailed guidelines on standards and quality of institutions. Article 3(3) of the CRC simply requires that ‘the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.’<sup>255</sup> However, as Cantwell and Holzscheiter note, although the CRC or ACRWC does not specify any basic requirements of a facility, such as the size or location, a suitability test will involve determining ‘how well residential facilities protect and promote the whole range of civil and economic, social and cultural rights to be enjoyed by children.’<sup>256</sup>

Nonetheless, there are several important documents that list specific requirements of residential facilities. The UN Guidelines for the Alternative Care of Children require that facilities providing residential care resemble as much as possible a family or small group situation.<sup>257</sup> The Guidelines further state that the residential care should be used as a temporary measure while actively seeking the child’s family reintegration or, if that is not possible, care in an alternative family setting.<sup>258</sup> The Council of Europe 2005 Recommendation also stipulates that children have the right to be placed

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<sup>253</sup> As above 45.

<sup>254</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 56.

<sup>255</sup> Art 3(3) of the CRC.

<sup>256</sup> N Cantwell & Holzscheiter, 2008 (n 135 above) para 57.

<sup>257</sup> Para 124 of the UN Guidelines for the Alternative Care of Children.

<sup>258</sup> Para 124 of the UN Guidelines for the Alternative Care of Children.

in residential care only if it best meets the needs of children ‘that have been established as imperative on the basis of a multidisciplinary assessment.’<sup>259</sup> The basic principles regarding residential placement includes, among others, the principle of non-discrimination, periodic monitoring of placements, respect for children’s views and prioritisation of the best interests of the child.<sup>260</sup> The 2005 Recommendation further requires ‘all the residential institutions to be accredited and registered with the competent public authorities on the basis of regulations and national minimum standards of care.’<sup>261</sup>

A temporary residential care or institutionalised care may prove to be a necessary evil in the context where there is no other suitable family-based alternative care placement. However, as emphasised above, states should endeavour to make residential facilities resemble small children’s homes or small group homes. Ultimately, the state should reduce the use of residential care by strengthening family-based alternative care placements.

### 3.4.6 Adoption

Adoption is a ‘welfare and protection measure that enables an orphaned or definitively abandoned child to benefit from a permanent family.’<sup>262</sup> As Van Loon points out, adoption is ‘the institutionalised social practice through which a person, belonging by birth to one family or kinship group, acquires new family or kinship ties that are socially defined as equivalent to biological ties and which supersede the old ones, either wholly or in part.’<sup>263</sup> The ‘acquisition of new family or kinship ties, which supersedes the old ties’ is the main element that distinguishes adoption from foster care. It is also one of the reasons why the determination of adoptability of a child is

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<sup>259</sup> Appendix to Recommendation Rec(2005)5 of the Committee of Ministers to member states of rights of children in institutionalised care (16 March 2005).

<sup>260</sup> Guidelines and quality standards, Recommendation (2005) (as above).

<sup>261</sup> As above.

<sup>262</sup> *Inter-country adoption*, UNICEF-Innocenti Digest No 4, UNICEF-International Child Development Centre, Florence, Italy (1998) 2.

<sup>263</sup> Van Loon’s definition is cited in S Detrick, 1999 (n 145 above) 343.

vital if an adoption were to take place.<sup>264</sup> Therefore, the primary aim of adoption ‘is to provide a child who cannot be cared for by his or her own parents with a permanent family.’<sup>265</sup>

Despite the obvious advantages of adoption as a way to provide permanent care in a family environment to children in need of care, adoption had been a controversial issue. During the drafting stage of article 20 of the CRC, some countries, including Australia and the US, wanted to give adoption a more prominent role in providing alternative care to children who are deprived of their family environment and sought that states should facilitate adoption of children even by providing ‘appropriate financial assistance to the adopting family.’<sup>266</sup> However, many countries expressed their concern over making adoption the only option in case a child cannot be cared for by his or her biological family.<sup>267</sup> The compromise was the recognition of adoption as one form of alternative care.

In addition to being listed as one of the alternative forms of care in articles 20 of the CRC and 25 the ACRWC, adoption is separately dealt with in articles 21 of the CRC and 24 of the ACRWC. Both articles give the paramount importance to the best interests of the child in adoption arrangements,<sup>268</sup> and provide for the minimal requirements for adoption procedure, especially with regards to the determination of the adoptability of the child.<sup>269</sup> It is important to note that, unlike article 20-related issues under the CRC, where the ‘best interests of the child’ is not mentioned, in matters related to adoption, ‘the best interests of the child’ is given paramount importance indicating that no other interests should take precedent over the interests of the child.<sup>270</sup> Although the CRC and the ACRWC do not provide detailed rights of

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<sup>264</sup> Art 21(a) of the CRC stipulates that only the competent authority should determine based on all the available information, the adoptability of a child. Art 24(a) of the ACRWC is also similarly worded.

<sup>265</sup> Art 13 of the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children.

<sup>266</sup> Article 20 Children deprived of a family environment for- Legislative history of the Convention on the Rights of the Child (1978-1989) (n 132 above) para 52.

<sup>267</sup> As above, para 53.

<sup>268</sup> Art 21 of the CRC and Art 24 of the ACRWC.

<sup>269</sup> Art 21(a) of the CRC and Art 24(a) of the ACRWC.

<sup>270</sup> R Hodgkin & P Newell, 2002 (n 136 above) 296.

children who are adopted, the CRC Committee on numerous occasions recommended that states develop mechanisms to monitor adopted children<sup>271</sup> and to ensure that the right of the adopted children to know their origin and access information on their background.<sup>272</sup> Although child participation is not explicitly mentioned in the articles, given that the children's right to participation is one of the fundamental pillars of children's rights, the right of children to participate in their own adoption arrangement should be fully guaranteed according to the maturity and age of the children.

The purpose of the section is not to analyse the problems and challenges present in adoption arrangement but rather to introduce adoption as a form through which alternative care can be provided to children who are deprived of their family environment. Therefore, a detailed discussion on adoption and children's rights implications is beyond the scope of the section. Adoption may be a preferable option for very young children who are deprived of their parental care. Adoption would secure permanency of care in family environment over other care options, such as kinship care, foster care and residential care. Especially, local adoption may increase the possibility of the children maintaining ties with their cultural and social identity. However, it should be noted that adoption may not be an appropriate option for children who wish to remain with their siblings. Also, it should be pointed out that despite the advantages of adoption, there are serious risks of children being adopted for wrongful purposes or children being abused in their adoptive families. In order to minimise such dangers, it is imperative to establish a clear legal and policy framework, which reflects the best interests of the child, to regulate all the stages of the adoption arrangement.

### **3.4.7 Inter-country adoption**

Inter-country adoption is dealt in the same articles as domestic adoption, in articles 21 of the CRC and 24 of the ACRWC. Before going into the details of these provisions, there is a need to clarify terminology such as 'inter-country adoption' and

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<sup>271</sup> For instance, see CRC/C/15/ADD.225 (CRC, 2000, Armenia) para 38; CRC/C/15/ADD.122 (CRC, 2000, South Africa) para 26; CRC/C/15/ADD.127 (CRC, 2000, Kyrgyzstan) para 38; CRC/C/15/ADD.138 (CRC, 2000, Centre African Republic).

<sup>272</sup> For instance, see, CRC Concluding Observation: Slovenia (2004) CRC/C/15/ADD.230, para 35.

‘international adoption’. The distinction between ‘inter-country adoption’ and ‘international adoption’ is made by UNICEF and by scholars, such as Van Bueren, ‘to avoid the impression given that there is a uniform type of adoption and that substantive rules exist which are different from national adoption.’<sup>273</sup> The main element of the inter-country adoption is the change in the child’s habitual country of residence, irrespective of the nationality of the adopting parents.<sup>274</sup> In international adoption, the main element is the change of the nationality of the adopted child. International adoption occurs when adoptive parents adopt a child of a nationality that is different from theirs and irrespective of whether or not they reside and continue to reside in the child’s country of habitual residence.<sup>275</sup>

Inter-country adoption is a phenomenon of the last half century.<sup>276</sup> Inter-country adoption, like domestic adoption, provides an opportunity to children who are deprived of their family environment to be cared for in a permanent family environment. Considering millions of children going through multiple foster care placements or living in institutionalised care, inter-country adoption seems to provide an excellent opportunity to both children in need of care and individuals who are willing and able to provide such care.<sup>277</sup> However, inter-country adoption seems to have been met with certain reluctance. The 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Child stipulates that inter-country adoption ‘may be considered’ if the child cannot be placed in a foster family, a domestic adoptive family or ‘cannot, in any suitable manner be cared for in the child’s country of origin’.<sup>278</sup> Article 21(b) of the CRC and article 25(b) of the ACRWC echo

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<sup>273</sup> G Van Bueren, 1995 (n 76 above) 96.

<sup>274</sup> UNICEF-Innocenti Digest 4, 1998 (n 262 above) 2.

<sup>275</sup> As above, 2.

<sup>276</sup> E Bartholet, ‘International Adoption’ in L Askeland (ed) *Children and youth in adoption, orphanages and foster care*, Greenwood Publishing Group (2005) 108; S R Wallace, ‘Inter-country adoption: The most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?’ (2003) 20 *Arizona Journal of International and Comparative Law* 692.

<sup>277</sup> See S R Wallace, 2003 (as above); S Dillon, ‘Making legal regime for inter-country adoption reflecting human rights principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Inter-Country Adoption’ (2003) 21 *Boston University International Law Journal* 179.

<sup>278</sup> Art 17 of the 1986 UN Declaration on Foster Care and Adoption.



the 1986 Declaration. During the CRC working group discussion on the provision concerning inter-country adoption, the representative of Venezuela expressed the view that inter-country adoption should be treated ‘as an extreme and exceptional measure and not as an alternative means of child care’.<sup>279</sup> Her sentiment was joined by other delegates from the Federal Republic of Germany who suggested replacing the words, ‘an alternative means’ to ‘an exceptional means’.<sup>280</sup> Such discussion seems to show how inter-country adoption was considered less favourably than domestic solutions. Cantwell argued that the insertion of the term ‘suitable manner’ means that if domestic care options are ‘unsuitable’, regardless of the existence of such options, inter-country adoption should be allowed.<sup>281</sup> However, the insertion of ‘any suitable manner’ seems to suggest that even institutionalised care, as long as it is deemed ‘suitable’, should be given priority over inter-country adoption.

Article 24 of the ACRWC is even more hesitant to endorse inter-country adoptions. Under the article, inter-country adoption ‘may, as a last resort, be considered’ when a child cannot be fostered, domestically adopted or be cared for in any suitable manner in the country of origin. Although the wording is similar, in the ACRWC, inter-country adoption may be considered as ‘a last resort’ while under the CRC, it may be considered as ‘an alternative means’. Furthermore, considering that the subsequent article (article 25 of the ACRWC) does not qualify institutionalised care as a last resort, it is ironic that such condition should be attached to inter-country adoption. As discussed above, article 25 of the ACRWC stipulates that children should be provided with ‘alternative *family* care’.<sup>282</sup> Nonetheless, one of the ways to provide permanent family care seems to have been met with a strong reservation. While article 20 of the CRC specifically mentions adoption, without differentiating whether it is domestic or inter-country, prior to the institutionalised care and demands that children be placed in institutionalised care as the last resort and only if it is necessary, article 25 does not specifically mention adoption giving the impression that the ACRWC gives inter-country adoption even lower priority than institutionalised care.

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<sup>279</sup> S Detrick, 1992 (n 3 above) 314.

<sup>280</sup> S Detrick, 1992 (as above) 314.

<sup>281</sup> N Cantwell, ‘The challenges of out-of-home care’ in *Early Childhood Matters*, Bernard van Leer Foundation (December 2005) 11.

<sup>282</sup> The emphasis is mine.

The strong reluctance towards inter-country adoption is often illustrated in the domestic laws in various states in Africa. For instance, under section 3(5) of the Adoption of Children Act, inter-country adoption is currently prohibited in Malawi.<sup>283</sup> The Law Commission in Malawi recommended that inter-country adoption to a state party to the Hague Convention should be allowed, if to do so is in the best interests of the child.<sup>284</sup> Nevertheless, a required 3-year foster care period while residing in Malawi effectively hinders inter-country adoption.<sup>285</sup> The Child Act No 10 of 2008 of Southern Sudan also imposes on restrictions of a three-year residency period in Southern Sudan and a prior fostering period of one-year on foreigners who wish to adopt a Southern Sudanese child.<sup>286</sup> Also, in Zambia, section 4(5) of the Adoption Act<sup>287</sup> prohibits inter-country adoption, although, technically, international adoption is recognised.<sup>288</sup>

Wallace listed three negative views that may prevent the full endorsement of inter-country adoption by countries; 1) the perception of inter-country adoption as a new form of imperialism; 2) the perception that allowing too many inter-country adoptions may send out the message that the country is not able to take care of its own children; and 3) a widely held perception that inter-country adoption leads to dangerous and evil practices, such as child-trafficking, kidnapping and financial exploitation.<sup>289</sup>

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<sup>283</sup> Sec 3(5) of the Adoption of Children Act Cap 26/01 states that ‘...adoption shall not be made in favour of any applicant who is not a resident in Malawi.’

<sup>284</sup> *Review of Children and Young Persons Act Cap 26:03*, Special Law Commission, Malawi (2003).

<sup>285</sup> Sec 3A(2) of the ‘Child care, protection and justice Bill’ requires that the applicants or one of the applicants, if not a relative of the child, has, while in Malawi, fostered the child for a continuance period of three years’, cited in Special Law Commission, Malawi 2003 (as above).

<sup>286</sup> Sec 90 of the Child Act No 10 of 2008, Southern Sudan.

<sup>287</sup> Adoption Act Chapter 54 of the Law of Zambia.

<sup>288</sup> Sec 4(5)(a) of the Adoption Act prohibits adoption of adoption order unless the applicant and the infant reside in Zambia. Furthermore, Sec 4(5)(b) requires the infant to have been cared for the applicant for at least three consecutive months immediately preceding the date of the order. Although Sec 4(5)(a) does not prevent foreigners who reside in Zambia from adopting (international adoption), it could be interested to prohibit inter-country adoption which involves a change of residential country and prospective parent(s) often does not reside in Zambia. Also the three-month requirement in Sec 4(5)(b) makes it difficult for foreigner(s) who do not reside in Zambia from adopting.

<sup>289</sup> S R Wallace, 2003 (n 275 above) 690-691; also see C Kleem, ‘Airplane trips and organ banks: random events and Hague Convention on Inter-country Adoption’ (2000) 28 *Georgia Journal of International and Comparative Law* 325.

Despite the general reluctance to accept inter-country adoption as a viable, and possibly the best option in certain cases, there has been a growing acceptance to inter-country adoption. The 1993 Hague Convention is a good example. The 1993 Hague Convention is the first international convention that enthusiastically endorses inter-country adoption.<sup>290</sup> In its preamble, the Hague Convention recognises the importance of children to grow up in ‘a family environment’ and goes as far as to say that ‘inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her country of origin.’ It should be noted that the Hague Convention is clear that children should not be removed from their own family environment unless their best interests dictate otherwise. Under the Hague Convention, inter-country adoption is a third-best option after children’s natural family environment and domestic adoption by a suitable family.<sup>291</sup> Therefore, inter-country adoption is given priority over institutionalised care in the country or origin.<sup>292</sup> Also, recent court cases on inter-country adoption in South Africa and Malawi suggest that the negative perception on inter-country adoption and the blanket preference to ‘any’ domestic alternative care options may be changing in favour of giving a more individual and balanced assessment to the necessity of inter-country adoption in certain cases.<sup>293</sup>

Given the important role of inter-country adoption in providing children who cannot be cared for, in a suitable manner, in their own countries, the more important issue is how to make inter-country safe for the children. The ACRWC stipulates that inter-country adoption<sup>294</sup> should take place between countries that have either ‘ratified or adhered’ to the CRC or the ACRWC. The condition is an attempt to provide the maximum protection for the children during and after inter-country adoption. The first step states may take to safeguard the interests of the children in inter-country adoption

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<sup>290</sup> S R Wallace, 2003 (as above) 692; B Mezmur, (n 22 above) 93.

<sup>291</sup> S R Wallace, 2003 (as above) 701- 702; C Kleem, 2000 (n 289 above) 333.

<sup>292</sup> S R Wallace, 2003 (as above) and C Kleem, 2000 (as above).

<sup>293</sup> See 1) In the matter of Adoption of Children Act CAP 26:01 and in the matter of David Banda (a male infant), 2) Adoption case of No 2 of 2006, Malawi [2008] MWHC 3; In the matter of Adoption of Children Act CAP. 26:01 and in the matter of Chifundo James (a female infant) of C/O Mr. Peter Baneti. Adoption case No 1 of 2009 [2009] MWHC 3. MSC A Adoption Appeal n° 28 of 2009, Malawi; *AD and Other v DW and others*, CCT 48/7, 2008 (3) SA 183 (CC).

<sup>294</sup> See Van Bueren, 1995 (n 76 above) 96 & UNICEF-Innocenti Digest, 1998 (n 262 above) 2 for the definition of inter-country adoption.

arrangements is to ratify the 1993 Hague Convention as frequently recommended by the CRC Committee and to revise their adoption laws to reflect the standard and principles of the Convention. As discussed in section 3.2, the Hague Convention is the most comprehensive instrument on inter-country adoption and it aims to harmonise laws and regulations on inter-country adoption in all countries.

#### **3.4.8 Supervised independent living arrangement for children**

‘Supervised independent living arrangement for children’ as alternative care is a relatively new concept, and is not mentioned in the CRC or the ACRWC.<sup>295</sup> The UN Guidelines for the Alternative Care of Children list the ‘supervised independent living arrangement for children’ as one of the forms of alternative care without giving examples of such living arrangement. Nevertheless, a few examples of supervised independent living arrangements for children may be found in *Applying the standard*, a publication by the Save the Children. Those examples include; 1) ‘supported accommodation’ defined as ‘small groups of older children living in separate and independent households but supported by visiting staff on a regular basis’, 2) ‘peer households’ defined as ‘a small group of young people choose to live together and are supported in doing so, learning necessary life skills and being offered initial support and guidance towards independence’; 3) ‘sheltered housing’ defined as ‘young people or children live independently with a permanent adult worker living independently on site but available as a mentor for guidance and support’; and 4) ‘supported child-headed households’ defined as ‘siblings living as a family, in their own home, with social workers providing ongoing guidance and support’.<sup>296</sup>

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<sup>295</sup> ‘Supervised independent living programme’, which is similar to ‘peer households’ has been first introduced as a transitional care for children and young adults generally aged from 18 to 20 years leaving foster care or other structured care placement. The aim of the programme is to support and teach life skills to youth in transition to enable them to build their lives outside of alternative care placements. See, M E Collines, ‘Transition to adulthood from vulnerable youth: a review for research and implications for policy (2001) 21 *Social Service Review* 271.

<sup>296</sup> D M Swales *et al.*, *Applying the standards: improving quality childcare provision in East and Central Africa*, Save the Children (2006) 4. There is no clear answer as to whether child-headed households are included in the independent living arrangement for children. The position of the International Social Service, an organisation who pioneered the drafting of the 2009 UN Guidelines for the Alternative Care of Children, is that a child-headed household (sibling-headed household) is not included in the independent living arrangement for children, but rather included under ‘kinship care’. Therefore, depending on whether the decision to form child-headed households is made informally by relatives or whether the decision is taken through an official authority, child-headed households will be considered, either informal kinship care or

As mentioned in the beginning, ‘supervised independent living arrangement for children’ as a mode of alternative care is a relatively new development. However, ‘supervised independent programme’ as a transitional care programme for young adults who are leaving foster care or institutionalised care has been developed, especially in the United States, since the 1980s.<sup>297</sup> Among the four different types of supervised independent living arrangements, ‘supported accommodation’ and ‘peer households’ may fit most closely as a transitional care to older children leaving alternative care placements.

Although all four care arrangements are similarly defined, the level of support provided to each care arrangement differs. Also, the composition of each ‘group’ or ‘household’ is different in terms of age (whether they are ‘children’ or ‘young persons’) or biological relatedness among the members of the households or groups. According to the definition, it seems that it is only a ‘child-headed household’, which, by definition, consists of children who are related by blood. The concept of supervised living arrangements is not defined in the UN Guidelines for the Alternative Care of Children, but the wording of paragraph 160 of the Guidelines suggests that such living arrangements are for children who are deprived of their family environment but cannot be cared for in a permanent family-based care, such as adoption or *kafalah*. For such children, other ‘long-term’ solutions, such as ‘foster care, or appropriate residential care, including group homes and supervised living arrangements’ should be envisaged.<sup>298</sup>

In the next section, a ‘child-headed household’ as an emerging form of alternative care is discussed in detail. The reasons for singling out child-headed households are twofold. Firstly, there is no agreement on whether child-headed households should be included in supervised independent living arrangement for children. Secondly, while other forms of supervised independent living arrangements have not been introduced

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formal kinship care.<sup>296</sup> However, including child-headed households in kinship care does not seem logical as kinship care, as mentioned before, is defined as a care provided by a member of extended family or a close friend of the family. A child-headed household is a household headed by a child with a support from an adult supervisor; therefore does not fit under kinship care but rather under independent living arrangement for children.

<sup>297</sup> For more information, see <http://www.cwla.org/advocacy/indlivtest991013.htm> [accessed: 2 J June 2010].

<sup>298</sup> Sec 160 of the UN Guidelines for the Alternative Care of Children.

or implemented as alternative care placements, child-headed households have been gradually recognised in many African states especially in their national strategic plans of orphans and vulnerable children, including those of Namibia, Rwanda, Swaziland, South Africa and Uganda.<sup>299</sup> As will be discussed more fully later, South Africa has gone as far as legislating on this issue, thus legally recognising child-headed households.

### 3.5 Child-headed households: An emerging form of care?

Child-headed households have become a very unfortunate phenomenon in societies that are profoundly affected by the HIV epidemic or conflicts.<sup>300</sup> The proportion of children in child-headed households is still small.<sup>301</sup> However, the important point is that the number is increasing.<sup>302</sup>

The best way to protect children in child-headed households would be to reduce the occurrence of child-headed households in the first place. The obvious way to prevent the occurrence of child-headed households is to prevent children from losing their parents to AIDS by making appropriate ART and other treatment for AIDS-related illnesses available to people living with HIV. However, once children have been deprived of their parental care and are at risk of forming child-headed households, providing support extended families to promote kinship care is an important way to reduce the occurrence of child-headed households.

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<sup>299</sup> National Plan of Action on Orphans and Vulnerable Children 2006-2010, Rwanda, National Plan of Action for Orphans and Vulnerable Children 2006-2010, Swaziland; National Strategic Programme Plan of Interventions for Orphans and Other Vulnerable Children, 2005-2010, Uganda; First National Conference on Orphans and Other Vulnerable Children 2001, Namibia; South Africa has legally recognised child-headed households in their Children's Act.

<sup>300</sup> See Second Periodic Report under article 44 of the United National Convention on the Rights of the Child: Rwanda (2004) CRC/C/70Add.22, para 319; also see BBC Report on children in conflict, available at: <http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/headed.shtml> [accessed: 17 October 2009].

<sup>301</sup> Information available at: <http://www.childrencount.ci.org.za/content.asp?PageID=68> [accessed: 17 October 2009]; The difficulty of ascertaining the accurate figure of child-headed household has been pointed out in UNICEF-Innocenti, 2006 (n 215 above) 16. .

<sup>302</sup> See chapters 2 and 4 for a detailed discussion; UNICEF-Innocenti, 2006 (n 216 above) 16.

The CRC Committee recommended that states provide all necessary measures of support to prevent children from being separated from their family of origin.<sup>303</sup> Cantwell and Holzscheiter argue that the responsibilities of states under article 20 of the CRC go beyond providing alternative care when children are deprived of their family environment.<sup>304</sup> The responsibilities of states include preventing children from being deprived of their family environment by providing appropriate assistance to the family.<sup>305</sup> For instance, article 18(2) of the CRC requires states to provide appropriate assistance to parents and other legal guardians to perform their child-rearing responsibilities. While article 27(2) recognises that the primary responsibility to maintain children remains with parents and others who are legally responsible for the children, article 27(3) requires states to assist parents and other legal guardians to realise children's right to an adequate standard of living. The ACRWC also have similar articles requiring states to render appropriate assistance to parents and others who are responsible for the child.<sup>306</sup> The UN Guideline on the Alternative Care of Children also emphasise the importance of assisting families in need in order to prevent children being deprived of their own family environment.<sup>307</sup> However, it should be noted that in impoverished communities, material gains could provide an incentive to unscrupulous members of extended families or community members to foster children. Therefore, the strategy to encourage extended family members or community members to foster or adopt children should be implemented together with effective monitoring and regulatory mechanisms to prevent maltreatment or abuse of fostered children.

However, there can be cases where despite all the efforts to prevent children from being deprived of their family environment, children are still unable to secure family environment after their parental deaths or incapacity. In such cases, if it is in their best interests and children wish to remain by themselves, children should be allowed to form and remain in child-headed households with appropriate support and assistance

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<sup>303</sup> CRC Committee, 2005 (n 40 above) para 649.

<sup>304</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 10.

<sup>305</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 10; Para 3 & 31 of the UN Guidelines for the Alternative Care of Children; CRC Committee, 2005 (n 40 above) para 649.

<sup>306</sup> Art 20(2) of the ACRWC.

<sup>307</sup> Para 31 of the UN Guidelines for the Alternative Care of Children.

from the government. In the following sections, the question of legally recognising child-headed households is discussed in general.

### 3.5.1 Recognising child-headed households

Legally recognising child-headed households aims to enable children to take care of themselves without a live-in adult caregiver. The idea of legally recognising child-headed households may be at odds with principles of children's rights, especially with a conventional idea that children should be taken care of by an adult caregiver, either in their own family environment or in an alternative care placement, such as foster care or institutionalised care.<sup>308</sup>

Although it might be ideal that children who are deprived of their family environment should be provided with appropriate alternative care placements, the reality may not allow such approach. A practical problem is the ability of states to provide adequate alternative care to all children who are deprived of their parental care in the context of the HIV epidemic or conflicts. Another problem is that such uniform approach may not be in the best interests of the children in child-headed households. Firstly, some children may wish to stay together in their family house to honour their parents' wish or to avoid losing their family properties.<sup>309</sup> In many cases, removing children from their familiar surroundings after the death of their parents adds to their emotional trauma.<sup>310</sup> Secondly, the UN Guidelines for the Alternative Care of Children stipulates that siblings 'should not in principle separated by placements in alternative care'.<sup>311</sup> A study conducted in Pietermaritzburg showed that all children in child-headed households interviewed indicated that their siblings were the source of emotional support.<sup>312</sup> Although the findings of the study should be generalised with caution, such result points out separating siblings could negatively affect children's emotional

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<sup>308</sup> UNICEF-Innocenti, 2006 (n 216 above) 16.

<sup>309</sup> K Subbarao & D Coury, 2004 (n 141 above) 27.

<sup>310</sup> K Subbarao & D Coury, 2004 (n 141 above); L Richter & S Rama, *Building resilience: a rights-based approach to children and HIV/AIDS in Africa*, Save the Children Sweden (2006) 13 & 31.

<sup>311</sup> Para 17 of the UN Guidelines for the Alternative Care of Children.

<sup>312</sup> D Donald & G Clacherty, 'Developmental vulnerabilities and strengths of children living in child-headed households: a comparison with children in adult-headed households in equivalent impoverished communities' (2005) 4/1 *AIDS Care* 27.



well-being. Kinship care and foster care are important alternative family-based care options, but a large sibling groups may need to be separated into different households.

Finally, the heterogeneous nature of child-headed households poses a problem when enforcing a conventional method of providing alternative care. As discussed in chapter one, child-headed households can be sub-divided into, to borrow the expression used by the African Child Policy Forum, ‘unaccompanied child-headed household’ and ‘accompanied child-headed household’.<sup>313</sup> Unaccompanied child-headed household refer to a household, which is consisted of only children due to the death of parents or guardians, or abandonment. When children are found to be in unaccompanied child-headed households, it may be possible to provide appropriate conventional alternative care placements, such as foster care or small residential care, considering the views and the best interests of the children. However, unlike ‘unaccompanied child-headed households’, accompanied child-headed households refer to households in which children are providing primary care to terminally ill parents or old grandparents. In such cases, the uniform measure of placing children in alternative care placement is impractical as children in accompanied child-headed households may want to stay with their ill parents or guardians. Furthermore, separating children from terminally ill parents or guardian is ethically questionable.

There are also certain advantages of legally recognising child-headed households. By legally recognising their status, states are able to develop a legal framework to enforce protection and assistance measures. It also highlights challenges faced by children in child-headed households and opens up discussions on how best to support them. For instance, in South Africa, the move to legally recognise them generated discussions on the definition of child-headed households, a legal age limit by which a child can be allowed to head a household, conditions in which a household can be recognised as a child-headed household, and appropriate measures of support and protection that respect the rights of all children in child-headed households, especially that of children heading a household.<sup>314</sup> Recognising their status and developing an

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<sup>313</sup> ‘Unaccompanied child-headed household’ is a child-only household. ‘Accompanied child-headed household’ refers to a household where a child is a *de facto* head of a household despite an adult is living in the household due to incapacity of the adult resident.

<sup>314</sup> See chapter 4 for a detailed discussion on the case of South Africa.

appropriate legal framework may be a step towards a rights-based approach. In the following section, the recognition and support provided to children in child-headed households in different African states will be discussed. The purpose of the section is to have an overview of the way child-headed households are addressed in legal and policy framework in different countries.

### **3.5.2 Recognising and supporting child-headed households in different African states**

There is an increasing trend to include recognition and support to child-headed households in the legal and policy framework in African states. Most notably, Namibia has an extensive draft Child Care and Protection Bill, which includes provisions on alternative care placements, including child-headed households. The first proposed draft Amendment Bill for the Children Act in Uganda also contains a provision on child-headed household. Furthermore, Southern Sudan's Child Act provides material support and protection to children in child-headed households.

#### *(i) Southern Sudan*

The Child Act No 10 of 2008 of Southern Sudan specifically requires all levels of the government to register children in particular material needs, including child-headed households.<sup>315</sup> The purpose of the registration is to 'protection those children from abuse and enable them to grow with dignity and develop their potential and self-reliance.'<sup>316</sup> Furthermore, section 126 of the Act, which defines children in 'special needs and protection', includes certain categories of children that could potentially include children in child-headed households. For instance, children who are 'uncared for because of illness, old age or death of parents or guardians'<sup>317</sup> and children 'whose parents are terminally or severely ill'<sup>318</sup> are the examples. In case, where children are found to be in need of special care and protection, the state is required to

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<sup>315</sup> Sec 117 of the Child Act No 10 of 2008 of Southern Sudan.

<sup>316</sup> Sec 117 of the Child Act of Southern Sudan.

<sup>317</sup> Sec 126(j) of the Child Act of Southern Sudan.

<sup>318</sup> Sec 126(p) of the Child Act of Southern Sudan.

provide temporary assistance and accommodation to such children, including food, education, medical care and other basic social service.<sup>319</sup>

Although it is commendable that child-headed households are specifically addressed in the Act, the absence of the definition of the term, ‘child-headed household’, and unclear measures to protect and support children in child-headed household raise concern. For instance, section 70 of the Act states that the State should provide ‘alternative family care’ to children who are *parentless*, including kinship care, foster care or adoption.<sup>320</sup> Section 70(2) stipulates that siblings should not be separated in foster care or adoption. However, it is not clear if a child-headed household is considered as an alternative family care. If child-headed household is not considered as an alternative family care, allowing children to remain in child-headed households may be contradictory to section 70. Furthermore, the Act does not specify in which condition children should be allowed to form and remain in child-headed households. Despite section 6 of the Act upholds the state obligation to give the best interests of the child the paramount importance in matters concerning child, specifically stating the requirements to be met, such as the age, maturity and wishes of the children in the households, would certainly increase the protection provided to children in child-headed households.

(ii) *Namibia*

The Namibian Child Care and Protection Bill is a comprehensive document, which contain detailed provisions on the care of children who are deprived of their family environment. There are two most notable features of the Namibian Bill, which are directly relevant to the thesis: 1) the inclusion of kinship care as a form of alternative care; and 2) provisions on child-headed households.

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<sup>319</sup> Sec 116(4) of the Child Act of Southern Sudan.

<sup>320</sup> The emphasis is mine. The emphasis is used to highlight the fact that the government’s obligation to provide alternative care family extends to children who are parentless rather than children who are deprived of their family environment, which could be interpreted more broadly than ‘parental care’.

The Namibian Bill defines ‘kinship care’ as ‘care of a child by a member of the child’s family or extended family’.<sup>321</sup> The definition of ‘family member’ is defined to include not only people who are related to the child through blood or legal ties, but also any other person with whom the child had developed a psychological and emotional attachment, which resembles ‘a family relationship.’<sup>322</sup> The understanding of the kinship care in the Bill is similar to that of the UN Guidelines for the Alternative Care of Children, which define ‘kinship care’ as ‘family-based care within the child’s extended family or with close friends of the family known to the child.’<sup>323</sup> Nevertheless, the definition of ‘kinship’ in the Namibian Bill seems to give more emphasis on the ‘relationship between the kinship care giver and the child’ by including the element of emotional attachment between the child and the care giver. Although the Guidelines also include that the individual should be a close friend to the family and the child should know the individual, the ‘prior knowledge’ may not necessarily mean ‘emotional attachment’.

The distinction between ‘foster care’ and ‘kinship care’ in the Namibian Bill is the same as the distinction made in the UN Guidelines. Foster care is defined as ‘the care of a person who is not the parent, guardian, family members of extended family member of the child’, which is granted through an order of a children’s court.<sup>324</sup> Kinship care, unlike foster care, does not necessarily go through a children’s court. However, in order for the kinship care giver to access any applicable grant or maintenance payment in terms of which the child is a beneficiary, the care agreement should be registered with the clerk of the children’s court.<sup>325</sup> While the majority of kinship care agreement is expected to be informal without a court intervention, the Bill specifically requires the kinship agreements are concluded after due consideration to the view of the child, and also to comply with the best interest of the child.<sup>326</sup> The inclusion of the provision regarding the best interests of the child is important as

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<sup>321</sup> Chp 1 Definitions, objectives of action and application, Child Care and Protection Bill, Revised final draft: May 2010, Namibia. Also, see Sec 114(1) of the Child Care and Protection Bill.

<sup>322</sup> Child Care and Protection Bill (as above).

<sup>323</sup> Para 29(c)(i) of the UN Guidelines for the Alternative Care of the Child.

<sup>324</sup> Sec 150 of the Child Care and Protection Bill (as above).

<sup>325</sup> Sec 114(2) of the Child Care and Protection Bill (as above).

<sup>326</sup> Secs 114(3)(c) & 114(5) of the Child Care and Protection Bill (as above).

during the informal kinship care arrangement, the best interests of the child or the participation of the child could be ignored or given minimal consideration.<sup>327</sup>

The provisions on child-headed households in the Namibian Child Care and Protection Bill are similar to the relevant provisions contained in the Children's Act in South Africa, which is discussed in detail in chapter four. Section 206 of the Child Care and Protection Bill sets out the circumstances in which a household may be recognised as a child-headed household. Despite the similarities, section 206 of the Child Care and Protection Bill does not specify the age limit of a child who may head the household.<sup>328</sup> Although an inflexible age limit is also undesirable, in the absence of the age limit of a child heading household, there is a danger that even a child who is too young to be a head of household may be entrusted with the responsibility. It may also be contrary to the requirement of the UN Guidelines for the Alternative Care, which urge states to provide special attention to ensure that the head of a child-headed household enjoy all rights inherent to his or her child status including access to education and leisure.<sup>329</sup> Furthermore, in the absence of basic guideline on the age limit of the child head of a household, the harmonisation of the laws regarding the school-leaving age, minimum age for employment and age by which a child can apply for grants on behalf of his or her siblings is pertinent.

In order to prevent a child who is too young to be given the responsibility of a head of a household, the best interests of the child, which is included as one of the conditions based on which the determination to recognise a household as a child-headed household, should be given the utmost importance. Nevertheless, it would be desirable if the provision sets out the minimum age at which a child is allowed to head the household while providing exceptional cases where a child below the minimum age can head a household. The exceptional cases could include the following: 1) the child is mature enough understand the responsibilities as a head of the household and the consequences of assuming the role; 2) terminally ill parents or adult guardians of the child stay with the child in the household; 3) it is in the best interests of the child;

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<sup>327</sup> N Cantwell, 2005 (n 57 above).

<sup>328</sup> Sec 206 of the Child Care and Protection Bill (n 321 above).

<sup>329</sup> Para 37 of the UN Guidelines for the Alternative Care of Children.

and 4) the child expressly wishes to remain with his or her terminally ill parents or guardians while performing the role of the head of the household.

As in South Africa, children in child-headed households are under the general supervision of an adult designated by: (a) a children's court; or (b) an organ of state or a non-governmental organisation determined by the Minister. The Bill provides a strong protection to children in child-headed households from the abuse and misuse of the power by the supervising adult by including specific penalties in case of misappropriation of grant or assistance directed to the children in child-headed households.<sup>330</sup> Furthermore, the section also provides that a child heading the household or other children in the household given the maturity and stage of development, may report the supervising adult if they are dissatisfied with the performance of their supervisor.<sup>331</sup> However, the section does not specifically mention the course of actions to be taken if the allegations against the supervisor have been proved true and the similar allegations are repeatedly made.

Finally, another important feature of the Bill is the provision on economic assistance to vulnerable children, including children in child-headed households. There are four main grants in relation to children; 1) state maintenance grant,<sup>332</sup> 2) residential child care facility grant,<sup>333</sup> 3) foster parent grant<sup>334</sup> and 4) child disability grant.<sup>335</sup> Residential child facility care grant is unique in that the grant is available to children in residential child care facilities. The grants are payable to the residential care facilities to provide financial assistance to residential care facilities in caring for the children. The assumption is that the grant will ensure that children received a standardised level of care in residential care facilities. However, despite the provision penalising misuse of grants directed to children by adult recipients, it is not clear how the spending of the grant will be monitored and regulated in the residential care settings. It would also have been highly desirable if the portion of the grant were to be reserved for the children on a monthly basis as part of the aftercare programme.

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<sup>330</sup> Sec 206(9) of the Child Care and Protection Bill (n 321 above).

<sup>331</sup> Sec 206(8) of the Child Care and Protection Bill (as above).

<sup>332</sup> Sec 218 of the Child Care and Protection Bill (as above).

<sup>333</sup> Sec 219 of the Child Care and Protection Bill (as above).

<sup>334</sup> Sec 220 of the Child Care and Protection Bill (as above).

<sup>335</sup> Sect 221 of the Child Care and Protection Bill (as above).

Children in child-headed households may apply for state maintenance grant. The grant is available for any child who is or under the age of 18 years. Also, importantly, children who receive a state maintenance grant or placed in foster care or in residential care are automatically entitled to various social services, including basic education in state schools, subsidised school uniforms and scholarly-related items and basic health care.<sup>336</sup> Furthermore, such children are entitled to exemption from payment for the application for any official document.<sup>337</sup> Such comprehensive provisions reflect the UN Guidelines for the Alternative Care of Children, which require states to provide support and services, particularly in relation to children's health, housing, education and inheritance rights.<sup>338</sup>

(iii) *Uganda*

The first proposed draft Amendment Bill for the Children Act specifies that a Family and Children Court may grant an order for the supervision of a child-headed household. Under section 36 on child-headed household, two categories of people can apply for such order; (1) a relative of the children, or (2) any person who is willing to undertake the role of supervising the children.<sup>339</sup> The Court shall, in granting the supervisory order, appoint a child as a head of the household and prescribe the roles and duties of the supervising adult.<sup>340</sup> Although it is commendable that child-headed households are specifically included in the Bill, the provision is limited in several ways. First of all, it does not define the term, 'child-headed households'. There is a danger that the term may be interpreted narrowly only to include 'child-only' households. Such limited understanding of the term could leave out households where children assumed *de facto* head of households despite the surviving parents or guardians. Secondly, the section does not specify under which circumstance the Court may appoint a child to head the household. It does not contain minimum thresholds,

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<sup>336</sup> Secs 224(a), 224(b) & 224 (c) of the Child Care and Protection Bill (as above).

<sup>337</sup> Sec 224(d) of the Child Care and Protection Bill (as above).

<sup>338</sup> Para 37 of the UN Guidelines for the Alternative Care of Children.

<sup>339</sup> Sec 36(1) of the proposed draft Amendment Bill to the Children Act, Uganda (11 December 2009) The copy of the Bill is with the author.

<sup>340</sup> Sec 36(2) of the proposed draft Amendment Bill (as above).

for instance, the age of the child to head the household, the maturity or capability of the child or different needs of the children in the households. Finally, the section does not mention whether and how the Court would assess the suitability of a person who is applying for the order for the supervision. Although the Court has the power to prescribe the roles and duties of the supervising adult, it is not clear whether and how the monitoring of the supervisor would be carried out.

*(iv) Child-headed households recognised and supported in the policy frameworks*

Child-headed households are also addressed in various national strategic frameworks on orphans and other vulnerable children including the National Plan of Action for Orphans and Vulnerable Children in Kenya,<sup>341</sup> the Malawi National Policy on Orphans and Other Vulnerable Children,<sup>342</sup> the Namibian National Plan of Action for Orphans and Vulnerable Children,<sup>343</sup> the National Guideline and Standards of Practice on Orphans and Vulnerable Children in Nigeria,<sup>344</sup> the National Action Plan for OVC in Swaziland,<sup>345</sup> the National Strategic Programme Plan of Interventions for Orphans and Other Vulnerable Children in Uganda,<sup>346</sup> the National Plan of Action for Orphans and Other Vulnerable Children in Zimbabwe.<sup>347</sup>

However, the level of support provided or responses developed in those documents differs from one country to another. For instance, a child-headed household is defined in the National Plans of Action for Orphans and Vulnerable Children in Nigeria, Namibia and Uganda. In all three countries, a ‘child-headed household’ is defined as a household headed by a child below 18 years of age. In Nigeria, the definition

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<sup>341</sup> National Plan of Action for Orphans and Vulnerable Children, 2007-2010, Ministry of Gender, Children and Social Development, Kenya.

<sup>342</sup> National Policy on Orphans and Vulnerable Children 2003, Ministry of Gender and Community Services, Malawi.

<sup>343</sup> National Guideline and Standards of Practice on Orphans and Vulnerable Children 2007, Federal Ministry of Women Affairs and Social Development, Nigeria.

<sup>344</sup> National Plan of Action for Orphans and Vulnerable Children, 2006-2010, Ministry of Gender Equality and Welfare, Namibia.

<sup>345</sup> National Action Plan for OVC, 2006-2010, Swaziland.

<sup>346</sup> National Strategic Programme Plan of Interventions for Orphans and Other Vulnerable Children, 2006-2010, Ministry of Gender, Labour and Social Development, Uganda.

<sup>347</sup> National Plan of Action for Orphans and Other Vulnerable Children, 2004, Zimbabwe.



includes a household headed by a child due to illnesses and disability of the parents.<sup>348</sup> In Uganda, the definition includes ‘children who are parents’.<sup>349</sup> The National Plans of Action for Orphans and Vulnerable Children in Kenya, Nigeria, Uganda and Zimbabwe provide a relatively comprehensive protection for child-headed households, such as mentorship support and financial support. National Plan of Action for Orphans and Vulnerable Children in Kenya provides for the establishment of mechanism to monitor child-headed households and to provide training programmes on issues such as parenting, financial management, safe sex and legal affairs.<sup>350</sup> In Nigeria, child-headed households are prioritised in all support programmes, such as health care, food security, community-based care programmes and education. In Zimbabwe, child-headed households are entitled to food packages, improved sanitation facilities and access to health care. In Namibia and Swaziland, the type of support is limited to the protection of inheritance right and provision of food packages.

Although the inclusion of child-headed households in the policy framework is important, the limited support measures provided to children in child-headed households and the lack of clear definition of child-headed households remain a concern. Furthermore, the national survey conducted by UNAIDS shows that despite the existence of the specific plans and strategies to support and protection orphans and other vulnerable children, including children in child-headed households, only a limited proportion of children have been covered. For instance, in Kenya, Uganda, Zambia and Zimbabwe, less than 25 per cent of orphaned and vulnerable children are benefiting from the existing support and protection measures.<sup>351</sup> In Malawi and Mozambique, the figure is a little higher at 30 per cent.<sup>352</sup> It is strongly recommended that states develop a clear definition of child-headed households and include comprehensive protection and support measures in their legislative framework. The example of South Africa, which will be discussed in chapter four, could provide a

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<sup>348</sup> Nigeria 2006-2010 (n 343 above) 51.

<sup>349</sup> Uganda, 2006-2010 (n 346 above) sec 3.4.

<sup>350</sup> Kenya, 2007-2010 (n 341 above)16.

<sup>351</sup> 2010 UNAIDS National Policy Composite Index for those countries can be found at: [http://www.unaids.org/en/KnowledgeCentre/HIVData/CountryProgress/2010\\_NCPI\\_reports.asp](http://www.unaids.org/en/KnowledgeCentre/HIVData/CountryProgress/2010_NCPI_reports.asp) [accessed: 20 July 2010].

<sup>352</sup> As above.

guidance to other countries, which endeavour to develop a similar legal framework recognising and protecting child-headed households.

In the following section, some pertinent issues that may be raised by legally recognising child-headed households are addressed.

### **3.5.3 A child-headed family or a placement of alternative care?**

As discussed in section 3.5.1, the implementation of effective strategies to reduce the number of child-headed households is, needless to say, important. Nevertheless, measures to legally recognise child-headed households do not necessarily contradict the efforts to prevent the occurrence of child-headed households. Legal recognition protects children who have no option but to form and remain in child-headed households, either temporarily or permanently. The importance of providing support and assistance to children in child-headed households has been advocated by various organisations<sup>353</sup> and legally recognising the rights of, and obligations of states towards, child-headed households is an important way to recognising the children's status as rights-holders. However, as Cantwell and Holzscheiter note, the implications of legally recognising child-headed households in relation to the right to alternative care, and special protection and assistance, have not been explored fully.<sup>354</sup> Some of the unexplored questions are whether to recognise child-headed households as a form of family, and whether state responsibilities should thus be geared towards 'family preservation', or whether child-headed households should be recognised as a form of alternative care.<sup>355</sup>

One of the strongest arguments for the family preservation approach is that child-headed households meet the criteria of 'family' and 'family environment'. As mentioned in the previous section, there are generally two criteria in determination of a 'family': the biological or legal ties among the members, and the emotional elements, such as an element of a 'life together'. Child-headed households often meet

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<sup>353</sup> UNICEF, 2007 (n 215 above) 29; S Tsegaye, *HIV/AIDS, orphans and child-headed households in sub Saharan Africa*, African Child Policy Forum (2008) 6.

<sup>354</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 86-88.

<sup>355</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above). Another question posed by Cantwell and Holzscheiter was the definition of child-headed households.

both criteria as child-headed households often consist of siblings and have a strong family bond.

However, it has to be emphasised that although child-headed households may meet the criteria of ‘family’, those criteria are based on an assumption that a parent(s) or adult relative live (‘exist’) in the concerned household. In all cases, where HRC or European Human Rights Court were asked to determine the ‘existence of family’, the cases concerned estranged parents, child custody, or the examination of violation of the right to family in article 24 of the ICCPR or in article 8 of European Convention on Human Rights in cases of immigration and deportation. As such, the presence of a ‘parent’ or at least an ‘adult caregiver’ in a ‘family’ has been taken for granted. Child-headed households, especially unaccompanied child-headed households, lack an adult caregiver within the households.

Besides the structural understanding of ‘family’, and most importantly, the question is whether recognising child-headed households as a type of family would be in the best interests of the children. By recognising a child-headed household as a type of family, the state assumes responsibilities to provide what is necessary to sustain it as a family unit. Nevertheless, once the child-headed household is recognised as a ‘family’, it would disqualify children in child-headed households from benefiting from article 20 of the CRC, and other relevant articles on children who are *deprived* of their family environment.<sup>356</sup> Once recognised as a ‘family environment’, such households of siblings could be excluded from receiving special protection and assistance because, in essence, the children have not been deprived of their ‘family environment’.<sup>357</sup> A preservation approach would provide a weaker protection and assistance to children in child-headed households than a protection approach, which recognise the special status of children in child-headed households. Furthermore, recognising child-headed households as ‘family’ could normalise such households, which in turn, may overshadow their vulnerable status that warrants special protection and assistance.

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<sup>356</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 88; However, under article 25 of the ACRWC, the matter is different as the article distinguishes children who are parentless from children who are deprived of their family environment.

<sup>357</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 32.

As Cantwell and Holzscheiter point out, child-headed households could be recognised as ‘alternative care that maintains family and other ties’.<sup>358</sup> The CRC General Comment No 3, which mentions child-headed household, is rather ambiguous in this instance. This General Comment simply urged states to give ‘special attention’ to children who are affected by AIDS, including child-headed households.<sup>359</sup> It recognised the necessity to give ‘legal, economic and social protection to affected children’ and ‘encouraged’ states to provide ‘support, financial and otherwise’ to child-headed households, but it is not clear whether such legal protection indicates legally recognising child-headed households.<sup>360</sup> While recognising that the best way to protect and care for children who are orphaned is to keep siblings together in the care of relatives or family members, the CRC Committee recommends that if the kinship care option is not available, states should, as far as possible, support family-type alternative care, such as foster care.<sup>361</sup>

The relevant sections in the 2009 UN Guidelines for the Alternative Care of Children are also ambiguous. The Guidelines require states to provide support and service to siblings who lost their parents or caregivers and choose to remain in their household and to protect such households from all forms of abuse and exploitation.<sup>362</sup> However, the Guidelines do not seem to explicitly recognise or categorise child-headed households into any particular categories.<sup>363</sup> Although the Guidelines do not clearly define or provide a list of possible forms of ‘supervised independent living arrangement for children’, if child-headed households would be so classified, it seems most feasible that child-headed households should have been explicitly included in the supervised independent living arrangement for children.

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<sup>358</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 86.

<sup>359</sup> CRC Committee, 2003 (n 32 above) para 31.

<sup>360</sup> CRC Committee, 2003 (as above) paras 31 & 34.

<sup>361</sup> CRC Committee, 2003 (as above) para 34.

<sup>362</sup> Para 37 of the UN Guidelines for the Alternative Care of Children.

<sup>363</sup> See n 296 above for the discussion on the understanding of kinship care.

The third way would be to legally recognise the special status of such households and to provide appropriate support mechanisms.<sup>364</sup> South Africa has opted for this approach. Child-headed households are, under certain conditions, recognised as a protective measure, and are given a secure and determined legal status. The significance of classifying child-headed households as a protective measure rather than as an alternative care measure is the idea that children should not be *deliberately placed* in child-headed households but if children were to be *found* in child-headed households, and to remain so is in their best interests, a legal status should be given to such household and the children should be fully supported to function as an independent unit of care. The UN Guidelines for the Alternative Care of Children seems to support the third way, albeit implicitly. Paragraph 37 of the Guidelines stipulate that states have a responsibility to ensure that through appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian' to provide 'mandatory support' to children from all forms of exploitation and abuse'.<sup>365</sup>

Another question that may arise is whether the recognition of a child-headed household, thereby allowing children to remain in such household, should be the last resort when all the other alternative care options have been considered and deemed inappropriate. The wording of the UN Guidelines for the Alternative Care of Children seems to suggest that sibling or child-headed households may be a preferred option to other alternative care placements if siblings need to be separated or at least there is no obligation on the part of the states to try alternative care placements for such children. As mentioned briefly, the Guidelines emphasises the importance of keeping siblings together and urges that as long as the eldest sibling is willing and capable of carrying out the responsibilities as a head of the household, states should provide support and service to such household.<sup>366</sup> Then, the next logical question would be how to support child-headed households to function as an independent unit of care while protecting

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<sup>364</sup> N Cantwell & A Holzscheiter, 2008 (n 135 above) para 86; However, the Act, which is finalised after the publication of the book indicates that South Africa has deliberately avoid classifying child-headed households as a form of placement of option.

<sup>365</sup> Para 37 of the UN Guidelines for the Alternative Care of Children.

<sup>366</sup> Para 37 of the UN Guidelines for the Alternative Care of the Children.

the rights of all children in child-headed households, including children heading the households. This is the subject matter of the next section.

### **3.5.4 Protection of children in child-headed households: a rights-based approach**

As Sloth-Nielsen points out, there are inherent dangers in legally recognising child-headed households.<sup>367</sup> Firstly, recognising child-headed households could undermine the principle that the protection of children's rights should be extended to all children below the age of 18.<sup>368</sup> Legally sanctioning a child to assume adult responsibilities could lead to 'dilution of the minimum age for entry into adulthood', which in turn could compromise the fundamental principle that all people under 18 are, by definition, children and, therefore, should be protected as such.<sup>369</sup> Secondly, there is a danger of states negating their responsibilities towards children who are deprived of their family environment by formally recognising child-headed households as autonomous family units, capable of regulating their own affairs.<sup>370</sup>

Nevertheless, the existence of child-headed households is a reality in many African states. The non-recognition of the existence of child-headed households could pose an equally great danger. The over-reliance on the willingness and capacity of extended families to provide adequate care to children who are deprived of their family environment could also lead to neglecting such children. Therefore, the recognition of child-headed households may provide an avenue for the governments to develop concrete measures to support and protect children in such households.<sup>371</sup> In order to minimise the dangers of recognising child-headed households, the measure recognising and supporting such households should be provided from a rights-based approach.

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<sup>367</sup> J Sloth-Nielsen, 'Of newborns and nubile: some critical challenges to children's rights in Africa in the era of HIV/Aids' (2005) 13 *The International Journal of Children's Rights* 77.

<sup>368</sup> As above 78.

<sup>369</sup> As above 78.

<sup>370</sup> As above 78.

<sup>371</sup> As above 79.

The benefit of adopting a human rights-based approach is clear in this case when compared to other approaches such as the needs-based or cost-effective approaches. Although all these approaches are essentially working towards relieving suffering of recipients, their ultimate objectives are different. For instance, a needs-based approach aims simply to meet the needs of the people. It is useful in short-term emergencies where the needs of the affected people are clear.<sup>372</sup> To achieve the objective of a needs-based approach, the theoretical consideration or examination of the root causes of the problem is not required. For instance, organisations providing humanitarian assistance to people in situations of armed conflict or natural disasters may naturally prioritise the speedy delivery of service to meet the needs of the people.<sup>373</sup>

However, a rights-based approach aims to address the root causes of the violation of those rights as well as the needs of the people. One case scenario is following: a study by Human Science Research Council indicated that children in child-headed households find it difficult to continue with their education.<sup>374</sup> A similar study conducted in Botswana showed that 40 per cent of children heading a household have not been to school.<sup>375</sup> Applying a needs-based approach may provide school fees or other assistance to enable children to attend the school without analysing the causes of the violation of the right to education of those children. On the other hand, applying a rights-based approach would require locating the right to education in domestic and international legal frameworks. It also requires an analysis of the root-causes of the non-fulfilment of the right to education. When the causes are identified, the government can be held responsible for not providing adequate services or assistance to enable those children to enjoy their right to education.

It could be argued that as long as children are given assistance to attend schools which approach has been applied is not important. However, if the cause of the non-attendance is linked to stigmatisation and discrimination against children in child-

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<sup>372</sup> S Goonesekere, *A rights-based approach to realizing gender equality*, available at: <http://www.un.org/womenwatch/daw/news/rights.htm> [accessed: 15 Sept 2006] para 67.

<sup>373</sup> S Goonesekere (as above) para 67.

<sup>374</sup> A Davids & D Skinner (eds), *Situational analysis of the socio-economic conditions of OVC in four districts in South Africa*, Human Science Research Council (2005) 71.

<sup>375</sup> G N Tshoko *et al.*, *A census of orphans and vulnerable children in two villages in Botswana*, Human Science Research Council (2006) 27.

headed households, simply providing school fees and uniforms through a needs-based approach may not be enough. A rights-based approach could facilitate a dialogue to address deeper causes of the violation and find a solution that is more permanent and has far reaching consequences. For example, in South Africa, under the South African Schools Act,<sup>376</sup> children should not be prevented from attending school if they are under 15 and have not completed grade 9.<sup>377</sup> A needs-based approach may not heed the fact that under the law, children have the right to education regardless of their inability to pay school fees. A rights-based approach emphasise the fact that children have the right to education and the government has a responsibility to put in place appropriate measures to ensure that children's right to education is fulfilled.

Furthermore, in needs-based approaches, beneficiaries of programmes are passive recipients rather than active participants. The participation and inclusion of recipients in programming and implementation of projects are not necessarily important. Nevertheless, the emphasis on participation and inclusion elements is important in addressing structural problems in a society. Unequal power distribution in any given society creates marginalised groups of the population. The marginalisation of socially vulnerable groups renders them invisible. The invisibility hinders active participation of such groups in decision-making processes which affect them. The lack of representation and participation, in turn, exacerbates their indivisibility and marginalisation forming a vicious circle. A rights-based approach ensures participation and inclusion of all the stake holders in planning and implementation of projects and programmes and thereby breaking the vicious circle of marginalisation and lack of participation. A rights-based approach is particularly important when planning and implementing projects, programmes and social services for children. Children are often socially and politically marginalised. Despite their right to be heard, children's participation often remains an aspiration.

Utilitarian-driven approaches, such as 'low-cost high impact' or 'cost-effective' approaches, might focus on a less severe type of violations that affects a larger

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<sup>376</sup> South African Schools Act No 84 of 1996.

<sup>377</sup> Sec 5(3)(a) of the South African Schools Act.



number of people.<sup>378</sup> A rights-based approach, which is based on the concept of maximum benefits to the most marginalized population, is more likely to give a priority to a severe or gross type of rights violation even if that affects only a small number of people.<sup>379</sup> Although the number of children in child-headed households is small in proportion compare to other children in poverty, due to their special vulnerability, states are under the obligation to provide special protection and assistance. Providing special protection and assistance to children in child-headed households does not mean, and should not mean, other vulnerable children are sidelined. Nevertheless it means that children in the most vulnerable situation should be given the adequate protection, if necessary a stronger protection, so there would be an equal chance of their rights being realised. The rights-based approach justifies providing a stronger protection for children in the most vulnerable situation. Furthermore, like a needs-based approach, utilitarian approaches do not necessary base their claims on human rights. Therefore, it shares the same weakness as a needs-based approach. As Goonesekere put it, the most important feature of the rights-based approach is that is ‘allows legitimate claims to be articulated with a moral authority which other approaches lack.’<sup>380</sup>

To design effective support and protection measures based on the principles of a rights-based approach, it is important to understand the particular difficulties and vulnerabilities of being in child-headed households. By correctly identifying and understanding the challenges faced by children in child-headed households, states can devise appropriate support and protection measures, which specifically target particularly vulnerable areas. Germann, quoting from the UNICEF workshop report on regional conference on children without parental care in Windhoek, identifies five areas of special vulnerabilities of child-headed households: 1) development of older children is negatively affected by the parenting responsibilities; 2) older children’s education is often interrupted due to the financial difficulties and lack of time; 3) child-headed households lack protection; 4) children are deprived of parental guidance and inter-generational skills; and 5) children face difficulties of meeting

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<sup>378</sup> C Nyamu-Musembi & A Cornwall ‘What is the rights-based approach all about? Perspectives from international development agencies’, IDS Working Paper 234 (November 2004) 3.

<sup>379</sup> C Nyamu-Musembi & A Cornwall, 2004 (as above) 3.

<sup>380</sup> S Goonesekere (n 372 above) para 4.

daily needs.<sup>381</sup> Subbarao and Coury note the particular vulnerabilities of children who are orphaned by AIDS as: 1) loss of income; 2) loss of educational opportunities; 3) malnutrition and adequate health care; 4) property grabbing; 5) abuse, exploitation and discrimination; and 6) psychological trauma.<sup>382</sup>

A study on children in child-headed households in Ethiopia by the African Child Policy Forum provided a detailed analyse on vulnerabilities of children in child-headed households. It pointed out the differences in needs and vulnerabilities between children in unaccompanied and accompanied child-headed households. The common vulnerabilities and needs are identified as: 1) financial difficulties; 2) the tremendous emotional trauma; 3) the danger of exploitation and discrimination; 4) the loss of educational opportunities, especially for children heading the households; 5) the inability to seek adequate health care and limited accessibility to health care services; 6) the heightened vulnerability to sexual abuses and property grabbing; and 7) a lack of play time.<sup>383</sup> The report noted that children heading accompanied child-headed households may experience added care burdens as they are required to meet physical and emotional needs of incapacitated adults as well as younger siblings.<sup>384</sup>

The most important areas of concern can be noted in relevant international documents. The CRC Committee specifically mentioned the legal, economic, and social protection to enable children to access ‘education, inheritance, shelter and health and social services’.<sup>385</sup> The 2009 UN Guidelines emphasise the importance of providing mandatory protection to children in child-headed households from all forms of abuse and maltreatment, with particular attention to children’s health, housing, education and inheritance right.<sup>386</sup>

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<sup>381</sup> S E Germann, *An exploratory study of quality of life and coping strategies of orphans in living in child-headed households in the high HIV/AIDS prevalent city of Bulawayo, Zimbabwe*, Doctorate thesis, University of South Africa (June 2005) 95.

<sup>382</sup> K Subbarao & D Coury, 2004 (n 141 above) 22.

<sup>383</sup> *Reversed roles and stressed souls: child-headed households in Ethiopia*, African Child Policy Forum (2008) 14-16.

<sup>384</sup> African Child Policy Forum, 2008 (as above) 16.

<sup>385</sup> CRC Committee, 2003 (n 32 above) para 31.

<sup>386</sup> Para 37 of the UN Guidelines for the Alternative Care of Children.

Considering the above vulnerabilities of child-headed households, the measures of special protection and assistance should focus on five broad issues: 1) the establishment of legal and social protection for all children in child-headed households against exploitation, abuses and discrimination; 2) the realisation of the right to an adequate standard of living; 3) protection of educational rights and health rights; 3) ensuring cultural connection remains with the communities in which they live; 4) providing psycho-social support and counselling; and 5) ensuring child-headed households benefit from adequate home-based care programmes to reduce the burden of care. The principles of a rights based approach should inform how the support measures should be designed and implemented to sufficiently address the vulnerabilities of all children in child-headed households.

### **3.6 Conclusion**

Many African states that are affected by the HIV epidemic are facing the immense challenge of providing care to children who are deprived of their family environment. One of the difficult dilemmas in those countries is the increasing number of children in child-headed households. Without doubt, supporting the existing extended family network to reduce the occurrences of child-headed households is essential. Also important is the strengthening of the formal alternative care structure to provide appropriate alternative care to children in child-headed households, such as kinship care, foster care or cluster foster care. However, in certain cases, there is no suitable option for the children but to remain in child-headed households. Children may not have suitable relatives who are willing take them. A large sibling group may need to be separated in kinship or foster care. A cluster foster care or small residential care may not be suitable for children who do not wish to leave their house where they have strong emotional ties. Therefore, the questions are how to determine whether children can remain in a child-headed household and how to support and protect children in child-headed households.

Determining whether a certain child-headed household can provide adequate welfare and protection to the children with warmth and affection should be examined on a case-by-case basis. Several factors, such as the maturity and willingness of the child heading the household, and the existence of external material and emotional support

will largely determine whether a certain child-headed household can function as an independent unit of society. In many cases, child-headed households will, with adequate support, be able to provide adequate care to children in the households. However, leaving aside whether they can or not, whether it is *desirable* to legally accept child-headed households may be questioned. One may argue that legally accepting child-headed households may normalise what is a most unfortunate consequence of the HIV epidemic. It may also be argued that by legally recognising child-headed households, states may evade their responsibility towards children deprived of family environment under articles 20 of the CRC and 25 of the ACRWC.<sup>387</sup>

In principle, placing children who are deprived of parental care and a family environment in conventional alternative care might seem to be in line with the principles of children's rights, but the matter is rather more complicated. First of all, it is reported that many children in child-headed households wish to stay in their family estate.<sup>388</sup> There can be several reasons, for instance, to protect their inheritance right and the desire to remain together. Secondly, separating from their siblings children who have gone through the traumatic experience of losing parents may add considerable psychological burdens on those children.<sup>389</sup> Thirdly, considering the lack of adequate alternative care measures and facilities in many countries in Africa, placing all children in alternative care would not only be impractical, but also undesirable. Considering the above points, at least in some cases, children may be better cared for in child-headed households.

However, not all households that have been spontaneously headed by a child after the death of parents should be legitimatised. There should be stringent criteria according to which the decision on whether children should be allowed to stay as a child-headed household should be made by a competent body. On the one hand, if the decision is made that children, for their best interests, should not be allowed to stay in the child-

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<sup>387</sup> J Sloth-Nielsen, 2005 (n 367 above) 78.

<sup>388</sup> See chapters 1 & 4 for further discussion. Also see L C Simbayi *et al.*, *Psychosocial issues affecting orphaned and vulnerable children in two South African communities*, Human Science Research Council & Nelson Mandela Foundation (2006) chapter 2; S Tsegaye, 2008 (n 353 above) 17.

<sup>389</sup> As above.

headed household, states have an obligation under the right to alternative care, and special care and protection to provide those children with appropriate alternative family care. On the other hand, if children, in their best interests, should be allowed to stay in a child-headed household, those children are entitled to special measures of protection and assistance from states.

The concept of special protection and assistance has been explored in section 3.4. The purpose of providing special protection and assistance is to ensure that children in child-headed households are not discriminated against from realising their potential and rights only due to the fact that they live in child-headed households. The support and protection measures should ensure not only the access to services but also the effective enjoyment of such services. For example, in relation to education, state responsibilities to provide education to children in child-headed households go further than giving them access to education. It also entails providing the necessary support, material and otherwise, to enable children in child-headed households to receive appropriate and quality education. Only when clear legal and policy frameworks to support children in child-headed households to fully realise their rights are established, should children be allowed to form and remain in child-headed households.

In the following chapter, the South African legal and policy frameworks legally recognising child-headed households are analysed against the background and principles provided in this chapter.