

**PROTECTION OF THE RIGHT TO A FAMILY WITHIN THE CONTEXT
OF SEPARATED AND UNACCOMPANIED CHILDREN IN NATURAL
DISASTERS**

BY

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Declaration

I, Ekanem Okon, hereby declare that this dissertation is my original work and it has not been previously submitted for the award of a degree at any other university or institution.

Signed: _____

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Place: _____

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Dedication

To God Almighty who "hath made everything beautiful in its time"...¹

To "family"

... that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children,...²

... that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,³

¹ King James Version of the Holy Bible Ecclesiastes 3 verse 11.

² UNCRC Preamble para 5.

³ UNCRC Preamble para 6.

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For all the mature scholarly minds who contributed in one way or the other in refining this piece, I am most grateful.

With the emotional and psychological support of my "family" I am beginning to live my dream. I am privileged to be a part of you.

Above all, I thank God Almighty for His faithfulness.

Abstract

Title: Protection of the right to a family within the context of separated and unaccompanied children in natural disasters

By

Ekanem Okon

Prepared at the Centre for Child Law, Faculty of Law, University of Pretoria, Republic of South Africa under the supervision of Prof Ann M Skelton

The years 2010 and 2011 recorded a number of incidents of natural disasters around the globe. These disasters resulted in death, injuries and loss of family members. Children, a vulnerable group of persons, found themselves caught up in the chaos of the natural disasters. Some children lost family members, others became separated from their families and caregiver(s) as a result of the disaster, and those who were "alone" prior to the natural disasters became completely exposed to serious physical and psychological harm. Yet, every child has the right to a family.

States have a duty to protect separated and unaccompanied children.⁴ Such protection involves prevention of separation, assessment of the child's situation, registration, documentation, family tracing, verification and reunification, emergency care arrangements, and permanent care arrangements.⁵ Based on the premise that every child has a right to grow up in a family environment this dissertation attempts to answer the question: How can separated children and unaccompanied children, in the African context, be protected in the event of natural disasters such that their right to a family is promoted and protected? In so doing, it presents an explanation of the concepts of separated children and unaccompanied children through investigation

⁴ UNCRC art 20.

⁵ International Committee of the Red Cross ("ICRC"), International Rescue Committee ("IRC"), UNHCR (United Nations High Commissioner for Refugees), United Nations Children's Fund ("UNICEF"), Save the Children UK (SCUK) and World Vision International ("WVI") (2004) *Inter-agency guiding principles on unaccompanied and separated children* ("Inter-Agency Guiding Principles").

into the practical effects of separation on children. It also presents discussions on the concept "natural disasters" and some of the effects of natural disasters on separated children and unaccompanied children. There is an attempt at defining the concept "family" based on its *internal* and *external* constitution and function, and a consideration of the needs which a family should satisfy in a child. Familial rights enjoyed by children are presented and analysed as rights which exist under the canopy of the "right to a family". In line with the *Interagency Guiding Principles*, the different stages of protection in natural disasters are highlighted and particular attention is given to intercountry adoption and the implications of placing moratoriums on intercountry adoptions at different stages of the intercountry adoption process, following events of natural disasters. The study stresses the need to *balance* the importance of protecting the child with the *need* to provide the child with a permanent family.

Keywords ACRWC – abandoned children – adoptability – best interests – family – functions of the family – intercountry adoption – moratoriums – natural disasters – orphans – protection – residential care – right to a family – separated children – separation – street children – unaccompanied children – UNCRC

Summary of the dissertation

Amidst the chaos associated with *any* disaster, there are those vulnerable members of society whose vulnerability becomes heightened by the occurrence. Children belong to this group of vulnerable persons. Coupled with their *childhood*, there are some children who are "alone" during natural disasters or who find themselves alone as a result of the disaster – separated and unaccompanied children – without the necessary protection of parent(s) or caregiver(s). In some extreme cases, some children are without any family member to support them during and after the traumatic event. Yet, "for the full and harmonious development of [the child's] personality, [he or she] should grow up in a family environment, in an atmosphere of happiness, love and understanding".⁶ In situations of natural disaster, the State has a duty to protect separated and unaccompanied children.⁷ Such protection involves prevention of separation, assessment of the child's situation, registration, documentation, family tracing, verification and reunification, emergency care arrangements, and permanent care arrangements.⁸ This dissertation presents discussions and arguments on the premise that every child has a right to grow up in a family environment. It attempts to answer the question: How can separated children and unaccompanied children, in the African context, be protected in the event of natural disasters such that their right to a family is promoted and protected? In so doing, the dissertation presents an explanation of the concepts "separated children" and "unaccompanied children" through investigation into the practical effects of separation on children. It also presents discussions on the concept "natural disasters" and some of the effects of natural disasters on its victims, with a focus on separated children and unaccompanied children thereby highlighting the societal vulnerability of this category of children. There are also discussions on the constitution and function of the family *internally* and *externally* and, from a functional perspective, a consideration of the needs which a family should satisfy in a child. Certain familial rights enjoyed by children are presented and analysed as rights

⁶ United Nations Convention on the Rights of the Child, 1989 ("UNCRC") preamble para 6.

⁷ UNCRC art 20.

⁸ International Committee of the Red Cross ("ICRC"), International Rescue Committee ("IRC"), UNHCR (United Nations High Commissioner for Refugees), United Nations Children's Fund ("UNICEF"), Save the Children UK (SCUK) and World Vision International ("WVI") (2004) *Inter-agency guiding principles on unaccompanied and separated children* ("Inter-Agency Guiding Principles").

which exist under the canopy of the "right to a family". Hence the study advocates for recognition, protection and promotion of the "right to a family" of the child at all times, even in situations of natural disasters. In line with the *Interagency Guiding Principles*, the different stages of protection in natural disaster are highlighted and particular attention is given to intercountry adoption as a measure of protection of the right of a child to a family. The implications of placing moratoriums on intercountry adoptions, on the child, and at different stages of the adoption process, following events of natural disasters are the highpoint in this study. The study culminates in highlights of the relationship between intercountry adoption and the right of the child to a family, stressing the need to *balance* the importance of protecting the child from harm with providing the child with a permanent family.

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Charter of Fundamental Rights of the European Union 2000

Convention Relating to the Status of Refugees 1951

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

Declaration of the Rights of the Child 1959

European Convention on Human Rights 1950

European Social Charter 1961

International Covenant on Economic, Social and Cultural Rights 1966

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990

Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

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Kenya

Constitution of Kenya 2008

Children Act 8 of 2001

Nigeria

The Constitution of the Federal Republic of Nigeria 1999

Child's Rights Act 2003

South Africa

Constitution of the Republic of South Africa 1996

Child Care Act 74 of 1983

Children's Act 38 of 2005

Disaster Management Act 57 of 2002

Refugees Act 130 of 1998

United Kingdom

Human Rights Act 1998

List of abbreviations

AIDS	Acquired immune deficiency syndrome
Am U J Gender Soc Pol’y & L	American University Journal of Gender, Social Policy and the Law
Ariz J Intl Comp L	Arizona Journal of International Comparative Law
Art	Article
AU	Africa Union
Austr J of Fam L	Australian Journal of Family Law
BAAF	British Agency for Adoption and Fostering
Brit Med J	British Medical Journal
CA	South African Children's Act 38 of 2005
CCA	Child Care Act 74 of 1983
Cornell Int'l LJ	Cornell International Law Journal
CPWG	Child Protection Working Group
CRA	Nigerian Child's Rights Act 2003
Fam. & Conc Courts Rev	Family and Conciliation Courts Review
HIV	Human immunodeficiency virus
KCA	Kenyan Children Act No 8 of 2001
ICRC	International Committee of the Red Cross

ICPRMWMF	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
Int J Ref Law	International Journal of Refugee Law
IOs	International organisations
IRC	International Rescue Committee
J. L. & Religion	Journal of Law and Religion
JCFAMCC	Journal of the Centre for Families, Children and the Courts
J Ref Stud	Journal of Refugee Studies
NGOs	Non-governmental organisations
OAU	Organisation of African Unity
para	Paragraph
PCWG	Protection Cluster Working Group
PTSD	Post traumatic stress disorder
S(/s)	Section
SCEP	Separated Children in Europe Programme
TdH	Terre des hommes
UN	United Nations

UNAIDS	Joint United Nations Programme on HIV and AIDS
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
Univ of Toronto LJ	University of Toronto Law Journal
US	United States of America
Va. J. Soc. Pol'y & L.	Virginia Journal of Social Policy & the Law
WVI	World Vision International

CHAPTER 1

INTRODUCTION

1 1 Background to the study

Nompo's parents and Mary's caregiver, Jast, are long-standing friends. They live in the same neighbourhood and work in the same government parastatal. On the first day of the 2010 school year, Nompo and Mary shed off all excitement for anxiety as they find their way through the undefined road path leading to their all-girls' school. In the capital city where they reside, only affluent children are chauffeured to school. Children from *average* homes alight the community bus at the school gate for a fare of ten shillings. Nompo and Mary would rather use their daily allowance of ten shillings for lunch since the school provides an option of breakfast or lunch to pupils. As they walk over the Kanki River, two kilometres away from the school, the thirty-year old bridge begins to shake. "It's an earthquake!" a passer-by exclaims. Nompo sprints off the bridge, in great agitation, towards her home; Mary follows closely behind. On getting to Nompo's house, the eleven year old girls meet breaking news on the television – the route to Nompo's parents' office was hardest hit by the earthquake. At the time of the news, casualties were yet to be reported. Unaware of the gravity of the earthquake, the girls sit together in Nompo's house without the slightest idea of what next to do. Their wait is interrupted at 9pm when Jast's friend, Timpti, comes in to check on Mary. He informs her that he has been unable to reach Jast all day. The search for missing persons begins amidst pandemonium.

The situation described above echoes the experience of some inhabitants of nations around the globe in the years 2010 and 2011. These years have been recorded for a number of incidents of natural disasters – earthquakes, tsunamis, hurricanes and floods. Some people died, many were injured and others suffered the loss of family members.

Children who are alone during natural disasters or who find themselves alone as a result of the disaster are most vulnerable. Some of these children are without any family member to support them during and after the traumatic event. In international law, these children are generally referred to as separated or unaccompanied children.

Separation of children from their parent(s) against the children's will is contrary to the dictates of United Nations Convention on the Rights of the Child ("UNCRC").⁹ From discussions in this dissertation, it is evident that, without parental care or familial protection children in natural disasters are exposed to numerous risks. If they are not taken into camps or institutional care by relevant authorities (which, in any case, are temporary measures), these children face difficulties in accessing humanitarian relief supplies that may be available to them. There are further risks of the children being victims of exploitative acts such as physical and sexual abuse, child trafficking, and child labour. There is also the possibility of loss of lives.

In natural disasters where separation *may be* inevitable the child is entitled to special protection from the State.¹⁰ The State's duty to protect separated or unaccompanied children in situations of emergency involves the prevention of separation, assessment of the child's situation, registration, documentation, family tracing, verification and reunification, emergency care arrangements, and permanent care arrangements, in this order.¹¹

The main impetus for this study is found in the preambles of the UNCRC¹² and the African Charter on the Rights and Welfare of the Child ("ACRWC")¹³. The study is borne from the realities that firstly, there are separated children or unaccompanied children in most African societies who require special protection, care and attention; and secondly, as highlighted in paragraph 1 4 below, there is an unusual trend of natural disasters occurring in places where they are least expected to happen.

⁹ UNCRC art 9.

¹⁰ UNCRC art 20.

¹¹ International Committee of the Red Cross ("ICRC"), International Rescue Committee ("IRC"), UNHCR (United Nations High Commissioner for Refugees), United Nations Children's Fund ("UNICEF"), Save the Children UK (SCUK) and World Vision International ("WVI") (2004) *Inter-agency guiding principles on unaccompanied and separated children ("Inter-Agency Guiding Principles")*.

¹² Preamble para 6: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

¹³ Preamble para 4: "Recognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,".

1 2 Title of the study

The topic of this dissertation may be divided into three main themes namely: the concepts of separated children and unaccompanied children; the right of the child to a family; and natural disasters. The concepts of separated children and unaccompanied children are relatively new in international law. Also the exact formulation of familial right – the right of the child to a family – is debateable in international human rights law. Studies on natural disasters from a legal perspective are rare. Yet, these three themes are of importance in studies around the protection of children in this millennium. Therefore, these themes have been married together to bring to the fore one of the ways in which protection of children can be ensured within the context of the three themes so merged.

1 3 The research question defined

The main argument in this study rests on the thesis that *all* children have the right to grow up in a "family environment, in an atmosphere of happiness, love and understanding" for the "full and harmonious development" of their personality. This right is not diminished at *any* point of *any* child's development – not even when a natural disaster has occurred. The study question then is: How can separated children or unaccompanied children, in Africa, be protected in the event of a natural disasters such that their right to a family is promoted and protected? In attempting to answer this main question the following sub-questions pertaining to each of the three themes of the study are raised and addressed:

- i. Who are separated children?
- ii. Who are unaccompanied children?
- iii. What is a natural disaster?
- iv. What are the effects of natural disasters on separated and unaccompanied children that warrant their special protection?

- v. What is family?
- vi. What does the right of the child to a family entail?
- vii. What does protection of separated or unaccompanied children within the context of natural disasters entail?
- viii. How can intercountry adoption be used to protect the right of separated or unaccompanied children to a family within the context of natural disasters?

1 4 Rationale and significance of the study

Considering the fact that Africa is relatively devoid of natural disasters, the significance of this study in the African context may be questioned. As noted by Bryant, one of the four consequences of modern natural hazards is that “natural hazards are pervasive in time and space.”¹⁴ According to him, unusual events of natural disasters are occurring in places where they are least expected to happen partly because a long period of passive hazards has been lived through. Bryant says that “we are experiencing a shift in regime for a number of hazards”.¹⁵ In fact, besides floods that have been recorded in Africa,¹⁶ on December 8, 1976, an earthquake was reported to have destroyed parts of the Welkom in the Orange Free State, South Africa.¹⁷ As such the possibility of occurrence of extreme events of disaster in Africa is not completely ruled out.

From studies on natural hazards and vulnerabilities, it is evident that the poor are more exposed in situations of hazards than the rich.¹⁸ Africa is a continent with high levels of poverty. The significance of this study lies firstly in the fact that separated and unaccompanied children are most exposed to exploitation in situations of natural disasters. Thus, there is great need to protect these African children in situations of

¹⁴ Bryant (2005) *Natural Hazards* 2nd ed 290.

¹⁵ As above 291.

¹⁶ See para 3 1 below.

¹⁷ Uzoegbo & Warnitchai (2000) *On the need for a regional policy on seismic resistant design and construction*.

¹⁸ Wisner, Blaikie, Cannon & Davis (“Wisner *et al*”) (2005) *At risk: Natural hazards, people’s vulnerabilities and disasters* 12.

disaster. Secondly, children have a right to a family. Delineation of what this right entails is significant academic contribution which may help in filling the gap in certain national laws where the right to a family is not acknowledged, directly or indirectly. Thirdly, with intercountry adoption as a desirable measure of protection, determination of when and to what extent the placement of halts on intercountry adoptions is expedient. With an exposition of the effects of moratoriums on intercountry adoption at different stages of the adoption process, this study brings to the fore "good" practices in intercountry adoption and at the same time encourages prospective adoptive parents in the "heart-warming act of goodwill".¹⁹

Kenya, Nigeria and South Africa have been selected for the study to allow for snapshots of the legal situations in the eastern, southern and western parts of Africa respectively.²⁰ These countries have coastal cities and may be susceptible to natural disasters. Also, there are significant levels of poverty in each of these countries. The dense population of Nigeria further makes it an appropriate choice when considering the impact of natural hazards resulting in disasters on highly vulnerable persons. Moreover, each of these three countries has relatively new children's legislation enacted within the first decade of the twenty-first century.

1 5 Assumptions and limitations of the study

The topic under study contains themes which, although contemporary social issues, want for academic research inputs. The dearth of academic materials on the effects of natural disasters on its victims, based on scientific studies, is a major limitation that was managed during the course of this study. Also, separated children and unaccompanied children are concepts discussed mainly on the international human rights and humanitarian law platform by Non-governmental Organisations (NGOs), International Organisations (IOs) and United Nations (UN) institutions. There is limited scholarly material on these concepts. With regard to the right of the child to a family, academic material and case law is also limited. This is partly because this exact formulation of the right is debatable. As discussed further in Chapter four,

¹⁹ Mezmur "From Angelina (to Madonna) to Zoe's Ark: What are the A-Z lessons for intercountry adoptions in Africa?" (2009b) 23 *International Journal of Law, Policy and the Family* 145.

²⁰ The north of Africa has unavoidably been excluded from the study due to language barriers.

certain academics dealing with children within the family argue against the existence of the right to a family, based on the view that protection of the right by States is unattainable. Due to the aforementioned limitations, the study represents a fusion of the wealth of knowledge on separated children and unaccompanied children, and the limited information available on the effects of natural disasters on its victims.

1 6 Research methodology

This study is desktop and library research based. Literature from research conducted by NGOs, governmental bodies and academics is employed in the analysis and assessment of provisions in international treaties and national laws relevant to the study. Provisions in international instruments are used as benchmark for the protection of children within the context of the study.

It is pertinent to note that, in adopting a rights-based approach to the study, a needs-based investigation on the topic is also adopted. This study reveals that it is difficult to effectively achieve the protection of human rights without considering the needs of the persons involved.²¹ Measures and legal provisions aimed at protecting the rights of persons can be better implemented if they are tailor-made to suit the people they intend to protect. Therefore this study investigates the effects of natural disasters on separated or unaccompanied children, taking into account their needs. In promoting the protection of their right to a family, the needs which the family satisfies in children is also considered.

1 7 Overview of chapters

This dissertation contains six chapters. The general introduction is set out in the current chapter. It presents the background to the study, an understanding of the title of the study, the rationale and significance of the study and limitations to the study. Chapter two provides in-depth understanding of the concepts "separated children" and "unaccompanied children". It also presents the results of investigation into the

²¹ See Second report of the Special Rapporteur to the United Nations International Law Commission ("UN ILC"), Mr Eduardo Valencia-Ospina, at the sixty-first session of the UN ILC on protection of persons in event of disasters 329; 331.

practical effects of separation on children and the plight of separated and unaccompanied children. Chapter three presents an explanation of the concept "natural disasters" and an overview of natural hazards that may result in disasters. The societal vulnerability of separated and unaccompanied children in natural disasters is highlighted therein. The conclusion drawn in this chapter is that separated and unaccompanied children are twice as vulnerable as other children in situations of natural disasters.

"Family" is under study in Chapter four. There are discussions on the constitution and function of the family *internally* and *externally*. From a functional perspective, the chapter considers the needs which family satisfies in a child. This "needs investigation" is undertaken in order to identify the void which a child without a family suffers. Familial rights that are enjoyed by children are also highlighted; these rights *should* exist under the canopy of the "right to a family". The chapter concludes on the note that the right to a family should be recognised and promoted by the State.

Chapter five explains the concept "protection". It highlights the different levels and stages of protection available to separated and unaccompanied children in situations of natural disasters. Intercountry adoption is the focus in this regard, and the placement of moratoriums on intercountry adoptions following events of natural disasters. There are brief discussions on the best interests principle and the concept of adoptability within the context of the study. The chapter culminates in highlights of the relationship between intercountry adoption and the right of the child to a family, stressing the need to *balance* the importance of protecting the child with providing the child with a permanent family.

The dissertation concludes in Chapter six with a presentation of salient conclusions including: that the child has the right to a family under which canopy all other familial rights fall; that intercountry adoption is a measure which may be employed in the context of separated and unaccompanied children in natural disasters, to protect their right to a family – the principle of subsidiarity applies. Appropriate recommendations are also extended including the recommendation that States should define "family" within their societal context in order to create legal certainty

and avoid some of the legal limbo in which children find themselves. Also, that intercountry adoption in situations of natural disasters should be considered on a case-by-case basis rather than applying blanket moratoriums on intercountry adoptions.

CHAPTER 2

UNDERSTANDING THE CONCEPTS "SEPARATED CHILDREN" AND "UNACCOMPANIED CHILDREN"

2 1 Introduction

From birth to the attainment of majority,²² a natural person is referred to as a child. The distinction between a child and an adult exists because of limitations in the legal status of the child – the child's legal capacity,²³ capacity to act²⁴ and capacity to litigate²⁵. A major factor which determines capacity in law is age.²⁶ From birth to the age of seven, a child is an *infans*,²⁷ from seven years to the age of majority, the child

²² The age of majority differs from one region to another depending on various factors including the childhood developmental perceptions of the particular region. National legislation in most countries defines precisely when majority is attained within a jurisdiction. In terms of the South African Children's Act ("CA") s 1, Kenyan Children Act ("KCA") s 2 and Nigerian Child's Rights Act ("CRA") s 277, majority is attained at 18 years. In the United Kingdom, majority is attained at sixteen years in Scotland and eighteen years in England and Wales. In most states in the United States of America, except in Mississippi and District of Columbia (where majority is attained at twenty-one), and Alabama and Nebraska (where the majority age is nineteen years), a person becomes a major at eighteen years. In certain provinces in Canada (Alberta, Manitoba, New Brunswick, Ontario, Prince Edward Island, Quebec and Saskatchewan) majority is attained at eighteen years while in the other provinces, the age of majority is nineteen years (http://en.wikipedia.org/wiki/Age_of_majority). In terms of international and regional instruments, the "UNCRC" art 1 and the African Charter on the Rights and Welfare of the Child ("ACRWC") art 2 define a child as a person below the age of eighteen.

²³ This is the vesting of legal subjectivity on an individual and the capacity to be the bearer of juridical competences, subjective rights and legal obligations. When a legal subject has legal capacity he or she is enabled to hold offices. For more on this see Boezaart (2010) *Law of persons* 5th ed 7 & 54.

²⁴ This judicial capacity enables a legal subject to enter into legal transactions. For more on this see Boezaart (2010) 7; 55.

²⁵ This judicial capacity enables a legal subject to sue and be sued in a private law suit. When a legal subject has the capacity to litigate, he can act as a plaintiff, defendant, appellant or respondent in a court of law. See Boezaart (2010) 8; 57.

²⁶ Boezaart (2010) 48.

²⁷ The judicial capacities of children from birth to the age of seven years differ per jurisdiction. In South Africa for instance, an *infans* has limited legal capacity (he or she is capable of being the bearer of certain rights and obligations but not certain others rights and obligations). Within this jurisdiction, the *infans* has no capacity to act or to litigate, not even with the assistance of his or her parents or legal guardians. The parent or legal guardian must act for the *infans*. With regard

is a minor.²⁸ While minority persists, a child typically needs the assistance of an adult (preferably a parent, legal guardian or caregiver, or customary caregiver) in carrying out most legal acts, and some personal acts. Where a child is without the required care and protection of an adult the child becomes much more vulnerable than he or she already is due to childhood. This is because, in addition to being unable to "care" for himself or herself, the child is gravely exposed to illnesses, physical, emotional, sexual and psychological abuse, labour exploitation and recruitment as child soldiers in situations of war.²⁹ This heightened vulnerability forms the basis for conceptualisation of the categories of children namely: separated children and unaccompanied children.

The plight of separated and unaccompanied children is currently of international concern. Various agencies and bodies, non-governmental and even some governmental bodies, have attempted working definitions of the concepts with the aim of delineating exactly when a child may be regarded as separated or

to delictual accountability, an *infans* is irrebuttably presumed to be unaccountable for his or her unlawfulness acts. For more this, see van Heerden, Cockrell, Keightley, Heaton, Clark, Sinclair and Mosikatsana (eds) ("van Heerden *et al*") (1999) *Boberg's law of persons and the family* 2nd ed 750-751 (particularly fn 25).

²⁸ It is important to note that the term "minor" is distasteful in some countries because of its historically degrading connotations in those regions. The terms "child" or "children" is preferred as adopted by the United Nations High Commissioner for Refugees ("UNHCR") in most of its recent documents. Be that as it may, to understand the concept of minority a clear understanding of the judicial capacities of children is relevant. Judicial capacities of children between the age of seven years and majority differ per jurisdiction, and depending on perceptions of childhood maturity and also, the type of act for which capacity is required. In South African Law of Persons, for instance, a minor has limited legal capacity but full capacity to act with respect to certain juristic acts (e.g. accepting a gift). For most other juristic acts the minor has limited capacity to act (in which situations the minor must be assisted by his or her parents or legal guardian). In yet some other juristic acts, such as entering an engagement contract before attainment of the age of puberty, the minor has no capacity to act. With regard to capacity to litigate, a minor has limited capacity to litigate and may therefore participate in a private law suit with the assistance of his or her parent or legal guardian. In a situation where, for instance, a father who is a minor is sued for child maintenance, that minor has full capacity to litigate. In the Law of Delict, a minor above the age of seven but before the age of puberty is rebuttably presumed to be accountable for his unlawful acts. After the age of puberty, the minor is presumed to be fully accountable for his unlawful acts. For more on this, see Boezaart (2009) *Child law in South Africa* 18-37 and van Heerden *et al* (1999) 745-915. A child's capacity to act *may* also depend on the issues in relation to which the child is acting. For instance, when dealing with legal consent and decision-making in medical treatment, an adolescent child may exercise his or her autonomy. The competence to exercise such autonomy is not dependent only on the age of the child but much more on the child's "sufficient understanding and intelligence" to enable him or her fully understand the proposed treatment. This principle on intellectual competence was set in the English case law *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) AC 112 and reaffirmed and expanded in *R (Axon) v the Secretary of State for Health* (2006) 2FLR 206.

²⁹ Save the Children (2005) "Protecting children in emergencies: escalating threats to children must be addressed" 1 1 *Save the Children Spring Policy Brief* 5.

unaccompanied. This chapter explains these concepts by defining a "separated child", and an "unaccompanied child". It discusses the different categories of separated children and unaccompanied children and analyses the current social positions of these children in select jurisdictions. It further presents the results of investigation into the practical effects of separation on children and draws conclusion on the plight of separated and unaccompanied children.

2 2 Separated and unaccompanied children defined

There are a number of definitions that apply to separated or unaccompanied children. Non-governmental organisations (NGOs) and International Organisational (IOs) use these different definitions to reflect their specific area of work and attention. (For instance, an agency which caters for unaccompanied foreign children limits the definitions of separated children and unaccompanied children to children who are outside their country of origin.)³⁰ It is particularly important that governments systematically, through laid down procedure, establish whether a child who has been brought to their attention is indeed separated or unaccompanied³¹ to enable successful early family reunification and, where necessary, placement in alternative care.³² This paragraph examines some of the different definitions that exist and contextualises the concepts of separated and unaccompanied children for purposes of this dissertation.

2 2 1 Separated children

In simple English language, the word separated means "to set or keep apart"³³ or "being or feeling set or kept apart from the group";³⁴ "no longer connected or

³⁰ An example is the UNHCR. (The UNHCR is an organisation mandated by the United Nations ("UN") to ensure worldwide protection of refugees. The organisation also aims at ensuring the resolution of refugee problems.) Also, the SCEP definition contains similar limitation for separated children.

³¹ UNCRC (2005) *General Comments No 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, Committee in the Rights of the Child* thirty-ninth session May 17 – June 3 2005 CRC/GC/2005/6 art 13. As stated in art 79 of the *General Comments*, the ultimate aim of assessing the child is to identify durable solutions that may be tailor-made to fit each child's needs.

³² Save the Children (2005) 8.

³³ When used as a verb.

³⁴ When used as an adjective, as in this study.

joined".³⁵ The Separated Children in Europe Programme ("SCEP")³⁶ defines separated children as

children under eighteen years of age who are outside their own country of origin and separated from both parents or from their legal or customary primary caregiver.³⁷

The SCEP definition differs from that of United Nations High Commissioner for Refugees ("UNHCR") in that the former refers to children outside their country of origin. The UNHCR defines separated children as

children under eighteen years of age who are separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from their relatives. These may, therefore, include children accompanied by other adult family members.³⁸

³⁵ Free dictionary <http://freedictionary.org/?Query=separated>. Retrieved on February 22, 2010.

³⁶ SCEP is a joint initiative of the UNHCR and Save the Children (Save the Children is an independent organisation which aims at 'creating lasting change in the lives of children in need in the United States and around the world'. It undertakes programme activities in several countries around the world. See www.savethechildren.org). It is based on complementary mandates and areas of expertise of the two organisations. SCEP was established in 1997 and seeks to improve the situation of separated children through research, policy analysis and advocacy at national and regional levels. Retrieved from (http://www.separated-children-europe-programme.org/separated_children/about_us/scep_programme.html) on February 27, 2010.

³⁷ Save the Children Denmark, UNHCR and UNICEF (2009) *SCEP Statement of Good Practice* 4th revised ed 3. Retrieved from www.separated-children-europe-programme.org on February 12, 2011.

³⁸ UNHCR (2004) *Action for the Rights of Children: Critical Issues – Separated Children*. The same definition is used in the UNCRC (2005) *General Comments No 6* art 8 (It is important to note that the application of this document is limited to children that have crossed borders. This dissertation however applies the relevant provisions in the *General Comments* to internally separated and unaccompanied children also). This definition is also contained in the *Inter-agency guiding principles*. The same definition is used in the ICRC, IRC, Save the Children, TdH, UNICEF, WVI, Plan International and War Child UK Child Protection Working Group (CPWG) (2010) *Guiding principles on unaccompanied and separated children following the Haiti earthquake* ("CPWG Guiding principles") Accessed on <http://plancanada.ca/Downloads/CPWG%20Guiding%20Principles%20Haiti.pdf> as accessed on February 24, 2010.

The SCEP prefers the word "separated" over the term "unaccompanied" because, in its opinion, separated better defines the essential problem that these children face.³⁹ According to the SCEP some separated children are totally alone while others may be living with extended family members (adult family members including adult siblings). The common denominator to all these definitions is that the child is separated from both parents and person(s) who may be legally responsible for their care. Such separation may be for varying periods of time depending on the particular situation.

2 2 2 Unaccompanied children

In terms of the Child Protection Working Group (CPWG)⁴⁰ *Guiding principles*,

[U]naccompanied children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.⁴¹

The UNHCR, Save the Children ("SC") and UNICEF (United Nations Children's Fund) also support this definition. In a study by the Forced Migration Studies Programme at the University of Witwatersrand, South Africa, it is documented that for a child to qualify as an unaccompanied child, the child must have crossed an international border.⁴² According to the Australian Human Rights and Equality Commission, unaccompanied children are generally children who are separated from

³⁹ SCEP (2009) 4. See also Ayotte (2001) "Separated children seeking asylum in Canada: a discussion paper" Canadian Council for Refugees 8-9 as retrieved from <http://www.web.net/~ccr/separated.PDF> on February 27, 2010.

⁴⁰ The CPWG is an organisation which functions in line with the mission of Protection Cluster Working Group ("PCWG" was established in September 2005 as part of the humanitarian reform and is accountable to the Emergency Relief Coordinator). The CPWG aims to facilitate a more predictable, accountable and effective child protection response in complex emergencies, disasters and other such situations. It views itself primarily accountable to the beneficiaries and seeks to support cohesive, interagency child protection responses at the field-level through global level advocacy, standards and policy setting, capacity building and tool development. http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Protection/CP%20TOR_Final.doc. Accessed on April 5, 2010.

⁴¹ CPWG (2010) *Guiding principles*. Another definition includes "a child who is an asylum seeker, recognised refugee and other externally displaced person. See Sourander (1998) "Behavior problems and traumatic events of unaccompanied refugee minors" 22 7 *Child Abuse & Neglect* 719 - 727.

⁴² Forced Migration Studies Programme, University of Witwatersrand for Save the Children UK (2007) *Children crossing borders: Report on unaccompanied minors who have travelled to South Africa* 3.

their families and are totally alone.⁴³ The SCEP maintains the same definition for separated children and unaccompanied children.⁴⁴ Definitions may vary in wording but the bottom-line is that unaccompanied children are separated from both parents and legal care givers.⁴⁵ As such these children are "alone".

2 3 Categories of separated or unaccompanied children

Separation of children from their parents or legal guardians or, legal or customary caregivers ("parent(s) or caregiver") may take varying forms and last for different time periods. This difference in form and period of time is attributable to the reasons for separation which reasons form the basis for categorisation of separated or unaccompanied children herein. Within the context of this study, it is pertinent to consider two main groups of separated or unaccompanied children namely: children separated or unaccompanied before the natural disaster and children separated or unaccompanied as a consequence of the natural disaster. Under these main groups are different sub-sets of separated or unaccompanied children. These are discussed hereunder.

2 3 1 Separated or unaccompanied children before the natural disaster

Before a natural disaster occurs, some children may already have been separated and unaccompanied. Bearing in mind the duty on governments to assess whether a child is indeed separated and unaccompanied, this paragraph takes into account different sub-categories of children and discusses their social position based on the reasons for their separation. In other words, the approach adopted herein proceeds from the reasons for separation which largely describe a child's situation and this situation determines whether the child is separated or unaccompanied. The social, and also legal, positions of children from Kenya, Nigeria and South Africa are considered under each sub-category of children.

⁴³ Australian Human Rights and Equal Opportunity Commission Report, "A Last Resort?: National Inquiry into Children in Immigration Detention" http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf. As accessed on April 2, 2010.

⁴⁴ Save the Children and SCEP (2004) *Position Paper on Returns and Separated Children*.

⁴⁵ See also Martin & Curran "Separated children: a comparison of the treatment of separated child refugees entering Australia and Canada" (2007) *19 3 Int J Ref Law* 440 – 470 for definitions by the Immigration and Refugee Board of Canada, Australian Department of Immigration and Indigenous Affairs and Australian Human Rights and Equal Opportunity Commission.

2 3 1 1 Street children⁴⁶

The term "street children" which came into general use in 1979⁴⁷ was coined by Henry Mayhew in 1851.⁴⁸ Street children may be split into two main groups – those who have no homes⁴⁹ (children *of* the streets) and those who are on the streets for economic purposes (children *on* the streets).⁵⁰ In many large cities, street children are found begging or hawking merchandise on the streets. The main difference between the two groups of street children is the fact that one group returns home (daily or otherwise) after economic activities on the street while the other group sleeps on the streets. A general observation is that most street children are from very poor homes. In order to assist in providing the basic needs for their families, or for themselves, some children take to the streets. Others opt for the streets just to satisfy their delinquent desires. Yet, some others have been abandoned, abused, neglected or have lost their parent(s) or caregiver(s). The street then becomes a place of refuge for these children. In response to the continued rise in the number of street children around the world, the African Union ("AU") dedicated Children's Day 2011 to street children in Africa with a firm call to all African nations to address the plight of street children in their countries.

In Kenya, the effects of war, poverty, illness and globalisation are evident in the increased number of street children in Nairobi. These children are economically active on the streets polishing shoes, washing windscreens, begging and even picking pockets.⁵¹ Some of the children are sent out by their parents to beg or work

⁴⁶ For a detailed psychological analysis and various definitions of the concept, see Mahlangu (2002) *Factors that contribute to street children leaving rehabilitation centres and returning to the streets* MA dissertation University of Pretoria 13-18, 21.

⁴⁷ 1979 was proclaimed as the International Year of the Child, by the UN.

⁴⁸ Wexler "Street children and US immigration law: what should be done?" (2008) *Cornell Int'l LJ* 545 at 547 quoting Scanlon TJ *et al* "Street children in Latin America" (1998) 316 *Brit Med J* 1596.

⁴⁹ Children who have no homes may be further categorised into two groups – children who are born and bred on the streets by homeless people and children who have no homes or parental contact and live on the streets without an adult legally responsible to care for them. The latter group fits into the scope of this study.

⁵⁰ Treanor "Relief for Mandela's children: Street children and the law in new South Africa" (1994) 63 *Fordham Law Review* 883 - 925. See also SOS Children's villages *Street Children and family strengthening programmes* retrieved from <http://www.street-children.org.uk/> on December 15, 2010. UNICEF also divides street children into these two co-existing subtypes.

⁵¹ SOS Children's villages (2010) *Street Children and family strengthening programmes*.

on the streets.⁵² The Kenyan Children Act 8 of 2001 ("KCA") does not define the term "street child". However, it describes children who are found begging or receiving alms, or children who are engaged in work likely to be detrimental to their health, mental or moral development as children in need of care and protection.⁵³

In the Nigerian context, when the term "street children" is used, it refers to two sub-categories of children namely: "living street children" and "working street children". The Child's Rights Act, 2003 ("CRA") describes a street child as a homeless child who is "*forced* to live on the streets, in the market places and under bridges" (living street children) *and* a child who is not homeless but is on the streets begging for alms, as a victim of "child labour, prostitution, and other criminal activities which are detrimental to the well-being of the child" (working street children).⁵⁴ The latter group of street children is predominantly the case in Nigeria.⁵⁵ In terms of the CRA, street children are "children in need of special protection measures"⁵⁶ and they have a right to such measures.⁵⁷ This legislation places a duty on child development officers, police officers and any other person authorised by the Minister charged with responsibility for matters relating to children⁵⁸ to bring street children before the courts⁵⁹ for determination of their legal situation and subsequent placement in alternative care where necessary.

From day to day interaction with children on Nigerian streets it becomes evident that working street children are those who are on the streets to eke out a living for their families. Some of these children, as young as six years of age,⁶⁰ are sent out by their parents or caregivers after school hours (or even during school hours depending on whether they can afford formal education) to hawk goods for money. In some instances, working street children are victims of child labour in that they are used as house-maids in homes and their bosses (madams) send them out to sell food items,

⁵² As above.

⁵³ KCA s 119 (b) and (o).

⁵⁴ CRA s 277 (6). Emphasis mine.

⁵⁵ Nwoke "Perception on the relationship between poverty and emotional adjustment of street children" (2007) 52 *Ife Psychologia: An International Journal* 82 at 85.

⁵⁶ CRA s 277.

⁵⁷ As above s 16.

⁵⁸ As above s 277.

⁵⁹ S 50 (g).

⁶⁰ Nwoke (2007) at 84.

clothing items and general merchandise on the streets for money. These children, though victims of abuse, are not separated or unaccompanied as used within the framework of this study. Living street children, on the other hand, are those who live on the streets and have their sole means of subsistence in the streets.⁶¹ In most cases, these children leave their homes because of various forms of abuse by parent(s) or caregiver(s), or even their bosses (in the case of child house-maids), neglect, poverty and generally for the purpose of getting income for food. There are also cases where children, particularly males, are on the streets and end up as commercial bus conductors in order to make some money for their needs. Most living street children are either voluntarily or, due to living circumstances at home, forced to be separated from their parent(s) or caregiver(s).⁶² Reunification with their families often proves difficult for welfare officials because of the poor identification system within the Federal Republic.

The situation in South Africa is somewhat similar to that in Kenya and Nigeria. Poverty and family breakdown have been identified as the two main reasons for children living on the streets.⁶³ Domestic violence, sexual abuse, lack of adequate housing and shortage in care facilities are contributory factors to the increase in the number of street children in South Africa. Known by different names – *strollers*, *twilight children*, *malunde* and *malalapayipi* – street children in this part of Africa have been found to be mainly black boys as young as ten years of age.⁶⁴ They are found on the streets picking pockets or begging for alms to allow them some income for food or addictive substances such as cannabis and glue. The Children's Act ("CA")⁶⁵ defines a street child as a child who has "left his or her home, family or community" because of "abuse, neglect, poverty, community upheaval and any other reason" and "lives, begs or works on the streets". Also included in the definition is a child who "begs or works on the streets" because of inadequate care but "returns

⁶¹ SOS Children's villages (2010) *Street Children and family strengthening programmes*.

⁶² According to Le Roux, a distinction could be made between runaways and castaways. The latter group is defined as those children who leave home because of abuse, neglect or abandonment while runaways are those children who voluntarily leave home. For the purpose of this dissertation, such debatable distinction is avoided because whatever the particular reason, these children leave their homes because of some form of discomfort or the other.

⁶³ Le Roux "A historical-educational perspective of urbanisation and its contribution to the street children phenomenon in South Africa" (2001) *30 1 Educare* 94 at 95; Mahlangu NI (2002) 18.

⁶⁴ As above.

⁶⁵ CA s 1.

home at night". The CA identifies street children as children in need of care and protection.⁶⁶ Where any interested person gives evidence in a children's court that a child is in need of care and protection, the presiding officer in the child's jurisdiction must refer the case to a designated social worker to determine whether the child is indeed in need of care and protection.⁶⁷

Of the two groups of street children identified, children living on the streets (children of the streets) meet the definition of separated or unaccompanied children.⁶⁸ Some working street children, for instance those who are sent out by their "madams" to hawk general merchandise on the streets, *may* also fit into the definitions of separated or accompanied children. These sub-sets of street children do not have any contact with their parent(s) or caregiver(s) and are best described as alone.

2 3 1 2 *Abandoned Children*

When generally defined, abandonment, with reference to a child, is the voluntary⁶⁹ relinquishment of all parental rights to the child.⁷⁰ It involves the conduct of abandoning and the intention to abandon.⁷¹ Laws prohibiting the abandonment of children have existed since the days of Constantine.⁷² In many legal systems today,

⁶⁶ As above s 150 (c).

⁶⁷ As above s 150 (2).

⁶⁸ For the definitions of separated children and unaccompanied children, see para 2 2 1 and 2 2 2, respectively, above. This view is supported by Lalor "Street children: A comparative perspective" (1999) 23 *Child Abuse & Neglect* 759. Also see Drane "Street children as unaccompanied minor with specialized needs: deserving recognition as a particular social group" (2010) 44 *New England Law Review* 911-913.

⁶⁹ Implies a *conscious* disregard of or indifference to the child.

⁷⁰ Garner (ed) (2004) *Black's law dictionary* 8th ed 2-3.

⁷¹ In the USA, a distinction is made between conditional and unconditional abandonment. Conditional abandonment ensues when a parent deserts a child without "corresponding" relinquishment of parental rights. Theoretically, this denotes an intention to "retrieve the child" at a later stage. Unconditional abandonment involves neglect and refusal to perform any parental obligations of care towards the child. With unconditional abandonment, there is conduct and intention to give up all parental rights. For more on this see Bogard "Who are orphans?: defining orphan status and the need for an international convention in intercountry adoption" (1991) 5 *Emory International Law Review* 571 at 586.

⁷² Tate "Christianity and the legal status of abandoned children in the later Roman Empire" (2008-2009) 24 *J. L. & Religion* 124 123 at 124. From the days of Constantine (Constantine was the first Christian emperor in the Roman Empire. He reigned from 306 – 377 AD) and his reform to the days of Valentine I (Valentine was emperor of Rome in the West in 364 AD) child abandonment was punishable. During the days of Valentine I, where parents fail to "nourish" their children, they were punished. See Tate (2008-2009) 124 and beyond for detailed discussion on child abandonment and the Roman Empire.

it is a crime to abandon a child.⁷³ As a consequence of their abandonment, some abandoned children fall into the same categories as some of the other separated or unaccompanied children identified herein. Some street children end up on the streets as a result of abandonment. Also, some of the children placed in institutional care were found abandoned. Where child abandonment is mainly due to economic factors within a country, criminalisation of the act may prove difficult.

Child abandonment in many African countries is mostly due to high levels of poverty;⁷⁴ children are abandoned by their parents or caregivers who are unable to care for them.⁷⁵ There are also non-economic factors which lead to child abandonment - teenage pregnancy, for instance. Some teenage mothers lack the emotional, financial and psychological support required to care for a child so they abandon their children to be cared for by "any interested person". Loss of parents or caregivers could also lead to abandonment.⁷⁶ In this case, abandonment is not seen a deliberate act of the parent. A typical example of a deliberate act of abandonment is the case in China where because of the one-child policy and the preference for male children many female children being abandoned.⁷⁷

⁷³ For instance, all states in the US (except Maryland) have laws which criminalise child abandonment (<http://washingtonexaminer.com/local/legislation-would-crack-down-child-neglect>); http://news.yahoo.com/s/ap/20101222/ap_on_re_eu/eu_france_haiti_adoption. Most states in the US allow for termination of parental rights through legal means which frees the child up for adoption. Where a child remains "unadopted" after a certain period of time, in some cases three years (as is the case in Washington state, Oklahoma, California and Illinois), parental rights may be restored by the courts. For more on this see Taylor "Resurrecting parents of legal orphans: un-terminating parental rights" (2010) *17 Va J Soc Pol'y & L* 318 at 332-336. In England birth parents may not give up their parental rights except by adoption. France protects the right of a woman to give birth anonymously. For more on this see O'Donovan "Real' mothers for abandoned children" (2002) *36 2 Law & Society Review* 347 at 348.

⁷⁴ Wallace "International adoption: The most logical solution to the disparity between the numbers of abandoned and orphaned children in some countries and families and individuals wishing to adopt in others" (2003) *20 Ariz J Intl Comp L* 689.

⁷⁵ Save the Children ("SC") (2004) *Field Guide to Separated Children Programs in Emergencies* 5. Retrieved from or http://www.ecdgroup.com/docs/lib_005230015.pdf on April 19, 2010.

⁷⁶ This is common in many African countries, particularly those in the Sub-Saharan region due to the AIDS pandemic.

⁷⁷ Wallace (2003) 689 referring to Singer "Intercountry Adoption Laws: How Can China's One-Child Policy Coincide with the 1993 Hague Convention on Adoption?" (1998) *22 Suffolk Transnational Law Review* 283, 290-96.

The KCA,⁷⁸ the CRA⁷⁹ and the CA⁸⁰ describe an abandoned child as a child in need of care and protection. The CA, defines an abandoned child as one who "has *obviously* been deserted by the parent, guardian or caregiver" or has not had contact with "his or her parent, guardian or caregiver" in a period of three months or more without an *apparent* reason.⁸¹ In terms of the CRA, like with street children discussed above,⁸² abandoned children must be brought before the courts by way of application made by certain persons.⁸³ None of these jurisdictions criminalises child abandonment.

From the reasons for child abandonment discussed above, legislative definitions and qualifications of abandoned children, it is evident that these children are completely alone and without any adult who is legally or customarily responsible for their care. Therefore, it suffices to say that abandoned children are separated children or unaccompanied children within the context of this study.

2 3 1 3 *Children placed in institutions (residential care) whose parent(s) are unable or unwilling to care for them*

The term "institutional care" may be used interchangeably with "residential care". In many countries, South Africa and Nigeria for instance, these terms are synonymous with orphanages and children's homes. Residential care for children may take two forms namely: care for children in need of care; and care for children accused or convicted of crimes.⁸⁴ It caters for different categories of children including: orphaned, abandoned, rejected or destitute children; children with disabilities; child offenders; children in adult penal establishments; and children in homes for mothers and babies.⁸⁵

⁷⁸ S 119 (a).

⁷⁹ S 50 (a), (d), (g).

⁸⁰ S 150 (a).

⁸¹ S 1. All emphasis mine.

⁸² See above 2 3 1 1.

⁸³ S 50.

⁸⁴ Skelton (2005) *Costing the Children's Bill: The provision of alternative care in child and youth care centres* Cornerstone Economic Research Report 6.7.9 submitted to the Department of Social Development 5.

⁸⁵ Tolfree (1995) *Roofs and Roots: The Care of Separated Children in the Developing World*.

Institutional care for children dates as far back as the twelfth and thirteenth centuries where Foundling Homes were founded for the purpose of providing shelter for orphaned and abandoned children.⁸⁶ By the early Modern Era, as formal adoption faded away due to widespread preference for blood ties,⁸⁷ orphanages and institutions, for example, the Moscow Foundling Home, became more popular for the care of parentless children.⁸⁸ This trend peaked in the first half of the nineteenth century but by the middle of the nineteenth century, its popularity declined due to economic and social conditions such as the high costs of running institutions, high mortality rates and the social stigmatization attached to institutionalisation.⁸⁹ This stigma is still attached to residential care of children today. In fact, there is on-going campaign by UNICEF and the Office of the High Commissioner on Human Rights ("OHCHR") to end unnecessary institutionalisation of children based on the premise that children belong *at home* not *in homes* where they receive substandard care.⁹⁰

Most international agencies dealing with the needs and rights of children⁹¹ advocate for residential care as a temporary "last resort"⁹² alternative care which should be avoided as much as possible.⁹³ These agencies believe that residential care is detrimental to development of the child because this form of care lacks in individual attention which children typically need and does not encourage the transfer of critical life skills to children.⁹⁴ It is also believed that institutional care dislocates children from their families, communities and cultural background resulting in reintegration problems when adulthood is attained,⁹⁵ and exposes children to overcrowding, lack

⁸⁶ Panter-Brick and Smith (eds) (2000) "The lives of foundlings in nineteenth-century Italy" in *Abandoned Children* 41-56.

⁸⁷ UN Department of Economic and Social Affairs/Population Division (2009) *Child Adoption: Trends and Policies* 10.

⁸⁸ As above.

⁸⁹ As above.

⁹⁰ Better Care Network *Newsletter* July 11, 2011. Also see "Ending placing children under three years in institutions: A call to action" <http://bettercarenetwork.org/BCN/details.asp?id=25426&themeID=1003&topicID=1023>.

⁹¹ These include UNICEF, Save the Children, and USAID's Displaced Children and Orphans Fund, International HIV/AIDS Alliance, Family Health International, International Social Services, CARE, USAID (United States Agency of International Development), UNAIDS (Joint United Nations Programme on HIV/AIDS), WVI.

⁹² Last resort with reference to domestic alternative care.

⁹³ Meintjes, Moses, Berry & Mampane in (Meintjes *et al*) (2007) *Home truths: The phenomenon of residential care for children in a time of AIDS* Cape Town Children's Institute, University of Cape Town & Centre for the Study of AIDS, University of Pretoria 9.

⁹⁴ Better Care Network *Newsletter* July 11, 2011.

⁹⁵ As above.

of privacy and illnesses. A common argument within this sector is that residential care violates the provisions of the UNCRC.⁹⁶ The provisions in the UNCRC are based on, the principle that the family is the ideal environment for growth and well-being of the child.⁹⁷ In article 20, the Convention provides that where a child has been temporarily or permanently deprived of his or her family environment, he or she is entitled to special protection and assistance from the State in the form of alternative care which includes "*if necessary* placement in institutional care".⁹⁸ As presented later on in this paragraph, the notion that institutional care violates the UNCRC is somewhat exaggerated. Although family based care is preferred, institutional care and children's homes are also beneficial, particularly in the African situation.

At national level, the CA also supports the view that the family environment is the ideal atmosphere for the full and harmonious development of the child's personality.⁹⁹ However, it makes provision for residential care programmes described as "child and youth care centres". These centres are governed by detailed legal dictates that regulate their establishment, registration, maintenance, management and cancellation.¹⁰⁰ They are mandated to offer therapeutic programmes involving a wide range of reception, development and care measures, assessed by a suitably qualified person, to ensure the proper all-round development of the child.¹⁰¹ In terms of section 196 of the CA, a children's home that was previously established under the Child Care Act (CCA)¹⁰² is now to be regarded as a child and youth care centre providing residential care and established in terms of section 195 of the CA.

⁹⁶ It is believed that residential care violates 1) the principle of non-discrimination because it tends to segregate children resulting in stigma; 2) the principle of best interests of the child because placement of children in institutions is based on the need of the institution and not the interests of the child; 3) the right to express an opinion since there is no individual and personal care and attention available to the children; and 4) the right to leisure, play and recreational activities, to mention a few. For more on this see Tolfree (2003) *Community based care for separated children* Stockholm Save the Children Sweden 9.

⁹⁷ UNCRC preamble paras 5 & 6.

⁹⁸ All emphasis mine.

⁹⁹ CA para 7.

¹⁰⁰ As above 191 – 212.

¹⁰¹ As above 191 (2) – (3).

¹⁰² Child Care Act 74 of 1983.

In the Nigerian context, the CRA defines a registered children's home¹⁰³ as a home which "provides or usually provides or is intended to provide care and accommodation wholly or mainly for more than three children at a time".¹⁰⁴ This definition differs from the CA in that the CA allows for six children or more¹⁰⁵ in a centre while the CRA stipulates a minimum number of three children per home. The CRA distinguishes between a voluntary home, residential care home and registered children's home. A voluntary home is "any home or other institution", managed by a voluntary organisation which provides "care and accommodation for children".¹⁰⁶ (In terms of the CRA voluntary home is not a children's home even though it is expected to accommodate and care for children.)¹⁰⁷ The CRA also definitions of voluntary home and registered children's home, respectively, exclude "residential care home".¹⁰⁸ However, a voluntary home must also be registered.¹⁰⁹ It appears that the significant difference between a voluntary home and registered children's home lies in the management of the home – the voluntary home is managed voluntarily by private persons while a registered children's home is managed by the State. According to the CRA, an independent school may also be a children's home if the school provides accommodation for less than fifty children and is not approved by the Ministry of Education or any other education authority at the state level.¹¹⁰

Part V of the KCA deals with children's institutions and distinguishes between rehabilitation schools and remand homes, and charitable children's institutions.¹¹¹ This part of the legislation, somewhat like the CRA, creates a distinction between these two groups based on establishment of the institutions. Rehabilitation schools and remand homes are established by the Minister responsible for such establishment¹¹² while charitable children's institutions are established by "a person, corporate or "unincorporated", a religious organisation or a non-governmental organisation" and approved by the Council "to manage a programme for care,

¹⁰³ In terms of the CRA s 195, a children's home must be registered.

¹⁰⁴ CRA s 195 (3).

¹⁰⁵ As above 191.

¹⁰⁶ As above s 277.

¹⁰⁷ As above.

¹⁰⁸ As above s 195; s 277. "Residential care home" is not defined in the Act.

¹⁰⁹ As above s 192 (2).

¹¹⁰ As above 195 (4).

¹¹¹ KCA s 47, 58 and 59.

¹¹² As above s 47 read with s 2 definition of Minister.

protection, rehabilitation or control of children".¹¹³ In terms of this legislation, all children's institutions are responsible for care of children in need of care and protection, and also for rehabilitation. A rehabilitation school is expected to have separate sections for children offenders and children in need of protection.¹¹⁴ It is believed that charitable children's institutions will serve mainly children in need of care and protection.

Residential care or children's home settings vary from institution to institution.¹¹⁵ Typically, two settings of living arrangements may be identified – the dormitory-style set-up (with communal and shared living spaces for a set of dormitories and central kitchen) and the household-style set-up (with small groups of children – up to ten – sharing facilities).¹¹⁶ The arrangements usually have housemothers, carers or even managers, depending on the (in)formality of the establishment. In some cases, housemothers and carers rotate shifts. This system of rotation of caregiver, the living-to-rule, routine and impersonal nature of residential care or children's homes has been diagnosed to be detrimental to childhood development.¹¹⁷ This informs the election of this form of alternative care as a temporary "last resort" model and supports the view that certain children in institutional care, particularly orphaned and abandoned children are separated and unaccompanied children within the context of this study.¹¹⁸ In most cases, even though the children are legally cared for by staff in the home, the physical, emotional, psychological and social difficulties resulting from the impersonal nature of care they receive places them in a situation where they are effectively "alone". Residential care should therefore remain a temporary care option.

Analysis of the current legal position of residential care, institutional care or children's home in select jurisdictions is important in understanding on-going debates on

¹¹³ As above s 58. Emphasis mine.

¹¹⁴ As above s 48.

¹¹⁵ As above at iii.

¹¹⁶ As above 29.

¹¹⁷ Tolfree (2003) 9.

¹¹⁸ UNICEF particularly refers to children in institutions as children faced with triple disadvantage because of the experience that led to their separation from their family and community, the physical, psychological, emotional and social difficulties they face in the institution, and the uncertain future that they are likely to face due to the lack of traditional family support. For more on this see Tolfree (1995) 2 It is however, arguable that even some children that grow up in "families" face psychological, physical, emotional and social difficulties and uncertain future.

residential care. However, these debates are beyond the scope of this study. It is evident from the legislative highlights presented above that, despite the shortcomings associated with residential care, this form of alternative care is still relevant in the African situation. "Widespread abuse, neglect and abandonment of children"¹¹⁹ have been found to be the major reasons for admission of children in residential care settings in Africa; neglect and abandonment may be due to poverty and HIV/AIDS. With no family to turn to, and nowhere to go, most children who have been separated from their parent(s) or caregiver(s) turn to residential care. Also, some parent(s) or caregiver(s) who are too poor or otherwise incapable of caring for their children, but who intend to have regular contact with their wards opt for residential care or children's homes. It is therefore important that legislative measures aimed at ensuring the warmth, safety and emotional, psychological and social protection of children in institutional care, are adopted by States, and the implementation of these measures closely monitored. If effective measures are in place to create workable models for residential care, it is believed that the negative features for which residential care is known will gradually *begin* to disappear.

2 3 1 4 *Orphans who do not have legal or customary caregiver(s)*

Orphans are defined differently per jurisdiction. What has however become clear from literature available on the topic is that orphanhood can be attained in one of two ways. Firstly, a child becomes a legal orphan when his or her parents legally relinquished their parental rights (and duties) to the child after which he or she becomes available for adoption.¹²⁰ Secondly, where the parent(s) of a child dies, the child becomes an orphan.¹²¹ In recent times, the HIV/AIDS pandemic has been a

¹¹⁹ Meintjes *et al* (2007) ii. In this detailed study, the authors found that 24% of children in homes were abandoned children (some thrown in the bush), 30% were victims of abuse and neglect, 11% orphaned, 6% due to HIV/AIDS parent or child illness and 3% were admitted as a result of poverty and inability to provide adequate care.

¹²⁰ For more on this see Taylor (2010) 318.

¹²¹ As defined in the *Inter-agency guiding principles*, a child who has lost one parent is called an orphan. UNAIDS also supports this definition. In fact, three groups of orphans have been identified – maternal orphan (a child who has lost his or her mother), paternal orphan (a child who has lost his or her father) and doubled orphan (a child who has lost both parents). According to the Namibian Multisectoral OVC Committee under the Ministry of Women's Affairs and Child Welfare, an orphan is a child who has lost a mother, a father, or both, or a primary caregiver, due to death, or a child who is in need of care. The Ethiopian Child, Youth and Family Welfare Organization 1992 defines an orphan as a child who has lost both parents. In Botswana a child who has lost one (single parents) or two (married couples) biological or adoptive parents qualifies

major cause of orphanhood in Africa. A 2005 survey by the Human Science Research Council of South African revealed that 11% of children from birth to fifteen years of age, in South Africa, had lost both biological parents to AIDS.¹²² At this time there were 2.5 million orphans in the Republic.¹²³ Be that as it may, not all orphans are actually parentless. In some countries, the term is also used to define the living situations of a child.¹²⁴ For instance, a street child may be referred to as an orphan even if his or her parent(s) are alive.¹²⁵ The CA limits the definition of an orphan to a child "who has no surviving parent caring for him or her".¹²⁶ The CRA does not define who an orphan is but includes an orphan as a child in need of care and protection.¹²⁷ Likewise, the KCA states that a child with no parents is a child in need of care and protection.¹²⁸ The UNCRC also does not define an orphan child.

Some orphans may have legal or customary caregivers following adoption or placement with foster parents or even community-based care while others may not have any form of care. Those children without care sometimes end up in some of the other categories of children discussed herein – street children, children in residential care,¹²⁹ internally displaced children and separated or unaccompanied children who have crossed borders. Orphans without legal or customary caregivers qualify as a subtype of separated or unaccompanied children because they are alone. The scope of this dissertation is limited to orphans without legal or customary caregivers.

for orphan benefits. In Uganda and Rwanda, a child below the age of 18 years who has lost one or both parents is an orphan. In Islam, an orphan (*yateem*) is a child under the age of *discernment* whose father has died or has been killed (Retrieved from http://www.load-islam.com/artical_det.php?artical_id=365§ion=family_society&subsection=Social%20Problems on February 4, 2011). See also CPWG *Guiding principles* for other definitions.

¹²² Tamasane and Head "The quality of material care provided by grandparents for their orphaned grandchildren in the context of HIV/AIDS and poverty: a study of Kopanong municipality, Free State" (2010) 72 *Journal of Social Aspects of HIV/AIDS* 75.

¹²³ UNICEF (2006) *Africa's orphaned and vulnerable generations: Children affected by AIDS*.

¹²⁴ UNHCR Action for the rights of children *Separated Children* December 2004.

¹²⁵ In Namibia where a child in need of care is termed an orphan.

¹²⁶ CA s 1.

¹²⁷ CRA s 50 (a).

¹²⁸ KCA s 119 (a) and (c).

¹²⁹ In the study by Meintjes *et al* (2007), it was revealed that of all the children admitted into residential care, 11% was due to orphaning. Children in residential care, though in "care" are accepted as separated and unaccompanied children because of the impersonal nature of care that they receive. For more on this see para 2 3 1 3 above.

2 3 1 5 *Children whose parent(s), legal guardian or legal or customary caregiver has been confined for long-term mental illness or imprisonment*¹³⁰

It is usually a traumatic experience for children when their parent(s) or caregiver is incarcerated¹³¹ whether for a long or short period of time. In such situations, children are subjected to change of school, environment, and loss of friends and persons with whom they are familiar. This change is often coupled with the fact that the incarcerated adult is not given the opportunity to explain the situation to the child and discuss care plans with the child.¹³² Some more serious effects of parental imprisonment on the child¹³³ are substance abuse, child neglect, domestic violence, juvenile delinquency, child prostitution and even eventual incarceration of the child for crime.¹³⁴ To avoid these possible effects, the ACRWC contains an article which deals with the children of imprisoned mothers.¹³⁵ This article provides that expectant mothers and mothers of infants and young children who have been found guilty of an offence should be provided with special treatment including preference for non-custodial sentencing, measures alternative to institutional confinement, and special alternative institutions for holding the mothers.¹³⁶ In practice, the South African Constitutional Court in *S v M*,¹³⁷ held that when sentencing the primary caregiver of minor children, courts must give "specific and well-informed attention" to ensure that the sentence imposed is "one that is least damaging to the interests of the children."¹³⁸ The court held that "the imposition of a sentence without paying

¹³⁰ In this regard, reference is made to cases where parent(s) have not relinquished parental rights. Where parent(s), legal guardian(s) or legal and customary caregivers have relinquished parental/guardianship rights over the child, the child is easily assessed as alone, and thereby adoptable.

¹³¹ Fran McNeely "Children of incarcerated parents: prisoners of the future?" (2002) 36 *DEC Prosecutor* 13.

¹³² Woodrow (1992) "Mothers inside, children outside: What happens to the dependent children of female inmates?" in Shaw (ed) *Prisoners' children: What are the issues?* 34.

¹³³ The effects of parent(s) or carer incarceration on young infants is marginal. It is believed that this is because the needs of infants are mainly those of "nurturing". When placed with a nurturing carer, the child's needs are met and the effects of separation are not direct. For more on this see Gabel & Johnston (eds) (1995) *Children of incarcerated parents* 71-75.

¹³⁴ As above.

¹³⁵ ACRWC art 30.

¹³⁶ As above.

¹³⁷ *S v M (Centre for Child Law as Amicus Curiae)* (2008) 3 SA 232 (CC).

¹³⁸ As above at para 33.

appropriate attention to the need to have special regard for the children's interests" threatens to violate the interests of the children.¹³⁹

The effects of long-term confinement for mental illness¹⁴⁰ on a child are not less grave. Children with mentally ill parents are most susceptible to neglect and abandonment,¹⁴¹ especially when parental rights have not been relinquished by the parent(s).¹⁴² Such children may be found without any legal or customary caregiver responsible for them; they may end up as street children or child offenders.

Academic material on the plight of this particular group of children is limited. However, one would agree that this group of children exist all over the world and particularly in the countries under study. Their situation is of interest in this study because, due to neglect, some of these children are alone. They therefore qualify as a subset of separated and unaccompanied children within the context of this dissertation.

2 3 1 6 *Internally displaced children, and separated and unaccompanied children who have crossed borders (separated and unaccompanied foreign children)*¹⁴³

Internal conflicts based on tribalism, bad governance, ethnicity, xenophobia and racism, religious intolerance and poverty are rife in many African countries. Between 1990 and 2005, one million children had been separated from their families or orphaned as a result of armed conflict.¹⁴⁴ Rwanda, Liberia, Somalia, Chad, Sudan¹⁴⁵

¹³⁹ As above at para 35.

¹⁴⁰ Mental illness may appear in a mild or severe form of schizophrenic, depression or anxiety disorders. See Gallager "Parents in distress: a state's duty to provide reunification services to mentally ill parents" (2000) *38 Fam & Conciliation Courts Rev* 234.

¹⁴¹ As above at 239.

¹⁴² The notion behind confinement of mental patients to institutions is to facilitate their rehabilitation. Where, for unforeseeable reasons, recovery and rehabilitation of parent patients takes longer than expected and parental rights are yet to be relinquished in the hope of recovery of the patient, the child suffers serious neglect and abuse.

¹⁴³ This dissertation goes beyond the scope of the *UNCRC General Comments No 6* and covers both children who have crossed borders and those who are internally displaced.

¹⁴⁴ Graca Machel (2000) *The Impact of Armed Conflict in Children* retrieved from www.unifem.org/index.php?f_page_pid=97 on August 17, 2010; UNICEF (2004) *On day of families, remember children who are alone*. Retrieved from http://www.unicef.org/media/meda_20941.html on August 17, 2010.

¹⁴⁵ In Sudan, some of the internal displacements are believed to be economically and politically fuelled. Some authors are of the view that after the discovery of oil in Southern Sudan, displacements of persons were deliberately created to reduce the number of black southerners in

and the Democratic Republic of Congo are known for their civil wars. Since the 1967 - 1970 Biafran civil war in Nigeria, violence resulting from religious and ethnic intolerance,¹⁴⁶ and economic imbalance,¹⁴⁷ has been seasonally reported from this country. Tribal clashes were reported from Kenya between 1991 and 2000. South Africa has a history of violence resulting from racism and, recently, xenophobia. Ivory Coast has been on the news in recent times for its political clashes which have led to more than 15,000 people fleeing the country to neighbouring Liberia.¹⁴⁸ Zimbabwe, in the early twenty-first century, is synonymous with bad governance.¹⁴⁹ The consequence of these varying conflicting situations is the internal displacement of persons within these national territories. In fact, in Kenya, thousands of people were internally displaced in different phases of the tribal clashes mentioned above and in subsequent political wars.¹⁵⁰ While wars and conflicts persist, some families and individuals flee in large numbers from their national territory while others remain in their countries but are displaced from their usual areas of habitation.¹⁵¹ Children in these situations are usually the hardest hit, particularly those children who lose their parents during the conflicts. A 2001 Save the Children/UNHCR note on refugee and internally displaced communities in West Africa revealed that many refugee and internally displaced girls engaged in exploitative sexual relations in order to obtain

the oil regions. For more on this see Abdullahi "State creation of internally displaced persons in Kenya" (2004) *10 1 East African Journal of Peace & Human Rights* 1. As at January 10 2011, there were still clashes at the border of Northern and Southern Sudan which, led to more than 21 deaths.

¹⁴⁶ It is believed that internally displaced persons were created as a politicking tool during the transition from military to democratic government in the Federal Republic. For more on this see Ibeanu "Exiles in their own home: conflicts and internal population displacement in Nigeria" (1999) *12 2 J Ref Stud* 167.

¹⁴⁷ For instance, the fights in the Niger-Delta areas because of the large amounts of crude oil exploited (and exploitable) in these parts and exported by the country.

¹⁴⁸ As reported on SABC 2 (South African Broadcasting Corporation) Morning Live news on January 3, 2011 and SABC 3 evening news on the same day. Also reported on www.cnn.com January 3, 2011. Before now, Ivory Coast has been in the process of recovery after civil war early in the twenty-first century.

¹⁴⁹ Zimbabwe's circumstance has led to millions of its citizens fleeing their usual natural habitation seeking asylum in neighbouring countries, and even in the West, with hope for "better life".

¹⁵⁰ It is believed that the government in this East African state employs internal displacement of persons as a political tool when there are impending elections in the country. By displacing loyalist to the opposition from their habitual residences, the ruling party disenfranchises these people and disrupts the voting pattern thereby gaining electoral advantage for themselves. For more in this see Abdullahi (2004) 1.

¹⁵¹ For more on internally displaced persons in Africa prior to the twenty-first century see Tindifa "Refugees and human rights in Uganda: a critical assessment of the law, policy and practice" (1998) *5 1 East African Journal of Peace & Human Rights* 53 and Gingyera-Pinyewa "Refugees and internally displaced people in Africa on the eve of the 21st century" (1998) *5 1 East African Journal of Peace & Human Rights* 45.

shelter, healthcare, food and education.¹⁵² Some of the internally displaced parentless children may remain in a fairly familiar territory while those who cross borders to other countries are exposed to totally new terrain.

The issue of internally displaced persons and refugees is topical in international humanitarian law and human rights law.¹⁵³ It is partly from these areas of law that the concepts "separated children" and "unaccompanied children" have been developed.¹⁵⁴ The term "internally displaced persons" is not a complex one to define; the term itself describes the situation of the people concerned and the reasons for their displacement¹⁵⁵ explain the difficulty of their circumstances. Internally displaced persons are defined as persons within a national territory that have been displaced from their usual areas of habitation in that national territory.¹⁵⁶ A refugee is defined as someone who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality..." and is unwilling to "avail himself of the protection of that country" or "return" to the country.¹⁵⁷ Refugees are of greater concern in international law and are legally protected therein.

Refugees and internally displaced persons are not alien to the countries under study.¹⁵⁸ As has already been highlighted above, Kenya, Nigeria and South Africa

¹⁵² UNHCR & Save the Children UK (2002) *Note for implementing and operational partners by UNHCR and Save the Children UK on sexual violence and exploitation: The experience of refugee children in Liberia, Guinea and Sierra Leone*.

¹⁵³ It has been reported that more than half of the world's refugees are children some of which are unaccompanied. For more on this see Nicholson C "A first call on available resources for child refugees in South Africa" (2005) *De Jure* 71.

¹⁵⁴ Particularly within the province of the UNHCR, a number of policy documents and guidelines have been put together to cater for unaccompanied and separated children including the 1994 UNHCR *Guidelines on Refugee Children, 1994*, the UNHCR *Policy on Refugee Children 1993*, and the UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997*. Also in South Africa, unaccompanied children are given definition and special protection in the Refugees Act 130 of 1998.

¹⁵⁵ Which include but are not limited to the reasons listed in the paragraph immediately above.

¹⁵⁶ For more on this concept see Abdullahi (2004) 1-6; Gingyera-Pinycwa (1998) 45 at 48; Oloka-Onyango "Forced displacement and the situation of refugee and internally displaced women in Africa" (1998) *5 1 East Africa Journal of Peace and Human Rights* 1 at 14-17; Tindifa (1998) 53 at 61.

¹⁵⁷ Convention Relating to the Status of Refugees, 1951 art 1; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969.

¹⁵⁸ In fact, it is documented that developing countries have the greatest concentration of separated and unaccompanied children who have experienced man-made disasters. See Bhabha &

experience man-made mishaps that lead to persons being internally displaced within these national territories or fleeing from the countries altogether. Internally displaced children or displaced children who have crossed borders may find themselves all alone.¹⁵⁹ In this state, the children are most vulnerable.¹⁶⁰ With nowhere else to go, some of these children end up living *on* or *off* the streets¹⁶¹ or in residential care within their own country or in another country as refugees. In this dissertation "internally displaced children" are those children who have been displaced from their usual habitation and are not with any adult who has the legal responsibility to care for them – they are alone. Refugee children are those children who have crossed borders seeking asylum and are not with any adult who is legally responsible to care for them – they are also alone. These children fit in as a sub-category of separated or unaccompanied children because they too are alone.

2 3 2 *Separated and unaccompanied children as a result of the natural disaster*¹⁶²

Most children who find themselves alone as a result of a natural disaster feel inundated in hopelessness and fear.¹⁶³ Not only because they have experienced a life-threatening, flow-rupturing and emotion-wrecking event but also because they lose their entire social fabric – parents, relatives, security of grandparents, neighbours, teachers and elders.¹⁶⁴ With this loss they also lose their security, safety, stability and roots.¹⁶⁵ Separation from the family affects the core of any child's

Schmidt "Seeking asylum alone: unaccompanied and separated children and refugee protection in the US" (2008) *1 1 Journal of the History of Childhood and Youth* 127 at 131.

¹⁵⁹ *Inter-agency guiding principles* foreword. Some children may become all alone after the death of a parent or caregiver or as a result of their involuntary separation during violent conflicts or wars.

¹⁶⁰ SC (2004) 7.

¹⁶¹ In its 2007 report, the Forced Migration Studies Programme reported that 25% of the children who had crossed borders into South Africa made their money by selling on the streets. Half of the children reported on earned less than R200 a week. For more statistical analysis see Forced Migration Studies Programme, University of Witwatersrand for Save the Children UK (2007) 5.

¹⁶² For clearer understanding of the situation of these children, this chapter may be studied after studying Chapter 3. However, references are made herein to relevant paragraphs in Chapter 3 of this dissertation.

¹⁶³ Silverman & La Greca (2002) "Children experiencing disasters: Definitions, reactions and predictors of outcomes" in La Greca, Silverman, Vernberg & Roberts (eds) (*"La Greca et al"*) *Helping children cope with disasters and terrorism* 11 (retrieved from <http://www.mentalhealth.org/publications/allpubs/SMA95-3022/default.asp> on March 7, 2001).

¹⁶⁴ Winnicott (1986) "Face to face with children" in *Working with children* Daphne (ed).

¹⁶⁵ Where there is total, permanent loss (resulting from death of parents), the child is left in a void. For more on bereavement of children, see Granot (2005) *Without you: children and young people growing up with loss and its effects* 27 – 52.

existence and exposes the child to serious physical and psychological harm. Some of the harm is due to the great difficulty the child experiences in obtaining food and humanitarian assistance required for survival.¹⁶⁶ There is also profound emotional impact of separation on children which impedes their growth and development.¹⁶⁷ Children who remain with their families or communities during and after natural disasters have been found to recover more quickly.¹⁶⁸

The effect of natural disasters can be such that children may become orphaned, abandoned, neglected or destitute. Where there has been a natural disaster, there is an increased burden on States to identify children who have become separated from their parent(s) or caregiver.¹⁶⁹ This is partly because humanitarian support by way of food, shelter, medication and counselling must be administered to victims, and where children are separated from their parents, administration of these needs becomes a more onerous task. Moreover, it is important to establish whether a child is separated so that the State may take appropriate steps to ensure family reunification or make necessary arrangements for alternative care (temporary or permanent, depending on the anticipated period of separation).¹⁷⁰ Another important duty on States is prevention of cross-border displacement or illicit trafficking of children as a consequence of disaster. This may be achieved by immediate tightening of exit procedures at national borders.¹⁷¹ It is believed that if displacements, abandonment and neglect of children remain internal, it will be easier for the State to manage and monitor the situation.

Abandonment and neglect of children by parent(s) or caregivers after a disaster may be a deliberate move or an accidental one. Some parents or caregivers deliberately separate from their wards in order to go out in search for humanitarian relief supplies

¹⁶⁶ UNCRC (2005) *General Comments No 6 art 3*. Also see SC (2004) 7.

¹⁶⁷ CPWG *Guiding principles*. For more on this see para 2 4 immediately below.

¹⁶⁸ Save the Children (2005) 1.

¹⁶⁹ UNCRC *General Comments No 6* (2005) art 13.

¹⁷⁰ Save the Children (2005) 8.

¹⁷¹ Rotabi & Bergquist "Vulnerable Children in the aftermath of Haiti's earthquake of 2010: a call for sound policy and processes to prevent international child sales and theft" (2010) 3 1 *Journal of Global Social Work Practice* retrieved from <http://www.globalsocialwork.org/vol3no1/Rotabi.html> on August 22, 2010.

in places where they believe such aid is readily available.¹⁷² These deliberate separations can be avoided by ensuring that households have access to basic relief supplies after the disaster.¹⁷³ Close monitoring of entry and exit of children into residential care in order to curb the inflow of children who have been deliberately sent out by their parents or caregivers into residential care is also necessary after a disaster.¹⁷⁴ Accidental separations, on the other hand, normally occur after a natural disaster. Children may be separated from their parents or caregivers during stampedes or mass evacuation from disaster sites. One of the ways in which separation in such situations may be prevented is by tagging children with their names, identification numbers and addresses as a measure aimed at prevention of separation following a natural disaster.¹⁷⁵ This will help ease the process of reunification of children with their parent(s) or caregivers where separation has actually occurred and the parents or caregivers are still alive and available to care for the children. Separation may also be due to death of parents or caregiver.

2 4 Effects of separation on children

From birth to adulthood, children experience varying forms of separation. At birth, the child is separated from the mother's womb. Also when he or she is being placed in his or her crib, there is separation from the mother or mother-figure. In ideal situations, the child is also separated from the safety of his or her family to go to school daily and sometimes for long terms. These separations are normal and instrumental to childhood development.¹⁷⁶ When there is traumatic loss related to the separation, the repercussions are extremely harsh. This is the plight which separated children in natural disasters face.

¹⁷² Unaccompanied and separated children in Tsunami affected countries as accessed on www.icva.ch/printer/doc00001315.html on December 29, 2010; Bonnerjea "Disasters, family tracing and children's rights: Some questions about the best interest of separated children" (1994) 18 3 *Disasters* 278.

¹⁷³ For more on this see SC (2004) 17.

¹⁷⁴ It is believed that some parents and caregivers place their children in institutional care in order to ensure the enjoyment of basic needs which they are unable to provide to their wards.

¹⁷⁵ For more see Williamson & Moser (1998) *Unaccompanied children in emergencies: A field guide for their care and protection* 36 as quoted in SC (2004) 18.

¹⁷⁶ Granot (2005) *Without you: children and young people growing up with loss and its effects* 57.

The effects of separation on a child depend on two main factors:¹⁷⁷ firstly, the age and level of maturity of the child;¹⁷⁸ and secondly, the culture and society in which the child is being raised.¹⁷⁹ The effects of separation may be long-term or short-term. This depends on factors including the support given to the child to enable him or her complete the grieving process. Six stages of grieving have been identified in children, and are discussed below. Another important point to note is "that separation does not occur in isolation of other events".¹⁸⁰ Therefore there are factors related to separation that influence the child's reaction to separation. These factors and stages are discussed hereunder.

2 4 1 *The age and level of maturity of the child*

The needs of a child vary with the age and maturity of the child. As such, the effects of separation on children differ depending on the age of the child and the child's level of maturity. An infant is totally dependent on, and attached to,¹⁸¹ his or her mother or parent-figure.¹⁸² It is at infancy that a sense of basic trust is developed.¹⁸³ A strong attachment to a parent-figure allows the child to develop trust for others and self-reliance.¹⁸⁴ An infant will not normally experience distress as a result of separation provided his or her regular needs of stimulation, food, warmth and comfort are

¹⁷⁷ Certain other factors influence a child's reaction to separation. These include: the strength of relationship being broken; the abruptness of the separation; past experiences of separation; the child's temperament; pre & post-separation environment; and the parting message that the child receives. For more on this, see Fahlberg (1994) *A child's journey through placement* (UK ed) 134.

¹⁷⁸ These are important parameters that determine the stage of development of the child.

¹⁷⁹ Tolfree (1995) 15-27.

¹⁸⁰ As above 19.

¹⁸¹ According to his attachment theory, Bowlby explains to us that there are three stages that a well-attached child goes through upon separation from his or her attachment figure. These stages are: 1) vigorous protests and attempts to recover the "attachment object"; 2) despair about the return of the carer amidst watchfulness for such return; and 3) emotional detachment and loss of interest in carers in general. For more on this see Bowlby (1998) *Attachment and Loss Vol 3 Loss: sadness and depression* (Bowlby (1998) series on *Attachment and Loss – Vol 1 Attachment; Vol 2 Separation: anxiety and anger; Vol 3 Loss: sadness and depression Attachment and Loss*; particularly *Vol 2 Separation: anxiety and anger* 46).

¹⁸² It is now generally accepted that infancy dependence is not limited to the birth mother especially in societies where shared parenting is the norm and with the extensively diverse child care and child rearing arrangements that can be observed cross-culturally. Attachments can be to fathers, siblings, grandparents or persons who may not necessarily be physical care providers to the child. For more on this see Tolfree (1995) 20. A child's parent-figure can be his or her parent, legal guardian or legal or customary caregiver.

¹⁸³ Tolfree (1995) 16-17.

¹⁸⁴ Fahlberg (1994) 14.

met.¹⁸⁵ When an infant's needs have been adequately met and he or she has experienced a sense of being loved and valued, he or she develops into a toddler with a sense of well-being, hope and security.¹⁸⁶ At this stage of a child's development, so long as there is immediate substitute care to sufficiently provide for the child's needs, the effect of separation on the child is not expected to be grave.

From toddlerhood to the age of five years, there is rapid physical and mental growth of the child;¹⁸⁷ the child's sense of autonomy and self-control develops. The presence of an "attachment-figure" during this period is most important as it enhances the child's confidence and development of self-control. As such, separation at this stage will cause the greatest distress in childhood development.¹⁸⁸ The sudden disappearance of the child's parent or caregiver in a natural disaster may result in the wounding of the child's basic infrastructure for mental and physical development.¹⁸⁹ This may be evident in the child's primary motor development and independence in crawling, talking and walking.¹⁹⁰ Also, the child may display some emotional difficulties by crying all the time or clinging to any available "potential" carer.

During middle-childhood and pre-adolescence when the child masters new skills, the child is somewhat detached from the parent-figure. It is at this stage that the child's sense of industry or inferiority is enhanced.¹⁹¹ Therefore, the encouragement and support of a parent-figure, as a role model, is key at this stage. In a situation of separation where this is lacking, the child may be flooded with sadness, anger, guilt and longing as a result of the separation.¹⁹² If separation occurred when the child was younger and the child, on reaching this age, avoids outside activities and is socially shy, there is a probability that the grieving process has not been successfully completed. Another serious effect of separation during this stage of a child's

¹⁸⁵ Tolfree (1995) 20.

¹⁸⁶ As above 17.

¹⁸⁷ The child begins to recognise his or her individual caregiver and therefore, develops an attachment-figure.

¹⁸⁸ Separation during the toddler years interferes with the development of a healthy balance between dependency and autonomy. See Fahlberg (1994) 136 for more on this.

¹⁸⁹ Granot (2005) 63.

¹⁹⁰ As above.

¹⁹¹ Tolfree (1995) 18.

¹⁹² Granot (2005) 75.

development is the build up of a sense of inferiority or low self-esteem which will be more evident during adolescence and even adulthood. It is therefore important that where a child in middle-childhood or pre-adolescence is separated from his or her parent-figure, the child is rehabilitated immediately after proper explanation of the reasons and repercussions of the loss to the child.¹⁹³

During adolescence, peer group relationships play an enormous role in the child's development. This period is described as a transit period where the "multitude of childhood experiences" of the child must be integrated with "mature adult identity". At this stage the child needs a parent attachment-figure as a secure personal base.¹⁹⁴ There is a risk of deep low self-esteem and low self-image in an adolescent who loses his or her parent-figure during adolescence or at a younger age without complete recovery from the trauma. A higher risk lies in the fact that, particularly in the African context, some adolescents are left to head household after the loss of their parent or caregiver. In taking up such responsibility, the¹⁹⁵ adolescent is expected to demonstrate emotional self-control.¹⁹⁶ This may involve the adolescent by-passing the grieving process. The effect of such emotional by-pass is often negative in that, as an adult, he or she may show lack of interest in ordinary aspects of life.

2 4 2 *The culture and society in which the child is being raised*

Cultural and societal beliefs play an important role in the development of a child. Therefore, the effect of separation will probably be easier on a child who grew up in a situation of multiple caretaking¹⁹⁷ than one who grew up with a single adult.¹⁹⁸ Also, a child who grew up in a society where, at middle-childhood and pre-adolescence, he or she is expected to assist the family in its "economic and subsistence responsibilities"¹⁹⁹ may develop a sense of independence at an early age. The effect of peer-group relationship during adolescence on such a child may

¹⁹³ As above 77.

¹⁹⁴ Tolfree (1995) 18.

¹⁹⁵ Granot (2005) 82.

¹⁹⁶ As above 81.

¹⁹⁷ For example, a polygamous extended family setting. For more on this, see more para 4 3 below.

¹⁹⁸ Tolfree (1995) 19.

¹⁹⁹ As above 18.

be less. More so, adolescents belonging to cultures where parents choose spouses for their wards will be much more dependent on their parent-figure than others. Societal beliefs & perceptions, to a certain extent, determine the degree of attachment of a child to his or her parent or caregiver.²⁰⁰ This degree of attachment determines the severity of the effect of separation on a child.

2 4 3 *Short-term effects of separation*

Two main short-term effects of separation can be identified: 1) distress immediately after separation; 2) development retardation which may have long-term implications.²⁰¹ Distress is usually a reaction to the loss²⁰² of a parent or caregiver²⁰³ (as opposed to the lack of care) or strangeness of environment in which the child finds himself or herself. In fact, when a child is placed in a strange environment, for instance, residential care, and cared for by strange people, his or her distress is likely to be more intense.²⁰⁴ As a general observation, most young children respond to traumatic separation with behavioural regression, sadness and withdrawal in the short-term.²⁰⁵ Older children, on the other hand, become anxious and display behavioural difficulties with other children. In extreme cases, teenagers turn to drugs and alcohol, and may even end up as juvenile offenders.²⁰⁶

According to Bowlby,²⁰⁷ the behavioural patterns that are exhibited by a well-attached child, as a result of distress, are protests, despair and detachment.²⁰⁸ The child protests vigorously and tries all possible to recover the mother or attachment-

²⁰⁰ As above.

²⁰¹ As above 20.

²⁰² According to Fahlberg (1994) 133 quoting loss is the "affectual state that an individual experiences when something of significance is unexpectedly withdrawn".

²⁰³ Distress reactions often result from separation from the parent-figure to which the child is attached. This reaction is most evident in children between six months and four years old. For more on this see Rutter (1981) *Maternal Deprivation Reassessed* 2nd ed.

²⁰⁴ Bowlby (1998) *Attachment and Loss Vol 2 Separation: Anxiety and anger* 46.

²⁰⁵ Granot (2005) 56.

²⁰⁶ As above 56.

²⁰⁷ John Bowlby is a renowned expert in the field of attachment in humans and non-humans and their reactions to loss and separation. He is popular for his attachment theory. For in-depth understanding of this field, see Bowlby (1998) series on *Attachment and Loss – Vol 1 Attachment; Vol 2 Separation: Anxiety and anger; Vol 3 Loss: Sadness and depression Attachment and Loss*; particularly *Vol 2 Separation: Anxiety and anger* 46.

²⁰⁸ Bowlby (1998) Vol 2 46.

figure. The protest phase raises the problem of separation anxiety.²⁰⁹ Then, in the despair phase, the child begins to despair about the return of the attachment-figure amidst watchfulness for such return. This phase is also known as the phase of grieving and mourning.²¹⁰ The length of this phase and its intensity depends on the period of separation.²¹¹ Later on, the child becomes emotionally detached and loses interest in caregivers in general. The detachment phase, also known as the phase of defence, may not be indefinite, depending on the period of separation, and the success in the grieving process.²¹²

The second short-term effect of separation, development retardation, is caused by privation of (lack of) the stimulation which leads to attachment. It is usually evident in the child's language,²¹³ learning abilities in school, social responsiveness (developing friendships), internalising values and conscience, and motor development at any age.²¹⁴ Development retardation will be found in infants whose needs have not been provided and toddlers who do not have parent-figure(s) to whom they may attach. Children in middle-childhood who do not have role models and adolescents who do not enjoy the secure personal base because of the loss of an attachment figure may also display development retardation.

2 4 4 *Long-term effects of separation*

Developmental reactions to separation may persist for years if the emotional support necessary for grieving has not been availed the child.²¹⁵ Adolescents who have experienced loss due to separation at a very young age have been found with difficulties in maintaining intimate relationships, depression, delinquent behaviour and suicidal tendencies.²¹⁶ Another underlying behaviour which may be exhibited long-term is lack of trust which may lead to the child growing up to be a victim or a

²⁰⁹ As above 47.

²¹⁰ The stages of grieving are discussed in para 2 4 5 immediately below.

²¹¹ Bowlby (1998) Vol 2 46.

²¹² See para 2 4 5 below.

²¹³ Especially when a toddler depends on a family member to be an interpreter as he or she acquires language.

²¹⁴ Fahlberg (1994) 135.

²¹⁵ Particularly where death of parents has occurred. See Fahlberg (1994) 136.

²¹⁶ Granot (2005) 56.

victimiser.²¹⁷ Separation from parent(s) or caregivers during adolescence may accentuate emotional instability and impulsiveness.²¹⁸ Some adolescents may even begin to believe that they have lost control of their lives and, as such, become suicidal. These effects may linger on right through childhood and far into adulthood.

2 4 5 *The grieving process, a sequel to separation*

As a consequence of separation, a child enters into a period of grieving which *may* last for all through childhood and even extend into adulthood. It is important that the child grieves. The length of the grieving period is determined by various factors including the stage of development in the child when separation occurred, the assistance given to the child by his or her subsequent carer to enable the grieving process, cultural factors (such as the belief that "big boys don't cry" or that girls should not exhibit anger),²¹⁹ and the strength of attachment between the child and the attachment-figure now separated.²²⁰ The stages of grieving identified are the following: shock, denial, anger, bargaining, sadness or despair, and resolution. Shock and denial stages are most prominent in abrupt separations²²¹ like separation which may occur in a natural disaster. Shock is exhibited in the shutdown of the child's body. The child will usually show little emotion and seem numb.²²² During the denial stage, the child exhibits evidence of sleep and appetite disturbances – overeating or loss of appetite and insomnia or excessive sleeping.²²³ With anger comes a displacement to carers, peers or social workers. Bargaining usually takes the form of promises. This stage is prominent during the ages three to five years and adolescence.²²⁴ A child's tearfulness is proof that he or she is in the sadness and despair stage of grieving; the child is also usually withdrawn. These stages should occur in the order presented herein but anger, bargaining, sadness or despair may occur in any order and may even recycle.²²⁵

²¹⁷ Fahlberg (1994) 136.

²¹⁸ As above 140.

²¹⁹ For more on this see Fahlberg (1994) 156.

²²⁰ Fahlberg (1994) 156-162.

²²¹ As above 154.

²²² As above.

²²³ As above 155.

²²⁴ As above.

²²⁵ As above.

2 4 6 *Other factors influencing the effects of separation*

Separation occurs with a host of other events. As a result, the effects of separation will also be determined by the events surrounding the separation. Factors including the reason for, and circumstances of the separation; the experiences preceding and following the separation; the living situation of the child before and after the separation; and the immediate availability of material, psychological, emotional, spiritual and physical care for the child after the separation, often influence the effects of separation on a child. Within the context of this study, one important factor that is expected to influence the effects of separation on a child is the trauma associated with a natural disaster. A child that is orphaned after the natural disaster will deal with the trauma resulting from experiencing the disaster and that which is due to permanent separation from his or her parents. An abandoned child will have to deal with the knowledge of the traumatic experience plus rejection. A child who has been placed in an institution due to parent's inability to care for the child will experience separation differently. Where a child loses a parent or caregiver in a flood or under the rubble of a building levelled by an earthquake, the child will be left with the shock from the earthquake, the gruesome death of the parent or caregiver, and the trauma resulting from separation to deal with. Where there is a natural disaster, a child's experience of separation will differ depending on factors such as the psychological, physical and emotional impact of the natural disaster on him or her, and the length of period of separation: short-term or long-term. If the child subsequently returns to his or her parent-figure, that child will have to go through the re-attachment process.

2 5 **Conclusion: Why separated and unaccompanied children are highly vulnerable**

Separated children and unaccompanied children are known categories of vulnerable children. Definitions of these concepts vary with fine differences between both the concepts. This chapter has firstly described a child in legal terms and then delineated separated children as distinguishable from unaccompanied children. The concepts have been defined by NGOs and IOs, from the perspective of their specific areas of interests in their work. An example highlighted herein is the definition given

to unaccompanied children by the UNHCR which limits the definition to children who are outside their country of origin.

Following a situation of natural disaster, there are two possible categories of separated and unaccompanied children – those separated before the disaster and those separated as a result of the disaster. Discussions in this chapter reveal that children who are separated and unaccompanied prior to the natural disaster include street children (particularly children of the streets), abandoned children, children placed in institutions (residential care) whose parents are unable or unwilling to care for them, orphans who do not have legal or customary caregivers, children whose parent(s), legal guardian(s) or legal or customary caregiver(s) has been confined for long-term mental illness or imprisonment, and internally displaced children, and separated and unaccompanied children who have crossed borders (separated and unaccompanied foreign children).

Generally, the effects of separation on a child depend on the age and level of maturity of the child, and the culture and society in which the child is being raised. These effects could be long-term or short-term and range from distress to development retardation and even depression, delinquent behaviours and suicidal tendencies. In addition to these effects has discussed other factors that could compound the effects of separation on children at different stages of their development. It is because of these possible effects that separated or unaccompanied children are described as highly vulnerable. The next chapter investigates the effects of natural disasters on these highly vulnerable children.

CHAPTER 3

NATURAL DISASTERS AND THEIR EFFECT ON SEPARATED AND UNACCOMPANIED CHILDREN

3 1 Introduction

A disaster is generally accepted as an extraordinary, overwhelming and traumatic experience which publicly, and adversely, affects large groups of people, usually members of more than one family.²²⁶ It involves physical, emotional and

²²⁶ Saylor (ed) (1993) *Children and disasters* 2.

psychological injury of persons or loss of lives, and destruction of property.²²⁷ Disasters have distinguishing features related to their cause, duration, severity, scope of impact, speed of onset, and extent of damage caused.²²⁸ The dictionary definition of a disaster is "an occurrence causing widespread destruction and distress; a catastrophe".²²⁹ A definition used in the United Kingdom is the following:

A major incident which is a serious disruption of life, arising with little or no warning, causing or threatening death or serious injury to, or rendering homeless such numbers of persons in excess of those which can be dealt with by public services operating under normal procedures, and which calls for the special mobilisation and organisation of those services.²³⁰

The World Health Organisation describes a disaster as

The result of a vast ecological breakdown in the relations between man and his environment, a serious and sudden (or slow, as in drought) disruption on such a scale that the stricken community needs extraordinary efforts to cope with it, often with outside help or international aid.²³¹

According to Rubonis and Bickman,²³² a disaster has the characteristics of being relatively sudden, with an identifiable onset, caused by external or environmental factors and affecting a group of individuals adversely. The South African Disaster Management Act²³³ defines a disaster as

²²⁷ Silverman & La Greca (2002) 11 quoting American Academy of Paediatrics Working Group on Disaster (1995) *Psychosocial issues for children and families in disasters: A guide for primary care physician*.

²²⁸ Saylor (ed) (1993) 12.

²²⁹ Retrieved from <http://www.thefreedictionary.com/disaster> on April 25, 2010.

²³⁰ United Nations (1984) 1 quoting from the County Emergency plan of Humber County Council United Kingdom.

²³¹ Retrieved from <http://www.who.int/topics/disasters/en/> on May 14, 2010.

²³² Rubonis & Bickman "Psychological impairment in the wake of disaster: The disaster-psychopathology relationship" (1991) *Psychology Bulletin* 109.

²³³ *Disaster Management Act 57 of 2002*.

[A] progressive or sudden, widespread or localised, *natural* or human-caused *occurrence* which *causes* or threatens to cause death, injury or disease; damage to property, infrastructure or the environment[;] or disruption of the life of a community; and is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.²³⁴

Whether natural (for instance hurricanes, earthquakes and certain floods),²³⁵ induced by humans (for example airplane crashes, toxic waste accidents, school shootings, terrorist attacks and bombings)²³⁶ or resulting from a combination of human error and natural forces (for example floods resulting from a dam break after heavy rains),²³⁷ disasters generally have the power to stop any economy. Any disaster includes the "consequences of a disastrous event"²³⁸ in addition to "the inability of its victims to cope with" such consequences.²³⁹

The years 2010 and 2011 will be remembered for the high magnitude and havoc-racking earthquakes in Haiti,²⁴⁰ Chile,²⁴¹ Taiwan,²⁴² Turkey²⁴³, Mexico,²⁴⁴ China,²⁴⁵ Argentina,²⁴⁶ Japan,²⁴⁷ and Thailand,²⁴⁸ the volcano in Iceland,²⁴⁹ and the floods in

²³⁴ S 1. All emphasis mine.

²³⁵ Natural disasters are caused by forces of nature.

²³⁶ Human-made disasters are caused by human error, human involvement or malfunctioning technology.

²³⁷ According to Whittow (1980) *Disasters: The anatomy of environmental hazards* 21-23) there is a current distinction between natural hazards, social hazards, man-made hazards and quasi-natural hazards of air and water pollution; disasters are a realisation of hazards. Natural hazards are the wildest category while quasi-natural hazards are results of man's exploitation of the environment and, as such, can be avoided and controlled.

²³⁸ There must be actual loss resulting from the event. For more on this, see second report of the Special Rapporteur to the United Nations International Law Commission (UN ILC), Mr Eduardo Valencia-Ospina, at the sixty-first session of the UN ILC on protection of persons in event of disasters.

²³⁹ Retrieved from <http://www.businessdictionary.com/definition/disaster.html> on February 10, 2011.

²⁴⁰ Occurred on January 12, 2010.

²⁴¹ Occurred on February 27, 2010.

²⁴² Occurred on March 4, 2010.

²⁴³ Occurred on March 8, 2010.

²⁴⁴ Occurred on April 4, 2010.

²⁴⁵ Occurred on April 14, 2010.

²⁴⁶ Occurred January 1 & 3, 2011.

²⁴⁷ Occurred March 11, 2011 and July 10, 2011.

²⁴⁸ Occurred March 23, 2011.

²⁴⁹ Occurred on April 14, 2010.

Mississippi in the USA,²⁵⁰ Nigeria,²⁵¹ Ghana,²⁵² South Africa,²⁵³ Australia,²⁵⁴ Philippines,²⁵⁵ Brazil,²⁵⁶ Germany,²⁵⁷ and Sri Lanka.²⁵⁸ These disasters devastated their target countries and have left some of these countries in ruins years on. Most surviving residents of disaster areas have to continue with life away from their usual habitation, without the lifestyle they were previous used to and its "comforts". Some people live with the painful loss of loved one(s) while others face life today with physical disabilities. For children of varying ages, disasters take a toll on their personal growth and development. The position of separated and unaccompanied children in disasters is most disconcerting because they do not have parent(s) or caregiver(s) (who serve as primary support for children in solving and coping with problems)²⁵⁹ to assist them in dealing with the trauma and its aftermath.

For purposes of this dissertation, certain elements in the definition of a disaster are pertinent namely: the suddenness of occurrence (little or no warning); the extent of the damage (widespread or localised); the resulting injury, death and homelessness; and the difficulties in coping with the effects of the occurrence (the need for victims (and governments) to employ extraordinary efforts and resources). The study focuses on natural disasters because natural disasters (when compared to man-made disasters) are less easily predictable, and in some cases unpredictable.²⁶⁰ There are therefore likely to take their victims unawares. Also, natural disasters have been rampant in recent times around the globe. The key traits of *natural disasters* on which this study is based are loss of property, the environment and infrastructure, displacement of groups of persons, and enormity of occurrences.

²⁵⁰ Occurred on May 3, 2010.

²⁵¹ Occurred between August 22 and August 25 2010.

²⁵² Occurred between August 9 and August 10, 2010. The floods in Ghana and Nigeria spread from the Niger river into these countries, also into Burkina Faso and Benin.

²⁵³ Occurred over a period of one month in January 2011 in seven provinces in the country particularly in the cities: Upington, East Rand, Centurion, Mamelodi, KwaZulu-Natal, and parts of the Northern Cape, Kwazulunatal (the South African government declared the flooded areas disaster zones on January 17, 2011).

²⁵⁴ Occurred from late December 2010 through January 6, 2011 with its effects lingering on to late January 2011.

²⁵⁵ Occurred during the period of December 2010 to late January 2011.

²⁵⁶ Occurred resulting from rains from January 1 through January 12 2011.

²⁵⁷ Commenced on January 9, 2011.

²⁵⁸ Occurred on January 13, 2011.

²⁵⁹ Silverman & La Greca (2002) 13.

²⁶⁰ Bryant (2005) *Natural Hazards* 2nd ed 5; Saylor (ed) (1993) 4.

This chapter focuses on the effects that natural disasters may have on separated and unaccompanied children. It is these effects that explain the plight of separated and unaccompanied children during the occurrence. The chapter commences with explanation of what a natural disaster is and gives an overview of natural hazards that may result in disasters. A sociological viewpoint on how humans are affected by natural disasters is also highlighted after which the study proceeds with a discussion on the physical, psychological and emotional effects of natural disasters. To understand disasters, knowledge about the vulnerability of different groups of people is necessary.²⁶¹ Thus, the chapter rounds off with the societal vulnerability of separated and unaccompanied children in the light of the effects discussed. A conclusion is drawn that separated and unaccompanied children are twice as vulnerable as other children in situations of natural disasters. They should therefore be given particular attention in order to alleviate their suffering to the barest minimum.

3 2 Natural disasters delineated

Natural disasters may result from either climatic or geographical²⁶² hazards. The phrase "natural disasters" is often used to refer to events such as hurricanes, earthquakes, tsunamis or floods. However, these natural events are not disasters unless a vulnerable group of persons is exposed to the hazards that result from the event.²⁶³ Bryant broadly uses the term "natural hazards" when dealing with periodic climatic and geographical hazards such as earthquakes, tsunamis, volcanic eruptions and flash floods.²⁶⁴ A "natural disaster" is defined by that havoc that is caused by these hazards. According to Whittow, "a disaster is a realisation of a

²⁶¹ Wisner, Blaikie, Cannon and Davis ("Wisner *et al*") (2005) *At risk: Natural hazards, people's vulnerabilities and disasters* 2nd ed 5.

²⁶² Hazards such as large-scale storms, localized storms, drought, floods including flash floods, fires in nature and oceanic hazards such as sea-ice, sea level rise and beach erosion are climatic while earthquakes, tsunamis, volcanoes, land instability are geographic.

²⁶³ Wisner *et al* (2005) 10. Wijkman & Timberlake (1984) *Natural Disasters: Acts of God or Acts of Man?* 19. Some institutions, for example, UNESCO, have differentiated between destructive disasters and harmless disasters. However, most academics in the field of natural hazards maintain the view that hazards are not disasters unless a group of persons is affected by the hazard.

²⁶⁴ According to Bryant, four very important points about "natural hazards" are the following: (1) they are predictable; (2) their occurrence is increasing in frequency; (3) they are pervasive in time and space; and (4) people have remarkable ability during calamities to rescue, survive and recover from the events.

hazard" (and any natural event that threatens life and property is a hazard).²⁶⁵ Climatic disasters result from climatic hazards such as flash floods, large-scale storms and fires in nature. It is believed that these disasters are, to a large extent, man-made and can be "man-corrected"; they are, to a large extent, predictable.²⁶⁶ Earthquakes, tornadoes and tsunamis, on the other hand, are geographic and are mostly caused by forces of nature. These are less predictable than climatic hazards.

3 3 Overview of disaster-wrecking natural hazards: cause, nature of occurrence and predictability

With the levels of poverty and oppression in most African countries, the consequence of natural hazards within the continent, should they occur, will be grave. Although the natural hazard statistics documented early in the twenty-first century states that the possibility of natural hazards occurring in Africa is relatively low,²⁶⁷ the possibility of these events occurring is not completely ruled out. It is now more likely that hazards occur in places where they are least expected.²⁶⁸ This paragraph outlines the degree of severity, length of event and predictability of certain hazards that can possibly (re)occur in Africa.

3 3 1 Hurricanes

Hurricanes are cyclonic storms which form over oceans. In simple terms, a hurricane occurs when water evaporates from the ocean and forms a storm over the ocean. When this storm spins and attains a wind speed of 74mph, a hurricane is declared. Hurricanes are ranked as very severe climatic hazards which fall under the group "tropical cyclones". In fact, hurricanes which occur in the Indian Ocean are called cyclones while those from the Eastern Pacific Ocean are called typhoons. Hurricanes include "severe rains, winds, flooding and, occasionally, tornadoes."²⁶⁹ These storms result from water which evaporates from the ocean and forms a storm

²⁶⁵ Whittow (1980) 19.

²⁶⁶ Wijkman & Timberlake (1984) 4; Bryant (2005) 1. Whittow is of the opinion that although prediction of a disaster-prone location may be accurate, the timing and gravity of disasters are extremely difficult to predict.

²⁶⁷ This is due to the tectonic stability of the continent, coupled with the fact that tropical storms do not develop in most parts of Africa but for the extreme south-east. Bryant (2005) 6.

²⁶⁸ Saylor (ed) (1993) 4.

²⁶⁹ La Greca & Prinstein (2002) "Hurricanes and earthquakes" La Greca *et al* (eds) *Helping children cope with disasters and terrorism* 107.

over the oceans. Though relatively predictable,²⁷⁰ hurricane storms do result in deaths. The huge storms may last for six to twelve hours,²⁷¹ covering up to four hundred miles and often wrecking widespread community-disrupting damage. Some recent most destructive hurricanes that devastated major cities are Hurricane Andrew, 24 August 1992, which devastated 136 000 homes in Central America;²⁷² Hurricane Mitch, October to November 1998, which levelled the Carribeans over a two-week period; and Hurricane Katrina which defaced New Orleans in the USA. Hurricane Mitch led to catastrophic flooding and mudslides destroying hundreds of thousands of homes leaving over three million people dead and killing up to eighteen thousand people.²⁷³ Also, Hurricane Katrina left the city of New Orleans in Louisiana flooded and more than 5 000 children reported missing or displaced.²⁷⁴

3 3 2 Earthquakes (and volcanoes)

Although there are certain areas that are regarded as "earthquake prone areas",²⁷⁵ earthquakes are generally unpredictable.²⁷⁶ Presenting itself as seismic waves (shaking and movement) in the earth's surface, earthquakes are caused by the dislocation of the earth's crust.²⁷⁷ They may occur as a result of volcanic eruptions, magna movements within the earth's crust or tectonic earth movements.²⁷⁸ Occurring mainly around islands surrounding the Pacific and Indian oceans, these periodic geographical hazards²⁷⁹ typically last for a few minutes followed by aftershocks which last for much longer.²⁸⁰ The damage resulting from an earthquake may be caused by the earthquake itself, by aftershocks that follow hours, weeks or even

²⁷⁰ In the USA, for instance, warnings of an impending hurricane are issued by the National Weather Service 24 hours before its arrival, when the storm spins.

²⁷¹ La Greca & Prinstein (2002) 109.

²⁷² Bryant (2005) 52. Hurricane Andrew has been recorded as the most damaging earthquake ever. However, it was reported that the construction of many of the homes affected was sub-standard for a hurricane-prone area.

²⁷³ Bryant (2005) 53. This hurricane affected Honduras, Nicaragua, Guatemala, Belize and El Salvador.

²⁷⁴ Mabry (2011) *Emergency alert: This is not a test! An international disaster relief plan for protecting children and families* 1. Unpublished conference paper, Lyon 2011.

²⁷⁵ For example, Japan.

²⁷⁶ La Greca & Prinstein (2002) 109. If at all predictable, such predictions are usually long-term. For more on this see Bryant (2005) 189.

²⁷⁷ As above 108.

²⁷⁸ Bryant (2005) 185.

²⁷⁹ As above 1.

²⁸⁰ La Greca & Prinstein (2002) 109.

months after the earthquake, or failure of human-made physical structures.²⁸¹ It has been proven that earthquakes can be massively damaging to poorly built structures. For instance, in 2006, earthquakes in Yogyakarta, Indonesia and Pakistan devastated the weak structures in these parts, thereby affecting about 3 million people in each of these countries.²⁸² In the aftermath of the 2010 Haiti earthquakes, some engineers stated that not many buildings in Haiti could withstand any type of disaster because of poor constructions standards.²⁸³ More forceful than the 2010 Haiti earthquake was the earthquake which hit Chile in that same year but less fatal. The Chile earthquake killed fewer people than the Haiti earthquake but affected about two million people and damaged 370 000 homes.²⁸⁴ In the ranking of hazard characteristics and impact, earthquakes are very severe hazards which have grave destabilising social effects.²⁸⁵ Volcanoes, on the other hand, result from the eruption of a volcano. They may take the form of small eruptions or supervolcano (large) eruptions.

3 3 3 *Tornadoes*

Tornadoes are violent currents of wind that often occur during thunderstorms. Appearing during humid, warm and unsettled weather, they are severe hazards which are, to some extent, unpredictable. They may occur one at a time, or in large outbreaks along storm line. Warnings are given by weather services when storm conditions are such that a tornado is likely.²⁸⁶ Like hurricanes, tornadoes may last for six to twelve hours.²⁸⁷ However, unlike hurricanes which often submerge a whole community, tornadoes often affect only a fraction of a community. From January to December 2010, there were reports of tornadoes in cities all over the globe including Orange County and Santa Barbara in the USA, Queensland in Australia, Bacolod City in the Philippines and Hille in Germany. The strongest tornado ever recorded was the Moore, Oklahoma on May 3, 1999 with wind speeds of 318mph.

²⁸¹ As above 108.

²⁸² Ki-Moon (2007) *Children and the Millennium Development Goals: Progress towards a world fit for children* 4.

²⁸³ Retrieved from http://wikipedia.org/wiki/2010_Haiti_earthquake on February 8, 2011.

²⁸⁴ As above.

²⁸⁵ Bryant (2005) 11.

²⁸⁶ La Greca & Prinstein (2002) 108.

²⁸⁷ As above 109.

3 3 4 *Floods*

Floods are caused by excessive rain or water in a location. This may result from prolonged rainfall or swift melting of large quantity of snow. In other instances, rivers burst their banks due to excess precipitation upstream causing widespread damage to areas in its surroundings. A flood can last for days or even weeks.²⁸⁸ For instance, the recent floods in the Philippines lasted from December 2010 to late January 2011. It was reported that these floods affected over 1 000 000 people and displaced about 236 000 families.²⁸⁹ Also during this period, parts of Southern Africa were inundated by floods. More than 6 000 people were displaced in South Africa; the government declared 28 areas in 8 of its provinces disaster areas.²⁹⁰ In Mozambique, 13 000 people were evacuated from their usual areas of habitation.²⁹¹ Devastating floods were also recorded in China in early May 2010 with about 4.7 million people displaced from their homes.²⁹² In the same year, the Niger river was pushed to an 80 year all-time high resulting in floods across to river to Nigeria, Ghana, Burkina Faso and Benin leaving 20 000 families displaced around the region.

3 3 5 *Tsunamis*

A tsunami results when a giant wave of water rolls ashore an area. It is usually caused by undersea earthquakes or landslides. Some of the most devastating tsunamis in the twenty-first century include the 2004 tsunamis caused by undersea earthquakes in the Indian Ocean and that resulting from landslides at Lituya Bay, Alaska. The 2004 Indian Ocean tsunami affected millions killing 226, 405 people and leaving thousands of children orphaned.²⁹³ More recently, on March 11, 2011, Iwate, Miyagi and Fukushima, Japan were devastated by tsunami killing about 15,300 – 23, 600 people.²⁹⁴

²⁸⁸ Whittow (1980) 19.

²⁸⁹ Retrieved from http://en.wikipedia.org/wiki/2010%E2%80%932011_Philippine_floods on February 8, 2011.

²⁹⁰ As above.

²⁹¹ As above.

²⁹² As above.

²⁹³ Ki-Moon (2007) 4.

²⁹⁴ As accessed on http://en.wikipedia.org/wiki/List_of_natural_disasters.

3 3 6 *Droughts and famines*

Drought is a natural disaster evidenced by widespread lack of agricultural livestock or all foodstuffs required for basic nutrition and survival. Droughts may result in famine which may last for months or years. Hence, famines are somewhat predictable. Some extremely devastating examples of famine include the Irish Potato Famine 1846 – 1849 and the Ethiopian famine 1984 – 1985 which led to 1.5 million and 1 million deaths respectively.²⁹⁵ Droughts are not as dramatic as earthquakes or volcanoes but they cause more economic loss and health challenges for any nation.

3 4 *Effects of natural disasters on victims*

No two disasters have the same effect on their victims. Most authors on the subject state that natural disasters do not kill or strike people in the same way – the oppressed and poor usually suffer the most.²⁹⁶ Wisner *et al* argue that the impact of natural hazards resulting in disasters depends on the vulnerability of persons affected;²⁹⁷ vulnerability is mainly determined by one's social and economic standing in society.²⁹⁸ In other words, people's response to natural disasters is contingent on their position in society. In the UNICEF Millennium Development Goals (MDG) progress report on children, it is estimated that countries with low and lower-middle-income make up 97% of global mortality risks from natural disasters.²⁹⁹ There is also a sociological viewpoint to natural disasters, in line with the Marxist theory of natural hazards, which states that the severity of the impact of the disaster on humans depends on who one is.³⁰⁰ In fact, the Marxist view is that the effect of natural disasters on Third World countries is deliberately perpetuated by the continuous exploitation of the resources and cash-cropping modes by the western, developed nations. Also, in Naomi Klein's view, the effects of diverse events in the past, including natural disasters, like Hurricane Mitch in 1998, were worsened by

²⁹⁵ As accessed on http://en.wikipedia.org/wiki/List_of_natural_disasters.

²⁹⁶ Bryant (2005) 5; Wisner *et al* 2005 7.

²⁹⁷ La Greca & Prinstein (2002) 107.

²⁹⁸ As above.

²⁹⁹ UNICEF (2010) *Progress for Children: Achieving the MDGs with equity No 9*.

³⁰⁰ According to Marxist theory, human response to hazards is contingent upon the position they occupy in the production process.

free-market policies by governments in countries where such economic systems would otherwise not have been accepted.³⁰¹

The effect of any disaster is better indicated in the number of persons whose normal lives are affected than by the numbers that are killed as a result of the disasters.³⁰² Certain factors, including cultural, ethnic, historical, political, meteorological and socioeconomic factors,³⁰³ dictate the unique effect of every disaster on its victims.³⁰⁴ On a more personal level, a victim's pre-disaster level of functioning (for example, anxiety levels or depression levels), predict, to a large extent, the psychological or emotional effect a natural disaster will have on that person.³⁰⁵ The direct (for example injury by debris falling from a building in an earthquake) or indirect (observation of family members suffering direct assault)³⁰⁶ exposure to trauma also influences the effect of the event on persons. Months after experiencing a natural disaster, children may display psychological, emotional and physical symptoms of the experience, including depressive and anxiety disorders.³⁰⁷ Depressive disorder is particularly the case where a child loses a loved one (sibling, close friend or other family member) in the disaster. In such cases, it is a secondary disorder arising from loss.³⁰⁸ Some children feel distant from friends and family, and generally lose interest in day to day activities such as reading, video games and athletics.³⁰⁹ These are symptoms of avoidance.

³⁰¹ Klein (2007) *The shock doctrine: The rise of disaster capitalism*.

³⁰² International Federation of the Red Cross and Red Crescent Societies (1998) *World disasters report*.

³⁰³ For further study on the influence of cultural, ethnic and socio-economic factors on the effect of natural disasters on its victims, see Rabalais, Ruggiero & Scotti (2002) "Multicultural issues in response of children to disasters" in La Greca *et al* (eds) *Helping children cope with disasters and terrorism* 73-90.

³⁰⁴ Saylor (ed) (1993) 3.

³⁰⁵ Silverman & La Greca (2002) "Children experiencing disasters: definitions, reactions and predictors of outcomes" in La Greca *et al* (eds) *Helping children cope with disasters and terrorism* 21. Also Vernberg "Natural disasters: Introduction" in La Greca *et al* (eds) *Helping children cope with disasters and terrorism* 121.

³⁰⁶ For instance, hearing a parent, friend or family member crying for help under rubble from a collapsed building.

³⁰⁷ Silverman & La Greca (2002) 19-20.

³⁰⁸ As above 19.

³⁰⁹ As above 18.

Commonly reported are symptoms of Post Traumatic Stress Disorder ("PTSD"), accompanied by serious impairment in functioning, displayed by young children.³¹⁰ One common symptom of PTSD is re-experiencing the event (evident in repetitive play in traumatic themes or re-enactment of the disastrous events in drawings or verbalisation).³¹¹ These psychological effects may, however, depend on the extent of loss or degree of exposure of the child and his or her family members to the disaster.³¹² Also commonly reported are reactions such as sleeping or concentration difficulties, angry outburst, irritability, exaggerated startle response and hyper-vigilance.³¹³ Fearfulness is another reaction which overtakes children following a natural disaster. They have been reported to exhibit increased fears of water, weather and rainstorms (depending on the exact natural hazard they had experienced) and fears of reoccurrence of the hazard.³¹⁴ These fears can remain in the long-term resulting in life-long phobias.

The physical effects of natural disasters are most obvious. These consist in the uprooting and displacement of families from their usual habitation, infrastructural collapse and economic losses that ensue. Families lose their life-earned properties and homes to which they are sentimentally attached. They are often times compelled to re-adjust themselves away from cities to which they are familiar, without close friends, neighbours and colleagues. Children in particular are forced to suspend their schooling because schooling structures may have been lost in the disaster. Rehabilitation may take months, or even years depending on the economic strength of the nation whose residents have suffered the loss. For instance, one year after the Haiti earthquake, many children in Port-O-Prince were still away from schools because their school buildings were destroyed during the earthquake.³¹⁵ "Children still live in crowded camps and rubble-filled cities — and few of their families can

³¹⁰ As above 18.

³¹¹ As above 18 quoting American Academy of Child and Adolescent Psychiatry "AACAP official action: Practice parameters for the assessment and treatment of children and adolescents with posttraumatic stress disorder" (1998) *Journal of the American Academy of Child and Adolescent Psychiatry* 37 (Suppl.) 4S-26S.

³¹² Saylor (ed) (1993) 3.

³¹³ Silverman & La Greca (2002) 18.

³¹⁴ As above 20.

³¹⁵ UNICEF (2011) *Children in Haiti: One year after – a long road from relief to recovery* 10. www.unicef.org/haiti.

provide them with the basics without assistance. They remain highly vulnerable".³¹⁶ "Save the Children [has been] working with the Haitian Ministry of Social Welfare, the Institute de Bien-Etre Social et de Recherches (IBESR), which is the department within the ministry responsible for reunification of separated families, and other humanitarian organizations throughout Haiti to bring families back together."³¹⁷

Timing of the post-disaster assessment is also an important consideration when analysing reactions to natural disasters.³¹⁸ Five phases of time periods surrounding a disaster have been identified: the pre-impact period (before the disaster); impact period (at the occurrence of the disaster); recoil period (immediately after the disaster); post-impact period (days to weeks after the disastrous event); and recovery and reconstruction period (months to years after the disastrous event).³¹⁹ Much of the literature³²⁰ available concentrates on the recovery and reconstruction period.³²¹ This lack in research on the phases preceding the recovery and reconstruction stages is due to practical constraints in the immediate aftermath of a disaster which make it difficult to undergo research.³²² This dissertation is based on the recovery and reconstruction stage.

3 5 Societal vulnerability in natural disasters

Many countries with political instability, corruption and civil wars - Third World countries - are afflicted by natural disasters. In natural disasters adults and children in families become more vulnerable than they may have previously been. According to Wisner *et al*, variables including class, caste, ethnicity, occupation, gender, disability, health status, age, immigration status and the extent and nature of social networks explain the differences in impact of a natural hazard on a person or group

³¹⁶ In the words of Charles MacCormack, Save the Children's president and CEO as accessed from www.savethechildren.org. on April 28.

³¹⁷ As above.

³¹⁸ Silverman & La Greca (2002) 14.

³¹⁹ As above 14-15.

³²⁰ For further reading on children and disasters see Vogel & Vernberg (1993) "Children psychological responses to disaster" 22 *Journal of Clinical Child Psychology* and Vernberg (1999) "Children's response to disaster: Family and systems approaches" in Gist R & Lubin (eds) *Response to disaster: Psychological, community and ecological approaches*.

³²¹ Silverman & La Greca (2002) 15.

³²² As above 16.

of persons.³²³ For example, the rich are usually insured and have reserved funds and credit facilities. As such, they can find alternative shelter and make a living despite the impact of a disaster. The poor on the other hand often lose all their stock and livelihood in the disaster and are seldom considered creditworthy. For separated and unaccompanied children, their vulnerability is heightened by their age and "aloneness" plus their class in society, the effects of the disaster on them and their reactions to the disaster. This paragraph serves as a brief on what the concept "vulnerability" entails within the context of natural disaster and the extent to which it influences the impact of natural disasters on a person or group of persons.

3 5 1 *Vulnerability of separated and unaccompanied children*

Vulnerability is that peculiarity in a person or a group of persons and their situation that affects their capacity to act so as to mitigate, cope with, fend off and recover from the impact of a natural hazard.³²⁴ According to Wisner *et al*, "the risk involved in disasters must be connected with the vulnerability created for many people through their normal existence". As such, disasters should not be isolated from everyday living. The authors argue that analysing disasters from the perspective of vulnerability of persons in the society aids the building of policies that can help reduce disasters and also encourage the improvement of the standards of living of people. Therefore, to understand disasters, good understanding of the different levels of vulnerability of different groups of people is important.

Certain factors determine vulnerability – the location of the earthquake, the temporal characteristics of the earthquakes and the characteristics of buildings.³²⁵ As has been discussed in paragraph 2 3 2 above, separated and unaccompanied children are most vulnerable in natural disasters because they face a traumatic situation all alone. In situations where the child is separated as a result of a natural disaster, the immediate availability of adequate substitute care will probably not be the case. As a result the child's sense of security and trust (of course, depending on the age of the child³²⁶) will be dented. This dent may result in the child exhibiting physical

³²³ Wisner *et al* (2005) 11.

³²⁴ As above 7.

³²⁵ Wisner *et al* (2005) 277.

³²⁶ See para 2 4 1 above for the impact of age on separation and exposure to trauma.

symptoms such as eating and sleeping disorders and general health problems.³²⁷ During middle-childhood and pre-adolescence when the child masters new skills, he or she is somewhat detached from the parent-figure. It is at this stage that the child's sense of industry or inferiority is enhanced.³²⁸ Therefore, the encouragement and support of a parent-figure, as a role model, is key at this stage. In the situation of natural disaster, where the needed support and encouragement is not available, the child may be flooded with sadness, anger, guilt and longing as a result of the separation.³²⁹

“Natural disasters place children at greatest risk”³³⁰ As has been highlighted in paragraph 2 4 5 above, where a child is separated from his or her parent(s) or caregiver following a natural disaster, that child will have to deal the trauma resulting from the separation from or (loss of) the parent or caregiver and that which flows from the disastrous experience. Also, there is the risk of exploitation. Often, women and children are circumstantially forced into exploitative activities, during situations of dire need, in order to obtain food and assistance”.³³¹ These may include harsh working conditions, physical, psychological and sexual abuse.³³² All these could have irreparably adverse effects on affected children.

3 6 Conclusion

The poor are more exposed in situations of hazards than the rich.³³³ Africa remains a continent that is infamous for its high levels of poverty. Although Africa may be less prone to extreme natural hazards than other continents, the continent is not excluded from the possibility of such occurrences. As already noted above, a number of natural disasters have occurred in 2010 and 2011 many of which have occurred in poor countries of the world. This chapter has attempted a delineation of the concept natural disasters and its effects on victims. These effects cannot be overemphasised. It is therefore important that these effects are thoroughly

³²⁷ Granot (2005) 63.

³²⁸ Tolfree (1995) 18.

³²⁹ Granot (2005) 75.

³³⁰ Ki-Moon (2007) 4.

³³¹ Save the Children (2005) 5.

³³² As above.

³³³ Wisner *et al* 12; Brandt 209. Wijkman and Timberlake (1984) 27.

researched and strategies for their management thereof clearly defined to reduce the sufferings of victims of natural disasters.

CHAPTER 4 THE RIGHT OF THE CHILD TO A FAMILY

4 1 Introduction

The family can easily be described as the central unit of human society. Its role is evident in all cultures and traditions. Most international³³⁴ and national legal instruments acknowledged the family as the “fundamental group of society”.³³⁵ Societies at large accept that the primary responsibility for the protection, upbringing and development of the child rests with the family.³³⁶ As such, the family is entitled to respect and protection. The UNCRC states that:

[...] the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding [...]³³⁷

The ACRWC contains similar acknowledgement in its preamble and, in its text, recognises the need for protection of the family as “the [...] natural unit and basis of society”.³³⁸ According to the Charter “no child shall be separated from his [or her] parents” except where such separation is determined to be in the best interest of the child.³³⁹ Where separation has occurred, for any reason, the child must be protected

³³⁴ ‘International’ here refers to universal and regional documents.

³³⁵ These documents include: Universal Declaration of Human Rights, 1948 (‘Universal Declaration’) art 12, 16(1); UN International Convention on Civil and Political Rights, 1966 (‘ICCPR’) Preamble and art 23; 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 (‘Declaration relating to the Protection and Welfare of Children’) art 1, 2 and 17; the UNCRC art 9, 10, 20, 21 and 22; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (‘UN Convention on Migrant Workers’) all through the document; International Covenant on Economic, Social and Cultural Rights, 1966 art 10; African Charter on Human and Peoples’ Rights, 1981 art 18; European Social Charter, 1961 art 16; ‘ACRWC’ preamble. These documents also, implicitly, recognise the right to a family.

³³⁶ Resolution of the UN General Assembly on the report of the Ad Hoc Committee of the whole (A/S-27/19/Rev.1 and Corr.1 and 2), 10 May 2002 – A World fit for children.

³³⁷ UNCRC preamble.

³³⁸ ACRWC art 18.

³³⁹ As above art 19.

by the State.³⁴⁰ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions ("Hague Convention, 1993") also recognises the importance of the development of the child in a family environment.³⁴¹ The African Charter on Human and People's Right ("ACHPR") also recognises the family as the natural unit and basis of society.³⁴²

At the national level, South African children's legislation supports these provisions as it states that

[...] it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that [...] the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding[.]³⁴³

In Kenya, the Children Act stipulates that

A child shall have a right to live with and to be cared for by his parents. [...] Where a child is separated from his family without the leave of the court, the Government shall provide assistance for reunification of the child with his family.³⁴⁴

An admirable principle of humanitarian law is the "principle of family unity" which provides that all children have a right to a family.³⁴⁵ This principle is inherent in the recognition of the family as a fundamental unit for proper development of the individual. Even at the grass-root level, few people will dispute the fact that the family is the backbone of development of any individual – more so, the child.

³⁴⁰ As above art 23 (3).

³⁴¹ Hague Convention, 1993 preamble para 1.

³⁴² ACHPR art 18.

³⁴³ CA as amended preamble.

³⁴⁴ KCA s 6.

³⁴⁵ *Inter-agency guiding principles* 16.

Certain familial rights have found definition in human rights law including: the right to (respect for) family life;³⁴⁶ the right to found a family;³⁴⁷ the right to family care;³⁴⁸ the right not to be separated from the family³⁴⁹ but “the right to a family” is not explicitly defined in human rights law. Even with the acknowledgement of various familial rights in international law, the term "family" has not been defined. Various academics and writers support this omission.³⁵⁰ It is believed, however, that attempts in the recognition and realisation of these rights *may* remain futile if the term is not explicated.

All children (including those separated from their families) are entitled to a family and its care thereof – the thesis in this study is that all children have the "right to a family". In different regions of the world, there are a continuum of family structures and patterns – some traditional with the heterosexual marriage form as its corner stone; some extended to the fourth generation; and others, a mixture of family forms (cohabitation, homosexual ("lesbigay") unions, non-residential father households, single parented households, child-headed households). This chapter deals with children’s "right to a family" and the content of this right. In other words, it delineates what the right to a family entails and advocates for the recognition of the right as a canopy of other familial rights. It is pertinent to note that this chapter is discussed in context; it is viewed from a child law perspective. As such debates around the topic whether children are a necessary part of a family are avoided. It is believed that engagement in such arguments will displace this chapter from the context of the topic under study. Thus, the approach adopted herein is in line with the view of certain family scholars who hold that the family must be studied as a development of "proper social and emotional basis for the child". This is because adequate nurture prepares the child for a role and function in the society and helps the child to adjust

³⁴⁶ The following documents explicitly provide for the right to family life: European Convention on Human Rights, 1950 ("ECHR") art 8(1); Human Rights Act (Act of Parliament of the United Kingdom), 1998 art 8; Child’s Rights Act of 2003 s 8.

³⁴⁷ Charter of Fundamental Rights of the European Union art 9.

³⁴⁸ Constitution of the Republic of South Africa, 1996 ("the 1996 Constitution") art 28.

³⁴⁹ UNCRC art 9; ACRWC arts 19 & 25.

³⁵⁰ van der Linde (2001) *Grondwetlike erkenning van regte ten aansien van die gesin en gesinslewe met verwysing na aspekte van artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* 23 unpublished LL D Thesis, University of Pretoria quoting Hodgson "The international legal recognition and protection of the family" (1994) *Austr J of Fam* 219.

properly in the society.³⁵¹ Therefore, the child is seen as an important member of the family (as such, childless families will not be discussed herein).³⁵²

This chapter commences with the definition of the term "family" – how the family is constituted *internally* and *externally*. In so doing, and without making blanket rulings about the internal dynamics and functioning of the family, it examines the different familial perspectives and structures that exist after which the functions of the family are described. The chapter proceeds with an explanation of the term "family environment" and a consideration of those needs which a regular family should satisfy in a child. This "needs investigation" is undertaken in order to identify the void which a child without a family bears. Also, the investigation reveals why certain contemporary structures are perceived to be familial; the study promotes the acceptance of some of these structures. What follows is a discussion on familial rights that are enjoyed by children and an explanation of why all these rights should exist under the canopy of the "right to a family". The chapter rounds off with consideration of factors that challenge the existence and stability of a family thereby buttressing the need for recognition of those contemporary family structures. Arguments on the recognition of the right and its realisation thereof are then presented. The chapter concludes on the note that the right to a family should be recognised and promoted by the State.

³⁵¹ Elmer (1945) *The sociology of the family* 3.

³⁵² From the Christian, Protestant, point of view, the birth (or adoption) of a child (and his or her socialisation thereof) culminates the marriage between a man and a woman which is the essence of the family.

4 2 Defining family³⁵³

The term "family" is very complex.³⁵⁴ Almost two decades after the International Year of the Family³⁵⁵ was celebrated there is still no universally accepted definition of "family".³⁵⁶ A major challenge in attempting a definition for "family" is the diversity of family forms. Also, the role and functions of the family vary immensely from era to era, region to region, State to State, and culture to culture. This diversity hinges on the variety in culture, religion, sociological order and legal perspectives that exist around the globe.³⁵⁷ Individual lifestyle preferences also, to a large extent, determine what a family is perceived to be. In developing an "all encompassing" definition for the term, questions arise such as: How can a definition be coined to accommodate the varying contemporary family forms that exist? What *criteria* may be used to determine whether a certain group constitutes a family?³⁵⁸ Is membership to a family

³⁵³ It is important to note that in attempting a definition for the term "family", this dissertation does not engage in debates around the concept. Such debates include the issue whether the family has changed from era to era or whether there has been outright decline in the family and the social science explanations for the current crisis in the family including: 1) changing cultural values evidenced by the increase in individualism; 2) changing economic patterns; 3) psychological causes of the family crisis such as inadequate communication skills, modern aggravation of reproductive patterns of males and females; and 4) the decline in, yet still visible, patriarchy. For an intriguing, yet brief, engagement in these debates see Browning, Miller-McLemore, Couture, Lyon and Franklin (1998) *From culture wars to common ground: Religion and the American family debate* 50-72. This dissertation ultimately seeks "common" ground based on which the existence of a family can be identified and upon which the "right to a family" of children can be promoted.

³⁵⁴ According to Jennings "From Amoeba up" (1927) *12 3 Survey Graphic* 272-276 as quoted in Elmer (1949) 20, family has "been worked out independently by many organisms".

³⁵⁵ The United Nations in its 78th plenary meeting on 8th December 1989 proclaimed 1994 to be the International Year of the Family.

³⁵⁶ Demo, Allen & Fine ("Demo *et al*") (eds) (2000) *Handbook of family diversity* 1. It is believed that the absence of a clear definition of the concept might even come into conflict with adoptive relationships. According to Tamir & Cahana-Amitay, (Tamir & Cahana-Amitay "The Hebrew language has not created a title for me': A legal and sociolinguistic analysis of new-type families" (2009) *17 Am U J gender Soc Pol'y & L* 545) "the absence of a clear definition of 'family' and the implicit exclusion of alternative families from the meanings covered in the term 'family' hurts individuals who live in such alternative families" (at 568)). See also International Social Services (ISS) / International Reference Centre for the Rights of Children Deprived of their Family (IRC) (2009) "How to strike a balance between the right to respect the private and family life and the protection of the child's best interest in adoption" *Monthly Review No 7/2009* 1.

³⁵⁷ Family diversity is a distinct subject in family studies. It is relevant in understanding the *full* variety of families and what exactly accounts for the variety which exists in families across the world. For a detailed discussion on family diversity, see Demo *et al* (eds) (2000) 1.

³⁵⁸ van der Linde (2001) 24.

determined by affinity, consanguinity, affection, cohabitation, adoption, a combination of one or more of these factors or from other methods?³⁵⁹

Families are not static entities which, once founded, exist in the same form until their members die.³⁶⁰ They contract and expand depending on economic and developmental situations – children are born, the elderly die, members move away from the family unit to take up employment in other regions, grown up children marry and move to new locations to live with their spouses e.t.c. Families evolve with the traditional family or nuclear family as the life-phase transition to other family structures.³⁶¹ To date, the prominent trends in family evolution include the introduction of working-mothers in the work force, single-parenting, delayed child-bearing, family dissolution, and individuals who are unrelated biologically or legally living together in a household.³⁶²

Modern day understanding of family relationships has been fuelled by scholarship in diverse disciplines including sociology, anthropology, psychology, history, family studies, child development studies, family therapy, education, medicine, economics, demography, social work and law.³⁶³ Some attempts have been made at defining the family. Murdock³⁶⁴ defines the family as

[A] social group characterised by *common residence*, economic cooperation and reproduction. It includes *both sexes*, at least two of whom maintain a *socially approved* sexual relationship, and one or more children, own or adopted, of sexually cohabiting adults.³⁶⁵

This definition is somewhat stereotypical because some of the elements included in Murdock's definition do not exist in some societies. According to Silverstein and Auerbach, a family is "two or more people who are in a relationship created by birth,

³⁵⁹ As above.

³⁶⁰ Keller, Zach & Abels ("Keller *et al*") (2005) "The German family: families in Germany" in Roopnarine & Gielen (eds) *Families in a global perspective* 244.

³⁶¹ Roopnarine & Gielen (eds) (2005) *Families in a global perspective* 6.

³⁶² Gottfried & Gottfried (eds) (1994) *Redefining families: Implications for children's development* 3.

³⁶³ Roopnarine & Gielen (eds) (2005) 7.

³⁶⁴ Murdock (1949) *Social Structure* 1.

³⁶⁵ All emphasis mine.

marriage or choice";³⁶⁶ Demo, Allen and Fine include adoption to this definition.³⁶⁷ Reiss³⁶⁸ remarks that one common element in all societies is that the key function of the family is nurturing and socialisation. A more contemporary and less restrictive definition is that which Strong gives:

[A] family is "one or more adults relate by blood, marriage or affiliation who cooperate economically, who *may* share a common dwelling place, and who *may* rear children."³⁶⁹

Winch defines family as a group of related persons in different positions within the family who fulfil functions necessary for the existence and survival of the family (reproduction, emotional care and child socialisation).³⁷⁰ Popenoe argues that the family is not necessarily based on heterosexual adult relationships but that a single adult-household, with a dependent child or adult is also a family.³⁷¹ According to Benokraitis, the distinguishing feature of the family is that its members identify themselves with the group and are attached to the group (which also has its own identity).³⁷² Some other authors describe the family as the "haven of primary fulfilment and meaningful experience".³⁷³ In Gittins' view, "the family" is a stereotype produced and maintained as a tool for social control.³⁷⁴ Gubrium and Holstein suggest that individual experience rather than structure or form define family.³⁷⁵

In practice, the purpose which the term intends to serve may determine which definition is adopted. In the fourteenth census of the USA, for instance, the term

³⁶⁶ Silverstein & Auerbach (2005) "(Post) Modern families" in Roopnarine & Gielen (eds) *Families in a global perspective* 33.

³⁶⁷ Demo *et al* (eds) (2000) Benokraitis (2005) *Marriage and families – changes, choices and constraints* 1. The view held in this text is that families are "defined by socio-emotional ties and enduring responsibilities" with one or more members depending on others for support and nurturance.

³⁶⁸ Reiss (1971) *The family system in America* 26.

³⁶⁹ Strong, De Vault & Sayed (1998) *The marriage and family experience: Intimate relationships in a changing society* 7th ed 14. Also see Benokraitis (2005) 3; Cherlin (1996) *Public and private Families – An introduction* 1. All emphasis mine.

³⁷⁰ Winch (1979) "Toward a model of familial organisation" in Burr, Hill, Nye & Reiss (eds) *Contemporary theories about the family* Vol 1 162-179.

³⁷¹ Popenoe American family decline 1960-1990: A review and appraisal (1993) *Journal of 55 Marriage and Family* 529–535.

³⁷² Benokraitis (2005) 3.

³⁷³ Zinn and Eitzen (1990) *Diversity in Families* 14.

³⁷⁴ Gittins (1995) *The family in question: Changing household and familiar ideologies* 15.

³⁷⁵ Gubrium & Holstein (1990) *What is family?* 1-10.

family was used to signify "a group of persons whether related by blood or not, who live together as one household usually sharing the same table" – a private family or an economic family. One person living alone; employees of a commercial accommodation house, if that was their usual place of abode; and all the inmates of an institution were considered as a single family.³⁷⁶ In the fifteenth census, 1930, the focus changed. The term family was used to depict a private family.³⁷⁷ The reality is that there is no applicable universal standard for what a family should look like or how a family should function. It is believed that what is *best* for any family or group of families is dependent on particular context (culture, tradition and circumstance) within which that family or group exists and functions.³⁷⁸

In a family seminar by the Centre for Families, Children and the Courts, moderated by Ogletree, the topic "WHAT IS FAMILY?" was tackled in an intriguing hypothetical.³⁷⁹ Four-year old twins (A and B) who were found in a homeless shelter with their mother (C), who is incapable of caring for them because of her drug abuse problems, were to be placed in a new family home. The possibilities of a family home placement include: the children's grandparents who are of meagre means (on fixed income); C's lover who had been caring for the twins as a parent before their breakup; and A and B's aunt and uncle. The main question which had to be answered was whether there was family or friends of family who were willing and able to take the twins in as foster children. The panel included a Retired Commissioner of the Superior Court of California, a Chief Judge, Directors of family centres and clinics, a Family Counsellors and a Juvenile Attorney. When asked what, in their opinion, a family is, answers varied. One of the panellists said " [a] family is what the child defines as his or her family; another said "[...] there are different kinds of families[...]", including the nuclear family with a continued movement away from the nuclear family, at the risk of broadening the definition of

³⁷⁶ Elmer (1949) *The sociology of the family* 19 quoting the United States Department of Commerce *Fourteenth Census of the United States* 1265.

³⁷⁷ As above quoting the United States Department of Commerce (1933) *Fifteenth Census of the United States* Washington DC 401. Two or more related occupants of an employee quarters for instance were seen as a family rather than as part of the hotel group.

³⁷⁸ This view is shared by recent family scholars including Demo *et al* (eds) (2000) *Handbook of family diversity* 4 New York: Oxford University Press.

³⁷⁹ Ogletree (moderator) in A Fred Family Seminar "Parentage issues challenging California's judicial system: WHAT IS FAMILY?" (2005) 6 *JCFAMCC* 99-120.

family to the extent that the relationship and biological aspects of "family" are lost. Yet some panellists defined the family as "a group of people who are willing to support the best interest of the child"; "a group of people, some related by blood, others not, who agree on a set of principles that guide their relationships and they work on what's best for that group". The last panellist who entertained the question answered, also with reference to the nuclear family, by stating that

a "nuclear family" is a family of adults who are responsible for a child, who have either brought a child into the world or by their intentional conduct caused a child to be there or adopted a child--responsibility plus relationship. By their conduct they have established that primary bond with the child. That's the family.

It therefore suffices to say that there remains an open definition of "family" because of the different perspectives which exist regarding what family structures (nuclear, extended, single-parented), marriage forms (heterosexual, homosexual, polygynous, polyandrous), and family relationships (blood-related or "adoptive", households) *should* exist. Factors such as the increase in unmarried couples with children, the increase in divorce and re-marriage rates, the decline in legal marriage, and the emergence of child-headed households have also hindered the development of nomenclature to describe the different family compositions.³⁸⁰ According to Muncie and Langan, "the diversity of contemporary society demands interdisciplinary forms of analysis" in order to capture the complex nature of the concept.³⁸¹ Freeman is of the view that "it is difficult to define the 'essence' of family" and that the diversity in perceptions of what a family is makes a "core" definition unworkable.³⁸²

It is believed that one of the major challenges with defining a family is the fact that the nuclear family is widely perceived as the real family – the norm. Therefore, structural deviations from the nuclear family are often regarded as abnormal and

³⁸⁰ Silverstein & Auerbach (2005) "(Post) Modern families" in Roopnarine JL & Gielen UP (eds) *Families in a global perspective* 34.

³⁸¹ Muncie, Wetherell, Langan, Dallos & Cochrane (eds) (1997) ("Muncie J *et al*") *Understanding the family* 2nd ed 1.

³⁸² Freeman (1994) "Defining family in *Mossop v DSS*": The challenge of anti-essentialism and interactive discrimination for human rights litigation" *41 Univ of Toronto LJ* 57.

unacceptable. A universal definition for the "family" must be one that is capable of including families from different cultures and historical periods. This, however, is practically impossible. Therefore, it is important that, in understanding the concept "family", the concept is firstly demythologised.³⁸³ Two main questions are pertinent: 1) What is the appropriate subject matter for the concept³⁸⁴ within the context of the society it aims at serving? 2) What is the "family" for?³⁸⁵ In the Centre for Families, Children and the Courts seminar referred to above, the moderator ended the seminar by stating that in the 21st century, there is an urgent need for a nation to confront the issue of what a family is in "a democratic, progressive society and answer it for ourselves in a way that would have meaning in the 21st century". It is believed that that is the exact attitude with which matters dealing with family should begin to be addressed.³⁸⁶

Under two broad categories (forms of family and functions of the family within the context of the child), this paragraph adopts a cross-cultural³⁸⁷ survey of the family. It

³⁸³ Zinn and Eitzen (1990) *Diversity in Families* 14.

³⁸⁴ Cheal advises that to obtain an answer to the question an exploration of the roots of family variations in different ethnic, racial and cultural identities is necessary. See Cheal (1991) *Family and the state of theory*.

³⁸⁵ Muncie & Sapsford (1997) "Issues in the study of the family" in Muncie *et al* (eds) *Understanding the family* 2nd ed 8.

³⁸⁶ Ogletree (2005) 120.

³⁸⁷ The cultural variation which "family" has for people is worthy of consideration herein. It is however pertinent to note at the outset that debates around what culture is and what it is not are beyond the scope of this paragraph, and dissertation as a whole. Culture is a very abstract concept. For the purpose of this study, it suffices to note that various definitions of culture exist based on comprehensive totality, social inheritance, culture as a rule or way of life and a design for living, culture as problem-solving device, patterning and organisation of culture, and culture as an accumulated product of group life. (Halsey & Shores (eds) (1969) *Collier's Encyclopedia* 7 554. According to Kroeber & Clyde (1952) *Culture, a critical review of concepts and definitions* there are six major types of definitions of culture: 1) as a comprehensive totality culture may be defined as embracing "all the manifestations of social habits of a community, the reactions of the individual as affected by the habits of the group in which he lives, and the products of human activities as determined by habits"; 2) as social inheritance being "the total social heredity of mankind"; "a particular strain of social heredity"; 3) as a rule or way of life and a design for living, culture may be defined as "the way in which the people in any group do things, make and use tools, get along with one another and with other groups, the words they use and the way they use them to express thoughts[...]"; 4) as problem-solving device culture may be defined as "the sum total of the material and intellectual equipment whereby" a group of people "satisfy their biological and social needs and adapt themselves to their environment"; 5) with regard to the patterning and organisation of culture, the term may be defined as consisting of "patterned and functionally interrelated customs common to specifiable human beings comprising specifiable social groups or categories"; 6) culture as an accumulated product of group life may be defined as "a precipitate of man's social life". Quoting Keller (1915) *Societal Evolution*, Murdock (1949) states that "culture is adaptive or 'functional,' sub-serving the basic needs of its carriers and altering through time by a sort of mass trial-and-error in a process which is truly evolutionary,

commences with a highlight of the theories in family studies and proceeds with a discussion on forms of family under which the composition (organisation and structure)³⁸⁸ of family members is investigated. A discussion of the functions of the family follows with an examination of the needs which ought to be satisfied in the child by the family. The roles of persons within the family structure are studied thereby. Throughout discussions in this section, the cultural, religious and traditional perspectives from selected societies³⁸⁹ are employed together with relevant theories of family studies. The paragraph aims at obtaining a *global* picture of "the family" and from that premise, zooming in on Africa with the aim of identifying a common denominator under which the term "family" can be adopted within the African context of "the child in the family".

4 2 1 *Some theories in family studies*

Certain theories on family have been identified namely: the structural-functional theory associated with Parsons; the systems theories – family systems theory, human ecology theory and family development theory; the individualism and interaction theories – symbolic interactionism theory, exchange and resource theory; the difference and diversity theories – phenomenology theory and feminist theory;³⁹⁰ the situational approach; and the institutional approach.

The *structure and function theory* has influenced family studies since the 1960s.³⁹¹ It is a type of the systems theory which focuses on structure and deals with the

i.e., characterised by orderly change.")By culture, this study refers to a trend different from religion and tradition – that consequence which distinguished a person brought up in one group from another person brought up in another group. Culture is that learned trait associated with a group of people which may not necessarily be a society. ("A society has natural and definite boundaries" while "culture is more fluid and less definite".) In the context of this study, however, the groups of people referred to are different societies.

³⁸⁸ These have been termed "the foundations of comparative and multi-cultural family studies" by authors in family studies. See Ingoldsby & Smith (eds) (1995) *Families in multicultural perspective* vii. This dissertation employs this approach because, despite scholarly suggestions that the family is not much of a structural, it is believed that to ensure social order, a structure needs be identified in every sphere of social existence. Such structure will allow for effective assumption of responsibilities and accountability thereof.

³⁸⁹ When adopting a cultural perspective, attempt is made to cover all parts of the globe – Western, Asian, African and the Middle Eastern regions. With regards to the religious perspective, Christianity and Islam are referenced because they remain the main religions across the globe.

³⁹⁰ Smith (1995) "Family theory and multicultural family studies" in Ingoldsby & Smith (eds) *Families in multicultural perspective* 8-35.

³⁹¹ As above, quoting Broderick (1993) *Understanding family process*.

functional connections among parts of society, particularly how each part connects to or disconnect from the system as a whole.³⁹² Based on this theory, the family is defined as "a structure that satisfies members' needs and operates for the survival and maintenance of society".³⁹³

The systems theory is based on the concept that the family as an organic system aims at maintaining balance amidst external pressures.³⁹⁴ The *family systems theory*, in particular, originated after World War II and has been employed extensively as a framework for therapeutic intervention.³⁹⁵ This theory focuses on the whole family rather than on individual members and examines the communication processes used by family members in their relationship, one to another, and in dispute resolution the impact of individuals' behaviours in and on the system.³⁹⁶ The *family ecology theory* is based on the human ecology theory which emerged in the late nineteenth century and re-emerged in the 1960s.³⁹⁷ This theory developed from home economics and sees family as a "life-support system dependent on the natural and social environments".³⁹⁸ It assumes that all families take in energy and information from their environments; families adapt to the environment.³⁹⁹ This theory is useful in analysing interactions between human development and social conditions (including poverty) at all eco-systems.⁴⁰⁰ It *may be* useful in development of public policies, institutional programmes and community action plans.⁴⁰¹ Like the family systems theory, the *family development theory* also emerged after World War II.⁴⁰² It defines family as "an intergenerational social group, governed by social norms pertaining to marriage and family, striving to maintain [...] balance as it

³⁹² Kingsbury & Scanzoni (1993) "Structural-functionalism" in Boss, Doherty, LaRossa, Schumm & Steinmetz ("Boss *et al*") (eds) *Sourcebook of family theories and methods* 195-210.

³⁹³ Smith (1995) 30.

³⁹⁴ The family systems theory defines family as such. See Hill & Rodgers (1964) "The developmental approach" in Christensen (ed) *Handbook of marriage and the family* 171-211.

³⁹⁵ Smith (1995) 12.

³⁹⁶ Whitechurch & Constantine (1993) "Systems theory" in Boss *et al* (eds) *Sourcebook of family theories and methods* 325-352.

³⁹⁷ Smith (1995) 13.

³⁹⁸ As above 30.

³⁹⁹ As above 14.

⁴⁰⁰ As above 15.

⁴⁰¹ As above 15.

⁴⁰² Ingoldsby & Smith (eds) (1995) 15 quoting Duvall "Family development's first forty years" (1988) *37 Family Relations* 127-134.

changes over the course of the family life cycle".⁴⁰³ It focuses on the changes in the family from marriage to death.⁴⁰⁴

The *symbolic interactionism theory* is described as one of the most popular family perspective in the field of family.⁴⁰⁵ It deals with development of the individual within the family, through social interactions.⁴⁰⁶ It recognises each person's identity as a derivative of social interactions.⁴⁰⁷ Based on this theory family is a unit of interacting personalities.⁴⁰⁸ Through social interactions, human beings create symbolic worlds which shape their behaviour.⁴⁰⁹ Amidst certain drawbacks,⁴¹⁰ the *symbolic interaction theory* is believed to have potential use in the examination of the operation of factors such as age, race, gender, ethnicity and social class in individuals' interpretation of symbols and social meanings evident in their interactions.⁴¹¹

"Family" under the *exchange and resource theory* is a set of relationships where individuals act to maximise profits.⁴¹² It is believed that when individuals receive rewards from engaging relationships, they continue engagement in such interaction with the rewarding individual. Rewards in this context include social acceptance and approval, power, prestige, social attraction and instrumental services.⁴¹³ The effect of this theory is evident in comparative assessments where individuals compare available alternatives and the rewards from their present relationship and determine whether to leave the relationship or remain therein.⁴¹⁴ The *exchange and resource theory* is useful in analysis of intimate relationships and identification of "the use of

⁴⁰³ Smith (1995) 30.

⁴⁰⁴ Nye (1973) *The family: Its structure and interaction* 21-23.

⁴⁰⁵ LaRossa & Reitzes (1993) "Symbolic interactionism and family studies" in Boss *et al* (eds) *Sourcebook of family theories and methods* 135-162.

⁴⁰⁶ Smith (1995) 18.

⁴⁰⁷ LaRossa & Reitzes (1993) 135-162.

⁴⁰⁸ Smith (1995) 30.

⁴⁰⁹ Ingoldsby & Smith (eds) (1995) 17.

⁴¹⁰ These include the study's failure to "situate individuals and families in a particular social, economic, cultural or historical context" and its tendency to overlook the impact socially authorised, hierarchical structures have on the interactions of individuals in the family and society. For more on this, see Ingoldsby & Smith (eds) (1995) 18.

⁴¹¹ Smith (1995) 19.

⁴¹² As above 30.

⁴¹³ As above 19.

⁴¹⁴ As above 20.

resources in marital relationships" to the exclusion of relationships based on local kinship ties and cultural beliefs.⁴¹⁵

In simple terms, feminists advocate for an end to the subordination of women in society. The *feminist theory* sees family as a unit of experience.⁴¹⁶ The theory urges an understanding of the concept based on the separate experiences of men and women rather than viewing the family as a whole unit.⁴¹⁷ It zooms in on the effects of cultural ideology and practices, religious beliefs and social norms on women in social order. According to the *phenomenology theory*, family is "a way of attaching meaning to interpersonal relationships".⁴¹⁸ This theory examines the meaning of everyday life to social actors depending on their experiences and stock of knowledge.⁴¹⁹ It explains that family has different meanings and definitions to different people depending on the meaning they prefer to attach to the term. The focus of this theory is therefore the "interpretation people make about families".⁴²⁰ However, such interpretations must be in line with "what everyone know" the term to mean.⁴²¹ The *phenomenology theory* is useful in identifying "family" within the cultural context.

The *situational approach* is used to analyse the actual behaviour of families while the *institutional approach*, which is also called the *historical approach* is used to examine family functions retrospectively with the aim of identifying what families have in common and why families exist.⁴²² With this approach, the family is viewed as just another institution.

For purposes of this study, the *structural and functional theory* and the *institutional approach* are the main approaches employed in defining "family". The *family ecology theory* and the *phenomenology theory* are also used in isolated discussions.

⁴¹⁵ As above 21.

⁴¹⁶ As above 30.

⁴¹⁷ Feminists view on the family is based on the role of the sexes within the family structure. They argue that these roles structure were created by men in order to retain power over women. They advocate for an *all encompassing* view of the concept to accommodate all sexually interdependent adult relationship regardless their social, parental, judicial statuses. For more on this, see van der Linde (2001) 33 fn 42.

⁴¹⁸ Gubrium & Holstein (1993) "Phenomenology, ethnomethodology and family discourse" in Boss *et al* (eds) *Sourcebook of family theories and methods* 654.

⁴¹⁹ Smith (1995) 26.

⁴²⁰ As above.

⁴²¹ Gubrium & Holstein (1993) 662.

⁴²² Nye (1973) 21-23.

4 2 2 *Forms of families*

There are myriad forms of families. This is because of the various functions and cultural patterns associated with the family and the variation in effectiveness with which family objectives are carried out.⁴²³ As human beings evolve so also do their perceptions of how things are and should be done change – cultures, traditions, religious activities, community norms and beliefs modify. In Africa in particular, factors such as poverty, career ambitions / employment, unemployment, sickness and the use and abuse of technology are additional challenges to the existence and stability of family in Africa. In the process of change, *accepted* family forms are altered and disappear, giving way to the "new" and resulting in varying familial forms from one era to another, and within eras.⁴²⁴ In analysing family forms, a broad approach must be employed to include all possible patterns in diverse cultural set-ups. It is also important to consider traits that are common to all family structures.

When discussing family forms, three broad headings are important: forms based on era, household forms and marriage forms. In this dissertation, particular attention is given to the development of the family from one period to another, in different cultures and religions. Changes in family structure, functions and perceptions are highlighted. In discussing household forms a core structural approach is adopted as a build-up to discussions on the functions of members of each family structure which follow.

4 2 2 1 *Forms based on era*

Most of the literature available on historical antecedents of family pertains to European and American family life.⁴²⁵ The relevance of the European historical development of family, for this dissertation which focuses on Africa, lies in the fact that some of the family forms in contemporary African societies originate from the West. For example, lesbian and gay couples' families, single-parent families, and even the nuclear family form. Notwithstanding the scarce literature on Africa, a

⁴²³ Elmer (1945) 17.

⁴²⁴ As at the 1940s when Anthropologist Murdock conducted his survey of 250 representative human societies, three distinct types of family organisations were identified namely: the nuclear family; the polygamous family and the extended family.

⁴²⁵ Ingoldsby (1995) 20.

developmental overview of the *African family* is also presented hereunder. While considering the historical background of the family, traditional views of various societies are inevitable. Hence, certain traditional perspectives are freely discussed under this heading.

4 2 2 1 1 Pre-modern family (a traditional and cultural perspective)

Family patterns in pre-modern times have influenced Western family forms to date. In the pre-modern era, families were predominantly patriarchal guided by the Old Testament Bible precepts. Starting with the Hebrews, their nomads were married to several women who were accorded lower status than the men.⁴²⁶ In those times, divorce was carried out for *any* reason but men were subjected to social disapproval if they divorced for frivolous reasons.⁴²⁷ Children were expected to be obedient otherwise they were met with severe punishment.⁴²⁸ They were highly valued for agricultural work.⁴²⁹ With the Greeks, adoption of children was common. Men who had no sons adopted male children who could inherit their property (females were not allowed to inherit. Where a man had no sons and did not adopt, his daughter might have been forced to marry a close relative).⁴³⁰

During the Roman era, the Roman family was the religious, economic, legal and educational centre of society.⁴³¹ Men had absolute powers as the *patria potestas* or *paterfamilias* who represented the community. A person was not viewed as an individual but as a member of the group it belonged to.⁴³² Guided by Roman family law, these men were allowed to have only one wife.⁴³³ Like the Hebrews, Roman men could divorce their wives for any reason⁴³⁴ but Roman women were much more independent than the Hebrews; they controlled childrearing to a certain degree.⁴³⁵

⁴²⁶ *The New Encyclopaedia Britannica* (1978) Macropaedia Vol 7 Knowledge in depth 157.

⁴²⁷ Ingoldsby (1995) 38.

⁴²⁸ As above 39.

⁴²⁹ As above.

⁴³⁰ As above 41.

⁴³¹ As above 42.

⁴³² van der Linde (2001) 34.

⁴³³ *The New Encyclopaedia Britannica* (1978) Vol 7 157.

⁴³⁴ Ingoldsby (1995) 42.

⁴³⁵ As above.

In Medieval times (also called the Middle Ages or the Dark Ages) marriages were based on consent of the couple rather than family arrangements.⁴³⁶ During this period children were accorded special customary and legal protection as minors.⁴³⁷ There was close contact and increased affection between mothers and their babies as they nursed these babies.⁴³⁸ Like in the Roman times, children were met with harsh discipline when they were disobedient.⁴³⁹

When reference is made to the traditional family form, it is often associated with the nuclear structure. However, as indicated immediately above, traditional family structures actually depend on the tradition which existed in a particular region. Family forms in traditional families in the West ranged from the patriarchal father with his wives, and concubines, and children, to the patriarchal father with his wife and children, and other kin, to the heterosexual two-parent family one husband breadwinner and a mother care-taker.⁴⁴⁰ In Germany in particular, the traditional family found definition in the emotional relationships between *two* individuals and their *biological* offspring.⁴⁴¹

In most countries in Africa, the traditional family (household) consisted two or three generations of blood or marriage relatives. In South Africa, during the pre-colonial era, the basic family form was the traditional kinship structure.⁴⁴² In Zulu tradition, polygamy is the norm. In fact, in pre-modern times, polygamy symbolised a man's "social standing, wealth and virility".⁴⁴³ The wives were responsible for bringing up the children.⁴⁴⁴ In Kenya, the Kikuyu society is traditionally polygamous.⁴⁴⁵ The

⁴³⁶ As above 46.

⁴³⁷ As above 48.

⁴³⁸ As above 48-49.

⁴³⁹ As above 49.

⁴⁴⁰ Some parts of the West allowed polyandry. For instance, the Dieri of Australia and the Chukchee of Siberia have been associated with this family form. However, there are views that these group marriages *seldom* exist. What is often found is an extension of sexual privileges, but not the economic benefits and responsibilities, to a group of men and women. See Murdock (1949) 23 - 40.

⁴⁴¹ Keller, Zach & Abels ("Keller *et al*") (2005) "The German family: Families in Germany" in Roopnarine & Gielen (eds) *Families in a global perspective* 244.

⁴⁴² Pretorius (2005) "Family life in South Africa" in Roopnarine & Gielen (eds) *Families in a global perspective* 368.

⁴⁴³ Accessed on <http://www.warthog.co.za/dedt/tourism/culture/family/polygamy.html> on April 20, 2011.

⁴⁴⁴ Accessed on http://www.zulu-culture.co.za/zulu_family.php on April 20, 2011. The wives are subservient to their husband(s).

father in pre-modern times usually had his own hut where he met with his children for lessons on family norms and traditions, and his wives for discussion of serious family issues. The mothers had their individual huts where they lived with their children – the boys lived with their mothers until puberty then they moved into the young men's hut.⁴⁴⁶ In the traditional Yoruba⁴⁴⁷ family, in Nigeria, the extended family is relevant in establishment of the family (which begins with marriage) and the survival of the family.⁴⁴⁸ Polygamy also existed (and still exists) particularly with the non-Christian members of this group.

In China,⁴⁴⁹ and Japan,⁴⁵⁰ the traditional family constitutes a large group with up to three or four generations living in the same household, under one roof.⁴⁵¹ In Egypt, among the Moslems, the family is traditionally an extended structure founded on marriage.⁴⁵² As a tradition, the families thrived on customs, foods, and social usages that are accepted from one generation to another.⁴⁵³ Most traditional family forms exclude contemporary family structures such as childless couples, cohabiting couples, foster parents and lesbian couples.

⁴⁴⁵ Accessed on http://en.wikipedia.org/wiki/Kikuyu_people on April 20, 2011. The Kikuyu are Kenya's most populous ethnic group

⁴⁴⁶ As above.

⁴⁴⁷ Accessed on http://en.wikipedia.org/wiki/Yoruba_people on April 20, 2011. Yorubas are one of the largest ethnic groups in Nigeria. They make up about 21% of the Nigerian population.

⁴⁴⁸ Ogundipe-Leslie (1994) *Re-Creating Ourselves: African Women and Critical Transformations*.

⁴⁴⁹ Chen & He in Chen & He (2005) "The family in Mainland China: Structure, organisation, and significance for child development" in Roopnarine & Gielen (eds) *Families in a global perspective* 52; 57. China is a socialist/communist society under the control of the central government which comes up with policies that influence family organisation, interpersonal relationships and individual behaviours. An example of a policy which governs family organisation is the only-child population policy.

⁴⁵⁰ Naito & Gielen (2005) "The changing Japanese family: A psychological portrait" in Roopnarine JL & Gielen (eds) *Families in a global perspective* 66-68 & 73. Influenced by Confucianism (other religious influences on the Japanese tradition include the native Shinto religion, Buddhism and Christianity) from 1603-1867, the traditional Japanese family is based on the *ie* system which pertains to a supraindividual household group with political, kinship, economic and religious functions. The family is traditionally patrilineal with the father at the top followed by the oldest son, then other males before the females in order of age. These families live in small homes with paper-thin walls to allow for close interaction.

⁴⁵¹ This structure has since been altered by socio-economic factors. See Chen & He (2005) 52.

⁴⁵² Ahmed (2005) "Egyptian Families" in Roopnarine & Gielen (eds) *Families in a global perspective* 154.

⁴⁵³ Elmer (1945) 6.

With regard to divorce, in the nineteenth century,⁴⁵⁴ divorce was rare in the West, and wives were more economically dependent on their wage-earning husbands. Also from a Christian religious perspective, divorce was frowned at. As such couples stayed married and sought means to make their marriages work.⁴⁵⁵

4 2 2 2 *Effects of Industrialisation and Urbanisation on family structures*

In nineteenth century Europe widespread industrialisation resulted in households being less economically independent but more emotionally attached. Being a small unit, the nuclear family form accommodates the mobility demands of industrial economy and the intimacy required to satisfy emotional needs. Hence, this family form was common. By the mid twentieth century, the economic climate in most societies led to the exit of certain industrial and material activities that were associated with the family group.⁴⁵⁶ As a result, the family's contributory role to the psychic needs of its individual members was eroded.⁴⁵⁷ Also, there was a change in parent employment and financial needs; traditional child-care and material provision roles of parents became modified. For instance, in situations where the father was unemployed while the mother remained in gainful employment, the father assumed the role of primary child-care. (From separate investigations in different parts of the world⁴⁵⁸ Russell, Pruett and Radin found that children reared by caregiver-fathers were more empathetic with greater internality and more flexibility, and had less sex-role-stereotyped attitudes with regards to parenting and employment.⁴⁵⁹ These children are believed to present a high likelihood of adaptation to life circumstances).

⁴⁵⁴ Browning "Families in the nineteenth and twentieth centuries" in Anderson, Browning, Evison, Van Leeuwen (eds) ("Anderson *et al*") (1998) *The family handbook* 296. Families in this era are referred to as "Victorian" families.

⁴⁵⁵ Silverstein & Auerbach (2005) 40.

⁴⁵⁶ Elmer (1949) 5.

⁴⁵⁷ As above.

⁴⁵⁸ Australia, different states in the United States and Sweden.

⁴⁵⁹ Radin (1994) "Primary-Caregiving fathers in intact families" in Gottfried & Gottfried (eds) *Redefining families: Implications for children's development* 3. These observations in children with father caregivers are also associated to the fact that the family is relevant in the informal nurture and training of the child to function efficiently in the society. As such, roles within the family can be assumed by any member of the unit. Where for instance the father is unemployed and therefore unable to provide financially to the family, the mother or other members of the family may assume that role. So long as the role is satisfactorily played, the family is not malfunctioning. The notion of a malfunctioning family is, therefore, viewed holistically. In other words, a malfunctioning family exists where the unit as a whole fails in certain roles that it should

The effect of industrialisation and globalisation has changed the structure of families in most cultures. As a result of families' economic dependence on industrialisation, the nuclear family form is preferred. In South Africa, with the discovery of gold and diamonds and the establishment of mines, and the commercialisation of agriculture, many able-bodied African men left their families for employment in the mines and farms. The consequence of this economically influenced separation was the absence of the father from the family for long periods of time and thus, the disruption of family life.⁴⁶⁰

4 2 2 2 1 Modern family

Modern families are characterised with dual-earning partners or spouses. However, women still bear the responsibility of childcare and housekeeping. Some family scholars are of the view that modern families are non-role sharing families.⁴⁶¹ It is believed that in cases where a partner or spouse cannot execute his or her role within the family the other partner or spouse assists him or her.

A country which is distinguished for its cultural homogeneity in family structure is Japan. As at 1995, the average Japanese family consisted of 2.9 members.⁴⁶² However, there is a range of family forms in the country – married couples with no children, families with elderly parents living with their children and grandchildren, married couple living with their parents and other kin, and couples with adopted child(ren).⁴⁶³ Also, in Indian culture, the extended family form remains firmly rooted in the fabric of its society.⁴⁶⁴ Family members partake collectively in family activities like visiting relatives and attending prayers; only a few Westernised families are seen to indulge in non-traditional activities.⁴⁶⁵

play, for instance, providing basic nutrition for the children in the family. For more on the malfunctioning family, see Nye (1973) 439.

⁴⁶⁰ Pretorius (2005) 368.

⁴⁶¹ Silverstein & Auerbach (2005) 34.

⁴⁶² Naito & Gielen (2005) 68.

⁴⁶³ As above 69.

⁴⁶⁴ Laungani (2005) "Changing patterns of family life in India" in Roopnarine & Gielen (eds) *Families in a global perspective* 100.

⁴⁶⁵ As above 87.

4 2 2 2 Post-modern family

The extended family form resurrected in the postmodern family with extended family members coming to the rescue of stressed nuclear family members. In African and even American societies, grandparents (usually grandmothers) live in the home of their child with her children and grandchildren either for short or long periods of time.⁴⁶⁶ This made little difference to societies like the Indians who have maintained the extended family structure with grandparents, uncles, aunts, nieces, nephews, sisters-in-law, parents and children in the same household.⁴⁶⁷ However, there are also nuclear families in Indian communities.⁴⁶⁸

According to social constructionists, Silverstein and Auerbach, postmodern families are "a deconstruction or transformation of at least one aspect of the traditional family".⁴⁶⁹ They list deconstructed and transformed families to include lesbigay couples, single mothers, families conceiving children via reproductive technology, and transnational families.⁴⁷⁰

4 2 2 3 Household forms

Families *may* form households.⁴⁷¹ Some authors are of the view that the composition of a family is largely determined by the decision of a newly married family to set up a new household or to become members of an existing household where close kin of either of the new spouses live.⁴⁷² Ball defines the household as a "spatial category where a group of people (or one person) is bound to a particular place".⁴⁷³ Two main forms of household have been identified namely: the nuclear family and the extended family. With the "deconstruction and transformation" characteristic of the post-modern era, various other household forms exist including: corporate families; single-parent families; experimental families; re-organised families; joint families; absent parent families; families with adoptive parents; families with foster parents;

⁴⁶⁶ Silverstein & Auerbach (2005) 39.

⁴⁶⁷ Laungani (2005) 87.

⁴⁶⁸ As above 88.

⁴⁶⁹ Silverstein & Auerbach (2005) 34.

⁴⁷⁰ As above.

⁴⁷¹ Muncie & Sapsford (1997) 11.

⁴⁷² *The New Encyclopaedia Britannica* (1978) Macropaedia Vol 10 Knowledge in depth 478.

⁴⁷³ Ball (1974) "The family as a sociological problem" in Skolnick & Skolnick (eds) *Intimacy, family and Society* 21.

households; and same-sex parents families. These household forms are briefly discussed below from the perspective of the child within the family.

4 2 2 3 1 Nuclear family

This "universal" type of domestic family⁴⁷⁴ is found in the all societies, particularly the modern society. All other forms of family tend to be defined with reference to the nuclear family.⁴⁷⁵ In fact, it is described by some family scholars as the nucleus of the corporate and the extended families – the first stage of both.⁴⁷⁶ Others are of the view that the nuclear family evolved from the extended family structure as a result of industrialisation and urbanisation.⁴⁷⁷ The common view however regarding the nuclear family is that it exists in, arguably, in every known society and consists only of a heterosexually married couple and their unwed children (biological or adoptive) to the exclusion of any other person. The husband and wife are usually from different families while the children have consanguine bonds.

This family form is preferred in Western societies. In Germany for instance, the old traditional family is the nuclear family consisting of two generations – parents and their children. In most modern African societies, in response to the economic climate, the nuclear family is common. For white South Africans,⁴⁷⁸ the nuclear family evolved from the extended family structure as a result of the South African War in the late nineteenth to early twentieth century followed by industrialisation and urbanisation in the Republic.⁴⁷⁹ In China, due to socio-economic factors, the nuclear family has replaced large joint families.⁴⁸⁰ Also in India, the 2.4-family-member

⁴⁷⁴ Murdock calls it "a universal human social grouping". See Murdock (1949) 2.

⁴⁷⁵ Muncie & Sapsford (1997) 10. The nuclear family may exist solely on its own as a family form or as the basic unit upon which more complex family forms are compounded. According to Lowie (1920) *Primitive Society* 66-67 as quoted by Murdock (1949) 3, "[...] the one fact stands out beyond all others that everywhere the husband, wife and immature children constitute a unit apart from the remainder of the community."

⁴⁷⁶ *The New Encyclopaedia Britannica* (1978) Vol 7 155. There is also the view that the nuclear family is a structural prerequisite for any human society because it fulfils four key functions in any society. This view has been challenged by many scholars in family studies who are of the argue that there are many *functional* societies without the nuclear family and also, societies, with the nuclear family, which do not fulfil one or more of those functions. For more on this see Nye (1973) 46-53.

⁴⁷⁷ See paragraph 4 2 2 1 above on the effect of industrialisation and urbanisation on the family.

⁴⁷⁸ Pretorius (2005) 369.

⁴⁷⁹ As above.

⁴⁸⁰ Chen & He (2005) 53.

structure exists although more as an exception than the norm.⁴⁸¹ As at 1995, about 60% of all families in Japan were nuclear families.⁴⁸²

From a Christian Protestant point of view,⁴⁸³ the existence of a family favours the nuclear family form and is marked by the *birth (or adoption) of a child* in covenant love established in *marriage* between a *man* and a *woman*.⁴⁸⁴ Also, the Roman Catholic Church which, to date, recognises family (and marriage) as a sacrament⁴⁸⁵ and covenant, favour the nuclear family form. Most theologians are of the view that family should be described in light of the New Testament precepts.

According to Murdock, the nuclear family form is functional for the survival of each society.⁴⁸⁶ However, arguments have been raised by anthropologists against the notion that the nuclear family is a universal family form. They argue that, considering societies such as the Nayar caste from south-west India (whose men are predominantly soldiers, often absent from home, and do not have any conjugal rights or rights of attachment to their wives or children), "the nuclear family is a social arrangement" rather than a universal form or "biologically determined family form".⁴⁸⁷ Single-parent family structures common in the West and parts of Africa, and even child-headed household forms found in Africa, are more recent examples supporting this argument.

⁴⁸¹ Laungani (2005) 88.

⁴⁸² Naito & Gielen (2005) 68.

⁴⁸³ The Pentecostal pattern of the family is also influenced by models from Hebrew, Greek and Roman traditions.

⁴⁸⁴ Post (1998) "Family" in Anderson, Browning, Evison, Van Leeuwen (eds) ("Anderson *et al*") *The family handbook* 21.

⁴⁸⁵ The Roman Catholic Church accepts marriage, and the family institution thereof, as an eternal enduring bond. For more on this see Witte (1998) "Families in medieval Christianity and the reformation" in Anderson *et al* *The family handbook* 293.

⁴⁸⁶ Mudrock (1968) "The universality of the nuclear family" in Bell & Vogel (eds) *A modern Introduction to the family*.

⁴⁸⁷ Muncie & Sapsford (1997) 12-13.

4 2 2 3 2 Extended family⁴⁸⁸

Extended family settings have always existed in most traditional African societies. As Broodryk⁴⁸⁹ points out, the extended family structure in African societies is such that a child has many fathers and mothers in his uncles and aunties. So, where the child's biological parents are not available to care for the child, his or her *other* parents will assume such responsibility. In most modern societies, the nuclear family appeared to be the norm following industrialisation and urbanisation. But with the need for additional support in nuclear families that are too stressed to carry on without such assistance, the extended family structure re-emerged in the post-modern era. The high cost of maintaining children often leaves mothers and fathers with no choice but to remain in outside employment, thereby needing help in childcare. An advantage of the extended family form is that children learn from a very early age to be tended by a variety of persons;⁴⁹⁰ they are not overly attached to any particular person. Also, this family form is more effective for maintenance and transfer of family traditions from one generation to another.⁴⁹¹

Extended families may be made up of polygamous families, monogamous nuclear families or a combination of both.⁴⁹² In industrial societies, the extended family takes the form of a domestic family plus close relatives living elsewhere⁴⁹³ while in non-industrial settings, the extended family is a single household unit. Also known as the non-nuclear family, the typical structure of an extended family includes parents, unwed and married children with their spouses and offspring, and even grandparents. There may also be great-grandparents living in the same house with their children and grand children up to the generation of their great grand-children. In

⁴⁸⁸ According to Nye there are several variations of the extended family. In his text (Nye (1973) 40-42) he mentions the *stem* family (which comprises two families in adjacent generations who are related by blood, share the same residence and are linked by economic considerations. The *stem* family is believed to keep the family estate intact through generations.) and the *joint* family.

⁴⁸⁹ Broodryk (2002) *Ubuntu: Life lessons from Africa* 29-31.

⁴⁹⁰ Laungani (2005) 87.

⁴⁹¹ Nye (1973) 41.

⁴⁹² Murdock (1949) 32. Read further from pages 33-40 for more on Murdock's view on the extended family.

⁴⁹³ This is called the expanded family in non-industrial societies. *The New Encyclopaedia Britannica* (1978) Vol 10 478.

the strict sense, once one of the parents belonging to the older generation dies, a small extended family is no longer an extended family.⁴⁹⁴

Mainly found in rural parts of Europe and Japan and in Africa,⁴⁹⁵ this familial form is common where family farms are large enough for sustenance of the aged parents, the married couple(s) and their children.⁴⁹⁶ In such cases, it is a tradition that the aged parents' child(ren) remain at home after marriage. In the African context, the extended family will include grandparents, parents, married and unmarried children and their spouses and children, and even aunts and uncles up to three generations.⁴⁹⁷ (In South Africa, the extended family was popular in the pre-colonial period.)⁴⁹⁸ In China, amidst the continued decline in the number of large joint families, extended families of up to three generations are still common.⁴⁹⁹ In Haiti, extended families are also common.⁵⁰⁰ In India, the extended family life is organised based on age and gender with the older males in higher positions of hierarchy.⁵⁰¹ Upon maturity, children in India are not expected to leave the home or live apart from the home. Even where males marry, they are expected to live close to the family home.⁵⁰²

4 2 2 3 3 Joint family

The joint family is often confused with the extended family structure. According to Nye, the joint family is a variant of the extended family.⁵⁰³ This family form is common among the *Hindu* in India. As different from the extended family, the joint family is a structure where all members of a family live together, including brothers and their wives and children, and have a communal kitchen, income, property and

⁴⁹⁴ *The New Encyclopaedia Britannica* (1978) Vol 7 155.

⁴⁹⁵ *The New Encyclopaedia Britannica* (1978) Vol 10 479.

⁴⁹⁶ As above.

⁴⁹⁷ Bradley & Weisner (1997) "Introduction: Crisis in the African family" in Weisner, Bradley & Kilbride (eds) *African families and the crisis of social change* xxi-xxvi.

⁴⁹⁸ Pretorius (2005) 368.

⁴⁹⁹ Chen & He (2005) 53.

⁵⁰⁰ Pierce & Elisme (1997) "Understanding and working with Haitian Immigrant Families" in Brown & Shalett *Cross-cultural practice with couples and families* 54.

⁵⁰¹ Laungani (2005) 89.

⁵⁰² As above 101.

⁵⁰³ Nye (1973) 42.

other resources with the patriarch as the head of the family and *commander* of the unit.⁵⁰⁴ Some, but not all, extended families are joint families.

4 2 2 3 4 One-parent (single-parent) family

The high rate of divorce in most parts of the world, especially the western parts and some developing countries has contributed to growth in the number of single-parent families. This family form was also common among the people of caste (coloureds) in the USA and is today common in South African societies.⁵⁰⁵ In some societies, where women are so economically empowered that they have difficulty in finding men that can contribute to their economic security, marriage is rare.⁵⁰⁶ Such women sometimes choose single-parenthood through adoption, artificial insemination, surrogate motherhood. As a result, most single-parent families are those where the mother is responsible for provision and care for the house.⁵⁰⁷ Death of a spouse, through various causes including terminal illnesses like the AIDS pandemic and cancer, has also led to the increase in the number of single-parented families that exist today. When it occurs Christians support single-parent families but they typically do not accept the culture of single-parenthood.

There are also absent parent(s) families (or non-resident father or mother household).⁵⁰⁸ This is a post-modern family form where one or both parents are absent from the household. In situations where a parent or the only parent in the household has to obtain employment in a city or a country away from the rest of the family, that parent may be compelled to leave the household and only visit occasionally. Often, it is fathers that have to absent themselves from the household for a period of time for employment purposes.

⁵⁰⁴ Laungani (2005) 88; Nye (1973) 42.

⁵⁰⁵ Pretorius (2005) 370.

⁵⁰⁶ Silverstein & Auerbach (2005) 36.

⁵⁰⁷ Pretorius (2005) 370.

⁵⁰⁸ As at April 5, 2011, it was noted that nine million children in South Africa *are with* no dads. See Holborn "No dads and often no prospects" in South African Institute of Race Relations 2011 *Fast Facts No 5/2011* 1. Emphasis mine.

4 2 2 3 5 Family with adoptive parent(s) or foster parents

Adoption as a legal institution⁵⁰⁹ has evolved from the times of Moses in the Bible⁵¹⁰ through that of Emperor Octavian Augustus to the Pre-Modern era when the Greeks adopted sons for inheritance purposes. Adoption is a legislation-regulated practice which establishes a child's legal membership in an adoptive family. It may be carried out domestically or internationally (domestic adoption, intercountry or international adoption). In most countries, adoption terminates all parental rights that existed between previous parents, biological or otherwise, or caregivers of the child;⁵¹¹ the *new* parents then become adoptive parents for all purposes. Today, in most countries, it is illegal to discriminate against any child on the basis of his or her adoptive status.

Foster care is a modern form of care for parentless children, children without families or those whose families cannot be identified. It is generally a form of *interim* care where a child is placed in State-managed and supervised care of a family to which the child *may not* be related.⁵¹² Since placement is intended to last until the child is reunited with his or her parents, attains adulthood or is permanently adopted, the State retains guardianship of the child for the period of foster care.⁵¹³ The foster parents are compensated by the State for care of the child through foster care grants.

4 2 2 3 6 Child-headed family (households)

In some Africa countries – Ethiopia,⁵¹⁴ South Africa, Zimbabwe – child-headed families (households) is a relatively new phenomenon which resulted from the high

⁵⁰⁹ UN Department of Economic and Social Affairs Population Division (2009) xv; 1 New York UN ST/ESA/SER.A/292 10.

⁵¹⁰ King James Version of *The Holy Bible* Exodus 2 verse 10.

⁵¹¹ See CA s 242 for effects of adoption.

⁵¹² This applies in the United States, some European countries and South Africa. In Western Europe and Scandinavia, foster care is long-term care, like adoption. For more on this see Williamson J & Greenberg (2010) *Families, not Orphanages* Better Care Network Working Paper September 2010 17. Retrieved from <http://crin.org/BCN/results.asp?keywords=family&offset=20> on October 21, 2010.

⁵¹³ As above.

⁵¹⁴ See Tsegaye "The lives of children heading household" retrieved from [http://www.crin.org/docs/The%20Lives%20of%20Children%20Heading%20Families\[1\].pdf](http://www.crin.org/docs/The%20Lives%20of%20Children%20Heading%20Families[1].pdf) on April 20, 2011.

mortality rate of parents and caregivers as a result of the HIV/AIDS pandemic.⁵¹⁵ This family form is best described in legal terms. In terms of the South African CA, a child-headed household is a household where because "the parent, guardian or caregiver is terminally ill or has died or has abandoned the children in the household", and there is no adult caring for the children, a child above the age of sixteen years assumes the role of caregiver for the other (younger) children in the house.⁵¹⁶ Where there is no extended family member or community based care to turn to, the children older children in these households fend for the younger children sometimes at the cost their own education.

4 2 2 3 7 Same-sex parented families ("Lesbigay families")

Following the legalisation of the union of gay couples,⁵¹⁷ and according child custody rights to these couples, in the Netherlands, France, South Africa,⁵¹⁸ Denmark, United Kingdom, Canada and some States within the USA, same-sex families are *becoming* an accepted family form.⁵¹⁹ These families also come in different forms. One combination that has been found is that of a family with a gay dad and lesbian mothers living in a duplex – the gay dad living downstairs and the gay mothers living downstairs.⁵²⁰ Children in this structure may be biological, adopted or surrogated. Of course, most traditionalists in family studies neither view same-sex unions as families nor support their rearing of children. There are no empirical data suggesting that lesbigay parents are less competent in child rearing than heterosexual parents.⁵²¹

⁵¹⁵ http://www.mida-international.org/index.php?option=com_content&view=article&id=53&Itemid=62 as assessed on April 20, 2011. Child-headed households may also exist as a consequence of a natural disaster. It is important that such households are monitored and supported by adults who can assist the children go through the trauma of the disaster coupled with separation from family. For more on this see SC (2004) 15.

⁵¹⁶ S 137 (1) (a).

⁵¹⁷ In ensuring equality between sexes and the elimination of all forms of gender discrimination.

⁵¹⁸ Following the landmark decision of the Constitutional Court in *Minister of Home Affairs v Fourie and Bonthuys and another* 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 CC

⁵¹⁹ Silverstein & Auerbach (2005) 37.

⁵²⁰ As above.

⁵²¹ As above.

4 2 2 3 8 Corporate family

The corporate family structure basis its existence on activities such as farming, hunting, trading in products, and rearing its children within its territory.⁵²² This familial form is common to pre-industrial or pre-literate societies.

4 2 2 3 9 Experimental family

With the experimental family form, a large number of people with different backgrounds, education, and from different countries are brought together for work in groups. The tasks include clearing, irrigation and planting on land, washing and mending clothes, making meals and caring for children. The fabric of this household form is the formation of small groups and the mutual interaction between the people in these groups thus creating a family group.⁵²³ An example of this household form is the *kibbutz* in Israel.⁵²⁴

4 2 2 3 10 Reorganised family

The high divorce rate around the globe has contributed to the rise in reorganised or reconstructed families. Remarried parents with their children from previous marriages are a common description of this family form. Also where a previously nuclear family household becomes legally separated, the family structure is reorganised to, possibly, a single-parented family.

4 2 2 4 *Marriage Forms*

Most schools believe that marriage (heterosexual) is the genesis of the family.⁵²⁵ However, Murdock is of the view that there should be a clear distinction between marriage and family; the former being the manner of establishing and terminating the family itself, the "normative behaviour and reciprocal obligations" within the family,

⁵²² *The New Encyclopaedia Britannica* (1978) Vol 7 155.

⁵²³ *The New Encyclopaedia Britannica* (1978) Vol 10 479. Also in terms of the Christian (Roman Catholic and Protestant) religion, marriage is the foundation for a family.

⁵²⁴ The Kibbutz is a collective community in Ireal which is based on agriculture. This community has a unique method of child-rearing where all children in the community sleep in communal children's homes.

⁵²⁵ Roman Catholics and Pentecostal Christians believe that family and marriage are inseparable.

and the accepted restrictions upon the members of the family.⁵²⁶ From a religious perspective, the Bible does not limit familial relationships to those based on consanguinity or marriage.⁵²⁷ As noted by Osiek, Christianity reshapes and widens family to include persons that have been accepted as such.⁵²⁸ In most countries, the law and custom define what a valid marriage is.⁵²⁹

4 2 2 4 1 Monogamous family

By definition, monogamy is a marriage form where one man has one wife. It is the commonest form of marriage in many cultures. Nuclear families are monogamous in nature. This the simplest form of marriage.

4 2 2 4 2 Polygamous family

A more complex is the term "polygamous" which may be used to refer to any form of plural marriage such as one where a male takes more than one wife (polygyny); a marriage where a female takes more than one husband (polyandry); a group marriage (cenogamy); and where several men and several women embrace a marital union (polygynandry).⁵³⁰ Most countries where Islam is practiced widely, like Egypt, Nigeria, allow polygamy.⁵³¹ Murdock identified four societies that practise(d) polyandry: the Toda of southern Indian, the Nayar of South-West India,⁵³² the Tibetans of China, and the Marquesans.⁵³³ In Nigeria, the Birom tribe in Jos Plateau, the Irigwe in Benue and the Abisi tribe have been recorded for practicing polygynandry in Africa.⁵³⁴ Though ascribed to the Chukchee of Siberia and the Dieri of Australia, group marriages seldom exist. What is often found is an extension of

⁵²⁶ Murdock (1949) 1.

⁵²⁷ The Holy Bible New King James Version Mark 3: 35; Matthew 12: 46-50. Also see Luke 8: 19-21.

⁵²⁸ Osiek (1998) "Family in Early Christianity" in Anderson *et al The family handbook* 288.

⁵²⁹ In South Africa, the common law definition of marriage was found unconstitutional in *Minister of Home Affairs v Fourie and Bonthuys and another* 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 CC found the common law definition of marriage at the time ("a union of one man and one woman to the exclusion, while it lasts, of all others").

⁵³⁰ *The New Encyclopaedia Britannica* (1978) Vol 7 155. For more on polygamous marriages see Murdock (1949) 2 & 23 – 40 and Ingoldsby (1995) 117-137.

⁵³¹ Ahmed (2005) 161.

⁵³² Also referred to above under the nuclear family form for their recognition of the nuclear family as a "social arrangement".

⁵³³ Ingoldsby (1995) 124-126 quoting Murdock (1957) "World ethnographic sample" *American Anthropologist* 59 (August) 664-687.

⁵³⁴ As above 128-131.

sexual privileges, but not the economic benefits and responsibilities, to a group of men and women.⁵³⁵ The most common of all polygamous marriages is polygyny. As already discussed above under pre-modern families,⁵³⁶ most African societies are traditionally polygynous – the Zulus of South Africa, the Kikuyis of Kenya, and the Yorubas and Hausa Moslems of Nigeria are typical examples of polygynous societies.

4 2 3 *Functions of “family”*

The function of the family can be seen as the crux of the existence of the unit. Understanding the functions which family serve in a child reveals the needs which will remain unsatisfied in a child if that child is without of a family. In line with the *functional theory*, "the basic task of the family is to serve human needs. As the needs differ, the organisation and activities of the family will differ."⁵³⁷ This explains the shift in perceptions of what the family should be to what the family is. The vital question therefore is "what needs do families *need to serve* in today's individual and the society?" This paragraph moves swiftly through the needs which the family previously satisfied and dwells on the needs which the family satisfies in today's child.

According to Ogburn, the family performs seven major functions for its individual members – "production of economic goods and services, status giving, education of the young, religious training of the young, recreation, protection, and affection".⁵³⁸ However, four functions which are universally met by families are satisfaction of member's physical, psychological, survival and maintenance needs.⁵³⁹ According to Murdock, the nuclear family (should) provide(s) four fundamental functions namely: sexual, economic, reproductive and educational.⁵⁴⁰ From a "functionalist"⁵⁴¹ point of view, society is held together by social institutions which perform specific functions. According to Elmer, "reproduction, nurture of children and mutual sympathetic

⁵³⁵ Murdock (1949) 2 & 23 - 40.

⁵³⁶ See para 4 2 2 1 1 above.

⁵³⁷ Elmer (1945) 9.

⁵³⁸ Nye (1973) 8.

⁵³⁹ Kingsbury & Scanzoni J (1993) 195-210.

⁵⁴⁰ Murdock (1949) 10.

⁵⁴¹ Parsons, Shorter and Fletcher are well-known for their structural-functional perspective in family studies.

understanding and helpfulness" are significant functions of the family.⁵⁴² "A key function of the family [...] is the ability to provide a locus for emotional support and fulfilling relationships."⁵⁴³ The Orthodox Marxists also agree that the family provides emotional support and personal freedom which is not found elsewhere. Zaretsky is of the view that in a capitalist society, the family serves as a closed society which protects from the "impersonal, rational and anonymous" society.⁵⁴⁴

Reproduction (sexual or otherwise), and the rearing and caring for children are necessary for any society to exist in perpetuity. These characteristics are easily achieved in the family. Protestant theologians like Patton and Childs are of the view that there is no ideal form which the family should take but that an inevitable normative function of the family is redemptive *care*.⁵⁴⁵ By care they mean "a combination of appreciation, respect, compassion and solitude" for however long.⁵⁴⁶ From a Pentecostal point of view, the main functions of the family are the birth of children and "their socialisation through highly personal love".⁵⁴⁷ The Protestant male (husband and father) is typically responsible for financial provision, emotional, educational and physical caretaking, physical and emotional protection, material and developmental endowment, and spiritual formation of their children and the family members at large.⁵⁴⁸ With on-going debates (fuelled by various factors including the economic climate in most parts of the world) in favour of equal sharing of familial responsibilities between men and women, these roles are also shared by females (mothers and wives). Grandparents, on the other hand, are seen as the repository for lifetime values and beliefs, living symbols of family continuity and stability, sources of unconditional love and acceptance, and mentors in the task of facing life and death.⁵⁴⁹

⁵⁴² Elmer (1945) 3.

⁵⁴³ Muncie & Sapsford (1997) 24.

⁵⁴⁴ Zaretsky (1976) *Capitalism, the family and personal life*.

⁵⁴⁵ Post (1998) 21 quoting Patton & Childs (1988) *Christian marriage and family: Caring for our generations* 12.

⁵⁴⁶ As above 21.

⁵⁴⁷ As above.

⁵⁴⁸ Stoneberg (1998) "Work of families: Roles of families" in Anderson *et al* 21.

⁵⁴⁹ Anderson R (1998) "Work of families: Roles of families" in Anderson *et al* 21.

A *functional* perspective of the family appears expedient,⁵⁵⁰ preferable to an ideological perspective.⁵⁵¹ It is important that in defining the term, one avoids being stereotypical. As Viljoen states, the fact that an institution performs a function does not mean that that function would not be performed if that institution does not exist or that the performance of the function creates the institution.⁵⁵² In context, this means that the fact that a group performs functions that are familial does not mean that those functions will not be performed if the family does not exist or that the fact that those functions are being performed makes that group a family. It is suggested that this functional perspective to the definition of "family" should be grounded by the intention to *permanently* perform those functions. In practical terms, where parents intend to permanently uphold their responsibilities of providing emotional, psychological, socialisation, financial and educational care for a child they create a unit (family) to which the child can belong to and on which the child can be dependent. Once the intention to permanently relinquish parental responsibilities is communicated, the family unit is broken. However, this should not amount to non-existence of "family" for the child rather it *should* be viewed as dissolution of one family form (nuclear family form) and the creation of another (single-parent family). It is submitted that the view that once parents separate, the family fails to exist is, arguably, flawed with structural stereotype. It is suggested that, with the ever-changing societal trends, perceptions of "family" should move further away from structure and closer to the content, and function of the family in the lives of its members, particularly children. The focus should be on what the family gives or *should* give its members that is unobtainable in the workplace or at school or in any other social or welfare institution.

⁵⁵⁰ The *structural-functional theory* to family studies has been employed by many social scientists in the field of family studies. This approach is used to organise and explain research study results. This dissertation advocates for the use of the functional approach in understanding what a family is and what needs it satisfies (or should satisfy) in a child in order to ensure the full and harmonious development of the child. It accepts that the family is an institution and as such should be organised in order to ensure proper functioning.

⁵⁵¹ Muncie & Wetherell (1997) "Family policy and political discourse" in Muncie *et al* (eds) *Understanding the family* 2nd ed 24. Ideology is often seen as a tool used by ruling groups to protect their economic and other interests. It suggests that there is a need for investigation into how reality is represented in ways that serve the interest of certain groups of persons and not others.

⁵⁵² Viljoen (1987) "Family structure and support networks" in Steyn, Strydom, Viljoen & Bosman (eds) (1987) ("Steyn *et al*") *Marriage and family life in South Africa: Research Priorities* HSRC Pretoria 6.

The function of the family is effectively defined by the role that each member of the family should play.⁵⁵³ These roles *should* determine membership of the group. For example, an adopted child (and the adoptive parent(s)) plays a specific role in the family. Although the child is not genealogically related to the other family members, the fact that he or she accepts and fulfils the socially defined role of being a daughter or son to the mother or father, the child is seen as part of that family. If it is accepted that the family is that unit with which a child permanently identifies and can return to on a daily or regular basis until (and even after) adulthood is attained – a unit that is legally, morally and socially obligated to care for the child emotionally, socially, psychologically, materially, financially, educationally and spiritually (whether the child is biologically related to the unit or attached to it by choice) – we will be a giant step ahead in obtaining a universally acceptable description of the concept family.

4 2 3 1 *Personal or individual functions*

One of the personal needs met by the family is the *satisfaction of emotional and psychological needs*. The satisfaction of mental and emotional needs in a child is linked with the social needs of the child. Therefore it is believed that it will be futile to attempt understanding "family" in traditional or modern perspectives, or in structural order, without giving attention to the emotional needs which the family satisfies. Some researchers argue that emotional functions are based on Western culture and may have different "meanings" to children of non-Western cultures, for instance, Chinese, or even African, children.⁵⁵⁴ In the main, however, it is believed that the presence, or lack of, maternal warmth "predicted later *emotional* adjustment, including feelings of insecurity, loneliness, depression, and perceived self-worth" while paternal warmth "predicted later *social and school* adjustment" such as peer and teacher assessed social competence.⁵⁵⁵ Mothers are generally found to be more sensitive to the emotional well-being of children compared with fathers.⁵⁵⁶ For instance, typically, Japanese mothers spend long hours with their infants for emotional attachment even though they seldom engage in verbal or physical

⁵⁵³ Anderson R (1998) 21.

⁵⁵⁴ Chen & He (2005) 57.

⁵⁵⁵ As above 58.

⁵⁵⁶ Chen & He (2005) 58.

activities with them.⁵⁵⁷ In Chinese culture, like in most others, mothers are the primary providers of care and affection to the child; fathers engage in few play-mate-like activities with the children.⁵⁵⁸ The same is the case in most African societies.

What appears to be commonly accepted in most cultures is the notion that the most important sources of psychological needs within the family are companionship and parenthood.⁵⁵⁹

Another need for which the family is relevant is the *satisfaction of physical and material needs including security needs*. Family members enjoy a sense of physical security which emanates from the willingness or duty to protect one another from imminent harm, provide one another with shelter, food, clothing, and to care for the sick and injured.⁵⁶⁰ For the child, parents are seen as a shield from the harshness of the outside environment – school and play field.⁵⁶¹ However, this is not to say that where, as a result of poverty or other social factor, parents cannot provide food, shelter and clothing for their children a family does not exist. It is at this point that national governments with high levels of poverty have the duty to preserve the family by affording the family necessary protection and assistance.⁵⁶² Article 27 of the UNCRC obligates State Parties to the Convention to, "in accordance with national conditions and within their means", "take appropriate measures to assist parents and others responsible for the child to implement" the right of the "child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development". In case of need, the State party shall "provide material assistance and support programmes, particularly with regard to *nutrition, clothing and housing*".⁵⁶³ Children in *comfortable* families generally enjoy a sense of physical and material security while children from poor families are sometimes expected or forced to engage in economic activities to supplement the family income.⁵⁶⁴

⁵⁵⁷ Naito & Gielen (2005) 70-71.

⁵⁵⁸ Chen & He (2005) 58.

⁵⁵⁹ *The New Encyclopaedia Britannica* (1978) Vol 7 156.

⁵⁶⁰ As above.

⁵⁶¹ As above.

⁵⁶² UNCRC preamble para 5.

⁵⁶³ All emphasis mine.

⁵⁶⁴ *The New Encyclopaedia Britannica* (1978) Vol 7 161.

4 2 3 2 *Social functions including educational aspects of socialisation*

With regard to the child, the main social functions of the family are procreation and child socialisation. Most schools of thought on the family agree that the family is primarily responsible for the socialisation of its members, particularly its children.⁵⁶⁵ The social functions for which the family's existence is essential depend, to a large extent, on the culture within which the family is founded. Goldstein states that the family is

more than a legal entity or even a social institution. It is the cradle into which the future is born and the nursery in which new democratic social order is being fashioned. The family is related to the past through tradition; but it is also related to the future through social responsibility and social trust.⁵⁶⁶

In most cultures, child socialisation ends at adolescence and is marked by a festival or ceremony.⁵⁶⁷ A major benefit of socialisation of the child by the family is that, when effectively carried out at all stages of a child's development, the child acquires life satisfaction, emotional and psychological well-being which are important for adolescence.⁵⁶⁸ As such, the effective execution of social functions result in the satisfaction of mental and emotional needs required in the child for adjustment to his or her social environment and responsibilities.⁵⁶⁹ Child socialisation may be viewed as a labour where the child takes up his or her own part and in so doing picks up "necessary knowledge and lore".⁵⁷⁰

Different methods of socialisation are used in different cultures. Chinese parents have been found to spend little time with their children. They leave their children at child centres before breakfast and pick them up after supper. Yet, they have been

⁵⁶⁵ See Elmer (1945) 7; 11; Heath (1995) "Parents' socialisation of children" in Ingoldsby & Smith (eds) *Families in multicultural perspective*; Murdock (1949); Nye (1973).

⁵⁶⁶ Elmer (1945) *The sociology of the family* 12 quoting Goldstein (1940) "The family as a dynamic factor in American society" in *Living* 11.

⁵⁶⁷ *The New Encyclopaedia Britannica* (1978) Vol 7 156.

⁵⁶⁸ Heath (1995) 161.

⁵⁶⁹ Elmer (1945) 7; 11.

⁵⁷⁰ *The New Encyclopaedia Britannica* (1978) Vol 7 156.

found to have significant impact on their children's development.⁵⁷¹ This parenting style is believed to encourage independence in children, self-confidence, self-control, and good character. Based on cross-cultural research, Heath draws the conclusion that when parents are actively involved in their children's development and have great expectations from them, the children present the best outcomes all-round.⁵⁷² By active interaction, it means spending quality time with the children sharing activities such as teaching the child a trade or an art, reading together or talking and sharing ideas and experiences.⁵⁷³ These interactions are linked with education (informal and, in some cases, formal) of the child.⁵⁷⁴

4 2 4 "Family" in terms of international and regional instruments

The term "family" is not defined in international instruments that deal with the family. The UNCRC is one of the main international instruments that refer to the family in its preamble and provisions.⁵⁷⁵ Yet, it does not contain a definition. However, the Committee on the Right of the Child (UNCRC Committee) appear to favour a flexible definition of "family". According to the UNCRC Committee, the UNCRC takes into account the diverse family structures and cultural patterns which exist, and also emerging familial relationships.⁵⁷⁶ In this regard, the UNCRC refers to the extended family and the community. The UNCRC applies to situations of nuclear family,

⁵⁷¹ Heath (1995) 167-181.

⁵⁷² As above 181-183. Greater parental involvement was found to result in better child behaviours in Japan and China; higher academic achievement in the children in Great Britain, India, South Africa, Thailand and the USA; greater psychological well-being in adolescents in Hong Kong, Iran, Puerto Rico; and less juvenile delinquency and substance abuse in Canada and the USA.

⁵⁷³ As above 181.

⁵⁷⁴ Formal education of children is one of the means by which parents can ensure that their children remain within their social class or climb somewhat higher. (*The New Encyclopaedia Britannica* (1978) Vol 7 162) As such most parents encourage their children to obtain formal educational qualifications to the highest obtainable level. Where families are unable to afford basic education for their children, there is a duty on States in terms of article 28 of the UNCRC to progressively realise the right of the child to education.

⁵⁷⁵ UNCRC preamble para 1 (refers to "human family"); preamble para 5 (states that the family as the fundamental unit of society); preamble para 6 (refers to the child's need to grow up in a family environment); art 2 (2) (refers to family members); art 5 (recognises the rights and duties of members of the extended family); art 8 (1) (acknowledges the child's right to family relations); art 8 (4) (provision of information to members of family); art 10 (1) (deals with family reunification); art 16 (1) (non-interference with child's family home); art 20 (1) (deprivation of family environment); art 21 (b) (refers to adoptive family); art 22 (2) (refers to members of family and family environment); art 24 (2)(f) (deals with family planning education); and art 37 (c) (states the need for children deprived of their liberty to have family contact) .

⁵⁷⁶ UNCRC Committee (1994) Day of General Discussion "Role of the Family in the Promotion of the Rights of the Child" para 2.1.

separated parents, single parents, common law family, joint family, reconstructed family and adoptive family.⁵⁷⁷ The Committee, and the UNCRC, may be described as function-focused with regard to the family. According to the Committee, the child acquires values and is socialised within the family. The family is important for the child's future because it is the base for development of human relations.

Even in a resolution following its 78th plenary meeting on December 8, 1989,⁵⁷⁸ where the UN proclaimed 1994 to be the International Year of the Family, there was not an attempt at defining or explaining what "family" is. However, some close attempts at defining family are contained in, for instance, the resolution adopted by the UN General Assembly - A world fit for children.⁵⁷⁹ This document plainly provides that "family is the basic unit of society and the holder of the primary responsibility of "protection, upbringing and development" of the child.⁵⁸⁰ It also acknowledges the existence of various forms of families.⁵⁸¹ In art 44 (19), it refers to the responsibilities of "family, parents, legal guardians and caregivers". This article, in particular, creates the notion that, there are family members, other than parents, that *may* be responsible for the child. A closer indication the meaning of "family" is found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family ("ICPRMWMF") which defines "members of the family" as

persons *married* to migrant workers or having with them a relationship that, *according to applicable law, produces effects equivalent to marriage*, as well as their dependent children and other *dependent persons who are recognised as members of the family by applicable legislation* or applicable bilateral or multilateral agreements between States concerned.⁵⁸²

⁵⁷⁷ UNCRC Committee (2005) Day of General Discussion "Children without parental care" CRC/C/153 para 644.

⁵⁷⁸ UN Resolution (1989) A/RES/42/82.

⁵⁷⁹ UN Resolution adopted by the General Assembly (2002) [*on the report of the Ad Hoc Committee of the Whole (A/S-27/19/Rev.1 and Corr 1 and 2)*].

⁵⁸⁰ As above art 15. Art 47(3) & 37 (17) state the need to strengthen, by way of strategy implementation and otherwise, family-based care for the child.

⁵⁸¹ As above art 15.

⁵⁸² UN Convention on Migrant Workers art 4. All emphasis mine.

This definition of members of the family places the definition of family within the province of *applicable* national legislature (or agreements between States).

At the regional level, the ACRWC provides for State protection of the family.⁵⁸³ The Charter refers to family in most of its provisions, particularly to family environment;⁵⁸⁴ family home⁵⁸⁵ and family life⁵⁸⁶ but it does not define the concept "family".

4 2 5 "Family" in terms of national laws

Although children's legislation in most African countries, and parts of the West acknowledge the family as the basis of social functioning the term family remains undefined even at national level. European countries signatory to the European Convention on Human Rights, 1950⁵⁸⁷ are obliged to respect everyone's right to family life.⁵⁸⁸ Also in the USA, there is the Organisation of American States ("OAS") with its own human rights treaty – the American Convention on Human Rights, 1969 ("ACHR") – which acknowledges the family as the "fundamental group unit of society" deserving protection.⁵⁸⁹ Though these instruments emphasise the importance of family for the individual and the society at large, neither of them explicitly defines the term family.

In Africa, the CRA, expressly guarantees the right of the child to family life.⁵⁹⁰ It offer a broad definition of family "in relation to a child" to include "a person who has parental responsibility for a child and a person with whom the child is living or has been living;"⁵⁹¹. The KCA⁵⁹² also does not define family; it guarantees the child's

⁵⁸³ ACRWC art 18.

⁵⁸⁴ As above preamble para 4; art 23 (3); art 25.

⁵⁸⁵ As above art 10.

⁵⁸⁶ As above art 14 (2) (f).

⁵⁸⁷ Art 8.

⁵⁸⁸ These countries include the UK, Germany, France and Belgium.

⁵⁸⁹ ACHR art 17 (1).

⁵⁹⁰ S 8. The Constitution of the Federal Republic of Nigeria, 1999, in s 37, entitles the said section "Right to private and family life" but the content of s 37 states that "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected. " It is unclear what exactly "family life" is in terms of this constitution. The CRA give better clarity in the it does not equate family life to the home as the constitution appears to have done.

⁵⁹¹ CRA s 277.

⁵⁹² S 45. The Constitution of Kenya, 2010, acknowledges the family as the natural and fundamental unit of society and mandate the Kenyan Parliament to enact legislation which recognises "any

right to parental care.⁵⁹³ The closest available legislative source of definition of family is the CA. This legislation acknowledges the need of the child to grow up in a family environment⁵⁹⁴ and has the object of preserving and strengthening families. It provides an indication of the content of "family" in section 1 where it defines a child's "family member" to be

- (a) a *parent* of the child;
- (b) *any other person who has parental responsibilities and rights* in respect of the child;
- (c) a *grandparent, brother, sister, uncle, aunt or cousin* of the child;
or
- (d) *any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;*⁵⁹⁵

The CA points out key characteristics of persons who *are* "family" to a child: parenthood (natural or adoptive) and blood relation; acquisition of parental responsibility in respect of the child; significant relationship,⁵⁹⁶ akin to a family relationship, resulting from psychological and emotional attachment. Subsection (d) of this definition purports flexibility in understanding "family", away from traditional consanguineous relations. This definition appears to extend family membership to persons (excluding blood relatives to the second degree) who may have cared for a

system of personal and family law under any tradition, or adhered to by persons professing a particular religion". This legislative piece takes into account the importance of the family and the variety of family forms that *must* be considered when dealing with family rights.

⁵⁹³ However, the Act defines "home" "in relation to a child" as "the place where the child's parent, guardian, relative or foster parent permanently resides, or if there is no parent, guardian or relative living and the child has no foster parent, the child's parent's or guardian's or relative's last permanent residence..." This definition highlights persons who have responsibility over the child – biological or by way of law.

⁵⁹⁴ CA preamble para 7.

⁵⁹⁵ All emphasis mine. The Constitution of the Republic of South Africa, 1996 (the 1996 Constitution) makes little reference to the family. One of the main provisions that relate to the family is contained in s 28 (1) (b) which entrenches the right of the child to "family care" or "appropriate alternative care when removed from the family environment".

⁵⁹⁶ The meaning of "significant" is subject to interpretation.

child for a period of time, and thereby become psychologically and emotionally attached to the child, without necessary acquisition of legal rights and responsibilities in respect of the child. It is submitted that clarity regarding the types of relationships which may fall within the definition in subsection d depends on the definition given to "family relationship". Inclusion of "resembles a family relationship" to subsection d may be yet another means of avoiding delineation of who is (or is not) family to a child.⁵⁹⁷

4 2 6 *What exactly does a child need from "family"?*

From a functional perspective, as discussed in paragraph 4 2 3 above, a child typically needs emotional, psychological, physical and material (including financial) support from family.⁵⁹⁸ Also important for the child is a base for socialisation, which the family provides.⁵⁹⁹ The degree of each of these needs which the family may satisfy in a child depends on the age and stage of development of the child. At infancy, the child needs mainly emotional support by way of stimulation, and the provision of immediate needs such as food, warmth, and comfort.⁶⁰⁰ As a toddler, a child's needs remain the same but for a sense of autonomy which makes the child less emotionally attached to his or her carer.⁶⁰¹ At middle-childhood and pre-adolescence, family support and protection is most important in the child's development to ensure development of the child's sense of industry (rather than a sense of inferiority).⁶⁰² An adolescent needs a family with an attachment-figure to aid full development of his or her personal security.⁶⁰³

⁵⁹⁷ In its December 2002 Review of the Child Care Act Report, Project 110, the South African Law Commission, acknowledging that the traditional nuclear family form is not the reality in South Africa, and noting the challenges that may ensue, recommended a flexible relationship-based definition of family member to be included in the children's legislation thereby preventing children from becoming "family-less".

⁵⁹⁸ It is pertinent to note that the lack of provision of any of these needs, for whatever reason, is not tantamount to the absence of a family.

⁵⁹⁹ See para 4 2 3 2 above.

⁶⁰⁰ See para 2 4 1 above for a more detailed discussion on the developmental needs of infants.

⁶⁰¹ As above.

⁶⁰² As above.

⁶⁰³ As above.

4 2 7 *An all-encompassing definition*

It has been argued at national level that, because of the social nature and structural diversity of the family, the law should not define this fundamental institution.⁶⁰⁴ However, it is believed that, in guaranteeing social rights, the law would require workable definitions which will ensure legal certainty. From a "needs and function" perspective, this paragraph serves as a pointer to the ingredients which *should* be included in the definition of family in respect of the child.

Firstly, people make up family. Therefore, a vital ingredient to the definition of family is the existence of and relationship between people. With respect to a child, there *should be* an adult responsible for the child in the family. Child-headed households are an exception to this requirement. Moving away from the structural stereotype which is often associated with family (that is the nuclear family structure), it is submitted that a contemporary definition of family should include "two or more persons, one of whom *must be* an adult". In so doing, the definition will accommodate single parent families, reconstructed families and even unmarried teenage mothers who may be living with their parent(s) or caregiver(s).

Secondly, *blood relationship* is an apposite indicator of family relationship. However, it is important to delineate, depending on factors including the cultural and customary dictates of a particular society, which degrees of consanguinity *should* evoke legal responsibility for a child (and which should not). Biological parents (who maintain their parental rights and responsibilities over a child) are an apparent inclusion in this regard. Factors such as the HIV/AIDS epidemic, poverty, and certain social behaviour towards children have left many African children "parentless". Grandparents, aunts, uncles and older siblings now assume parental responsibilities over these children. These categories of blood relatives should also be included in the definition of family.

A third ingredient is *parental rights and responsibilities*. Biological parents have automatic rights and responsibilities over their children. These rights and responsibilities may also be legally acquired through adoption or parental rights and

⁶⁰⁴ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 10 BCLR 1253 (CC).

responsibilities agreements. All persons with such rights and responsibilities should be included in the definition of family.

Fourthly, *emotional and psychological support or attachment* is relevant at all stages of a child's development. The child also requires *material* (including financial) and *physical security*. A child's parent(s), legal guardians or persons responsible for the child have primary responsibility to provide these to the child.⁶⁰⁵ A unit or persons to whom a child is emotionally and psychologically attached and from whom the child enjoys material and physical security *should be* viewed as "family" in respect of the child. It is therefore submitted that the definition of family should include the satisfaction of these needs in the child, albeit not in isolation of legally acknowledged parental rights and responsibilities of adult(s) in the group or unit over the child. A child's siblings should also be considered in the definition of family in respect of the child because they partake in socialisation which is also an important need for development of the child. Moreover, children develop attachment to their siblings which has effects on their growth.⁶⁰⁶

As has been noted in paragraph 4 2 3 above, the *permanence or intended permanence* of relationship with the child is relevant in identifying family. Thus, it is submitted that permanency (or intended permanency) of the relationship between the family and the child is a vital ingredient for the definition of family. This, however, tends to exclude most foster families from recognition as "family" in relation to the child. The exclusion of foster care is welcome because foster care is subject to government supervision. Moreover, due to its temporary nature, foster care is, in certain instances,⁶⁰⁷ subsidiary to adoption, institutional care and intercountry

⁶⁰⁵ UNCRC arts 18 & 27.

⁶⁰⁶ It is worth noting one of the factors in s 7 of the CA which must be considered when the best interest of the child standard is tested: "the likely effect on the child of any separation from" "any brother or sister or other child" "with whom the child has been living". S 7 (d) (ii). This provision points to the need to maintain emotional and psychological attachments that may have developed in the child.

⁶⁰⁷ For instance, where separation from family environment is temporary and there is possibility or plan for of family reunification.

adoption. (In countries where foster care is intended as permanent alternative care, this exclusion will not exist).⁶⁰⁸

4 3 Family rights enjoyed by children

The family rights commonly found in children's instruments and legislation are: the right to family care,⁶⁰⁹ the right to family life;⁶¹⁰ the right to parental care,⁶¹¹ the right not to be arbitrarily separated from parents;⁶¹² and the right to grow up in a family environment⁶¹³. Once mentioned, it comes to mind that each depend on the existence of a "family". Therefore, thus definition of family and express acknowledgment of the right to a family seems relevant in ensuring realisation of these family rights. In support of this view are the following words from the UNCRC Committee:

Children's rights will gain autonomy, *but they will be especially meaningful in the context of the rights of parents and other members of the family* - to be recognized, to be respected, to be promoted. And this will be *the only way* to promote the status of, and the respect for, the family itself.⁶¹⁴

Children's rights, particularly their familial rights, depend on the family and the recognition, respect and promotion of the rights of its members. In other words, without the family, children's rights remain a mirage.

4 3 1 The right to a family

International agencies involved with child care acknowledge that "all children have a right to a family".⁶¹⁵ This right is not explicitly stated in international legal documents

⁶⁰⁸ In Western Europe and Scandinavia foster care is intended to be permanent.

⁶⁰⁹ CA s 2.

⁶¹⁰ CRA s8.

⁶¹¹ Constitution of Kenya s 53 (e); CA s 2.

⁶¹² UNCRC art 9;

⁶¹³ UNCRC para 6, art 20 (1), art 22 (2); CA s 2.

⁶¹⁴ UNCRC Committee (1994) General Day of Discussion "Role of the Family in the Promotion of the Rights of the Child" para 198.

⁶¹⁵ The ICRC, IRC, Save the Children, TdH, UNICEF, WVI, War Child UK and Plan International acknowledge this right in their document - CPWG *Guiding principles* 1.

and national legislation pertaining to children. As a result, its existence lies within the province of judicial interpretation.

In South African case law the lack of express recognition of familial rights in the new text of the 1996 Constitution⁶¹⁶ was addressed in *In re: Certification of the Constitution of the Republic of South Africa, 1996*.⁶¹⁷ The Constitutional Court, while addressing the objectors to the non-recognition of the right held that there has been no "universal acceptance" of the need to expressly recognise the right to family life as being fundamental and "requiring constitutional protection".⁶¹⁸ The court explained that "[t]he absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies".⁶¹⁹ According to the court, because families are constituted in a variety of ways there is "uncertainty" as to the outcomes of constitutionalising family right. As a result, constitution-makers would rather not regard the right to family life as a fundamental right appropriate for definition in constitutional terms.⁶²⁰ The court pointed out that "[v]arious sections in the NT [1996 Constitution] either directly or indirectly *support* the institution of marriage and family life"⁶²¹ – the right of the child to "family care or parental care, or to appropriate alternative care when removed from the family environment" is entrenched in the Constitution.⁶²² It argued that by providing for the right of the child to family care, the Constitution "directly" deals with the right to family life of the child. (The right is "expressly guaranteed" therein).⁶²³

Legislation in Kenya also does not explicitly provide for the right (of the child) to a family. In its findings, the court in *Republic v Minister of Home Affairs & 2 others Ex-parte Leonard Sitamze*⁶²⁴ held that the family is of vital importance to the Kenyan

⁶¹⁶ 1996 Constitution s 28(1)(b).

⁶¹⁷ 1996 10 BCLR 1253 (CC).

⁶¹⁸ Para 98.

⁶¹⁹ Para 99.

⁶²⁰ Para 99.

⁶²¹ Para 101. Emphasis mine.

⁶²² Constitution of the Republic of South Africa, 1996 s 28(1)(b).

⁶²³ 1996, 10 BCLR 1253 (CC) para 102. It should be noted that this part of the judgement responds to the objection that the right to family life (and not the 'right to a family') is not expressly recognised in the Constitution. The 'right to family life' and the 'right to a family' are two distinct familial rights. This judgement has been cited as an example because it addresses the issues of familial rights generally (and the right to family life specifically).

⁶²⁴ *Republic v Minister of Home Affairs & 2 others Ex-parte Leonard Sitamze* (2008) eKLR.

society and that the “right to a family”, amongst other rights, is informed by the fundamental right to human dignity which is constitutionally recognised in Kenya.⁶²⁵ Nigeria’s Child’s Rights Act states that the child has “a right to family life”.⁶²⁶

Sloth-Nielsen, Mezmur and Van Heerden (“Sloth-Nielsen *et al*”), in criticism of the judgement of in the Namibian case *JD and Another and Minister of Health and Social Services and Two Others*⁶²⁷ state that “[...] a child does not have the “right” to a family in international law”. They explain that, as stipulated in international law, a child has the right to parental or family care and to appropriate alternative care when deprived from the family environment but this is distinct from the “right” to a family.⁶²⁸ According to these authors the “right to a family” privileges intercountry adoption above other forms of alternative care. This argument appears unbalanced. Although the judge *may have* faulted in his judgement by presenting the principle of subsidiarity, as it applies to intercountry adoptions, as ousted by the right of the child to a family, the principle and the right *are not* married. The right of a child to a family exists as a right that may be easily interpreted from (and in) other familial rights that have been expressed in treaties. Realisation of familial rights depends wholly on the existence of the family. In simple terms, for a child to enjoy the right to family care, the child *must* belong to a family in the first place.

Belonging to a family is prerequisite for all other forms of familial rights which may be protected in human rights law; all familial rights identified are inherent in the “right to a family”. Considering the fact that legal claims for protection by the family group can only (practically) be made by individual members of the family, the position of a child without family is of great concern. Where a child, decides to claim his or her right to family or parental care, or legally battles the exploitation that he or she suffers as a result of being separated from the family, that child will first of all need

⁶²⁵ As above 20. This view appears similar to that held by the Israeli Supreme Court in the *Adalah* case (HCJ 7052/03 Adalah – the Legal Centre for the Arab Minority Rights in *Isr v Minister of Interior [2006]*) where the court held that the right to family is embodied in the concept of human dignity. Justice Salim Joubran, in his judgement, stated that “in protecting the right to family, the law protects the basic freedom of the citizen to live his life as an autonomous person, who is free to make choices” (at 7).

⁶²⁶ CRA s 8.

⁶²⁷ Case No (P) A 261/2002.

⁶²⁸ Sloth-Nielsen, Mezmur and van Heerden “Intercountry adoption from a Southern and Eastern African perspective” (2010) *International Family Law* 86-96.

an adult (in the ideal situation, a parent or guardian) to assist him or her. It is therefore arguable that a child who is without a family may, even before claiming the right to family and parental care and protection, claim the right to belong to a family. It is submitted that States *must* begin to consider parental or family care and protection of the child from the departure point of the right of the child to a family.

Express recognition of the "right to a family" is important because such recognition validates the existence firstly, of a group to respect and protect⁶²⁹ and secondly, of a group from which duties (such as the duty to care for the child) are due. Also, express recognition of the right will ensure legal certainty and bring to bay those arguments that challenge the existence of the right of the child to a family in international law.

The right of the child to a family needs to be seen as a *sine qua non* for the realisation of other family rights pertaining to children. It is arguable that explicit legal provision of the right of the child to a family will create *unrealistic* obligations on States to realise this right. Conversely, acknowledgement of the right to a family will promote non-violation of this right by parents and other persons legally responsible for the child. Such acknowledgement also supports the UNCRC Committee recommendations that State parties to the UNCRC "develop, adopt and implement" a comprehensive national policy on families and children.⁶³⁰

It is believed that difficulties that have hindered express recognition of the right hinge mainly on reluctance of States to define "family" for themselves thereby establishing what the institution entails. With regard to State intervention, States may view families "as a location that is useful for locating certain categories of persons for purposes of welfare supplies such as social grants"; "as a process where children are socialised and matured into adult values; a process that government may support"; "as a target to which social workers may intervene when the "process" is at risk of going wrong or actually goes wrong" or "as a norm proper for adult sexuality

⁶²⁹ Jastram and Newland (2003) "Family unity and refugee protection" in Feller, Türk & Nicholson *Refugee protection in international law: UNHCR's global consultation on international protection* 566.

⁶³⁰ UNCRC Committee (2005) Day of General Discussion "Children without parental care" CRC/C/153 para 645.

and child socialisation".⁶³¹ Each State *should* therefore define "family" for its purposes and within its cultural, economic and social circumstances, explicitly acknowledge children's right to a family and progressively ensure the realisation of the right. Also, as suggested by Mabry, statutes should be interpreted broadly so that more families to accommodate contemporary families.⁶³²

4 4 **Conclusion: The right to a family as a canopy for all other familial rights of children**⁶³³

It has been argued above that the major challenge in acknowledgement, and realisation, of the right of a child to a family lies in the definition of the concept "family". It has also been noted that the social and private nature of this institution makes the realisation of the right appear impossible. Furthermore, it becomes difficult to acknowledge the existence of this right when the family is viewed as a structure or form that must conform to a "norm". Most cultures acquire family members through a variety of relationships – consanguinity, marriage (in recent times, civil unions) or adoption. Based on the identified theories of family studies, this chapter has explored the perspectives, approaches and methods from which a definition of "family" may be developed. It has been submitted that a functional approach, rather than an ideological one should be adopted in delineating "family". What is important for the child within the family are the needs that are satisfied by the family. From discussions above, the family roles of child socialisation, emotional, financial, material and physical security are key for child development. It is now clear that for the definition of family to be meaningful, it must be developed within the context of the society it aims at serving.

From time immemorial, the family structure has evolved and adapted to suit changing times. Contemporary family forms have become more removed from the

⁶³¹ Muncie & Sapsford (1997) 32.

⁶³² Mabry "Joint and shared parenting: Valuing all families and all children in the adoption process with an expanded notion of family" (2009) *17 Am U J Gender Soc Pol'y & L* 659 at 683.

⁶³³ It is important to stress that the best interests of the child remain a primary consideration when dealing with all rights of the child. Therefore, although a child has the right to a family, it will not be in the child's best interest to remain with the family because of, for instance, abuse and violence endured by the child therein. For more on the best interest of the child standard see para 5 4 2 below.

"usual" nuclear or extended family structure. According to van der Linde,⁶³⁴ the rise in the number of "restructured" families suggests an adaptation to changes in modern society rather than a decline in the importance of the family. The essence of a family should therefore not lie in its structure or form but rather in the functions of the family members, one to another, and the intention to establish permanence in the adoption of such functions. With this in mind, a definition of the concept should be developed, in context, to reflect the representation of the concept within the relevant territory, after which the definition should be included in the children's legislation to ensure legal certainty. The definition so developed should be revisited regularly and adapted to changing times and needs.

Once a definition has been developed, express recognition of the right *of the child* to a family should be ensured to create legal certainty and promote non-violation of this right by persons most likely to deprive children of their family. Currently, the right of the child to a family exists merely as a shadow of other familial rights. However, these rights do not exist without the prerequisite existence of the family. As argued for above, the right of the child to a family should be expressly recognised as a canopy for the existence of all other familial rights.

CHAPTER 5 PROTECTION OF THE RIGHT TO A FAMILY OF SEPARATED AND UNACCOMPANIED CHILDREN IN NATURAL DISASTERS

5 1 Introduction

As has been discussed in Chapter 2 above, children become separated and unaccompanied for various reasons. In an attempt to ensure that these vulnerable children grow up in a family environment, different measures are employed by individuals, communities, governments and non-governmental organisations. These measures include community based care, foster care, and even intercountry adoptions. When a natural disaster occurs, the State assumes responsibility for children who are found to be separated and unaccompanied.⁶³⁵ The duty on the State to protect commences with attempts towards family tracing and reunification,

⁶³⁴ van der Linde (2001) 27.

⁶³⁵ In terms of UNCRC art 20 all children *temporarily* or *permanently* deprived of their family environment are entitled to special protection and assistance by the State.

followed by temporary care placement, and where necessary, permanent care placements.⁶³⁶ This chapter begins with explanation of the concept "protection" within the context of the study, with analysis of the different levels and stages of protection available to separated and unaccompanied children in situations of natural disasters. Intercountry adoption is the focus in this regard. Discussions commence with a brief historical background of the sub-topic and proceed with highlights of current practices around the world are compared with good practice⁶³⁷ standards in terms of international, regional and national legal documents. Brief discussions on the best interests principle and the concept of adoptability which are central to the practice of intercountry adoption are also presented under this chapter. While addressing current practices in intercountry adoptions, the placement of moratoriums on intercountry adoptions, following natural disasters, and the effect thereof, on different stages of the adoption process is the focal point. In conclusion, this chapter highlights the relationship between intercountry adoption and the right of the child to a family and stressed the need to *balance* the importance of the need to protect the child with the need to provide the child with a permanent "family".

"To portray [intercountry] adoption as THE answer to the problem of [child] abandonment" or separation is an extreme which is detrimental for children.⁶³⁸ It is therefore pertinent to clarify that this chapter does not attempt to or aim at advocating for intercountry adoption as ultimate alternative care in the protection of the right of the child to a family. The principle of subsidiarity as applicable in intercountry adoptions laws is acknowledged herein.⁶³⁹ Intercountry adoption is one

⁶³⁶ ISS / IRC (2005) "For an adequate protection of children separated from their family during natural disasters" *Monthly Review No 1/2005 Special Edition – tsunami in South-East Asia* 1. Also see UNCRC art 20.

⁶³⁷ Borrowing the wording in The Hague Conference on Private International Law (2008) *The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice* Guide No 1 under the Hague Convention of 29 May 1993 on Protection of Children in Respect of Intercountry Adoption 17 as retrieved from http://www.hcch.net/upload/adoguide_e.pdf on June 2, 2011, the discussions in this chapter are termed good practices rather than best practices because "some practices are necessarily different (due to differences in resources, skills, strengths and challenges) in different States".

⁶³⁸ ISS/IRC (2004) "Editorial: Family life, deinstitutionalisation and adoption" *ISS/IRC News Bulletin No 66* 1.

⁶³⁹ The Hague Convention, 1993 refers to the principle of subsidiarity (art 4 (b)). According to the UNCRC Committee Concluding Observations: Brazil (November 2004) para 47, the subsidiarity principle when applied in intercountry adoptions limits the practice to a measure of last resort. In other words, after all other alternative care options have been considered and proved futile in respect of a particular child, intercountry adoption may be considered. There are arguments

of the ways in which a child may be brought to attain growth and development in a family environment as, in terms of international (and certain national) law. This method of alternative care is not tantamount to the right of the child to a family. Also, the right of the child to a family is not advocated for in the previous chapter in order to nullify the principle of subsidiarity to which intercountry adoption is subject.

5 2 "Protection" in natural disasters

The concept "protection" is broad. The primary responsibility for the protection, upbringing and development of the child rests with the family.⁶⁴⁰ Article 9 of the UNCRC provides that State parties must ensure that no child is separated from his or her parents against his or her will except such separation is in the best interests of the child. Where arbitrary separation occurs, the child has a right to protection from the State. In cases of emergency, the international community, via Non-governmental organisations (NGOs) and other International Organisations (IOs), often come to the succour of victims. However, the protection of children has been noted to be of secondary concern to these organisations.⁶⁴¹

In its 2005 Spring Policy Brief SC notes that

"... child protection encompasses more than stopping attacks or moving children out of harm's way. It includes measures that promote children's physical and emotional well-being, provide them equal access to basic services, and safeguard their legal and human rights."⁶⁴² "The best protection measures *prevent* violence

around the position which institutional care should assume in consideration of alternative care options – whether institutional care should be preferred over intercountry adoptions or whether intercountry adoptions should be considered immediately after domestic family solutions, before institutional care. For a discussion on this see Mezmur (2009 a) *Intercountry adoption in an African context: A legal perspective* 301 – 305 unpublished LL.D. thesis, University of Western Cape. As highlighted by Mezmur, the principle of subsidiarity is important because 1) it allows children remain in their family of origin; 2) it facilitates promotion of the cultural identity of the child; and 3) offers the child's country of origin an opportunity to respond to the needs of the child before the international responses are considered. For debates and on interpretation of the principle, see Mezmur (2009 a) 311 – 340.

⁶⁴⁰ Resolution of the UN General Assembly on the report of the Ad Hoc Committee of the whole (A/S-27/19/Rev 1 and Corr 1 and 2), 10 May 2002 – A World fit for children.

⁶⁴¹ Save the Children (2005) 1.

⁶⁴² Save the Children (2005) 3.

and abuse from happening in the first place. They strengthen the ability of individuals and communities to protect themselves and their children from future threats, laying the ground for lasting security and stability".⁶⁴³

Protection during disasters consists of long-term⁶⁴⁴ and short-term measures. For protection to be effective, time and money must be put into preparedness for disasters. Preparedness must be supported by legislation and concerned with, amongst others, operational planning, stockpiling of supplies and emergency funding arrangements. Certain factors (including, the magnitude of the event, the political ideology and the resources available for disaster relief and assistance) determine a nation's ability to deal with a disaster and its effects on the citizens of that nation.⁶⁴⁵ Dealing with disaster within a country primarily involves a concerted effort of national and local authorities, and local communities. During and after hurricane Katrina,⁶⁴⁶ for instance, child survivors were cared for by the Paediatric Injury Response Team ("PIRT") and registration of separated children was carried out by the National Centre for Missing and Exploited Children (NCMEC).⁶⁴⁷ All the thirty-six children who were listed as separated children with NCMEC were subsequently reunited with their families and guardians. Assistance from neighbouring States and international bodies is also needed as secondary support.

There should be an aim of plan so that the purpose and limitations of the intended protective measures will be understood and appreciated. The plan must be realistic and adaptable taking into cognisance the fact that authorities and the emergency services may also be affected by the event. Mabry suggests that a plan for protecting children and their families in natural disasters should include: registering children before and after a disaster; providing aid for biological parents to care for their children; locating relatives to care for unaccompanied children; finding suitable accommodations; planning ahead to care for children after a disaster; the

⁶⁴³ Save the Children (2005) 3.

⁶⁴⁴ *Inter-agency guiding principles* 19.

⁶⁴⁵ Whittow (1980) 27.

⁶⁴⁶ Hurricane Katrina made landfall on the 29th of August 2005 in the United States Coastal Gulf Coastal regions of Louisiana and Mississippi.

⁶⁴⁷ Brandenburg, Watkins, Brandenburg, Schieche (2007) *Operation Child-ID: reunifying children with their legal guardians after Hurricane Katrina* 279.

intercountry adoption alternative; post-adoption reporting; preparing prospective parents to parent traumatised children.⁶⁴⁸ At the apex of the structure of any disaster plan should be the legislative authority and related documents for effective operation and execution.⁶⁴⁹ Most authors on the topic of natural disaster management hold that legislation for disaster preparedness should include directions about: (1) the monitoring of natural phenomena, the issue of warnings and the actions that should then be taken; (2) the conduct of emergency measures; (3) the operation of measures relating to protection, rescue and relief (4) measures for rehabilitation (5) financial measures (6) the definition of authorities and responsibilities and the establishment of appropriate agencies.⁶⁵⁰ National legislation and policies on disaster management are necessary from any effective protection process in events of natural disaster.

According to the International Committee of the Red Cross ("ICRC"), International Rescue Committee ("IRC"), United Nations High Commissioner for Refugees ("UNHCR"), United Nations Children's Fund ("UNICEF"), Save the Children UK ("SCUK") and World Vision International ("WVI") the concept of protection "refers to all activities aimed at ensuring full respect for the rights of the individual [...] as set out in the relevant human rights instruments and international humanitarian law".⁶⁵¹ Three complementary types of action exist in this concept - responsive action, remedial action and environmental building action.⁶⁵² In order to effectively protect the right to a family of separated and unaccompanied children during natural disasters, all three actions are relevant in the order listed above. For meaningful study, a brief discussion of the different actions is presented with particular, more detailed, focus on a sub-set of the remedial action – intercountry adoptions – in situations of natural disasters.

⁶⁴⁸ Mabry (2011) 26 – 36.

⁶⁴⁹ Economic and Social Commission for Asia and the Pacific, the World Meteorological Organisation and the League of Red Cross and Red Crescent Societies (1977) *Guidelines for Disaster Prevention and Preparedness in Tropical Cyclone Areas* 7- 17.

⁶⁵⁰ As above.

⁶⁵¹ *Inter-agency guiding principles* 17.

⁶⁵² UNHCR (2004) *Action for the Rights of Children: Critical issues – separated children* 14.

5 2 1 ***A brief overview of the stages of child protection following situations of natural disaster***

As indicated immediately above, and according to the *Interagency guiding principles*, there are three complementary protective actions in disaster situations namely: the *responsive action*, *remedial action* and *environmental building action*. The responsive action is preventative targeting the immediate effects of abuse. Measures aimed at preserving family unity, evacuation, legal identity and birth registration may be classified as responsive. The remedial action is rehabilitative, restorative and reparative. It may include measures such as assessment of the situation of the child, identification, registration and documentation, family tracing and verification, family reunification, follow up of placement and reunification. Issues which fall under alternative care arrangements – community-based care, fostering, institutional care, guardianship, child-headed households and adoptions (intracountry, intercountry or international⁶⁵³) – may also be grouped under remedial action. The environmental building action targets the environment and specifically aims at creating and/or consolidating an environment (political, institutional, legal, social, cultural and economic) conducive for the full respect of the rights of the individual.⁶⁵⁴ The responsive and remedial actions are discussed hereunder.

5 2 1 1 *The responsive action*

The first responsive step necessary for the protection of children aims at preservation of family unity. It involves activities which ensure prevention of

⁶⁵³ A distinction has been made between the three concepts intra-country adoption, intercountry adoption and international adoption. Intra-country adoption is akin to domestic adoption and entails adoption of a child by parents with the same nationality and country of residence as the adopted child. Intercountry adoption is the adoption of a child by parents of 'any' nationality, and there has to be a change in the country of residence of the child sequel to the adoption (as stated in Louw (2006) "Intercountry adoption in South Africa: Have the fears become fact?" *De Jure* 530, 'the child is separated from his or her country of origin'). International adoption consists in the adoption of a child by parent(s) with nationality different from that of the child irrespective of the country of residence of the child or the adoptive parents. So, the main differences lie in the fact with intercountry the child is compelled to change his or her country of residence while with international adoption such change is not taken into account. Also with intra-country adoption, the adoptive and adopted parties have the same nationality while with international and intercountry adoptions nationalities differ. For more on this see Nicholson (2009) 373; Louw (2006) 505.

⁶⁵⁴ *Inter-agency guiding principles* 18.

separation during evacuations.⁶⁵⁵ For separated children who *may* be with relatives, efforts should be geared towards preserving their unity with those relatives. Such efforts may include provision of relief supplies for the relatives, as a family, so that they can provide for the children. Also, formal adoption of the children by those relatives who are willing to adopt may be encouraged. Once evacuations have been completed, children who have been identified as separated or unaccompanied must be assessed, at the earliest possible time, "to establish the extent of family separation".⁶⁵⁶ Assessment is the first step in tracing and family reunification (family tracing and reunification is made up of four fundamental aspects namely: "identification, registration and documentation, tracing and verification, and reunification and follow-up").⁶⁵⁷ Assessment must be conducted by a team that is informed about the issues relating to separated children within the region where the assessment is taking place.⁶⁵⁸ Also, assessment must be done with active participation of members of the community, and by two or more specialised agencies.⁶⁵⁹ According to SC, community mechanisms such as "word of mouth" are most effective for family reunification⁶⁶⁰ hence, it is important to involve community members in this stage of the protection process.

5 2 1 2 *The remedial action – tracing and family reunification*

Tracing and family reunification begin the remedial action stage. The key processes in tracing and family reunification are identification, registration and documentation. Through identification, the number of children who have been separated from their families and caregivers is established. Registration allows for collation of key personal data of the children to facilitate tracing and protection – full names, date and place of birth, mother's name, father's name, former address and present location.⁶⁶¹ Documentation is the process where all other relevant information about each child, including special need of each child, is recorded. Where children cannot

⁶⁵⁵ Where separation of children from their parents or legal or customary caregiver is in the best interests of the child, such separation should be temporary. For more on this see *Inter-agency guiding principles 24*.

⁶⁵⁶ *Inter-agency guiding principles 30*.

⁶⁵⁷ SC (2004) 28.

⁶⁵⁸ *Inter-agency guiding principles 31*.

⁶⁵⁹ As above 31 - 32.

⁶⁶⁰ SC (2004) 15.

⁶⁶¹ *Inter-agency guiding principles 33*.

provide relevant information adequately, photographs, and even materials like clothing items in possession of the children, may be useful in the tracing process.⁶⁶² Sequel to the different attempts by groups of individuals to escort or kidnap children across the Haiti borders after the Haiti 2010 natural disaster has been argued that in emergency situation, there is a duty on receiving countries to ensure that countries of origin follow their own national intercountry adoption laws especially with regard to the verification of children's identity and adoption dossier.⁶⁶³

Children who are found alone after natural disasters should be identified as soon as possible and attempts made to trace *any* of their family members. It is recommended that such children should be kept, as far as possible, in their living environment or within their communities with food, medical care, education, and psychological and emotional support provided to them and the persons with whom they are temporarily placed.⁶⁶⁴ Since protection of children is the ultimate goal, emergency relief efforts should be prioritised during the emergency period; children should have enough time to recover from the trauma in familiar environment.⁶⁶⁵ To avoid a lengthy period of separation, it is suggested that relevant State authorities, working with agencies experienced in family and community reunification, consider procedures for registration of children and family identification as priority.⁶⁶⁶ In fact, one of the lessons learnt from the Haiti 2010 natural disaster is that *everything* possible must be done to keep children with their families.⁶⁶⁷

Family tracing involves search for "family members or primary legal or customary caregivers" of children who have been identified and those children whose parents are looking for them.⁶⁶⁸ Generally, a two-year period is proposed as reasonable time for family tracing.⁶⁶⁹ (However, the recommended length of emergency phase post

⁶⁶² As above 34.

⁶⁶³ Dambach & Baglietto (2010) *Haiti: "Expanding" intercountry adoptions in the aftermath of a natural disaster... preventing future harm* 25. Retrieved from www.iss-ssi.org on June 2, 2011.

⁶⁶⁴ ISS/IRC (2005) *Monthly Review No 1/2005* 1.

⁶⁶⁵ Dambach & Baglietto (2010) 6.

⁶⁶⁶ ISS/IRC (2005) *Monthly Review No 1/2005* 1-2.

⁶⁶⁷ ISS/IRC (2010) "Emergency situations and adoptions: when will things get back to normal?" *Monthly Review No 8/2010 Special Edition on Adoptions and Emergency Situations*.

⁶⁶⁸ *Inter-agency guiding principles* 35.

⁶⁶⁹ UNCRC *General Comment No 6 (2005)* para 91.

natural disasters is one year.⁶⁷⁰) It is particularly important that, with unaccompanied children, a family relative or member is identified to care for the child because these children are without any adult caring for them. For separated children who *may* be with relatives, attempts should be made, where possible, to locate and reunite the children with their parent(s). It is in the best interest of the child to be raised in a family environment – necessary for the *full and harmonious* development of the child's personality.⁶⁷¹ Therefore it is important that governments exploit measures aimed at strengthening family so that children remain within their families. The definition of "family" is important in determining whether a child is without any person with whom he or she has a family relationship. Taking into account Ogletree's hypothetical discussed in paragraph 4 2 above, it is believed that clarification of which persons constitute family to the child, and which do not, will hasten the reunification process. A speedier reunification process will prevent exacerbation of the trauma which the child may suffer as a consequence of the disastrous experience coupled with separation.

Immediately after the tracing process is the verification and family reunification process which basically involves validation of relationships, confirmation of willingness of the child and the family member to be reunited, and the process of bringing the child and the family together.⁶⁷² For children who are successfully reunified with their families, follow-up of reunification is essential to ensure that the child is well integrated in the family. For those children who all possible attempts toward family tracing and reunification have been proved futile, it must be confirmed that the child is separated or unaccompanied.⁶⁷³

⁶⁷⁰ ISS/IRC (2005) *Monthly Review No 1/2005* 2.

⁶⁷¹ UNCRC preamble para 6.

⁶⁷² *Inter-agency guiding principles* 37.

⁶⁷³ As stated in the UNHCR (2006) *Guidelines on formal determination of the best interest of the child* 35 as retrieved from <http://www.unhcr.org/refworld/docid/48480c342.html> on June 1, 2011, family reunification should be regarded as being in the best interest of the child unless it will entail "a risk of irreparable harm or if the child or the parents are opposed to it".

5 2 1 3 *The remedial action – care arrangements and durable arrangements*

Under the remedial action stage, there are care arrangements (including emergency care and assistance, community-based care, foster care,⁶⁷⁴ institutional care, guardianship) and durable arrangements (alternative long-term placement, and domestic and intercountry adoptions).⁶⁷⁵ It is widely accepted that all reasonable measures should be taken towards family tracing and reunification before the child is given up for intercountry adoption.⁶⁷⁶ ISS suggests that after the recommended one-year emergency period has lapsed, steps should be taken to ensure final family placement of children who are still without families at the time.⁶⁷⁷ With regard to permanent placements, intercountry adoptions may be considered after domestic options have been exhausted.

5 3 **Brief historical background of intercountry adoption**⁶⁷⁸

Adoption laws originate as far back as four millennia ago. Some sources of ancient adoption law include the Babylonian Code of Hammurabi,⁶⁷⁹ the Greek laws of Solon⁶⁸⁰ and the Law Code of Gortyn, and the Roman laws.⁶⁸¹ In those times formal

⁶⁷⁴ Sub-categories of foster care include traditional or informal fostering, spontaneous fostering and arranged fostering. *Inter-agency guiding principles* 42.

⁶⁷⁵ As above 55.

⁶⁷⁶ The Hague Conference on Private International Law supports this view. See *Recommendations Concerning the Application to Refugee Children and Other Internally Displaced Children of the Hague Convention* (1994) para 2. Retrieved from <http://www.unhcr.org/refworld/publisher,HAGUEPRIVATE,,,3ae6b37420,0.html> on May 11, 2010.

⁶⁷⁷ ISS/IRC (2005) *Monthly Review No 1/2005* 1.

⁶⁷⁸ A distinction has been made between the three concepts intra-country adoption, intercountry adoption and international adoption. Intra-country adoption is akin to domestic adoption and entails adoption of a child by parents with the same nationality and country of residence as the adopted child. Intercountry adoption is where the child is adopted by parents of 'any' nationality, and there has to be a change in the country of residence of the child sequel to the adoption (in the words of Louw (2006) 530, "the child is separated from his or her country of origin"). International adoption consists in the adoption of a child by parent(s) with nationality different from that of the child irrespective of the country of residence of the child or the adoptive parents. So, the main differences lie in the fact with intercountry adoption the child is compelled to change his or her country of residence while in international adoption such change is not taken into account. Also with intra-country adoption, the adoptive and adopted parties have the same nationality while with international and intercountry adoptions nationalities differ. For more on this see Nicholson "Intercountry Adoption in Africa?" in *Child Law in South Africa* (2009) 373; Louw (2006) 505. According to the Free Dictionary accessible on <http://encyclopedia.thefreedictionary.com+adoption>, international adoption is the akin to intercountry adoption.

⁶⁷⁹ According to this code, amongst others, only male children could be adopted.

⁶⁸⁰ These laws had three distinct forms of adoption namely: *inter vivos* adoption (adoption between living persons), testamentary adoption in the will of a deceased person, and posthumous

adoption was undertaken for reasons such as support for older adoptive parents,⁶⁸² ancestral worship,⁶⁸³ to avoid the extinction of a family,⁶⁸⁴ and as a means of power succession of emperors⁶⁸⁵ (dynastic adoption)⁶⁸⁶ By the early Middle Ages, but for the preservation of adoption rules in the Byzantine Empire,⁶⁸⁷ formal adoption was no longer in use in many parts of the Roman Empire (and remained unknown to the English legal system). It was in the late Middle Ages when jurists in Western Europe began to rediscover ancient Roman law that certain adoption rules as contained in Justinian's *Institutes*⁶⁸⁸ were revived.⁶⁸⁹ At these time adoptions were mainly for the interests of the children - philanthropic adoptions.⁶⁹⁰ As formal adoptions faded from legal frameworks, orphanages and institutions began to play a major role in the care of children without parental care in the Modern Era.⁶⁹¹ In this era the French Civil Code of 1804 - the Napoleonic Code - which was based largely on Roman law was most influential. This code permitted only persons who were fifty years or older and had neither children nor legitimate descendants to adopt. Also, only adults could be parties in adoption and the age difference between the adoptive parent and the

adoption by a relative in the name of the deceased family. According to these laws persons who already had legitimate sons were not permitted to adopt. For more on this see UN department of Economic and Social Affairs/Population Division (2009) 6-7.

⁶⁸¹ Roman law recognised different forms of adoption under different emperors. There is the *adoptio* and *arrogatio* cited in the *Institutes* of Gaius. With *adoptio*, the adopted person was emancipated from the authority of his natural father and given to his adoptive father. *Arrogatio* involved the adoption of persons who were not under the authority of someone else. Under emperor Justinian, *adoptio plena* and *adoptio minus plena* were formed. With the former, full adoption was limited to natural fathers and the latter involved the adoption by persons who were not blood relatives. Women were generally not allowed to adopt unless they had express authority of the emperor. Only childless persons were allowed to adopt. For more on this see UN department of Economic and Social Affairs/Population Division (2009) 7. Also see Ferreira (2007) "The origin of adoption in South Africa" 13-2 *Fundamina* 2.

⁶⁸² *Inter vivos* adoption was undertaken for this purpose.

⁶⁸³ This was the purpose for testamentary adoption. Also Roman laws aimed at achieving this end.

⁶⁸⁴ In terms of Roman law, adoption was undertaken to avoid extinction of a family. For more on this see UN department of Economic and Social Affairs/Population Division (2009) 6-7.

⁶⁸⁵ Roman laws aimed at this purpose.

⁶⁸⁶ Ferreira (2007) 2. Ferreira provides a historical overview of Roman Law adoptions.

⁶⁸⁷ Byzantine Empire existed in the Middle Ages and was also known as the Roman empire of Romaina. See http://en.wikipedia.org/wiki/Byzantine_Empire for a brief history of the empire.

⁶⁸⁸ UN Department of Economic and Social Affairs/Population Division (2009) 9.

⁶⁸⁹ As above.

⁶⁹⁰ Ferreira (2007) 2.

⁶⁹¹ UN Department of Economic and Social Affairs/Population Division (2009) 10.

adopted person had to be fifteen years or more.⁶⁹² To this end, the Napoleonic Code influenced some of the adoption laws currently in existence.⁶⁹³

By mid-nineteenth century many children were placed with families as an alternative to institutional care. This change was necessitated by the social and economic constraints on institutional care at the time. In the early 1850s, the first modern adoption laws were passed. It is believed that these laws were in response to the need for society to pay more attention to the promotion of child welfare.⁶⁹⁴ The first adoption law widely recognised is the Massachusetts Adoption of Children Act of 1851.⁶⁹⁵ Still in the nineteenth century, after the Massachusetts Adoption of Children Act, the New Zealand Adoption of Children Act of 1881 and the Western Australia Adoption of Children Act of 1896 were enacted. By the 1920s, as a consequence of the First World War and the influenza epidemic of 1918,⁶⁹⁶ many children were orphaned and abandoned. This resulted in the enactment of adoption laws in England and Wales,⁶⁹⁷ the Soviet Union⁶⁹⁸ and France.⁶⁹⁹ Three years before enactment of the Adoption of Children Act, 1926 in England and Wales, the Adoption of Children Act 25 of 1923 was enacted in South Africa.⁷⁰⁰ Sequel to the Second World War, between 1940 and 1980, more countries enacted their adoption laws and those who already had adoption laws developed theirs.⁷⁰¹ At this time, most children were sent to new homes in the United States from Germany, Greece and Japan. This initiated the popularity of intercountry adoptions which popularity was later increased after the Korean and Viet Nam wars. To date, there have been calls for

⁶⁹² As above 11.

⁶⁹³ As above.

⁶⁹⁴ As above 12.

⁶⁹⁵ As above 13.

⁶⁹⁶ "The flu pandemic was implicated in the outbreak of *encephalitis lethargica* in the 1920s. The pandemic lasted from March 1918 to June 1920, spreading even to the Arctic and remote Pacific islands". Between 50 and 100 million (about 3% of the world's population - 1.6 billion at the time), died of the disease, making it the deadliest natural disaster in human history. An estimated 500 million, or 1/3 were infected. http://en.wikipedia.org/wiki/Influenza_of_1918 as accessed on May 22, 2010.

⁶⁹⁷ In these parts, for the first time, the Adoption of Children Act of 1926 was enacted.

⁶⁹⁸ The Family Code of 1926 was enacted reinstating adoption therein.

⁶⁹⁹ In France, a legal decree was made to provide for adoptive legitimation. For more on this see UN department of Economic and Social Affairs/Population Division (2009) 9.

⁷⁰⁰ Ferreira (2007) 4.

⁷⁰¹ Countries such as Tanzania (1942), Ireland (1952) and India (1956) enacted their first adoption laws. Amendments were made to the existing laws in England and Wales, New Zealand, Romania, the Soviet Union, France, Poland and Germany. For details see UN department of Economic and Social Affairs/Population Division (2009) 15-16.

the encouragement, overhaul and modernisation of adoptions of children by key world leaders.⁷⁰² It is suggested that even countries which are not open to intercountry adoptions should begin to consider intercountry adoptions as a means of protecting children without families. This form of alternative care has the advantage of creating an opportunity for a child to be adopted by their distant family members who may reside in a country other than the child's country of origin.

5 4 Intercountry adoptions in situations of natural disasters: good practices versus current practices

"Adoption is *essentially* a measure to protect the child deprived of a family"⁷⁰³ by providing the child with a permanent family.⁷⁰⁴ There is no obligation on States to practise intercountry adoptions. The UNCRC, being the foremost international instrument dealing with children's rights,⁷⁰⁵ states that where a child has been deprived (temporarily or permanently) of his or her family environment, that child is entitled to special protection by the State,⁷⁰⁶ in the form of alternative care which *could* include adoption.⁷⁰⁷ Article 21(b) of the document contains permissive provisions on intercountry adoptions. It binds only those State Parties that recognise "and/or" permit adoption.⁷⁰⁸ These States *may* consider intercountry adoption if the child in need of care cannot be *suitably* placed in the child's country of origin.⁷⁰⁹ However, there must be safeguards and standards for intercountry adoptions equivalent to those in national adoptions. Also, appropriate measures must be in place to ensure that intercountry adoptions do not "result in improper financial gain" for those involved in the process.⁷¹⁰

Although not ratified by as many countries as the UNCRC, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("the

⁷⁰² For instance, former United States Presidents B Clinton and G Bush and the former British Prime Minister T Blair. For more on this see UN Department of Economic and Social Affairs/Population Division (2009) 17.

⁷⁰³ ISS/IRC (2004) "Editorial: adoption and politics" *ISS/IRC News Bulletin No 64*.

⁷⁰⁴ The Hague Convention, 1993 preamble para 3.

⁷⁰⁵ The document has been ratified by all countries but the USA and Somalia.

⁷⁰⁶ UNCRC art 20 (1).

⁷⁰⁷ UNCRC art 20 (2 & 3).

⁷⁰⁸ UNCRC art 21.

⁷⁰⁹ UNCRC art 21 (b); ACRWC art 24 (b). This is in line with the principle of subsidiarity.

⁷¹⁰ UNCRC art 21 (c) & (d); ACRWC art 24 (c) & (d).

Hague Convention, 1993") also places a duty on State parties to take appropriate measures to ensure that children remain in the care of their family of origin.⁷¹¹ It provides for the establishment, regulation and authorisation of Central Authorities and Accredited Bodies (and co-operation between these bodies); procedural requirements in intercountry adoptions; and the effect and recognition of intercountry adoptions. The Convention aims at regulating intercountry adoptions in the best interests of the child and to prevent the abduction, sale of or traffic in children.⁷¹² At regional level, the ACRWC binds State Parties that recognise intercountry adoption and places an obligation on them to establish machinery for monitoring the well-being of the adopted child.⁷¹³ None of the aforementioned documents deals specifically with children in situations of natural disasters. However, the *Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice*, recommends that, in situations of disaster, family reunification must take priority and "premature and unregulated" attempts at adoption of children abroad should be avoided and resisted.⁷¹⁴ In terms of the *UNCRC Committee on the Rights of the Child: General Comments No 6 on the treatment of unaccompanied and separated children outside their country of origin, 2005* ("General Comments No 6") "unaccompanied and separated children must not be adopted in haste in the height of an emergency".⁷¹⁵ The ISS is of the view that intercountry adoption is not a step to be *considered* by States where there have been natural disasters but may be contemplated after sufficient waiting period.⁷¹⁶ UNICEF suggests that intercountry

⁷¹¹ The Hague Convention, 1993 preamble para 2. As noted by Dambach & Baglietto (2010), as at April 21, 2010, all the countries that had expedited adoptions at the aftermath of earthquakes, to the exclusion of Haiti, had ratified the Hague Convention, 1993.

⁷¹² The Hague Conference on Private International Law (2008) *The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice* Guide No 1 under the Hague Convention of 29 May 1993 on Protection of Children in Respect of Intercountry Adoption 28 Bristol: Family Law. Retrieved from http://www.hcch.net/upload/adoguide_e.pdf on June 2, 2011.

⁷¹³ ACRWC art 24 particularly (f).

⁷¹⁴ The Hague Conference on Private International Law (2008).

⁷¹⁵ *General Comments (2005) No 6* para 91.

⁷¹⁶ ISS /IRC (1999/2004) *The rights of the child in internal and intercountry adoption: Ethics and principles, guidelines for practice* 7. Retrieved from www.iss-ssi.org/Resource_Centre/Resource_Centre_EN/Documents_of_interest/documents_of_interest or <http://www.iss-ssi.org/2009/index.php?id=38> on June 1, 2011).

adoption should only be envisaged after family tracing efforts have proved futile and no domestic care solutions are available for the child.⁷¹⁷

The Nigerian CRA creates a criminal offence, punishable by fifteen years imprisonment, where a person "permits or causes or procures the possession of a child to be given to any person" outside Nigeria with the intention of that child being fostered by that person.⁷¹⁸ This legislation restricts adoptions to only Nigerian citizens.⁷¹⁹ Before the ground-breaking judgement in *Minister of Welfare and Population Development v Fitzpatrick*,⁷²⁰ intercountry adoption was also prohibited in South Africa. In this judgement, the Constitutional Court found section 18 (4)(f) of the Child Care Act ("the CCA"),⁷²¹ which prohibited adoption, by a non-South African citizen,⁷²² of a child born to a South African citizen, to be inconsistent with the provisions of section 28 (2) of the 1996 Constitution, thus invalid.⁷²³ The court held that section 18 (4)(f) of the CCA did not give paramountcy to the best interests of the child principle. Following this judgement, and with South Africa's accession to the Hague Convention, 1993 (in 2003) the CA now contains provisions aimed at giving effect to the provisions in the Hague Convention.⁷²⁴ Prior to its accession of the Hague Convention in 2007, Kenya enacted the KCA which permits adoption of children of Kenyan citizenship by non-Kenyan citizens.⁷²⁵ With regard to situations of natural disasters, none of these national legislation specifically provide for intercountry adoptions. Thus, answers to questions on intercountry adoptions following natural disasters lie within the province of international legal provisions, as discussed immediately above. It is submitted that the best test is whether the practices in different States help to achieve the objects of the Hague Convention, 1993 and the UNCRC.

⁷¹⁷ UNICEF's *Position paper on intercountry adoption*. Retrieved from http://www.unicef.org/media/media_41918.html on June 1, 2011.

⁷¹⁸ CRA s 144 (2)(b).

⁷¹⁹ CRA s 131 (1)(d). In other words, the CRA proscribes intercountry adoption.

⁷²⁰ *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC).

⁷²¹ Child Care Act 74 of 1983.

⁷²² Except where the non-South African citizen is a step-parent of the child and is jointly applying with the biological parent (South African citizen) of the child.

⁷²³ *Fitzpatrick* 2000 3 SA 422 (CC) at 429D-E.

⁷²⁴ CA s 254-273.

⁷²⁵ KCA s 162.

There have been successes and major challenges with intercountry adoptions in situations of natural disasters. Some of the challenges recorded link to child trafficking.⁷²⁶ The irregularities and uncertainties that ensue in intercountry adoptions have left this form of alternative care heavily criticised as modern day imperialism,⁷²⁷ an embarrassing acknowledgment to the failures of Africa,⁷²⁸ a provision of help for a selected few and ignoring the plight of the greater number African children⁷²⁹ and a cover-up for child trafficking and baby selling.⁷³⁰ The challenges facing intercountry adoptions have resulted in some countries placing restrictions on intercountry adoptions. In Romania, for instance, intercountry adoptions are restricted to only relatives of the adoptable child.⁷³¹ In his LL.D. thesis, Mezmur⁷³² gives a comprehensive account of challenges that have faced the practice. Only a few of these accounts are recorded hereunder.

One of the cases where intercountry adoptions practices have been challenged is the Zoe's Ark case in Chad where, following the violent attacks in the Darfur region of Sudan, nine French citizens were arrested in eastern Chad while attempting attempt to illegally transport one hundred and three children to France for adoption.⁷³³ Also, the "stealing", "sale" and "adoption" of two Ethiopian children involving intermediaries, orphanage workers, government administrative personnel and an Austrian family;⁷³⁴ and the disappearance of babies from Pumwani Hospital in Nairobi, Kenya suspected to be earmarked for trafficking through a Kenyan church

⁷²⁶ See Mezmur (2009 a) 392 - 399. Also see ISS/IRC (2010) "Bringing moratoriums in line with international standards" *Monthly Review No 4/2010*.

⁷²⁷ Martin "The good, the bad, and the ugly? A new way of looking at intercountry adoption debate" (2007) 13 *U C Davis Journal of International Law and Policy* 174.

⁷²⁸ Wallace "Intercountry 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 *3 Arizona Journal of International and Comparative Law* 690.

⁷²⁹ Root "Angelina and Madonna: Why all the fuss? An exploration of the rights of the child and intercountry adoption within African nations" (2007) 8 *Chicago Journal of International Law* 339.

⁷³⁰ Van Bueren (1998) *The international law on the rights of the child* 96.

⁷³¹ UN Department of Economic and Social Affairs/Population Division (2009) 18.

⁷³² Mezmur (2009 a) 35 – 37; 387 – 442. Also see Mezmur "From Angelina (to Madonna) to Zoe's Ark: What are the 'A-Z' lessons for intercountry adoptions in Africa?" (2009 b) *International Journal of Law, Policy and the Family* 23 145-173 for a detailed account of some high profile intercountry adoption cases – Madonna, Angelina Jolie and the Zoe's Ark cases.

⁷³³ For more on this, see Mezmur (2009 a) 393.

⁷³⁴ As above 401.

evangelist based in the United Kingdom (UK).⁷³⁵ One month after the Haiti 2010 natural disaster, intercountry adoption increased alarmingly.⁷³⁶ Canada and the United States recorded 203 and 1,200 adoptions respectively from Haiti compared to 89 and 380 adoptions respectively in 2009.⁷³⁷ A group of U.S. missionaries were reported to have tried to take 33 children out of Haiti illegally, claiming they were orphans, while each of these children had at least one living parent.⁷³⁸ In order to protect children within their borders, some countries suspend intercountry adoptions during emergencies. The following discussion focuses on moratoriums on intercountry adoptions following natural disasters.

5 4 1 *Implications of placing moratoriums on intercountry adoption, following a natural disaster*

It is important to establish at the outset that placement of a moratorium on intercountry adoptions is not a violation of any of the treaties dealing with children generally and intercountry adoptions specifically.⁷³⁹ This is because there is no obligation on States to undertake intercountry adoption.⁷⁴⁰ In fact, as in the case of Guatemala 2001, where the UNCRC Committee recommended suspension of intercountry adoptions for legislative overhaul, moratoriums are recommended where necessary.⁷⁴¹ The recent trend in most countries has been placement of moratoriums on intercountry adoptions, after the occurrence of a natural disaster, with the aim of preventing exploitation of vulnerable children. In December 2004 after the tsunami that ravaged countries across South-east Asia, many countries affected by the disaster stopped all intercountry adoptions to protect their children.⁷⁴² Also, after the Zoe's Ark case in Chad mentioned immediately above, moratorium was placed on intercountry adoptions. This had a ripple effect as other African countries – Congo (Brazzaville), Zambia, Togo, Liberia and Romania – also suspended

⁷³⁵ Mezmur (2009 a) 405; Mezmur (2010) "The sins of the 'Saviour': Child trafficking in the context of intercountry adoption in Africa *Hague Conference on International Private Law HCCH Information Document 2 28*.

⁷³⁶ Dambach & Baglietto (2010) 22.

⁷³⁷ As above.

⁷³⁸ <http://www.thegrio.com/news/113-haitian-children-join-adoptive-french-families.php>.

⁷³⁹ Mezmur (2009 a) 442. Also see ISS/IRC (2010) *Monthly Review No 4/2010*.

⁷⁴⁰ See paragraph 5 4 above.

⁷⁴¹ Mezmur (2009 a) 443.

⁷⁴² Mezmur (2009 b) 145-173 at 163.

intercountry adoptions in order to address the dysfunctions in their adoption systems.⁷⁴³

Dambach and Baglietto note interesting responses from different countries and international bodies following the Haiti 2010 earthquake⁷⁴⁴ - most international and regional bodies, including the European Union, advocating for intercountry adoptions called for fast tracking of adoptions from Haiti weeks after the earthquake. On the other hand, child protection organisations lobbied for moratorium on intercountry adoptions. The Hague Conference on International Private Law released a press statement shortly after the earthquake requesting for special measures on intercountry adoptions that were already in the pipeline.⁷⁴⁵ At the same time, some countries, including the USA, called for expedition of intercountry adoptions.⁷⁴⁶ The story of adoptive parents, Debbie and Scott, who featured on the Oprah Winfrey show, 2010, offers an example of an adoption expedited following the earthquake. After three years in the adoption process, the couple noted that "we probably still wouldn't have her if the earthquake hadn't [...] hit. But we were able to get her out through a humanitarian aid visa."⁷⁴⁷ This case is an example of an adoption process that had already begun before the earthquake. From Debbi and Scott's experience, it appears correct that such intercountry adoptions should be speedily concluded, provided that social work investigations are complete.

Moratoriums on intercountry adoptions are often initiated by countries of origin for various reasons.⁷⁴⁸ It may be viewed as an expedient measure to prevent unlawful activities that may flow as a result of the disaster. Moratoriums on intercountry adoptions may be blanket or specific (local or region specific, orphanage specific or age-group specific).⁷⁴⁹ It is important however that pipeline cases of intercountry

⁷⁴³ ISS/IRC (2008) "Implications of the increase in the number of intercountry adoptions from a region and growing awareness of the needs: The example of Africa" *Monthly Review No 5/2008* 1.

⁷⁴⁴ Dambach & Baglietto (2010) 20.

⁷⁴⁵ For more on this see para 5 6 below. Also, see Hague Conference on Private Law (2010) Press release "Haiti earthquake and intercountry adoption of children" and Information note to States and Central Authorities: Haiti earthquake and intercountry adoption of children. Retrieved from http://hcch.e-vision.nl/upload/haiti_infonote_e.pdf on August 10, 2010.

⁷⁴⁶ Dambach & Baglietto (2010) 21.

⁷⁴⁷ <http://www.oprah.com/oprahshow/Adopting-from-Haiti/2>

⁷⁴⁸ ISS/IRC (2010) *Monthly Review No 4/2010*.

⁷⁴⁹ Mezmur (2009 a) 443 and ISS/IRC (2010) *Monthly Review No 4/2010*.

adoptions, in other words, intercountry adoptions that were already in process at the time of the natural disaster, *should* not be suspended.⁷⁵⁰ Two groups of pipeline cases may be identified: firstly, those children for whom child-adoptive parent matching has taken place and the relevant parties have agreed; and secondly, children for whom matching has not occurred.⁷⁵¹ There is also another category of children who *may* also be considered as pipeline cases – children who have been declared adoptable, and children for whom adoption orders have been granted by the court.⁷⁵² The effect of blanket moratoriums on these pipeline cases may result in children who would have genuinely benefitted from intercountry adoption being deprived of a family environment, with a tripled effect of emotional distress resulting from the natural disaster, separation from parent(s) or caregiver(s), and a legal limbo.

For the first group of pipeline cases identified above, it is recommended that State governments finalise the adoption process after it must have been determined that the prospective adoptive parents are eligible and that all immigration procedure to facilitate the child's entry into and permanent residence in the State where the adoptive parents reside are in place.⁷⁵³ Also, the sending country and the receiving country must have agreed to finalisation of the adoption process.⁷⁵⁴ For the second group of children, where matching has not occurred, it is advisable that intercountry adoptions be halted. However upon consideration of certain pertinent factors that are not *numerus clauses*, governments may find justifiable reasons to proceed with adoptions in their situation.⁷⁵⁵ Some of these factors include: 1) the age of the child; 2) characteristics of the prospective adoptive parents (for instance, family related adoptions); 3) the period of time for which the child has been on the waiting list for adoption; 4) the likely period of time for which the child will wait for permanent family

⁷⁵⁰ Hague Conference on Private Law (2010) Press release "Haiti earthquake and intercountry adoption of children" and Information note to States and Central Authorities: Haiti earthquake and intercountry adoption of children.

⁷⁵¹ ISS/IRC (2010) *Monthly Review No 4/2010*.

⁷⁵² ISS/IRC (2010) "Earthquake in Haiti: adoption not a priority" *Monthly Review No 1/2010*.

⁷⁵³ ISS/IRC (2010) *Monthly Review No 4/2010*.

⁷⁵⁴ As above.

⁷⁵⁵ As above.

placement; 5) the psycho-social needs of child; 4) the effect of the natural disaster and separation on the child; and 6) other special needs of the child.⁷⁵⁶

Although it *may be* acceptable that moratoriums on intercountry adoption of separated and unaccompanied children in situations of natural disasters protects these children from unlawful adoption-related activities that may easily be carried out in these situations, blanket moratoriums on intercountry adoptions are believed not to be ideal.⁷⁵⁷ Such orders tend to have the effect of violating children's rights to a family. It is therefore important to consider the effect blanket moratoriums may have on intercountry adoption applications that were already in process before the natural disaster occurred and the stage thereof (the so-called transitory or pipeline cases⁷⁵⁸). For instance, the to-be adopted child may have commenced the attachment process with the prospective adoptive parents, halt on the adoption process at this stage may have adverse psychological and emotional effects on the child, and even the prospective parents.

Certain children who may actually be totally alone, and unable to be adopted domestically, may risk being deprived of a family because of a blanket moratorium on intercountry adoptions.⁷⁵⁹ It is suggested that blanket moratoriums should be avoided even for children who may become adoptable after the disaster. Mezmur is of the view that serious consideration should be given to the nature and duration of moratorium taking into account the presence of adoptable children whose right to a family environment is only accessible via intercountry adoption.⁷⁶⁰ It is submitted that following natural disasters, rather than suspending intercountry adoptions altogether, applications should be considered circumspectly on a case by case basis, taking into account the peculiar circumstances of each child with the best interests of each child as the primary consideration. Where it is in the best interest of the child to have the

⁷⁵⁶ As above.

⁷⁵⁷ Mezmur (2009 a) 443 supports this view.

⁷⁵⁸ As termed by Mezmur (2009 a) 444. Read further from page 442- 446 for examples of situations where moratoriums have been placed on intercountry adoptions albeit not following natural disasters.

⁷⁵⁹ Mezmur (2009 a) 443 supports this view. In fact, he states that lengthy moratoriums on have the "to limit" adoptable "children's access to growing up in a family environment".

⁷⁶⁰ Mezmur (2009 a) 446.

child united with the adoptive family, expedition in intercountry adoptions may be appropriate.⁷⁶¹

In most cases of natural disasters, only parts of the country rather than the whole country are structurally affected. For the parts damaged by the disaster, it is often difficult to immediately establish whether children are actually "alone" because documentation *may* be unavailable to establish children's familial status. Yet, these children have a right to a family (the right to family care and a right not to be deprived of a family environment). It is therefore important for States to employ resources from areas that are not directly affected by the disaster with the aim of firstly protecting families and preserving their unity; and secondly, protecting vulnerable children who are without families. States may also explore the possibility of carrying out intercountry adoption procedures with the assistance of provinces or States within their countries where operations have not been affected by the disaster. Besides, with the prescribed Central Authority⁷⁶² a workable centralised information system is encouraged to ensure that, at least, the information of children who were separated and unaccompanied prior to the natural disaster is obtainable and that of children separated as a result of the disaster is assessable.

5 4 2 *The best interests of the child principle*

First recorded in international human rights law under the Declaration of the Rights of the Child, 1959 ("1959 Declaration")⁷⁶³ the concept of the best interests of the child has been resonated in several other international document dealing with the child – the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW); the Hague Convention on the Civil Aspects of International Child Abduction, 1980;⁷⁶⁴ the UNCRC; the ACRWC and the Hague Convention, 1993.

⁷⁶¹ Dambach & Baglietto (2010) 23.

⁷⁶² Prescribed by the Hague Convention 1993, art 6.

⁷⁶³ The 1959 Declaration principle 2.

⁷⁶⁴ Preamble para 1.

The best interests principle is broad and ambiguous. More so, the subtle variety in its wording connotes contradictory notions of its degree of application.⁷⁶⁵ Some instruments provide that the “the interests of the child are of *paramount* importance in matters relating to their custody”,⁷⁶⁶ others state that “the best interest of the child *shall* be a primary consideration” in all actions concerning the child.⁷⁶⁷ Yet some other documents contain the best interest of the child as “*the* primary consideration” in all actions concerning the child;⁷⁶⁸ and “of paramount importance in every matter concerning the child”.⁷⁶⁹ Skelton notes that the difference in the words *a* and *the* as employed in the wording of the principle significantly determines the weight given to the principle.⁷⁷⁰ In his work, Mezmur gives insight to the uncertainties that the different wordings of the principle creates and concludes by stating that

"the absence of a fixed and inflexible definition of what constitutes best interests allows for a case by case consideration, and facilitates a context-dependent application to the individual child".⁷⁷¹

This is in line with the Sachs J's notion in the South African case – *M v The State*⁷⁷² where he stated that

“A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”⁴⁹

⁷⁶⁵ Mezmur (2009 a) 114 - 116 unpublished LL.D thesis University of Western Cape.

⁷⁶⁶ The Hague Convention on the Civil Aspects of International Child Abduction, 1980.

⁷⁶⁷ UNCRC art 3.

⁷⁶⁸ ACRWC art 4 (1).

⁷⁶⁹ SA Constitution, 1996 s 28 (2).

⁷⁷⁰ Skelton “The development of a fledging child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments” in (2009) *9 African Human Rights Law Journal* 486 – 489.

⁷⁷¹ Mezmur (2009 a) 114 - 127.

⁷⁷² *M v The State* [2007] ZACC 18, 26 September 2007 para 24.

Be that as it may, it remains key that legal provisions attain certainty for effective application of the provision. Both the UNCRC and the ACRWC provide that the best interests of the child shall be “the paramount consideration” when adoptions are considered.⁷⁷³ The Hague Convention, 1993 recognises that, with regards to intercountry adoptions, it is in the best interests of the child to grow up in a family environment.⁷⁷⁴ “Intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin”.⁷⁷⁵ The *UNHCR Guidelines on Determining the Best Interests of the Child* aids in simplifying the principle with a list of factors that determine a child’s best interest. These factors include: the views of the child; a safe environment; family and close relationship; and development and identity needs.⁷⁷⁶ The CA also offers *recommendable* workable guidelines on the best-interests.⁷⁷⁷

⁷⁷³ UNCRC art 21; ACRWC art 24..

⁷⁷⁴ The Hague Conference on Private International Law (2008) 28.

⁷⁷⁵ As above.

⁷⁷⁶ UNHCR (2008) *UNHCR Guidelines on determination of the best interest of the child* 97 (retrieved from <http://www.unhcr.org/refworld/docid/48480c342.html> v, 2011),

⁷⁷⁷ CA s 7. “Best interests of child standard — (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

(a) the nature of the personal relationship between—

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards—

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from—

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child—

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child’s—

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

The best interests principle *appears* to favour intercountry adoptions in cases where the child is separated or unaccompanied. The Haiti post-2010 natural disaster situation exemplifies the view that intercountry adoption of children who may be exposed to chaos, poverty, out-break of diseases and starvation in their country of origin seems to be in the best interest of the child.⁷⁷⁸ It is submitted that such reasoning is over-simplistic. As emphasised by the South African Constitutional Court *AD and Another v DW and Others*,⁷⁷⁹ a “contextualised case-by-case enquiry” must be conducted “to find the solution best adjusted to the child”.⁷⁸⁰ In situations of natural disaster, certain conditions⁷⁸¹ should be carefully considered after which children for whom the adoption will be in their best interests should be transferred to their adoptive parents within the generally recommended one year *emergency* period.⁷⁸²

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- (j) any chronic illness from which a child may suffer;
 - (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (l) the need to protect the child from any physical or psychological harm that may be caused by—
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.”

⁷⁷⁸ Dambach & Baglietto (2010) 19 - 24.

⁷⁷⁹ *AD and Another v DW and Others (Centre For Child Law as Amicus Curiae; Department for social development as intervening party)* 2008 (3) SA 183 (CC) para 49.

⁷⁸⁰ As above para 50.

⁷⁸¹ The recommended conditions provided by ISS include 1) that identification of the child and his/her location is secured by the necessary safeguards, particularly through copies of dossiers lodged in the receiving country with measures in place to ensure that personal data is stored properly; 2) that the psycho-social adoptability of the child is re-evaluated taking into account the trauma that the child has suffered as a result of the natural disaster; 3) establishing that the child's is complete and that an adoption order had in fact been made by the competent authority; 4) verification of the actual identities of the adoptive parents, adoption dossiers and alternative care conditions of the children by the diplomatic representatives of the receiving country; 5) the relevant authorities of the sending country are duly informed of the adoptions. For more on these see ISS/IRC (2010) *Monthly Review No 4/2010*.

⁷⁸² The ISS /IRC (2004) *The rights of the child in internal and intercountry adoption: Ethics and principles, guidelines for practice* 7 recommends two years as sufficient period for attempts at family tracing. The European Parliament also favours a two-year waiting period to allow for family tracing.

5 4 3 ***The concept of "adoptability"***

Adoptability is a key concept in the field of adoptions – intercountry or domestic. It establishes the fact that there are no legal impediments, and, amongst others, social, medical, psychological, emotional or physical conditions, which may prevent a child from benefitting from the intended adoption.⁷⁸³ It involves an investigation *without which not* formal adoption cannot exist. There are basically two elements of adoptability namely: the first is psycho-social adoptability and the second is legal adoptability.⁷⁸⁴ The former element determines the impossibility of the child's birth family to care for the child and the benefits that the child will enjoy from a new environment.⁷⁸⁵ Legal adoptability is the basis for severance of the relationship between the child and the birth family.⁷⁸⁶ It is important to understand the meaning of "adoptable" for the following reasons: to distinguish between an "adoptable child" and a child in out-of-home care; to dispel the notion that orphanhood is tantamount to adoptable; and to facilitate compliance with the principle of subsidiarity.⁷⁸⁷

Neither the UNCRC nor the ACRWC, employ the term "adoptable" in their provisions. However, it is suggested that articles 21 (b) of the UNCRC and 24 (a) of the ACRWC should be read to imply that adoptability encompasses legal and *other* elements to be considered together.⁷⁸⁸ The Hague Convention, 1993 uses the term but doesn't provide a definition for it.⁷⁸⁹ In article 4 (a) (1), it states that a child may be declared adoptable by competent authorities in the State of origin.⁷⁹⁰ Termination of parental rights and responsibilities by court order, voluntary relinquishment and abandonment are identified grounds for adoptability.⁷⁹¹ In terms of the Hague

⁷⁸³ Cantwell (2003) "Intercountry adoption. A comment on the number of 'adoptable' children and the number of persons seeking to adopt internationally" in *The Judges Newsletter of the Hague Conference on Private International Law Vol V* (The Hague: HCCH). See also Para-Aranguren G (1994) *Explanatory report to the Hague of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* Hague Conference on Private International Law, proceedings of the seventeenth session, Tome II.

⁷⁸⁴ The Hague Conference on Private International Law (2008) 81-82.

⁷⁸⁵ As above 82.

⁷⁸⁶ Mezmur (2009 a) 211.

⁷⁸⁷ See Mezmur (2009 a) 213 - 218 for a detailed discussion on this.

⁷⁸⁸ Mezmur (2009 a) 222.

⁷⁸⁹ See Mezmur (2009 a) 229 for a brief discussion on the absence of definition for the term in the Hague Convention, 1993.

⁷⁹⁰ The Hague Conference on Private International Law (2008) 82.

⁷⁹¹ For a discussion on the termination of parental rights, see Mezmur (2009 a) 235 - 275.

Convention, 1993, a central registry is expected to maintain the list of adoptable children.

In natural disasters, extra effort is required to establish a child's adoptability. As already discussed in paragraph 5 2 1 2 above, it is recommended that, following any emergency situation, intercountry adoption processes should not be initiated until after the emergency period. It is therefore believed that the establishment of a child's adoptability, during the emergency period, after tracing and family reunification attempts, will mainly favour domestic adoptions. However, as discussed in paragraph 5 4 1 above, pipeline cases where children have already been found adoptable should be dealt with and finalised, in the best interests of the child.⁷⁹² Also, it is submitted that, for children who have been found to be separated or unaccompanied prior to the occurrence of the disaster, adoptability should be determined and where domestic solutions are not available they should be given the opportunity to enjoy permanent family environments via intercountry adoptions. In addition, all "adoptable" children *must* be assisted to recover from the trauma of the natural disaster.⁷⁹³ The possible effect(s) of the trauma from separation coupled with the natural disaster can scarcely be over-emphasised. Professional assistance is therefore required at every stage to deal with the trauma that the child *may* suffer.

5 4 4 *The role of poverty in intercountry adoption*

As already discussed in paragraph 2 3 1 2 above, poverty is one of the main reasons why children are abandoned. The effects of dire poverty could also include child malnutrition, school drop-out, low-self esteem and psychological and emotional stagnation. The privations which children living in poverty endure may lead to their involvement in various juvenile crimes, such as theft and shoplifting in order to obtain basic needs. From the adult caregiver perspective, poverty may lead to engagement in child sale or trafficking. An interesting hypothetical is one where an African single parent (B) lives with her four children, within the age range of 1year to 6years. A wealthy couple, during their world tour, arrive in Africa and meet B's 4year old

⁷⁹² This *may* involve weighing the harm which the child may suffer while in his own country of origin with the harm that may be suffered if adopted in another country and arriving at a decision which will be more beneficial to the child.

⁷⁹³ Dambach & Baglietto (2010) 24.

daughter (S) who they find simply adorable amidst her meagre means. The couple speak to B and offer her a life changing sum in return for her relinquishment of parental rights and responsibilities for S, to allow their adoption of S. Such an attractive offer could captivate anyone who is barely able to have a day's meal in one day and has four children to nurture. That appears to be the situation in some of the countries where intercountry adoption practices have been highly criticised.

It is pertinent to note that poverty of a child's parent(s) or caregiver(s) alone is not a ground for adoptability of a child.⁷⁹⁴ As in the hypothetical presented above, there are situations where individuals from rich nations visit poor nations and, moved by the degree of poverty which children live in in certain parts, opt for the emotive practice called intercountry adoptions. The South African Constitutional Court, in *AD and Another v DW and Others*, held that it will be "unrealistically simplistic" to regard the interest of a child as better served by the child being adopted by a national of a *materially* rich country.⁷⁹⁵ This is arguably true because it will always be in the best interests of the child to have the child grow up in a family environment where all material and financial needs can easily be satisfied. However, poverty should not be a ground for finding a child adoptable. It is suggested that, in the best interests of the child, States should support families (by way of, amongst others, material assistance, community development and implementing poverty reduction strategies) in order to ensure that children's basic needs are provided for, and thereby preserve the family.⁷⁹⁶

One of the challenges with the practice of intercountry adoptions is that parents may consent to and give up their children for intercountry adoption for financial gain. In terms of the UNCRC and the Hague Convention, 1993, intercountry adoption must not result in improper financial gain for those involved in the practice.⁷⁹⁷ It is arguable that, because of the inclination of some poor parents to relinquish their

⁷⁹⁴ UN (2010) General Assembly *Guidelines for the Alternative Care of Children* sixty fourth Session A/RES/64/142 para 15. See also Sohr K "Difficulties implementing the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoptions: A criticism of the proposed Ortega's law and an advocacy for moderate adoption reform in Guatemala" *18 Pace International Law review* 559. See also UN *Guidelines for the Appropriate Use and Conditions of Alternative Care for Children* (2008).

⁷⁹⁵ *AD and Another v DW and Others* 2008 (3) SA 183 (CC) para 49 fn 45.

⁷⁹⁶ UNCRC Committee (2005) Day of General Discussion "Children without parental care" para 659.

⁷⁹⁷ UNCRC art 21 (d); Hague Convention, 1993 art 8 .

parental rights and consent to adoption of their children for financial gain, intercountry adoptions should not be encouraged where a child's parent(s) is (are) alive and capable, with sufficient assistance, to raise the child. Where parent(s) or caregiver(s) is (are) alive intercountry adoption orders should be granted with great circumspection.

5 5 Conclusion: Balancing the need to protect from exploitation with the need to protect the right to a family

The key word in dealing with intercountry adoptions after natural disasters is “balancing”. As discussed in para 2 4 above, the effect of separation on children is such that they need sufficient time to go through the grieving process. When coupled with the trauma of natural disasters professional or skilled assistance is required to ensure that the child recovers from the traumatic experiences. It therefore comes to mind that one of two possible solutions may be explored. The first is carrying on with an intercountry adoption which qualifies as a "pipeline case" but ensuring that the adoptive parents are equipped with the necessary skills to assist the child deal with the trauma; or a second option is allowing the child to grieve and recover from the trauma in "familiar environment" (in his or her country of origin) after which the child adoption process which should have already been underway before the natural disaster should be finalised. It is submitted that the watchword in either case should be the best interests of the child. There remains a possibility that in allowing the child to remain in his or her country of origin, around the environment where he or she suffered the trauma may have the effect of replaying the whole incident and loss in the child's mind. The best interests of each child should be determined in line with UNHRC's Guidelines on Formal Determination of the Best Interests of the Child⁷⁹⁸ in order to balance the need to protect the child from exploitation and the need to provide the child with a permanent family.

With regard to separated children who are already with relatives, it is suggested that these children remain with the relatives, if they are willing to care for the children. Formal adoption of these children by the willing relative(s) should be encouraged.

⁷⁹⁸ As stated in the UNHCR (2006) *Guidelines on the formal determination of the best interest of the child* 35. Retrieved from <http://www.unhcr.org/refworld/docid/48480c342.html> on June 1, 2011.

Where a child's relative(s) is unwilling to care for the child, intercountry adoption of the child, in line with the principle of subsidiarity should be encouraged.

CHAPTER 6 CONCLUSION AND RECOMMENDATIONS: THE WAY FORWARD

During natural disasters there is grave disorder in most systems; families are separated and often without any documentation or form of identification. Some, children experience extreme stress and trauma, which *may* be exacerbated by a sudden change of environment,⁷⁹⁹ while others may be adversely affected, psychologically, emotionally and physically, should they remain in the environment where they experienced the “double” trauma. This study has zoomed in on the situation of separated and unaccompanied children in natural disasters. Broadly speaking, the study explicates the need to give special attention to protection of these children.

From definitions of the concepts “separated children” and “unaccompanied children” provided in the text, it is evident that there are fine differences between both concepts. Academic support has been provided for the view that the effects of separation on children depend on the age and level of maturity of the child, and the culture and society in which the child is being raised. These effects could be long-term or short-term, and range from distress to development retardation and even depression, delinquent behaviours and suicidal tendencies. These possible effects make separated and unaccompanied children most vulnerable.

It has been argued that the poor are more exposed in situations of hazards than the rich.⁸⁰⁰ Africa is a poor continent and is also prone to extreme natural hazards. It is therefore important that the effects of natural disasters on its victims are thoroughly researched and strategies for management, within the African context, developed in order to reduce the suffering of victims of natural disasters.

⁷⁹⁹ ISS/IRC (2010) *Monthly Review No 4/2010*.

⁸⁰⁰ Wisner *et al* 12; Brandt 209. Wijkman and Timberlake (1984) 27.

With regards to the right of the child to a family, this dissertation has provided legal arguments to promote recognition of the right, and erase uncertainties around the existence of the right. It is now evident that the right of the child to a family is a canopy under which all other familial rights fall. More so, it is apparent that the definition of family, by States, in the context of their societal circumstances is pertinent in the promotion and realisation of familial rights, including the right of the child to a family.

This study has explored the protection of children in natural disasters. In this regard, the concept “protection” has been sub-categorised, and a particular aspect of protection – intercountry adoption – has been the focus. Arguments against the view that the right of child to a family favours intercountry adoption over other forms of alternative care have also been presented. The conclusion drawn herein is that intercountry adoption is not tantamount to the right of a child to a family; the principle of subsidiarity applies and the best interests of each child remain paramount. Intercountry adoption is a measure that *may* be employed to protect the right of the child to a family.

Following the above conclusions drawn, it is recommended that firstly, blanket moratoriums on intercountry adoptions following natural disasters should be avoided. Rather, decisions on intercountry adoptions should be dealt with on a case-by-case basis to ensure that the best interests of each child are served. In so doing, it has been suggested that intercountry adoptions which qualify as “pipeline cases” should be proceeded with while ensuring that adoptive parents are equipped with the necessary skills to children in dealing with the trauma. With particular reference to separated children, it has been suggested that these children remain with their relatives, if they are willing to care for them. Formal (domestic) adoption of such children by their relatives should be encouraged. Intercountry adoption should generally be decided upon circumspectly; intercountry adoption by relatives who reside outside the country where the child lives should be considered as expedient. Efforts to establish the child's adoptability, and subsequent adoption of the child, should be expedited in such cases.

Secondly, there is need for legal certainty around the concept “family”. From various definitions presented in the dissertation, it is clear that there is no applicable universal standard for what a family should look like or how a family should function. However, the fact that "family" is a complex term should not deter the practical realisation of rights, such as the right to a family and the right not to be deprived of a family, that have been acknowledged, directly or indirectly, in international documents and national laws. It is believed that what is *best* for any family or group of families is dependent on the particular context (culture, tradition and circumstance) within which that family or group exists and functions. This dissertation therefore calls for further study of family within the context of the African child in the family. Following such study, a definition of family should be developed to suit the *climate* (cultural, social, economic or religious) in the particular society where the definition would be relevant. With critical and analytical investigation into this unit, and establishment of what the family consists in, the tasks of executive governmental bodies will be eased a tad in ensuring that children are raised in a family environment. As rightly prescribed by Ogletree's in his paper referred to in Chapter four above, once each State defines family for its own purposes much of the legal limbo within which children are caught up on custody and adoption issues would be avoided. Furthermore, the realisation of familial rights will be more practicable and measurable where there is clear understanding of the concept of family. Clear definition of family would also support the campaign to end unnecessary institutionalisation of children since institutions are often used as temporary care measures while determining a child's adoptability or custody.

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