

Child-headed households:

a feasible way forward, or an infringement
of children's right to alternative care?

Charlotte Phillips



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List of Principal Abbreviations and Acronyms

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immuno Deficiency Syndrome
ANPPCAN	African Network for the Prevention and Protection against Child Abuse and Neglect
AU	African Union
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
DHS	Demographic and Health Surveys
FHI	Family Health International
GDP	Gross Domestic Product
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ISS	International Social Service
MDGs	Millennium Development Goals
NGO	Non-Governmental Organisation
OVC	Orphans and Vulnerable Children
UDHR	1948 Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNGASS	United Nations General Assembly Special Session on HIV/AIDS
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Emergency Fund
UNRISD	United Nations Research Institute for Social Development
USAID	United States Agency for International Development
WHO	World Health Organization

Introduction

1.1 Background

With a total of 22.5 million people infected as at the end of 2009, sub-Saharan Africa remains the region most heavily affected by HIV/AIDS and with the highest numbers of AIDS-related deaths. Recent figures (2009) show that 69% of all new HIV-infections were concentrated in sub-Saharan Africa; 72% of all AIDS-related deaths occurred in this region.¹ The majority of these deaths result in children being deprived of one or both parents and give rise to the need for alternative care. Other agents leading to the loss of parental care are poverty, armed conflict and natural disasters.²

By 2009, more than 56 million children in sub-Saharan Africa had lost one or both parents due to a variety of causes and the number of children without parental care is still on the increase, predominantly in Eastern and Southern Africa; approximately one quarter of the death of parents was caused by HIV/AIDS.³

In Africa, orphaned and vulnerable children are traditionally cared for by family members; historically, members of the same family are under a (moral) obligation to care for one another and children were assured of being cared for either by their own parents or by a family member.⁴ In recent years,

1 UNAIDS 2010a, pp. 20, 21.

2 UNICEF 2009a, p. 19.

3 UNAIDS 2010a, p. 48.

4 Bennett 1999, p. 6.

however, care for these children has become an insurmountable burden for many families, pushing them beyond their ability to cope. Extended family networks – once the pride of African care for children – have quite simply become overwhelmed by the vastly increasing number of children in need of alternative care. As the availability of alternative care arrangements ensured by the government is limited, these developments initially led to a rise in the number of families headed by aunts or grandparents. However, from the early 1990s an unprecedented rise in the phenomenon of child-headed households has been witnessed.⁵

Various definitions of child-headed households have entered into use: in general terms a child-headed household may be described as one in which the (usually) oldest child has assumed most of the responsibilities of a parent. These households more often than not lack the capacity to adequately provide for the children forming part of the household; children living in child-headed households are extremely vulnerable to abuse as well as to economic and sexual exploitation.⁶ It is estimated that more than 80% of all child-headed households are located in sub-Saharan Africa.⁷

According to international and – in most countries – national law, governments are obliged to provide children who are permanently or temporarily deprived of parental care with a suitable alternative.⁸ In reality, however, the responsibility for these children is generally transferred to the extended family and – in the case of child-headed households – even to children themselves.⁹ In the latter situation children's right to alternative care is violated; taking into consideration the often appalling living circumstances of these children, infringement of other rights – the right to survival, development, protection and participation – is a given.

5 UNICEF 2003, pp. 15 – 25.

6 Progress for Children 2009, p. 20.

7 Mbugua 2007, p. 6.

8 Both the UN Convention on the Rights of the Child (Article 20) and the African Charter on the Rights and Welfare of the Child (Article 25) impose an obligation on Member States to provide children without adequate care with a suitable alternative.

9 UNAIDS, UNICEF, USAID 2004, pp. 8 – 12.

In December 2009, the Guidelines for the Alternative Care of Children, aimed at the enhancement of (inter)national legislation with regard to alternative care of children, were welcomed by the UN General Assembly with a recommendation to all Member States to take them into account.¹⁰ Paragraph 37 of the UN Guidelines pays special attention to child-headed households. It recommends that States ensure that these households “benefit from mandatory protection from all forms of exploitation and abuse (...) through the appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian”. This amounts to a *de facto* acceptance of child-headed households as a form of alternative care. In recent years – coinciding with the drafting period of the UN Guidelines – a number of African countries have revised national legislation to accommodate acceptance and regulation of child-headed households; this endorsement of child-headed households as a form of alternative care raises many questions, principal amongst which the issues of protection of children belonging to such households and in particular of the child acting as head of the household. According to both the CRC and the ACRWC, the best interests of the child principle should be taken into consideration in all actions concerning children.¹¹ Although the application of this principle remains open to debate,¹² it seems improbable that it is in children’s best interests to grow up in a child-headed household, both for children heading a family as well as for the other children belonging to the household.

1.2 Aim

The aim of this study is to explore the import of the right to alternative care for children, as well as the various aspects of the acceptance and recognition of child-headed households as a form of alternative care in light of the international standards for the protection of children as enshrined in the Convention on the Rights of the Child, the African Charter on the Rights and the Welfare of the Child and other relevant international instruments.

¹⁰ UN General Assembly, A/RES/64/142, 2010.

¹¹ Article 3 CRC; Article 4 ACRWC.

¹² UN High Commissioner for Refugees 2008, p. 5.

Firstly, this study provides an overview of the international legal framework governing the right to alternative care for children. Furthermore, an impression of alternative care in its manifold guises in the sub-Saharan context is provided, based on information from nine selected African countries, namely Ethiopia, Kenya, Malawi, Namibia, Rwanda, Sierra Leone, South Africa, Swaziland and Uganda. This research further intends to clarify and define the concept of child-headed households, on the basis of the factual situation in the aforementioned countries, followed by an analysis of the pros and cons of the legal recognition of child-headed households. In addition, national rules and regulations relating to alternative care for children from the nine focus countries are discussed. Based on the results of this study, recommendations will be made to further the advancement of policies relating to children's right to alternative care in general, as well as the improvement of the protection of children who are at risk of ending up in a household headed by a child.

Notwithstanding the author's acknowledgement of the deplorable situation of millions of children in sub-Saharan Africa, this research emphatically does not seek to provide a solution to practical problems; conversely, this study aims to provide an insight into children's right to alternative care, the consequences of the ratification of international standards and the importance of adequate implementation thereof for the purposes of middle- to long-term policymaking. This course of action is wholly in line with the *modus operandi* of both the Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child as well as with research carried out by the African Child Policy Forum.

1.3 Research questions

In light of the abovementioned aim, this study will deal with the following questions:

Primary question

What does the internationally recognised right to alternative care for children entail and is the recognition of child-headed households as a form

of alternative care in line with the Convention on the Rights of the Child and other international standards which have been adopted as a measure to protect the inherent rights of children to protection, development, survival and participation?

Sub-questions

Chapter 2

- Which international legal and other instruments regulate children's right to alternative care when they are deprived of adequate parental care and what obligations are imposed on States by these documents?
- What is the *status quo* of States Parties' reports to the UN Committee on the Rights of the Child and to the African Committee of Experts on the Rights and Welfare of the Child?
- Which minimum standards can be derived from the international instruments governing the right to alternative care?

Chapter 3

- What are the main factors leading to the need for alternative care in the nine countries central to this study?
- Which are the main forms of alternative care for children and what type of care is most prevalent in the nine focus countries?

Chapter 4

- What are the main causes of the formation of child-headed households?
- What is the situation of children living in child-headed households and is it possible to formulate a universal definition of this type of households?

Chapter 5

- To what extent is the right to alternative care legally embedded in national legislation in the countries central to this study and are these laws in conformity with the Convention on the Rights of the Child, the African Charter on the Rights and the Welfare of the Child and the author's proposed legal framework for alternative care?

- How have countries responded to the increasing numbers of child-headed households in terms of national rules and regulations?
- Taking into account national legislation and the author's proposed legal framework for alternative care, is the recognition of child-headed households in compliance with the relevant provisions of the Convention on the Rights of the Child and the African Charter on the Rights and the Welfare of the Child, in particular those regarding the right to health, education and an adequate standard of living, as well as the right to adequate protection from abuse?

1.4 Area of research

Millions of children in sub-Saharan Africa are in need of alternative care and the majority of child-headed households are to be found in this region. While this research is primarily aimed at the situation of children in sub-Saharan Africa, the existence of child-headed households is not solely restricted to that continent; similar households are to be found in parts of Latin America, Asia and China.¹³ However, little is known about the situation of those children as information on child-headed households in countries outside the sub-Sahara is practically non-existent. The author's recommendations are therefore not exclusively aimed at African countries, but have a universal character.

Due to the limited availability of reliable and accurate data and resources, the study focuses on nine specific countries, all but one situated in Eastern and Southern Africa. These countries were selected on the basis of a number of criteria. Firstly, national legislation and regulations as well as other sources had to be available in English. Secondly, the texts of relevant national laws had to be accessible, either via official and reliable websites or via authoritative academic and personal sources. In addition, reliable data on the causes of children's loss of parental care had to be available, as well

13 University of East London 2008; India HIV/AIDS Alliance 2006; <<http://www.soschildrensvillages.ca/News/News/orphan-charity-news/Pages/China-Children%E2%80%99s-Welfare-Week-035.aspx>>, accessed on 18/06/2011; <<http://reliefweb.int/node/195478>>, accessed on 18/06/2011; <http://www.ausaid.gov.au/publications/focus/feb10/focus_feb10_pakistan.pdf>, accessed on 18/06/2011.

as information on the mechanisms of alternative care for children. Finally, data relating to children in alternative care settings and information on the prevalence and circumstances of children in child-headed households were essential, resulting in the author's selection of the following countries: Ethiopia, Kenya, Malawi, Namibia, Rwanda, Sierra Leone, South Africa, Swaziland and Uganda. Geographically and socio-economically, they are to a greater or lesser extent representative of the entire region, as they encapsulate the widely varying situations to be found in the sub-Saharan.¹⁴

Instead of providing a full account of each country's history and *status quo* on politics, economics and otherwise – for which multitudinous sources are widely available – data on a number of relevant factors are presented in figure 1.1. This table contains details on the following aspects:

- total population in millions
- life expectancy
- birth registration rate
- under 5 mortality rate per 1,000 children born
- HIV/AIDS prevalence rate for the age category 15 – 45
- number of double orphans (children who have lost both parents)
- number of single orphans (children who have lost one parent).

14 UNICEF categorises the selected countries as developing countries (Kenya, Namibia, South Africa and Swaziland) and least developed countries (Ethiopia, Malawi, Rwanda, Sierra Leone and Uganda), UNICEF 2011, pp. 124, 125.

Figure 1.1 Country information¹⁵

	Population in millions (2009)	Life expectancy (2009)	Birth registration	Under 5 mortality (2009)	HIV prevalence (2009)	Double orphans (2009)	Single orphans (2009)
Ethiopia	82.8	56	7% (2005)	104	2.1% (2007)	630,000 (1.6%) (2007)	4,370,000 (11%) (2007)
Kenya	39.8	55	60% (2009)	84	6.3%	460,000 (2.3%)	2,600,000 (13.2%)
Malawi	15.3	54	unknown	110	11.0%	180,000 (2.2%)	1,000,000 (12.3%)
Namibia	2.2	62	67.1% (2007)	48	13.1%	19,000 (2.0%)	120,000 (12.6%)
Rwanda	10.0	51	82% (2005)	111	2.9%	110,000 (6.5%)	690,000 (40.7%)
Sierra Leone	5.7	48	51% (2008)	192	1.6%	37,000 (4.5%)	320,000 (11.3%)
South Africa	50.1	52	92% (2008)	62	17.8%	670,000 (3.7%)	3,400,000 (18.6%)
Swazi-land	1.2	46	20% (2007)	73	25.9%	21,000 (3.7%)	100,000 (17.8%)
Uganda	32.7	53	21% (2006)	128	6.5%	470,000 (2.6%)	2,700,000 (14.8%)

1.5 Research methodology

In this study a combination of research methods has been employed.

Firstly, this thesis contains an analytical study on the international rules and regulations governing the alternative care for children without adequate care, on the basis of international legal sources such as treaties, declarations, guidelines and academic literature. Other sources include: General Comments and Concluding Observations of the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child.

¹⁵ Based on the following sources: Amnesty International 2010; UNAIDS 2009c; UNICEF 2006; UNICEF 2008a; UNICEF 2010; UNICEF 2011; <<http://www.unicef.org/infobycountry/>>, accessed on 18/06/2011.

For the purpose of a study of the current situation of children in need of alternative care in the countries central to this study and, more specifically, of children in child-headed households in these countries, detailed desk research has been conducted based on existing qualitative studies and on quantitative reports.

A comparative analysis of the harmonisation of national legislation in the nine focus countries with the Convention on the Rights of the Child and the African Charter on the Rights and the Welfare of the Child is included, on the basis of official national texts of laws and regulations.

The sources on which this study is based were obtained through extensive and thorough library and digital research, via personal communication with internationally acclaimed experts in the field of children's rights in Africa as well as with child protection specialists and personal consultation with childcare workers at grassroots level. The author established contact with a number of the latter during her participation in the *First International Conference in Africa on Family-based Care for Children*, held in Nairobi, Kenya, in September 2009.

All but one of the sources are in the English language.

1 January 2011 has been used as a cut-off date for consulted research sources; however, occasional references to later relevant developments have been made.

1.6 Limitations

In this study certain limitations had to be taken into account.

Due to the set time frame and other restrictions, it was not feasible to carry out empirical research in the nine focus countries. As a result, children in child-headed households have not personally been approached by the author and – apart from information obtained via existing qualitative studies and from childcare workers – the opinions of children living in child-headed households are not included in this study.

Hitherto, few studies have been conducted on the topic of child-headed households and in some instances inferences have had to be made from reports which include young people up to the age of 25. Studies in which a child is defined as a person in the age category 0 – 15 are subject to the same limitation.

Another matter which has neither been sufficiently explored in academic studies to date, nor falls within the scope of this research, is the implementation of provisions from international rules and regulations. This study is concerned with the availability of national legislation on alternative care in the nine focus countries, rather than the actual implementation.

1.7 Organisation of thesis

The study is divided into six chapters.

After this introductory chapter, the second chapter describes the history of children's rights from the 1900s onwards, discussing the establishment and meaning of the main international declarations, conventions and guidelines governing alternative care for children. The chapter concludes with a proposal for a universal legal framework for alternative care.

Chapter 3 is intended to provide the reader with an insight into the situation of children in need of alternative care, specifically in the focus countries, as well as the contributory factors to the loss of parental care.

Chapter 4 discusses relevant studies on child-headed households and proposes a universal definition of the term. The legal recognition of child-headed households and the growing trend towards categorising these households as a form of alternative care are discussed.

Chapter 5 looks at national legislation and policies governing alternative care in the countries central to this study and on (the legal status of) child-headed households. A comparison is drawn between universal children's

rights and the UN Guidelines on the one hand and national rules and regulations on the other.

Chapter 6 summarises the findings of this study regarding the legal aspects of alternative parental care and of child-headed households. The positive and negative aspects of the legal recognition of child-headed households are analysed. The chapter concludes with a number of recommendations.

Note: the author has opted to avoid the issue of gender-specificity, referring instead to a child or parent as “he”, “him”, “his” and “himself”; these terms should be understood to encompass all genders.

International rules and regulations governing alternative care

Introduction

Legal protection for children does not solely entail development and implementation of and adherence to children's rights; it encompasses a number of other requirements.¹⁶ First and foremost, it should be recognised and accepted that every child is the bearer of rights. Additionally, children should be informed about their rights and they should be provided with the opportunity to exercise these rights and be guided in this exercise by their parents or by others legally responsible for them.¹⁷ The rights of children should be protected at all times.

A child has the right to be raised in a manner which provides him with the best possible development of his personality. There is a global consensus that this upbringing is (in principle) the primary responsibility of the child's parents. In this regard, a distinction should be made between biological and moral parenthood. A biological parent, also known as a genetic or natural parent, is a child's parent through birth. Moral parenthood is defined as providing a child with the best possible upbringing by giving it care, love and understanding; this form of parenthood is not restricted to the biological parent, but can also be achieved by (a form of) foster parenting, adoptive parents, relatives or in a residential institution.¹⁸

¹⁶ Verhellen 2000, p. 76.

¹⁷ Art. 5 CRC.

¹⁸ Archard 2004, pp. 108, 109.

Children who are temporarily or permanently deprived of parental care have a right to alternative care. The basis of the right to alternative care can be found in various national and international rules and regulations; national laws and principles are generally the result of the implementation of international declarations, treaties and guidelines. Alternative care for children may be provided in numerous ways; in chapter 3 the most prevalent forms of care are portrayed. In this chapter the history and development of children's rights will be discussed, illustrated by the following international documents:

- Geneva Declaration of the Rights of the Child (1924)
- Universal Declaration of Human Rights (1948)
- Declaration of the Rights of the Child (1959)
- 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)
- Convention on the Rights of the Child (1989)
- African Charter on the Rights and Welfare of the Child (1999)
- UN Guidelines for the Alternative Care of Children (2009).

In addition, the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption shall be reviewed.

Furthermore, specific principles concerning alternative care enshrined in the aforementioned documents will be analysed. In conclusion, a framework for the right to and the modes of practice of alternative care – comprising a set of minimum elements of alternative care – is introduced, based on the aforementioned instruments.

Prior to embarking on the discussion of the history and principles of the main children's rights documents, a number of key concepts should be briefly defined and clarified.

Guidelines are understood to be rules or instructions without any legal enforceability. They are a frame of reference to be used by policymakers and planners in the development or adaptation of national legislation, aims and goals. Within the context of Universal Human Rights instruments,

guidelines are considered to have a strong moral impact, as they are mostly based on or derived from legally binding standards.¹⁹

A declaration is an official statement of principles or stipulations, often employed in human rights issues. It expresses the views and intention of parties, but is not a legally binding document. A declaration may not be a sufficient tool to ensure the protection of rights;²⁰ however, it is universally accepted that parties to human rights declarations adhere to the tenets of such instruments.

A treaty (also referred to as a convention, covenant or charter) is a formal, international, written agreement between States on a specific set of rules and/or regulations.²¹ It is a legally binding document resulting in obligations for ratifying parties. Initially, prospective States Parties sign a convention, thereby acknowledging its text as authentic and definite and accepting the obligation to refrain from acts which may impede implementation in future.²² When signatory parties have had the opportunity to make a more in-depth study of the text of the convention and adapt their national law accordingly, they should progress to ratifying the convention. Ratification is the final and formal confirmation of States Parties' acceptance of the convention through which they are bound by its articles and obligations.²³ Additionally, States may also accept a treaty as legally binding through accession.²⁴

The role of treaties as well as disputes in relation to treaties are governed by the 1969 Vienna Convention on the Law of Treaties (hereinafter: Vienna Convention). This Convention is recognised as an authoritative instrument on the development of treaties and their implications. As of 17 January 2011, a total of 111 countries have ratified the Vienna Convention and 15 countries have the status of signatory;²⁵ five of the nine countries central

19 <<http://www2.ohchr.org/english/law/>>, accessed on 13/06/2011.

20 Mullen 1986, p. 15.

21 Article 2 sub 1(a) Vienna Convention on the Law of Treaties 1969.

22 Article 18 Vienna Convention on the Law of Treaties 1969.

23 Wallace 1997, p. 228.

24 Article 15 Vienna Convention on the Law of Treaties 1969.

25 <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en>, accessed on 18/08/2010.

to this study have neither ratified nor signed the Vienna Convention.²⁶ Nonetheless, countries not party to the Vienna Convention may be bound by its stipulations as per ruling by the International Court of Justice on 25 September 1997: according to the Court's Judgement, the Vienna Convention is considered to be applicable globally irrespective of ratification.²⁷

The *pacta sunt servanda* principle is explicitly embodied in the Vienna Convention, binding nations to the treaties they have ratified.²⁸ Notwithstanding that in dualist systems, until a treaty has been incorporated in national law, that treaty is effectively meaningless, Article 27 of the Convention provides that a State "may not invoke the provision of its internal law as justification for its failure to perform a treaty."²⁹

2.1 Geneva Declaration of the Rights of the Child (1924)

The social reformer and founder of the Save the Children Fund, Eglantyne Jebb (1876 – 1928), was very closely involved with children who were victims of World War I. Jebb drafted the 1924 Geneva Declaration of the Rights of the Child (hereinafter: 1924 Geneva Declaration), which was adopted by the League of Nations³⁰ and was the first international human rights instrument to address the rights of children. The impact of the First World War on the lives of many a child, combined with a changed attitude towards children (hitherto children had been allocated the status of "miniature adults"), served as the catalyst that led to the drafting and adoption of this declaration. It was recognised "that mankind owes to the Child the best that it has to give".³¹ The Declaration contains a total of five stipulations,

26 Ethiopia and Kenya are signatories, Malawi and Rwanda are Parties, Namibia, Sierra Leone, South Africa, Swaziland and Uganda are neither signatory nor Party.

27 International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, para 46, 25 September 1997.

28 Article 26 Vienna Convention on the Law of Treaties 1969.

29 Malanczuk 1997, pp. 63, 64.

30 The League of Nations existed from 1919 to 1946 and was the precursor of the United Nations. The primary objective of the League was the prevention of wars and the promotion of universal peace; <[http://www.unog.ch/80256EE60057D930/\(httpPages\)/8C989922E1DBC95980256EF8005048CA?OpenDocument](http://www.unog.ch/80256EE60057D930/(httpPages)/8C989922E1DBC95980256EF8005048CA?OpenDocument)>, accessed on 20/08/2010.

31 1924 Geneva Declaration of the Rights of the Child.

aimed at the well-being of children in general. These stipulations are not formulated as rights; they should be seen as the duties of adults towards children, couched in formal and legal jargon, as well as an expression of optimism with regard to international law and joint operations in the field of peace and human rights.³²

Stipulation 2 specifically refers to alternative care; it states:

The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored.

Embodied in this principle is the obligation to aid every needy child. However, special attention is given to orphans and homeless children: they have to be protected and supported. As indicated previously, the Declaration is merely an appeal for understanding and a set of basic principles concerning the well-being of children, with a view to improving their lives.³³ This particular stipulation illustrates the acknowledgement of the global need for care for children without parental care.

The universal tenet that children are as much the bearers of rights as adults, is one that can be found in the works of various scholars, dating back to the ancient Greeks. The paediatrician, children's advocate and author Janusz Korczak (1878 – 1942) was one of the first to actually formulate children's rights, specifically in his book *How to Love a Child*. The compilation of these rights is also known as the *Janusz Korczak's Declaration of Children's Rights*.³⁴ The most remarkable aspect of this Declaration is that it contains very explicit provisions on what is nowadays known as child participation and on civil rights and procedures. The fact that Korczak's children's rights were never formally transferred into a declaration may be explained by the – at the time – revolutionary nature of these proposed rights.

³² Detrick 1999, p. 13.

³³ Freeman 2007a, p. 11.

³⁴ Lifton 1989, pp. 355, 356.

2.2 Universal Declaration of Human Rights (1948)

After World War II, with its manifold horrors for mankind as a whole – and for children in particular – the United Nations (hereinafter: UN) was established in 1945. The following year, the United Nations Children’s Emergency Fund (hereinafter: UNICEF) was founded. UNICEF was to be a temporary arm of the UN, aimed at helping children in emergency situations after World War II, mainly with regard to shortages of food and supplies. However, UNICEF became a permanent organ of the UN, mandated to fight worldwide poverty and the under-development of children.³⁵

In 1948 the Universal Declaration of Human Rights (hereinafter: UDHR) – the first of its kind – was developed and adopted by the UN General Assembly. This Declaration, as in the case of the foundation of the UN and UNICEF, was born in reaction to the atrocities of the latest war.³⁶ Human rights may be defined as “moral-political claims that, by contemporary consensus, every human being has, or is deemed to have, on his society and on his government, and that are considered indispensable for the development of the individual”.³⁷ Human rights – and therefore the UDHR – apply to every human being, both adults and children, while Article 25 UDHR expressly states that “motherhood and childhood are entitled to special care and assistance”. However, the Declaration does not explicitly recognise that children are particularly vulnerable and neither does it recognise children’s need to special protection in certain circumstances. The idea of a separate, additional document, providing specific protection for children, was starting to gain momentum;³⁸ the 1924 Geneva Declaration was to serve as a basis for this new document.

Note that children’s rights within the context of human rights have an added dimension in that children do not possess the legal capacity to act on their own behalf; children as rights-holders are – in many cases – not given the choice to claim their rights.³⁹

35 Veerman 1992, p. 61.

36 Meuwese, Blaak & Kaandorp 2005, p. 2.

37 Veerman 1992, p. 24.

38 Pinheiro 2006, p. 32.

39 Kaime 2009, p. 12.

2.3 Declaration of the Rights of the Child (1959)

In 1959, the UN General Assembly⁴⁰ adopted the Declaration of the Rights of the Child (hereinafter: 1959 Declaration), containing a Preamble and ten Principles. In contrast with the 1924 Geneva Declaration, the Principles are formulated as children's rights, rather than as aims and duties for adults.⁴¹ Equally noteworthy is the use of Principles as opposed to Articles, underlining the non-binding character of the Declaration.⁴² The Preamble proclaims that every child should "have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognise these rights and strive for their observance by legislative and other measures progressively taken". Despite the fact that this Declaration delved deeper than its predecessor and was an important step on the way to the global recognition of children's rights, it was still merely a statement of intent, incorporated in a declaration, a non-legally binding document.

The right of a child to receive care by means of either biological or moral parenthood, can be found in Principle 6 of the 1959 Declaration; it proclaims:

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

40 The UN General Assembly is the main representative and deliberative body of the UN <<http://www.un.org/ga/about/background.shtml>>, accessed on 21/08/2010.

41 Detrick 1999, p. 14.

42 Veerman 1992, p. 168.

This Principle is aimed at the realisation of the “full and harmonious development” of the personality of a child and confirms that a child should preferably grow up in the care of its parents. Should this not be attainable – a situation that must be avoided as much as possible especially in the case of young children – a child should in any event be raised in a safe environment, both morally and materially.

Included in this Principle is the responsibility of society and of the public authorities for the care of children without parental care. These children should also be allowed to grow up in “an atmosphere of affection and of moral and material security”.⁴³

Although not child specific, the 1966 International Covenant on Civil and Political Rights (hereinafter: ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR) contain a number of provisions relating to children’s rights. These documents form an expansion of the UDHR, defining its principles and containing legal obligations for States Parties.⁴⁴ The realisation of civil and political rights may be achieved without significant effort in that these are negative rights, merely requiring States to refrain from any intervention, while the realisation of socio-economic rights require governments to actively intervene and to make available sufficient resources.⁴⁵ Article 23 ICCPR recognises the family as the “natural and fundamental group unit of society”. In addition, Article 24 ICCPR stipulates that every child has the right to protection, the registration of his birth, a name and nationality. Article 10 ICESCR also provides the right to protection of the family as well as children’s entitlement to special protection and assistance.

The aforementioned obligations are explicitly noted in the Preamble of the Convention on the Rights of the Child and they are embodied in this Convention in more concrete terms (*ut infra*, paragraph 2.5).

43 Veerman 1992, p. 174.

44 Craven 1998, p. 7.

45 Alston & Quinn 1987, p. 159.

2.4 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)

During the *World Conference on Adoption and Foster Placement* in 1971, a number of serious problems on the subject of adoption and foster care were addressed. Some of these problems were caused by the different views on adoption and foster care held by various countries, based on their social and cultural norms. Another issue addressed was intercountry adoption, particularly in respect of the best interests of the child.⁴⁶ In 1975, a group of experts was asked by the UN to draw up a declaration containing Principles with regard to national and international adoption and foster placement; a draft declaration was completed over the next four years. A number of Islamic countries, however, raised objections against the draft because adopting a child is not permissible under Islamic law. After various adaptations and a guarantee that the declaration would not impose the obligation to implement the legal institution of adoption on States, but should merely be seen as a set of recommendations, procedures for approval by the UN General Assembly commenced.⁴⁷ The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (hereinafter: Declaration on Foster Placement and Adoption), was adopted by the UN General Assembly on 3 December 1986. The Preamble of the Declaration explicitly recognises alternatives to adoption and foster care, such as *kafalah* under Islamic Law. The term *kafalah* is derived from the Arabic word *kafal*: ‘to take care of’. Under *kafalah* a child maintains his own family name; this form of care does not provide the child with inheritance rights in relation to his new caregiver.⁴⁸ The Preamble also states that the Principles of the Declaration do not impose on States such legal institutions as foster placement or adoption.

⁴⁶ Detrick 1999, p. 332.

⁴⁷ Veerman 1992, p. 341.

⁴⁸ UN DESA ST/ESA/SER.A/292 2009, pp. 26, 27.

Despite the expectations that might conceivably arise from the title of this Declaration, the actual impact of its stipulations on the lives of children may be considered to have been largely insignificant due to the status of this instrument: a non-binding declaration, hence the need for an additional and legally binding document, realised in the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which will be discussed further on in this chapter. However, some important Principles and formulations from the Declaration have found their way into the UN Convention on the Rights of the Child (*ut infra*, paragraph 5.2.2),⁴⁹ specifically on the topic of intercountry adoption,⁵⁰ which accounts for discussion of this instrument being included in this chapter.

The Declaration consists of a Preamble and 24 Articles, all relating to foster care and adoption, both nationally and internationally. It is divided into the following categories:

- A General family and child welfare
- B Foster placement
- C Adoption

The Preamble recalls – amongst other documents – the UDHR as well as the 1959 Declaration, indicating that the Declaration is based on these documents and that it respects the rights stated therein.⁵¹ Noteworthy is the consideration that all foster placement and adoption procedures should be in the best interests of the child. The field of tension between the child's interests and the interests of prospective adoptive or foster parents – the latter at times seemingly of overriding importance – is a matter of debate that still features prominently in discussions concerning intercountry adoption. A case in point: the adoption of two Malawian children by the artist Madonna gave rise to widespread criticism and it has been alleged that her motivation was self-serving media attention rather than acting in the best interests of the children.⁵²

49 Cantwell & Holzscheiter 2009, p. 16.

50 Detrick 1999, p. 26.

51 Veerman 1992, p. 341.

52 <<http://news.bbc.co.uk/2/hi/entertainment/8095837.stm>>, accessed on 21/08/2010.

A General family and child welfare

The first nine Articles of the Declaration concern family and child welfare in general. States should allocate a high priority to family and child welfare, acknowledging that the welfare of a child depends upon good family welfare (Articles 1 and 2).

Preferably, a child should be cared for by his own parents. However, when such care is unavailable or inappropriate, other forms of care such as foster or adoptive care should be considered. When under the care of somebody other than the child's own parents, the best interests of the child should be the paramount consideration (Articles 3, 4 and 5).

Signatories should determine adequate national child welfare services and implement appropriate actions where necessary. States should in any case ensure that persons responsible for foster placement or adoption procedures have received professional or other appropriate training (Articles 6 and 7). Every child should have a name, a nationality and a legal representative at all times. Those responsible for the care of a child should recognise his need to learn about his background, unless this is not in his best interests (Articles 8 and 9).

B Foster placement

Articles 10 to 12 deal with foster care. According to the Declaration, States should regulate foster placements by law. Although foster care is temporary in nature, it may continue until the age of majority of the child; it should, however, neither exclude the possibility of a child returning to its own parents, nor should it exclude adoption (Articles 10 and 11).

Prospective foster parents and – as far as is possible – the child and his natural parents, should be involved in all aspects of foster care. States should put into place a competent authority or agency, responsible for the supervision of foster care, ensuring the welfare of the child (Article 12).

C Adoption

Most Articles in this section concern intercountry adoption; the first three relate to adoption in general.

The Declaration states as the primary aim of adoption: to provide a child who cannot be cared for by his own parents with a permanent family (Article 13). When the most appropriate environment for the child has been selected,

the adoptive parents and – wherever possible – the natural parents and the child should be given sufficient time and counselling in order to reach a decision on the child's future. Prior to adoption, the relationship between the child and the prospective adoptive parents should be observed by child welfare services. Once adopted, the child should be recognised by law as a full member of the adoptive family (Articles 14, 15 and 16).

Intercountry adoption should only be considered if a child cannot be adopted, placed in a foster family or cared for in another suitable way in the country of birth. If States permit intercountry adoption, policies, legislation and effective supervision for the protection of children involved should be established. Illegal placements and abduction should be prevented at all times and the prohibition thereof should be enshrined in policies and laws (Articles 17, 18 and 19).

Intercountry adoption procedures should be carried out by competent authorities or agencies, ensuring the safeguards and standards equivalent to those with regard to national adoption. There should be no improper financial gain for the parties involved in the adoption procedure. When agencies are involved on behalf of prospective adoptive parents, special precautions should be taken in order to protect the best interests of the child (Articles 20 and 21).

Only after establishing that, firstly, a child is legally free for adoption, secondly, all necessary documents will be made available and, finally, that the child will be able to join its adoptive parents and obtain their nationality, should intercountry adoption be considered. If the nationality of a child differs from that of its adoptive parents, the laws of both States should be given due weight, taking into consideration the cultural and religious background and the best interests of the child. The legal status of adoption should be assured in both countries involved (Articles 22, 23 and 24).

2.5 Convention on the Rights of the Child (1989)⁵³

Although the 1959 Declaration figured prominently in the promotion and global recognition of children's rights, there was a growing realisation that a legally binding instrument was lacking. In 1978, the year preceding the International Year of the Child, the government of Poland proposed to convert the 1959 Declaration into a – legally binding – Convention on children's rights. The proposal as such was rejected, but the idea to convert the 1959 Declaration into a Convention was in fact accepted and referred to the UN Commission on Human Rights; the Commission decided that a proposal for a Convention, based on the 1959 Declaration, should be drawn up.⁵⁴

2.5.1 Ratification status and implementation of the Convention on the Rights of the Child

After a period of ten years of negotiation and many amendments to the first (Polish) draft, the text of the Convention on the Rights of the Child (hereinafter: CRC) was adopted by the UN General Assembly on 20 November 1989.⁵⁵ By September 1990, 20 countries had ratified the Convention, at which point it became effective. To date, all countries apart from the United States and Somalia have ratified the Convention (the latter have only signed the Convention), resulting in an almost universal document. Figure 2.1 shows the exact dates of ratification by the nine focus countries.

53 Appendix I.

54 Detrick 1999, pp. 15, 16.

55 UN Convention on the Rights of the Child 1989.

Figure 2.1 Ratification of the CRC

Country	Ratification date
Ethiopia	14/05/1991
Kenya	30/07/1990
Malawi	02/01/1991
Namibia	30/09/1990
Rwanda	24/01/1991
Sierra Leone	18/06/1990
South Africa	16/06/1995
Swaziland	07/09/1995
Uganda	17/08/1990

The Convention is a unique document in that it encompasses civil and political rights as well as economical, social and cultural rights. It expresses the evolvement of the views on children's rights and the changed attitude towards children, whereby they are no longer viewed as miniature adults, but as human beings who have the right to grow into balanced and responsible adults. The child is seen as the owner of rights as well as being the subject of rights.⁵⁶ The Convention is regarded as a treaty in which the international progression of human rights and children's rights are brought together.⁵⁷ It is acknowledged as the most important international treaty, concerning all aspects of children's rights.⁵⁸ Whether civil, political, economic, social or cultural, all rights must be regarded as justiciable and States should ensure procedures for non-compliance with these rights to be redressed and effective remedies for violations thereof should be established.⁵⁹

The Convention is acknowledged as "a transnational, multicultural, cross-cultural and ultimately local framework" for children's rights.⁶⁰ With the adoption of the Convention – containing universal, legally binding standards – children's rights were put firmly on the map, resulting in global attention for children and their rights. Consequently, States Parties changed national

56 Meuwese, Blaak & Kaandorp 2005, p. 1.

57 Kaime 2010, p. 640.

58 Sloth-Nielsen 2004, p. 4.

59 UN General Comment No. 5 (2003), paras 24, 25.

60 Kaime 2010, p. 642.

laws in accordance with the Convention, children's acts were constituted, children's ombudspersons were appointed and a host of other measures taken to ensure that children's rights were observed. For the first time in history, States could be held accountable for the manner in which children were treated and for violation of children's rights.⁶¹

The Convention calls upon Parties, and therefore all members of society, to observe the rules it has set out. This requires the amendment of domestic laws to comply with the CRC. However, harmonisation entails much more than simply 'copying' articles from the CRC to national laws: the Principles of the CRC require further elaboration.⁶² The Convention comprises an extensive Preamble, as well as 54 Articles on a wide range of subjects. The Preamble refers retrospectively to both the 1924 Geneva Declaration and the 1959 Declaration, as well as to the UDHR, the ICCPR and the ICESCR, emphasising the incorporation of all international human rights into the Convention.

Due to the universal character of the Convention and the fact that it is aimed at countries with differing political, legal and economic systems, the phrasing of the Convention is general and broadly formulated. As a result, States Parties are given extensive leeway in the manner of implementation of the Convention's stipulations.⁶³

The Convention calls for children to be protected, for the prevention of harm, the provision of assistance ensuring basic needs and it advocates the participation of children in matters that concern them. These aims are also known as the four P's (protection, prevention, provision and participation).⁶⁴ Another frequently used and comparable categorisation is the division of rights into three main types: provision, protection and participation ("3 P's").⁶⁵ It is argued though that children's rights should be graded as civil, political and social rights, unifying children's rights with – rather than

61 Newell 2005, p. 36.

62 African Child Policy Forum 2007b, p. 39; final remarks Professor J.E. Doek.

63 Gras 2001, p. 6.

64 Sloth-Nielsen 2004, p. 4.

65 Quennerstedt 2010, p. 621.

detaching them from – other human rights.⁶⁶ It lies beyond the scope of this study to elaborate on this discussion and thus references are made to both classifications.

According to Article 2 CRC, States Parties are obliged to respect and ensure the rights set forth in the Convention; the means of achieving this are laid down in Article 4 CRC, which states that governments are to undertake all necessary measures – legislative, administrative and otherwise – in order to implement the rights recognised by the Convention.

Although no distinct division is made between civil and political rights on the one hand and socio-economic rights on the other, Article 4 CRC declares that “with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” Both civil and political rights and economic, social and cultural rights are regarded to be justiciable by the Committee on the Rights of the Child (hereinafter: CRC Committee.⁶⁷ Despite equality on this level between these two categories of rights, civil and political rights have traditionally been accorded higher prominence.⁶⁸ It has been stated by the UN Committee on Economic, Social and Cultural Rights (hereinafter: CESCR) that breaches of economic, social and cultural rights by States Parties continuously take place and that these violations continue to be tolerated by the international community.⁶⁹

Despite the clarity of the Convention as to which rights States Parties should ensure, it cannot guarantee the extent to which conformity may be achieved, for this largely depends on the “available resources” of a particular State. States that fail to fulfil their obligations while claiming that they have put all available means to use, have to substantiate this claim by providing insight into the allocation of the national budget.⁷⁰ In its 2011 African Report on Child Wellbeing, the African Child Policy Forum presents the level of

66 Quennerstedt 2010, pp. 630 – 633.

67 UN Committee on the Rights of the Child, CRC/GC/2003/5, 2003, para 6.

68 Rosa & Dutschke 2006, p. 3.

69 UN Committee on Economic, Social and Cultural Rights, E/1993/22, para 5.

70 UN Committee on the Rights of the Child, CRC/GC/2003/5, 2003, para 51.

performance in budgeting for children by comparing the budgeting of all African countries, ranking them in the following categories:

- 1 “allocated the maximum of available resources for children”
- 2 “allocated a fair amount of available resources for children”
- 3 “allocated the minimum of available resources for children”.

Ethiopia, Kenya, Malawi, Namibia, Rwanda, South Africa, Swaziland and Uganda fall into category 1, whereas Sierra Leone falls into the last category. Research has revealed that the level of economic development is not an indicator for the percentage of GDP that countries spend on children. For instance, Rwanda, a country with limited resources, allocates a relatively high percentage of GDP on budgeting for children.⁷¹

For developing countries, the standards of the Convention are generally difficult to achieve, with a higher risk of children’s rights not being met. This raises the question as to whether the function of the Convention for these children should merely be seen as guidance on children’s rights provided to their governments and as one of the tools of human rights, i.e. deterrence of violations of these rights.⁷² The answer to this question has to be an unequivocal “no”. Firstly, the issue of limited resources is no legitimisation for States Parties’ non-compliance with the CRC. Secondly, the international community should also be held accountable.⁷³ According to Article 4 CRC, the necessary measures to be taken to ensure the rights of the Convention form not only an obligation for States Parties to bring their own legislation in line with the CRC, but also to assist with universal harmonisation by means of international cooperation.⁷⁴ The CRC Committee encourages States receiving financial assistance from other nations to designate a significant part thereof to issues relating to children.⁷⁵ Article 4 CRC may therefore be seen as placing a legal obligation on the international community to

71 African Child Policy Forum 2010, pp. 103 – 108.

72 Melton 2005, p. 17.

73 UN General Comment No. 3 (2003), para 14.

74 Rishmawi 2006, p. 35.

75 UN Committee on the Rights of the Child, CRC/GC/2003/5, 2003, paras 60 and 61.

provide assistance in accomplishing the safeguarding of the rights of all children.^{76, 77}

The universality of children's rights should be beyond dispute. The Vienna Declaration and Programme of Action states that all human rights are universal; these include children's rights.⁷⁸ The Declaration further provides that "the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."⁷⁹

The CRC Committee's 2007 Day of General Discussion was devoted to the issue of available resources for the rights of the child and States' responsibilities. In its Concluding Recommendations, the Committee specifies the term 'available resources' in that these should be understood to include financial, human, technological, organisational, natural and information resources. In this respect, the quality of resources, rather than merely the quantity, should also be taken into account.⁸⁰ The Committee underscores the importance of national legislation on the allocation of a specific proportion of a country's public expenditure on children. In addition, systematic and independent evaluation of this expenditure should be carried out.⁸¹ The role of international cooperation is outlined as follows: the fulfilment of children's rights is a shared responsibility between developed and developing nations. On the one hand, States Parties should assist other countries in complying with the CRC through international cooperation; on the other hand, States in need of assistance should actively seek cooperation and demonstrate they have acted to the best of their

76 Detrick 1999, p. 110.

77 See generally Rishmawi 2006.

78 The Vienna Declaration and Programme of Action was adopted by the World Conference on Human Rights in 1993.

79 Para 5 Vienna Declaration and Programme of Action, 1993.

80 UN Committee on the Rights of the Child, Day of General Discussion 2007, para 24.

81 UN Committee on the Rights of the Child, Day of General Discussion 2007, paras 22, 23.

ability.⁸² States receiving international aid should reserve an adequate part thereof for issues relating to children.⁸³

The CRC Committee fulfils a vitally important role in ensuring that States Parties adhere to their obligations and in monitoring the implementation of the CRC into national legislation as stated in Article 4 CRC. The process of measuring implementation is complex, due to the broad formulations of stipulations in the Convention.⁸⁴ The Committee, which was established in 1991, is sanctioned by Article 43 CRC. Its 18 elected members are international independent experts on children's rights; they do not represent their own country. After the initial report, which has to be submitted within two years of the ratification date, States Parties must submit reports regarding the situation of children's rights in their own country to the Committee on a five-year interval basis. The reports are restricted to the activities of governments; private parties involved in childcare are not subject to the scrutiny of the Committee. However, the onus of ensuring that private parties respect children's rights, rests on the State on the basis of its obligation to protect these rights.

The Committee examines the reports and brings out recommendations – Concluding Observations – to each individual country. In their next report, countries should inform the Committee with regard to measures taken following these recommendations. The main activity of the Committee is the monitoring of States Parties' activities concerning the protection of children's rights.⁸⁵ The Committee formulates its Concluding Observations on the basis of countries' reports; additional reports from NGOs, UNICEF and other UN agencies are welcomed by the Committee and are taken into consideration. During a session of the Committee, these sources, as well as the report submitted by the State Party are discussed by members of the Committee and representatives of the government in question, leading to the formulation of said Concluding Observations.⁸⁶ By means of these

82 UN Committee on the Rights of the Child, Day of General Discussion 2007, para 51.

83 UN Committee on the Rights of the Child, Day of General Discussion 2007, para 52(c).

84 Gras 2001, p. 6.

85 Gras 2001, pp. 53 – 56.

86 African Child Policy Forum 2007a, p. 104.

Observations, the Committee holds States Parties accountable for their obligations deriving from the CRC and reveals the extent to which States' legislation is in compliance with these obligations.⁸⁷ Suggestions and recommendations for change are included in the Concluding Observations of each country.⁸⁸ Other UN treaty committees, such as the Human Rights Committee and the CESCR, also disclose their findings and recommendations by means of Concluding Observations. Due to the fact that none of the aforementioned committees possesses judicial powers, Concluding Observations do not contain legal obligations; they do, however, have an authoritative status in that they reflect on violations of legal obligations deriving from treaties. Furthermore, Concluding Observations have an interpretative character, providing valuable information regarding the thrust and scope of treaty obligations.⁸⁹ Although not legally binding, the function of the Concluding Observations is twofold: firstly, they form the Committee's 'jurisprudence' and are thus employed by the Committee and other UN organisations in analogous cases; in addition, the Concluding Observations provide an insight into the situation of children's rights in a particular country, exposing it to the international community. The divulgence of the failure to adhere to the CRC potentially provides an incentive for governments to honour their commitment to the Convention to the best of their ability.⁹⁰

Although in theory each State Party is obliged to submit the aforementioned reports after ratification of the CRC, in practice the submission of these reports is dependent on the goodwill of the government as enforcement measures are not provided in the CRC. Various States Parties have failed to present their reports to the Committee when due.⁹¹ The issue of non-submission with regard to overdue reports is one that is not unique to the CRC; the reporting requirements relating to other human rights conventions are flouted in equal measure. The main reasons for the failure to submit reports on time are the lack of trained staff and inadequate resources to carry out the preparation of reports, as well as the lack of political will

87 Boerefijn 2009, p. 182.

88 LeBlanc 1995, p. 270.

89 O'Flaherty 2006, pp. 32 – 36.

90 Gras 2001, p. 136.

91 African Child Policy Forum 2007a, p. 104.

to comply with this obligation.⁹² Thus far the Committee has resorted to sending reminders to States Parties.⁹³ According to the Vienna Convention, however, failure to submit may be viewed as a breach of the CRC, which – theoretically at least – is a ground for other parties to the CRC to terminate the treaty or to (partly) suspend its operation.⁹⁴ In figure 2.2 the reporting status of the nine countries central to this study is presented.

Figure 2.2 Reporting status CRC

Country	Ratification	Initial report	Second report	Third report
Ethiopia	1991	1995	1998	2005
Kenya	1990	2000	2005	-
Malawi	1991	2000	2007	-
Namibia*	1990	1992	2009	2009
Rwanda	1991	1992	2002	-
Sierra Leone	1990	1996	2006	
South Africa	1995	1997	-	-
Swaziland	1995	2005	-	-
Uganda	1990	1996	2003	-

* In 2009, the government of Namibia issued subsequent Country Reports in one document in an effort to catch up on the country's reporting obligation; consideration of this report has yet to be scheduled by the CRC Committee.

From the above table, it is clear that none of the focus countries has managed to comply with the reporting obligations; while in some instances initial reports were submitted within the required time frame, subsequent reports have failed to meet the set deadlines. It should be noted that this state of affairs is not unique to the sub-Saharan; this is a trend seen across the board.

Children – or any other individual for that matter – may not approach the Committee in relation to a violation of their rights, nor is there another complaints mechanism in place, which is considered to be a significant shortcoming of the Convention and to some an indication that children

92 LeBlanc 1995, pp. 229, 230.

93 Gras 2001, p. 96.

94 Article 60(3) Vienna Convention on the Law of Treaties 1969.

are not (yet) fully recognised as subjects of rights.⁹⁵ In June 2009, however, an international lobbying campaign led to the establishment of an NGO Working Group by the UN Human Rights Council; by resolution of March 2010, the UN Human Rights Council provided the Working Group with a mandate to draft a proposal for an Optional Protocol to the CRC with regard to a complaints mechanism, providing a so-called communications procedure for children and their representatives, complementary to the aforementioned reporting procedure which currently exists.⁹⁶ In September 2010, the first proposal for a draft of the Optional Protocol was submitted to the UN General Assembly,⁹⁷ followed by a revised draft proposal in January 2011.⁹⁸ The text of the revised draft Optional Protocol was discussed during the third and final Working Group meeting, a seven-day session in February 2011, leading to the adoption of a new draft Optional Protocol, document A/HRC/WG.7/2/CRP.2.⁹⁹ The CRC Committee, UNICEF and other delegations voiced their deep concern about this latest draft because they considered it to be a compromise package, *inter alia* due to the deletion of provisions for collective communications and the inclusion of a provision allowing States to enter reservations when ratifying the Protocol. The outcome of this last meeting was met with great disappointment by the Chair of the CRC Committee, Professor Y. Lee, who publicly apologised to all children, stating: “I am afraid that we have affirmed that children are mini humans with mini rights and the current draft fits this idea of children.”¹⁰⁰

In addition to the aforementioned duties, the Committee formulates its interpretation on key themes of the Convention – such as the right of the child to be heard and the rights of children affected by HIV/AIDS – which have been issued as General Comments since 2001. As the provisions of the Convention have been formulated in such broad and general terms, clarifying their meaning is essential and forms an important task of the Committee.¹⁰¹ Despite the fact that these General Comments are non-

95 Lee 2010, p. 480.

96 UN Human Rights Council, A/HRCH/13/L.5, 2010.

97 UN General Assembly, A/HRC/WG.7/2/2, 2010.

98 UN General Assembly, A/HRC/WG.7/2/4, 2011.

99 UN General Assembly, A/HRC/17/36 (future), 2011.

100 Complaints Mechanism: Summary of Final Draft Meeting <<http://www.crin.org/resources/infodetail.asp?id=24180>>, accessed on 24/02/2011.

101 Gras 2001, p. 51.

binding, they have an authoritative status in that they provide guidance to States Parties' understanding of their obligations deriving from the Convention.¹⁰²

2.5.2 Relevant Stipulations CRC

As stated previously, the Convention covers a wide range of issues in the field of children's rights. The Preamble and a number of Articles deal with the family environment in general and alternative care in particular.

The Preamble announces:

(...)

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,

(...)

A reference to alternative care can be found in the recognition that "a child should grow up in a family environment". Should this not be possible within the child's biological family, an alternative environment must be provided. This paragraph in the Preamble partly reaffirms Article 6 of the 1959 Declaration in which it was similarly acknowledged that children should grow up in a family environment.

Best interests of the child

Article 3 CRC contains the principle of the best interests of the child (paragraph 1), as well as provisions on the protection and care for a child's well-being (paragraphs 2 and 3):

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

¹⁰² Sloth-Nielsen 2004, p. 6.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Equivalent provisions on the principle of the best interests of the child can be found in both the 1959 Declaration and the Declaration on Foster Placement and Adoption. This principle – which prescribes that in all actions concerning a child his best interests should not only be taken into account, but be “a primary consideration” – is very far-reaching and is regarded as an ‘umbrella provision’ because it is relevant to every other provision in the CRC.¹⁰³ Although an extensive analysis of the best interests principle does not fall within the scope of this study, the author deems it necessary to devote some considerations to this topic.

The CRC Committee has elevated four Articles to the grade of General Principles,¹⁰⁴ viz Article 2 (non-discrimination), Article 3 (best interests of the child), Article 6 (right to life, survival and development) and Article 12 (respect for the views of the child).¹⁰⁵

The concept of the best interests principle is undefined and the wording is such that the meaning of the principle can only be acquired through interpretation; the application of this principle, therefore, is a complicated task.¹⁰⁶ On the other hand, the relative openness of the principle enables flexibility in its application, tailored to each specific situation.¹⁰⁷ The principle is not static in that changes in society may lead an adjustment in

103 Detrick 1999, p. 92.

104 Hodgkin & Newell 2002, p. 42.

105 UN Committee on the Rights of the Child, CRC/C/58/Rev.2, 2010, para 23.

106 Alston & Gilmour-Walsh 1996, p. 1.

107 Arts 2010, p. 14.

interpretation of the best interests concept. Different societies at different times will have divergent views on what is in a child's best interests, although some circumstances – for example hunger or poverty – are never considered to be in a child's best interests.¹⁰⁸ At the same time, this flexibility leads to the best interests principle being considered a 'Trojan horse' by some as its indeterminacy allows for non-compliance with the provisions of the CRC under the guise of cultural relativism.¹⁰⁹ A topical example is female genital mutilation (FGM); the practice of FGM is – wrongfully – generally justified as culturally determined.¹¹⁰

The use of 'a' (as in: "a primary consideration") rather than 'the' is noteworthy; it indicates that not only the best interests of the child should be taken into consideration in actions concerning children, but that competing interests such as conflicting human rights issues may play a role. However, the best interests principle should, at the very least, be given due consideration if not primary consideration.¹¹¹ The best interests of a child do not have absolute priority.¹¹²

The principle covers "all actions concerning children". Although the word 'action' may imply an activity, failing or omitting to act in relation to a child should also be regarded as an action. For instance, the neglect of a child is not an activity as such; however, it does fall into the category "actions concerning children" and the best interests principle applies in this situation as well.¹¹³

The best interests principle also plays a role in budget allocation concerning children's issues: "With regard to budgetary priorities in the allocation of available resources, the State Party should be guided by the principle of the best interests of the child".^{114, 115} A General Comment concerning

108 Freeman 2007a, p 27.

109 Alston & Gilmour-Walsh 1996, p. 2.

110 Freeman 2007a, p. 35.

111 Alston & Gilmour-Walsh 1996, pp. 11, 12.

112 Detrick 1999, p. 91.

113 Freeman 2007a, p. 45.

114 Hodgkin & Newell 2002, p. 44.

115 See generally Freeman 2007a.

the best interests principle is in the process of being drafted by the CRC Committee.¹¹⁶

Article 3 paragraph 2 CRC places an obligation on States Parties to safeguard the well-being of children by means of appropriate legal and administrative measures necessary for children's protection and care. It may be derived from this Article that the responsibility for a child's care and protection lies primarily with the State. However, the Article also stipulates that the rights and duties of a child's parents or others legally responsible should be taken into consideration. These duties include the primary responsibility for the upbringing and development of a child (Article 18 Paragraph 1 CRC). When Article 3 (2) CRC is read in conjunction with Article 18 (1) CRC it can be concluded that parents should be regarded as having the obligation to provide a child with adequate care and protection, while States are obliged to support parents in fulfilling this duty. Should parents fail to meet their obligations, the State will have to take adequate measures.¹¹⁷

Paragraph 3 contains the duty of States to set up and maintain standards with regard to alternative care. The obligation of States Parties to provide children with alternative care which complies with certain set standards, such as trained and qualified staff in child care facilities, is intrinsic to this Article.¹¹⁸

Right to alternative care

The best interests principle has found its way into a number of stipulations of the CRC, amongst which Article 20 CRC, the principal provision concerning children without parental care.¹¹⁹ Article 20 CRC prescribes that:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

¹¹⁶ Lee 2010, p. 480.

¹¹⁷ Freeman 2007a, pp. 65 – 67.

¹¹⁸ Detrick 1999, p. 94.

¹¹⁹ Freeman 2007a, pp. 7, 8.

2. *States Parties shall in accordance with their national laws ensure alternative care for such a child.*

3. *Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*

Pursuant to paragraph 1 of this Article, children who are temporarily or permanently deprived of a family environment or in whose best interests it is to be removed from this environment, have the right to State-provided protection and aid. According to paragraph 2, States Parties are obliged to provide these children with alternative care and in paragraph 3 a non-exhaustive account of forms of alternative care is given. The use of “shall” in this Article is noteworthy and provides for a strongly formulated right for children. Although it is arguable that Article 20 CRC encompasses all the four P's (protection, prevention, provision and participation) discussed in paragraph 5.2.1,¹²⁰ the aims of protection and provision are most significant.

All children are entitled to the observation of the rights enshrined in the CRC, but children without parental care have the right to special protection. States have an extra obligation to ensure that the rights of this particular group of children are adhered to and to protect them from all forms of violence and abuse.¹²¹ The form of special protection and assistance that should be given is not specified in the Convention, but can be derived from relevant Articles on health (Article 24 CRC), an adequate standard of living (Article 27 CRC) and education (Article 28 CRC), in which indisputable obligations for States are laid down. Furthermore, the second paragraph of Article 20 CRC states that children who do not live within their own family environment are entitled to alternative care. The entitlement to alternative care could be seen as (one of the forms of) protection and assistance to be provided by the State.

¹²⁰ Cantwell & Holzscheiter 2008, p. 7.

¹²¹ Cantwell & Holzscheiter 2008, p. 5.

Although a clear definition of the term ‘family environment’ is not set out in the Convention, Article 5 CRC – with regard to parental guidance – indicates that care within a family environment may be care provided by parents, by “members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child”.¹²² Article 20 CRC should therefore be read as follows: children who are not cared for by their parents, legal guardians, others legally responsible for the child, members of the extended family or community members as provided for by local custom, have the right to special protection and assistance provided by the State.

Possible forms of alternative care, recognised by the Convention, are: foster care, *kafalah*, adoption and institutional care (paragraph 3). The use here of the term “*inter alia*” is noteworthy, indicating that other forms of alternative care are not excluded and allowing States Parties to provide children with varying forms of alternative care “in accordance with their national laws”. The phrasing of paragraph 3 indicates that alternative care provided by a family is to be preferred and – unless deemed “necessary” – placement in an institution should be avoided.¹²³ While provisions on adoption and institutional care are included in the CRC, it is notable that the Convention does not contain any specific rules regarding foster care or the quality of this care.

A number of rules concerning adoption are included in Article 21 CRC, which may be considered to be an elaboration on Article 20 CRC with regard to adoption; other forms of alternative care are not further expounded on in the Convention. However, the heretofore discussed Declaration on Foster Placement and Adoption contains Principles with regard to both adoption and foster care. Furthermore, in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (*ut infra*) additional rules relating to adoption are to be found. Additionally, the UN Guidelines for the Alternative Care of Children (*ut infra*) provide States with an extensive set of criteria on all forms of alternative care.

¹²² Detrick 1999, p. 335.

¹²³ Detrick 1999, p. 336.

Adoption

Directly related to Article 20 CRC is Article 21 CRC in which adoption – one of the forms of alternative care recognised by Article 20 paragraph 3 CRC – is further elaborated on.¹²⁴ Article 21 CRC stipulates:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

¹²⁴ Vité & Boéchat 2008, p. 9.

As the Convention does not impose the obligation on States Parties to embody adoption in their legal systems, this Article only applies to States that recognise or permit adoption. The term ‘adoption’ encompasses both national and intercountry adoption; paragraph a) of Article 21 CRC relates to national adoption and paragraphs b) – e) concern intercountry adoption. The fact that this Article mainly covers intercountry adoption indicates the importance of the protection of children’s rights when this form of adoption is considered.¹²⁵ In all cases of adoption, the best interests of the child should be of paramount consideration. Note that in relation to adoption the best interests principle should be ‘the’ paramount consideration, not just ‘a’ primary consideration as prescribed by Article 3 CRC.¹²⁶ A comparable phraseology can be found in the Preamble as well as in Article 5 of the Declaration on Foster Placement and Adoption, as discussed in paragraph 2.4 of this study;¹²⁷ this, however, is a non-binding declaration, whereas governments are bound by the CRC. In cases of intercountry adoption, States are under the obligation to give the highest level of prominence to the interests of the child irrespective of any other interests, such as those of the natural and adoptive parents, governments and adoption agencies.¹²⁸

Paragraph a) of Article 21 CRC prescribes that adoption should be authorised only by competent authorities. In accordance with the law and based on all relevant and available information, these authorities should verify that the child is legally free for adoption. Articles 13 to 16 of the 1986 Declaration outline further procedures concerning national adoption. The importance of this stipulation is related to upholding the best interests of a child. Adoptions arranged by the natural and adoptive parents or by agents that are not competent to carry out the procedures cannot be guaranteed to be in a child’s best interests given that the interests of the aforementioned parties shall undoubtedly play a role. For instance, the biological parents may be desperate (due to economic circumstances) for the care of a child to be taken over by an adoptive parent, while this may not necessarily be in the best interests of the child. Adoptive parents may be primarily led

125 Vité & Boéchat 2008, p. 1.

126 UN General Comment No. 7 (2005), para 36(b).

127 Detrick 1999, p. 347.

128 Vité & Boéchat 2008, p. 24.

by their own wishes to form or complement a family, rather than by the interests of the adoptee. Adoption agencies that have not been accredited by the government are frequently driven by financial interests rather than by the best interests of children.¹²⁹

In paragraph b) the exceptionality of intercountry adoption is indicated: although not explicitly stated, this form of adoption is to be regarded as a measure of last resort to be considered only if there are no other suitable options of alternative care available to a child in his country of birth.¹³⁰ This is stated in like fashion in Article 17 of the 1986 Declaration.

Paragraph c) bears parallels with Article 20 of the 1986 Declaration, stating that the safeguards and standards for intercountry adoption should be equivalent to those in place for national adoption. Consequently, the aforementioned paragraph a) and Articles 13 to 16 of the 1986 Declaration apply to both national and intercountry adoption. Article 21 CRC explicitly recognises that a child enjoys the safeguards and standards, whereas Article 20 of the 1986 Declaration lacks this relationship.¹³¹

According to paragraph d) the possibility of gaining improper financial gain from intercountry adoption should be prevented. A comparable provision can be found in Article 20 of the 1986 Declaration. The distinction between proper and improper financial gain is difficult to make: although it is clear that certain costs, such as reasonable administrative fees, are inherent to adoption procedures, defining an acceptable level of payments is impossible. The transparency of costs involved is therefore essential.¹³²

In paragraph e) States Parties are called upon to promote the objectives of Article 21 CRC by means of bilateral or multilateral arrangements or agreements and to strive to ensure that a child's placement in another country is carried out by competent authorities or parties. In the 1986 Declaration similar provisions are to be found in Article 19 on the prohibition

129 Vité & Boéchat 2008, pp. 30, 31.

130 Vité & Boéchat 2008, p. 45.

131 Vité & Boéchat 2008, p. 48.

132 Vité & Boéchat 2008, pp. 53, 54.

of abduction and illicit placements and in Article 20, concerning placements through competent authorities or agencies.

The CRC Committee regularly refers to the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (*ut infra*) in the context of Article 21 CRC, encouraging States to ratify this Convention.^{133, 134}

Right to periodic review of placements

Article 25 CRC relates to the periodic review of placements for the purposes of care, protection or treatment of a child; according to this Article States Parties should:

recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

The right to a periodic review of alternative care placements can be derived from this Article as ‘treatment’ does not only encompass treatment of a medical nature but also alternative care provided to a child who is temporarily or permanently deprived of parental care.¹³⁵ Note that this right is limited to placements by competent authorities such as a court or an administrative body (for example, a child protection board); in theory, there is no obligation for review of other placements, for instance placements by parents or legal guardians. This may lead to undesirable inequality between a child placed in an institution by a court and one placed there by his parents or legal caregiver, the latter not having the right to periodic review of his placement.¹³⁶ However, the CRC Committee’s Concluding Observations suggests that periodic review should reach across all alternative care situations.

133 Detrick 1999, p. 355.

134 See generally Vité & Boéchat 2008.

135 Doek 2008, p. 11.

136 Doek 2008, pp. 4 – 7.

Although the phrasing of the Article is inconclusive, the purport of the provision has been expressed by the CRC Committee in its 1996 General Guidelines for Periodic Reports;¹³⁷ according to the Committee, care placements that should be reviewed are “public and private institutions, services and facilities”.¹³⁸ This provision is applicable to all institutional care – irrespective of whether this care is provided by a competent State authority or by a private body – as well as to foster care. The purpose of periodically reviewing a placement should be seen to be the assessment of the efficacy of the placement as well as the need for its continuation.¹³⁹

Article 25 CRC leaves unanswered the question of who should carry out the review and how often review should take place (the term periodic allows for variegated interpretation). In order for review to be objective and effective, it should be carried out by an independent and impartial authority. With regard to periodicity, States should acknowledge and take into account the following factors:

- the potential negative consequences of a placement
- the right of a child to be returned to his parents as soon as this is in his best interests
- the rapidity of a child’s development.

In view of the aforementioned factors, it is considered essential to review a child’s placement every six months.¹⁴⁰

The counterpart of Article 25 CRC can be found in Article 12 of the 1986 Declaration, relating to the supervision of foster care.

137 Detrick 1999, p. 439.

138 UN Committee on the Rights of the Child, CRC/C/38, 1996, para 86.

139 Doek 2008, p. 9.

140 Doek 2008, pp. 10 – 13.

Right to adequate standard of living

Article 27 CRC proclaims:

1. *States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*
 2. *The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.*
 3. *States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*
- (...)

Although this Article does not refer to alternative care as such, its relevance for a child in alternative care and the parties involved in providing such care, should not be underestimated. This Article concerns the right of a child to “a standard of living adequate for the child's physical, mental, spiritual, moral and social development” (paragraph 1). The responsibility of securing this right initially lies with the parents or others responsible for the care of the child (paragraph 2); however, States Parties should enable parents or other caregivers to fulfil this responsibility, providing material assistance and support where necessary (paragraph 3).

The entitlement to an adequate standard of living includes both material elements (such as food and housing) and intangible factors (aspects relating to physical, mental, spiritual, moral and social development). A child's right to a certain standard of living is based on these criteria.¹⁴¹

According to this Article, the responsibility for providing a child with an appropriate and adequate upbringing lies primarily with the parents or others caring for the child, such as kinship and foster caregivers. In impoverished families, it is extremely difficult if not impossible for parents to fulfil this obligation. The same applies to (single) parents who lack the

¹⁴¹ Eide 2006, p. 17.

required time or skills required to provide their children with an adequate standard of living.¹⁴²

Additional responsibility lies with the State as outlined in paragraph 3. If parents are incapable of fulfilling their obligations, governments should assist parents and others responsible for the child to act in conformity with this right. Where appropriate, they should provide material assistance and support programmes, in particular relating to food, clothing and housing.¹⁴³ States Parties should provide the aforementioned aid “within their means”. The proviso relating to the available resources of a particular State presupposes that developing countries are less likely to fulfil their obligations as they have fewer means at their disposal. Although this is true up to a certain point, the *availability* of resources is no guarantee that States meet their obligations; the United Kingdom is a prime example of a developed – and wealthy – country where a relatively high proportion of children (one in three) live below the poverty threshold.¹⁴⁴ This paragraph also covers the obligation of States to provide children who are affected by HIV/AIDS with an adequate standard of living.¹⁴⁵ On the basis of Article 4 CRC, States are under the obligation to help – through international cooperation and assistance – countries unable to provide their children with an adequate standard of living when parents fail to do so.^{146, 147}

2.5.3 General Comments relevant to alternative care

As indicated earlier, a number of stipulations from the CRC have been expanded on by means of General Comments issued by the CRC Committee.

¹⁴² Eide 2006, p. 4.

¹⁴³ Detrick 1999, pp. 459, 460.

¹⁴⁴ <http://www.unicef.org.uk/Documents/Publications/Child%20poverty%20in%20the%20UK_UNICEF%20UK%20Information%20Sheet.pdf>, accessed on 18/06/2011.

¹⁴⁵ Eide 2006, pp. 32, 35.

¹⁴⁶ Eide 2006, p. 46.

¹⁴⁷ See generally Eide 2006.

General Comment No. 3, HIV/AIDS and the rights of the child (2003)

The issue of care for children affected by HIV/AIDS had previously been addressed in the 2001 Declaration of the Commitment on HIV/AIDS, a crucial policy instrument in the combat against the disease.¹⁴⁸ In 2003, the CRC Committee issued a General Comment relating to this topic.

Professor J. Sloth-Nielsen, member of the African Committee of Experts on the Rights and Welfare of the Child, is of the opinion that “the most crucial characteristic of the General Comment is the formal recognition it accords to the phenomenon of child-headed households within the international law framework”.¹⁴⁹ This General Comment provides that “special attention must be given to children orphaned by AIDS and to children from affected families, including child-headed households”.¹⁵⁰ The Committee emphasises that financial and other support by the State should be provided to this particular group of children.¹⁵¹

On the subject of alternative care, General Comment No. 3 explicitly states that children affected by HIV/AIDS have, *inter alia*, the right to care.¹⁵² The Committee acknowledges that orphans are best protected and cared for by the extended family in a family-based setting and that siblings should be enabled to grow up together. Where necessary, States should provide assistance to maintain existing family structures. Should kinship care not be possible – due to the HIV/AIDS pandemic, many families have suffered heavy losses – other forms of family-based care should be pursued, such as foster care.¹⁵³

Institutional care may have to be employed as an interim measure in situations where family-based care is not an option. However, institutional care should remain a measure of last resort and stringent regulations should be in place to safeguard the well-being of children and to protect them from all forms of abuse. In addition, placements in institutions should

148 UN Declaration of the Commitment on HIV/AIDS.

149 Sloth-Nielsen 2005, p. 75.

150 UN General Comment No. 3 (2003), para 31.

151 UN General Comment No. 3 (2003), para 34.

152 UN General Comment No. 3 (2003), para 28.

153 UN General Comment No. 3 (2003), para 34.

be limited in time as much as possible and children must be supported to reintegrate into their communities.¹⁵⁴

General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (2003)

General Comment No. 5 of the CRC Committee contains measures of implementation of the CRC.¹⁵⁵ The Committee considers it to be an obligation of States Parties to execute an extensive legal review in order to bring national laws in conformity with the CRC.¹⁵⁶ In order to do so efficaciously, it is recommended that countries draw up a national plan or policy aimed at harmonisation. Such policy should focus on a review of existing laws, systematic checking of proposed laws, structuring of new legislative measures, drafting of and consultation on legislation and the implementation of this legislation.¹⁵⁷

General Comment No. 7, Implementing child rights in early childhood (2005)

General Comment No. 7 elaborates on the concept of the family. The Committee recognises the family to be more than just the nuclear family of a child: extended family and – in certain cases – community members may also be classed as belonging to a child's family, provided that this is in the best interests of the child.¹⁵⁸

The importance of family-based alternative care settings – especially for young children – is also stressed in this General Comment.¹⁵⁹

General Comment No. 12, The right of the child to be heard (2009)

In General Comment No. 12 the child's right to be heard – the right to participate – is expanded on. Although Article 12 CRC prescribes that children's views should be heard and considered in relation to all issues that concern them, the Committee explicitly recommends that States Parties should ensure that children's opinions are heard and taken into

¹⁵⁴ UN General Comment No. 3 (2003), para 35.

¹⁵⁵ UN Committee on the Rights of the Child, CRC/GC/2003/5, 2003.

¹⁵⁶ UN Committee on the Rights of the Child, CRC/GC/2003/5, 2003, paras 11 and 18.

¹⁵⁷ Doek 2007a, p. 2.

¹⁵⁸ UN General Comment No. 7 (2005), para 15.

¹⁵⁹ UN General Comment No. 7 (2005), para 36(b).

due consideration in all matters concerning foster care and institutional care.¹⁶⁰ The same applies to adoption and *kafalah*.¹⁶¹ The Committee finds that the determination of the best interests of a child – to be taken into consideration in all decisions relating to alternative care – is only possible when the child's right to be heard is adhered to.¹⁶²

Governments should ensure that children are in a position to express their views in any alternative care setting they find themselves in. To this end, legislation should be implemented, ensuring that children are fully informed with regard to their care placements. Such legislation should also be aimed at taking into account children's views. In addition, a competent monitoring mechanism should be established.¹⁶³

2.6 African Charter on the Rights and Welfare of the Child (1990)¹⁶⁴

Notwithstanding the fact that all African countries but Somalia have ratified the CRC, very few African nations were involved in its drafting process, which was predominantly led by Western Europe and the US.¹⁶⁵ The African member States subsequently expressed the view that the needs of children in Africa had not been fully addressed in the Convention, nor had the specific African socio-cultural and economic situation been taken into account.¹⁶⁶ Furthermore, a number of key subjects in the final text of the Convention had been loosely-formulated, in order to maintain the universality of the document and to satisfy the full international community.¹⁶⁷ Essentially, Africa felt that it was imperative to draw up a Charter which addressed African needs fully.

160 UN General Comment No. 12 (2009), para 54.

161 UN General Comment No. 12 (2009), para 55.

162 UN General Comment No. 12 (2009), para 56.

163 UN General Comment No. 12 (2009), para 97.

164 Appendix II.

165 LeBlanc 1995, p. 30.

166 Veerman 1992, p. 182.

167 Lloyd 2008, p. 34.

2.6.1 Ratification status and implementation of the African Charter on the Rights and Welfare of the Child

In 1979, the Organisation of African Unity, currently known as the African Union,¹⁶⁸ adopted the Declaration on the Rights and Welfare of the African Child, underlining the paramountcy of children's rights on the African continent. However, this document contains a mere 12 articles – concerning the promotion of child welfare, particularly with regard to education, medical care, nutrition, other basic services and child labour¹⁶⁹ – and is not legally binding. During the drafting process of the CRC, the Organisation of African Unity had indicated that an additional document would be required, encompassing specific African socio-cultural aspects; subsequently the African Charter on the Rights and Welfare of the Child (hereinafter: ACRWC) was drawn up. The Charter was adopted by the Organisation of African Unity in July 1990 and entered into force on 29 November 1999. It is seen as the most important document on children's rights in Africa.¹⁷⁰ As with the CRC, the Charter encompasses the whole gamut of civil, political, economic, social and cultural rights.¹⁷¹

The Charter, consisting of a Preamble and 48 Articles, strongly resembles the CRC as far as provisions are concerned,¹⁷² but offers the African child – in comparison with the CRC – a higher level of protection in additional or adapted articles.¹⁷³ For instance, Article 1 paragraph 3 ACRWC explicitly sets aside “any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter”, in so doing going further than the CRC in ensuring the protection of children's rights. Article 2 ACRWC states that “a child means every person below the age of eighteen years”, setting a uniform age for the duration of childhood. In contrast, Article 1 CRC provides States Parties with the possibility of setting

168 The Organisation of African Unity was established in 1963, its main objective the promotion of unity in Africa. The African Union, established in 2002, is its successor. All African States, excluding Morocco, are members of the African Union; <<http://www.africa-union.org/root/au/index/index.htm>>, accessed on 22/08/2010.

169 Declaration on the Rights and Welfare of the Child, AHG/St. 4 (XVI) Rev.1 1979.

170 Lloyd 2008, p. 33.

171 African Child Policy Forum 2007a, p. 12.

172 Bennett 1999, p. 98.

173 Veerman 1992, p. 273.

a younger age of majority. The African child is accordingly guaranteed protection according to the Charter until the age of 18.¹⁷⁴ This right may be impaired though by the lack of adequate birth registration.¹⁷⁵

Apart from the additions and improvements to the CRC, the ACRWC's strength lies in the accessibility of its wording, which is considered to be clear and unambiguous.¹⁷⁶ Although all the countries central to this study – with the exception of Swaziland – have ratified the Charter, 8 of the 53 African Union Member States have yet to do so.¹⁷⁷ This is a point of concern in terms of the implementation of children's rights into national legislation, as voiced by Professor J.E. Doek, former Chair of the CRC Committee, urging all African countries to ratify the ACRWC.¹⁷⁸ Figure 2.3 shows the ratification status of the nine focus countries.

Figure 2.3 Ratification of the ACRWC

Country	Ratification date
Ethiopia	02/10/2002
Kenya	25/07/2000
Malawi	16/09/1999
Namibia	23/07/2004
Rwanda	11/05/2001
Sierra Leone	13/05/2002
South Africa	07/01/2000
Swaziland	(signed 29/06/1992)
Uganda	17/08/1994

Article 1 paragraph 1 ACRWC obliges States Parties to “recognize the rights, freedoms and duties enshrined in this Charter” and to undertake the necessary steps to adopt “legislative or other measures as may be necessary to give effect to the provisions of this Charter”; this article is equivalent to

174 Chirwa 2002, p. 158.

175 Lloyd 2008, p. 35.

176 Chirwa 2002, p. 170.

177 The status of ratifications of the ACRWC on 01/01/2011, <<http://www.acerwc.org/ratifications/>>.

178 African Child Policy Forum 2007b, p. 27; concluding remarks by Professor J.E. Doek.

Article 4 CRC. It is noteworthy that the Charter lacks an explicit provision through which States Parties have an obligation to fully deploy their resources in order to safeguard children's rights, as is provided in Article 4 CRC with regard to economic, social and cultural rights. It has been argued that, as a result of this hiatus, States Parties' commitment of resources are of a lower ranking than the commitment derived from the CRC as *any* allocation of resources – however insignificant – could be said to fulfil a State's obligation.¹⁷⁹ However, the obligation derived from Article 1 ACRWC (to adopt other measures as may be necessary) must be understood to include the allocation of financial resources “as may be necessary”, without any restrictions; it may thus be concluded that the ACRWC goes further than the CRC in its directive to States Parties to make available sufficient budgetary resources.¹⁸⁰

In accordance with Article 32 ACRWC, the African Committee of Experts on the Rights and Welfare of the Child (hereinafter: ACERWC) was established in July 2001. The Committee is responsible for the promotion and protection of the rights enshrined in the Charter, as well as the monitoring of the implementation of these rights.¹⁸¹ The ACERWC is an institution of the African Union and as such is responsible to the African Union Assembly. From the outset, the Committee has had to cope with many challenges – such as a provisional budget and the lack of a secretariat and structures – affecting its functioning adversely.¹⁸² The Committee can be likened to the CRC Committee; however, unlike the CRC Committee, individuals are entitled to approach the ACERWC with a complaint in relation “to any matter” covered by the Charter,¹⁸³ upon which the Committee may conduct an investigation and make recommendations to the government in question.¹⁸⁴ States Parties are obliged to report to the Committee “within two years of the entry into force of the Charter for the State Party concerned” and every three years thereafter.¹⁸⁵ In order to save time and

179 Rishmawi 2006, p. 12.

180 Rosa & Dutschke 2006, pp. 10, 11.

181 Article 42 ACRWC.

182 Lloyd 2008, p. 42.

183 Article 44 ACRWC.

184 Article 45 ACRWC.

185 Article 43 ACRWC.

resources, States Parties are explicitly permitted to draw from the reports they have submitted to the CRC Committee, integrating the unique and specific aspects of the ACRWC.¹⁸⁶ The fact that States have an obligation to supply the ACRWC with reports on a more frequent basis is seen by some as an improvement on the reporting system of the CRC in that it provides for more effective monitoring.¹⁸⁷ However, as with the CRC, the Charter does not contain any enforcement measures; to date, the majority of countries have yet to submit their initial report. The shorter intervals between reports have therefore not (yet) materialised. Figure 2.4 shows the reporting status of the ACRWC of the nine countries featuring in this research.

Figure 2.4 Reporting status ACRWC

Country	Ratification	Initial report
Ethiopia	2002	-
Kenya	2000	2010
Malawi	1999	-
Namibia	2004	-
Rwanda	2001	2008
Sierra Leone	2002	-
South Africa	2000	-
Swaziland	(signed)	Not applicable
Uganda	1994	2010

The fact that countries default on their responsibility to submit reports to the Committee may be viewed as non-commitment to the Charter and its obligations.¹⁸⁸ Nonetheless, a number of countries have in the meantime incorporated provisions of the ACRWC in national legislation or are in the process of doing so.¹⁸⁹

¹⁸⁶ African Committee of Experts on the Rights and Welfare of the Child, Cmtee/ACRWC/2 II. Rev2, para 24.

¹⁸⁷ Olowu 2002, p. 131.

¹⁸⁸ Save the Children Sweden 2008, p. 9.

¹⁸⁹ Memzur 2008, pp. 27, 28.

2.6.2 Relevant stipulations ACRWC

One of the core provisions of the African Charter is the principle of the best interests of the child; Article 4 ACRWC prescribes that:

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

(...)

The best interests principle in the ACRWC is more strongly formulated than its counterpart in the CRC. First of all, it states that the best interests of the child should be “the” primary consideration, not “a” primary consideration, according this principle an overriding status.¹⁹⁰ Furthermore, in contrast with the provisions of the CRC, the Article states that actions by “any person or authority” are subject to this principle, rather than restricting it to actions by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”, effectively leading to a much wider range of application of the principle,¹⁹¹ which includes a child’s parents.¹⁹²

According to Article 16 ACRWC, children should be protected from all forms of abuse, neglect and torture, regardless of whether in the care of their parents or any other caregiver. States should ensure that special monitoring units are set up in order to provide the necessary support to both children and their caregivers.

In Article 18, the Charter recognises that “the family shall be the natural unit and basis of society”. The Charter’s provisions concerning alternative care resemble the principles of the CRC, principles to which the Charter reaffirms adherence. According to the Preamble, States Parties should recognise that for the full and harmonious development of a child’s personality, it should grow up in a family environment.

¹⁹⁰ Chirwa, p. 160.

¹⁹¹ Lloyd 2008, pp. 36, 37.

¹⁹² Freeman 2007a, p. 21.

Article 19 ACRWC concerns parental care and protection. It states that:

1. Every child shall be entitled to the enjoyment of parental care and protection (...)

The Charter does not specify the meaning of the term ‘parental care’; however, Article 20 ACRWC outlines parental responsibilities:

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:

(a) to ensure that the best interests of the child are their basic concern at all times;

(b) to secure, within their abilities and financial capacities, conditions of living necessary to the child’s development; and

(c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures;

(a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;

(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and

(c) to ensure that the children of working parents are provided with care services and facilities.

This Article is comparable to Article 27 CRC. The responsibilities laid down in this Article do not only concern the parents of a child, but include any person responsible for a child. The primary responsibility for the upbringing and development of a child lies with the parents or “other persons responsible for the child”. Parents should ensure that the best interests of the child are paramount and they should – within their means and abilities – secure

the living conditions necessary for the child's development, respecting the dignity of the child.

Additionally, this responsibility lies with the State Party which should – within its means – assist parents and others responsible for the child. Where necessary, a Charter ratifier should provide material assistance and support programmes, in particular regarding food, health, education, clothing and housing. The State should assist parents and others responsible for the child; institutions for child care, as well as care services for children of working parents, should be facilitated. In relation to HIV/AIDS, this Article is significant in that the Charter explicitly holds governments responsible for the care of children whose primary caregiver has lost the ability to provide them with adequate care or who have succumbed to the disease.¹⁹³

Rules concerning adoption can be found in Article 24 ACRWC:

States Parties which recognize the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

(b) recognize that intercountry adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child affected by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

¹⁹³ Lloyd 2008, p. 39.

(d) take all appropriate measures to ensure that in intercountry adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) establish a machinery to monitor the well-being of the adopted child.

This Article is comparable to Article 21 CRC, with a number of differences. Firstly, paragraph b) explicitly states that intercountry adoption should be treated as a measure of last resort. Although the phrasing of Article 21 paragraph b CRC indicates that intercountry adoption should only be considered if a child cannot adequately be cared for in his own country, it is not explicitly expressed as a measure of last resort.

Paragraph d) expressly forbids trafficking and improper financial gain from adoption. Article 21 CRC does not include a similar prohibition; however, Article 35 CRC prohibits the sale and trafficking of children in general without making a link to adoption.

Finally, an additional paragraph (f) has been included in Article 24 ACRWC, obliging States Parties to establish a monitoring system concerning the well-being of adopted children. This is an enhancement of the CRC, as the Convention does not contain any stipulations on monitoring in relation to adoption.¹⁹⁴

Article 25 ACRWC concerns children without parental care:

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;

2. States Parties to the present Charter:

(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in

¹⁹⁴ Vité & Boéchat 2008, p. 11.

his or her best interests cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;

(b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

This Article is analogous to Article 20 CRC, with a number of minor differences in nuance. Article 25 paragraph 2 sub a ACRWC states that governments should ensure “alternative family care”, creating the impression that alternative care should be family-based. In the same Paragraph, however, the possible forms of care mentioned are foster placement or placement in suitable institutions, indicating that institutional care is accorded an equal status to “alternative family care”.

The use of the term “for any reason” indicates that this Article has a broader scope than Article 20 CRC, as it is aimed at children who are deprived of their family for any reason whatsoever, including children who are unaccompanied, separated or displaced as a result of armed conflicts and natural disasters. In addition, Paragraph 2 sub b concerns displaced children and the obligation of States Parties to take all necessary measures to reunite these children with their families in cases of armed conflict or natural disasters.

In Paragraph 3 this Article states that the choice of alternative care should be in the best interests of the child. The ACRWR is more explicit than the CRC in this respect, the latter only applying the best interests principle to the decision to remove a child from its family environment.¹⁹⁵

¹⁹⁵ Cantwell & Holzscheiter 2009, pp. 22, 23.

2.7 UN Guidelines for the Alternative Care of Children (2009)¹⁹⁶

According to both the CRC and the ACRWC “children should grow up in a family environment, in an atmosphere of happiness, love and understanding”.¹⁹⁷ Article 20 CRC declares that States Parties shall provide special protection and assistance to children who no longer have a family or who are temporarily deprived of their family. These children have the right to alternative care, provided by the state. The following possible types of alternative care are mentioned in Article 20 CRC: foster care, *kafalah*, adoption or, should other options not be available, placement in a suitable institution for the care of children. Article 25 ACRWC is comparable in that it obliges States Parties to provide children with alternative family care when necessary. Among other options, this care could include foster care or institutional care.

Despite the clarity of the CRC (and of the ACRWC for that matter) regarding the responsibilities of States towards children who live without their parents, many children – in most cases having lost one or both parents as a result of the HIV/AIDS pandemic, armed conflict or natural disasters – have ended up without any protection or assistance whatsoever. In the years leading up to 1989, when the CRC was drafted, the rise in the number of orphaned children was not foreseen and as a consequence provisions for this category of children were not put in place.¹⁹⁸ The CRC merely forms a framework, but does not provide States with comprehensive and more detailed guidelines. The rapidly increasing number of children growing up without parental care gave rise to the call for an internationally-accepted instrument on the subject of alternative care.

2.7.1 Development

In 2004 the International Social Service and UNICEF expressed their concern about the fact that a number of States Parties fail to provide suitable

¹⁹⁶ Appendix III.

¹⁹⁷ Preamble CRC and Preamble ACRWC.

¹⁹⁸ Sloth-Nielsen 2004, p. 6.

alternatives for children without parental care, as well as about situations where harmful care provisions exist. These organisations briefed the CRC Committee on the dire need for and the feasibility of global standards for the protection and well-being of children in need of alternative care.¹⁹⁹ In the same year the Committee called for guidelines to be developed to ensure the protection of children who do not or who cannot live with their parents.

At the Committee's Discussion Day on 16 September 2005, it was recommended that an Expert Meeting should prepare a set of international standards for the protection and alternative care of children without parental care.²⁰⁰ 'Children without parental care' is the generic term used to cover all cases of children who do not live with at least one of their parents, for whatever reason and under whatever circumstances. An NGO Working Group on Children without Parental Care – including organisations such as Defence for Children International, Resources Aimed at the Prevention of Child Abuse and Neglect, Save the Children UK, SOS Children's Villages International and World Vision International – was set up to develop the first draft of the then UN Guidelines for the Protection and Alternative Care of Children without Parental Care, which was submitted to the Committee in May 2006.²⁰¹

In August 2006 an international, intergovernmental Meeting of Experts took place in Brazil in order to revise the Guidelines as well as raise support for them. A 15-country "Group of Friends", led by the Brazilian government, was set up to facilitate further revisions. In 2009 the draft Guidelines were renamed UN Guidelines for the Alternative Care of Children (hereinafter: UN Guidelines). In June 2009, the Human Rights Council considered that the Guidelines "set out desirable orientations for policy and practice with the intention of enhancing the implementation of the Convention on the Rights of the Child, and of relevant provisions of other international instruments regarding the protection and well-being of children deprived

199 UNICEF / International Social Service 2004a; UNICEF / International Social Service 2004b.

200 UN Committee on the Rights of the Child, CRC/C/153, 2006.

201 Draft UN Guidelines for the Protection and Alternative Care of Children without Parental Care, International Social Service & UNICEF, 2006.

of parental care or who are at risk of being so". The Council submitted the Guidelines to the UN General Assembly for consideration, with a view to their adoption.²⁰² On 20 November 2009 – the 20th anniversary of the CRC – the Guidelines were welcomed by the UN General Assembly. Due to the fact that the text of the Guidelines contained an anomaly in the numbering of the Paragraphs, a correction was made in the Resolution of 24 February 2010.²⁰³

Although non-legally binding, the UN Guidelines should be seen as a reference text for governments, policymakers and those involved in alternative care for children.²⁰⁴ They also provide an efficient incentive; the outspoken support by the UN General Assembly (in various Resolutions), the CRC Committee (in its Concluding Observations) and civil society (through years of lobbying) add to the value of the Guidelines.

In this regard, reference should perhaps be made to the European Q4C Standards (Quality4Children Standards for Out-of-Home Child Care in Europe), aimed at the improvement of care placements of children within Europe. Both the UN Guidelines and the Q4C Standards are founded on the CRC.²⁰⁵ There are a number of differences between these two documents, notably the development and scope thereof: during the drafting process of the Standards extensive participation from children, young people, parents and caregivers from 32 European countries took place, leading to Standards based on experiences and good practices from all parties involved. In addition, sufficient public support for the Standards was achieved. Furthermore, the Q4C Standards form a regional (European) instrument and are therefore tailored to European issues, whereas the UN Guidelines have global coverage.²⁰⁶ What makes the Q4C Standards a very practical instrument is the fact that they have been translated into most European languages, resulting in increased accessibility. The Q4C Standards enjoy a (regional) universality; alternatively European nations may opt to derive National Standards from the Q4C Standards.

202 UN Human Rights Council, A/HRCH/11/L.11, 2009, pp. 31, 32.

203 UN General Assembly, A/RES/64/142, 2010.

204 Cantwell 2008a, p. 4.

205 SOS Children's Villages International 2007, p. 9.

206 Cantwell 2008a, pp. 1–3.

2.7.2 Contents

The Guidelines contain 167 paragraphs, divided into 9 different sections.²⁰⁷ The first three parts concern the purpose, the principles and the scope of the Guidelines. Part 4 deals with prevention of the need for alternative care. In part 5 the framework of care provisions is set out, followed by the determination of the most appropriate form of care in part 6. Part 7 sets out ground rules for provision of alternative care, while part 8 covers care provision for children who find themselves outside their country of habitual residence. The concluding part of the Guidelines concerns care in emergency situations. The aforementioned sections will be briefly discussed below.

Purpose, general principles and scope

The Guidelines are meant to enhance the current (inter)national legislation on children's rights dealing with the protection and well-being of children without parental care. States are called upon to ensure full implementation of the Guidelines and, where necessary, adopt legislation to do so.

The ultimate goal of the Guidelines is for children to stay with or return to their parents or to other close family members; the state is obliged to provide families with the necessary means of support to this end. Alternatively, other appropriate and permanent solutions, including adoption, should be found. When circumstances make this impossible, the most suitable form of alternative care should be provided, under conditions that promote the child's full and harmonious development. Alternative care can be informal, on the basis of a private arrangement, or formal, as when ordered or authorised by a judicial authority or an administrative body. Alternative care may be kinship care, foster care or residential placement. Explicitly ruled out as an instrument of alternative care are institutions where children have been placed as a suspect of a criminal offence or after conviction; those children are protected by other UN rules. The period prior to finalisation of the adoption procedure is regarded as a form of alternative care; from the moment that the procedure has been finalised, the Guidelines consider an adopted child to be in parental care.

²⁰⁷ UN Guidelines for the Alternative Care of Children.

The Guidelines encourage governments and all parties involved to take full responsibility for child care, providing them with assistance where necessary in implementing said Guidelines in their policies and activities. All decisions should be case-specific, always in the best interests of the child; they should respect the right of children to be consulted and have their views taken into account.

The Guidelines specifically mention the provision of support measures for vulnerable children, including those living with or affected by HIV/AIDS, living in regions of armed conflict, children affected by substance abuse and addiction, street children, victims of abuse and exploitation, abandoned children as well as the children of migrant workers and asylum seekers.

With regard to alternative care, the Guidelines prescribe that children should stay as close as possible to their habitual place of residence and that siblings should not be separated, unless separation is in their best interests. Young children, especially those under the age of three years, should preferably be placed in family-based settings. When children are looked after informally by relatives or by others, States should provide appropriate measures to ensure their well-being. Children living in institutions must be protected from institutionalisation; States should design standards to prevent this. Every child should grow up with the support and protection of a legal guardian; no child should be deprived of his rights, including access to education and healthcare, the right to identity, protection of property and inheritance rights.

Preventing the need for alternative care

According to the Guidelines, States should promote parental care by means of family-oriented policies that support families in meeting their responsibilities towards their children as well as measures to prevent family separation. Through these policies, families should be provided with competences, attitudes and tools enabling them to ensure the welfare of their children. Parents who indicate an inability to provide their children with appropriate care, should receive counselling and social support, encouraging and enabling them to continue to care for their offspring. The

Guidelines pay particular attention to single and adolescent parents and their children.

In cases of detention of the child's main carer, the Guidelines prescribe that the best interests of the child should prevail when deciding on whether the child should be accommodated with the imprisoned carer or be placed in care.

The Guidelines recognise the rising phenomenon of child-headed households, which are described as "siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable of acting as the household head".²⁰⁸ The Guidelines prescribe that States should ensure full protection and support for such households, *inter alia* by appointing a legal guardian or other recognised responsible adult or competent public body. Special attention should be paid to the preservation of the rights of the child heading the household, fully taking into account his child status.

Paragraph 2.7.3 of this chapter elaborates on the development as well as the meaning of the provision on child-headed households.

Framework of care provision

States should ensure that adequate forms of alternative care are in place to meet the specific psycho-emotional, social and other needs of children, whereby family- and community-based care are to be given preference. All forms of alternative care should be in keeping with the principles of the UN Guidelines.

Parties and individuals involved in alternative care of children should meet stringent criteria, ensuring their "professional and ethical fitness". States should ensure that informal carers are known to the relevant authorities and that they receive all necessary support; States should in all cases continuously monitor the welfare of the child.

Determination of the most appropriate form of care

The Guidelines stipulate judicial or administrative procedures to precede any decision-making on alternative care, which should be based on thorough assessment, planning and review of every individual case and be

²⁰⁸ Paragraph 37 UN Guidelines.

carried out by qualified professionals in a multidisciplinary team. Children should be consulted at all stages. Short-term placements should be avoided wherever possible, and children should preferably be placed in a permanent care setting, enabling them to form attachments.

To determine the most appropriate form of care, children and/or their legal guardian(s) or parent(s) should be fully informed of all the available options, as well as their rights and obligations.

Provision of alternative care

The UN Guidelines urge States to develop and implement policies which entail processes to determine who is responsible for a child, as well as procedures for information-sharing and networking between entities and individuals, ensuring effective care and protection of the child. The policies should also cover the standards of skills, selection, training and supervision of carers, both in residential and in family-based settings.

The Guidelines lay down a number of general conditions which apply to all forms of formal alternative care. Firstly, transfer into alternative care should take place in as child-friendly a manner as possible, carried out by specially trained and non-uniformed staff. Contact between children in alternative care and their parent(s), family, previous carers or others close to them should be encouraged and facilitated where possible and be in the best interests of the child. Children should receive adequate and proper meals, based on relevant dietary standards and their religious beliefs. Furthermore, the health of the child should be of paramount importance to the carer and medical care and psychological support should be sought where necessary. Carers should ensure that children receive the maximum level of education, in accordance with their rights. In addition, the right of all children to develop through play and leisure activities should be recognised and stimulated. Children should be encouraged at all times to develop and exercise informed choices. They should also be allowed to have and to practise their religious beliefs and should never be talked into abandoning their religion while in care. States should ensure that accommodation in all alternative care settings is safe, providing protection against abuse, abduction, trafficking, sale and all other forms of exploitation. All disciplinary sanctions and behavioural measures should be in keeping with international human rights. Children should be assigned to a confidant(e)

whom they can approach about any given matter. An effective and impartial mechanism should be operationalised, allowing children to file a complaint or raise concerns with regard to the care they receive. Finally, a life story book containing information about every phase of the child's life should be maintained and be made available to that child.

According to the UN Guidelines, agencies and institutions should ensure appropriate after-care for children leaving their care setting, aimed at their self-reliance and full integration into society.

In addition to the abovementioned conditions, carers providing children with informal care should be registered with and receive support from the State when necessary. These carers should be recognised as the legal guardians of the child.

Besides these rules and regulations, all those involved in alternative care should be subject to inspection and monitoring by means of independent mechanisms.

Care provision for children outside their country of habitual residence

All public and private bodies, as well as individuals involved in the provision of care for children outside their country of habitual residence, should respect the terms of the Guidelines. States should ratify the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for Protection of Children.

The Guidelines pay special attention to unaccompanied or separated children, including those who have arrived unlawfully in a country and to victims of trafficking. These children are entitled to the same level of protection and care as any other child living in the country concerned and should not be detained in police custody. Unless extensive research and assessment has proven the situation safe, unaccompanied or separated children should not be returned to their country of habitual residence.

Care in emergency situations

The UN Guidelines should apply to situations of emergency which have arisen from natural and man-made disasters, including armed conflict and foreign occupation. Primary concern in the aforementioned situations is the prevention of separation of children from their parents or carers. However,

should children become separated from their parents, States should play an active role in identifying, registering and documenting these children for the purposes of family reintegration. Neither the child nor others concerned should be put at any risk while family members or carers are being traced. Only when all tracing efforts have been exhausted and proven to no avail, should long-term alternative care be considered.

2.7.3 Child-headed households

To date, the UN Guidelines form the only international instrument to refer specifically to child-headed households. The definition provided in Paragraph 37 UN Guidelines refers to the formation of a living arrangement consisting of two or more siblings who have lost their parents or other caregivers, in which no adults are present; the eldest child is to be “both willing and deemed capable of acting as the household head”.

2.7.3.1 Development Paragraph 37 UN Guidelines

It is notable that the term ‘child-headed household’ has not been incorporated in the UN Guidelines; earlier draft versions had embraced this term. A deeper insight into the motivations behind adaptations in the text is not provided by the Working Group or others involved in the drafting process of the UN Guidelines. Accordingly, a textual comparison of the relevant paragraphs concerning child-headed households of the major draft versions of the Guidelines is drawn here.

Paragraph 38 of the 2006 draft Guidelines states:²⁰⁹

Support and services should be available to children who choose to remain together with their siblings in a child-headed household following the loss of their parents or caregivers. States should ensure that such households benefit from mandatory protection from all forms of exploitation and abuse, supervision and support on the part of the local community and its competent services, with particular concern for the children’s health, housing, education and inheritance rights. Special

²⁰⁹ UN Guidelines for the Protection and Alternative Care for Children without Parental Care 2006.

attention should be given to ensuring the head of such a household retains all rights inherent to his/her child status, including access to education and leisure, in addition to his/her rights as a household “head”.

In the 2007 draft Guidelines a revised Paragraph 38 stipulates that:²¹⁰

Support and services should be available to siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable to act as the household head. States should ensure, including through the appointment of a legal guardian or other recognised responsible adult as stipulated in para 18, that such households benefit from mandatory protection from all forms of exploitation and abuse, and supervision and support on the part of the local community and its competent services, such as social workers, with particular concern for the children’s health, housing, education and inheritance rights. Special attention should be given to ensuring the head of such a household retains all rights inherent to his/her child status, including access to education and leisure, in addition to his/her rights as a household head.

Paragraph 37 of the final version of the UN Guidelines reads:²¹¹

Support and services should be available to siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable of acting as the household head. States should ensure, including through the appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian, as stipulated in paragraph 19 above, that such households benefit from mandatory protection from all forms of exploitation and abuse, and supervision and support on the part of

²¹⁰ UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children 2007.

²¹¹ UN Guidelines for the Alternative Care of Children 2009.

the local community and its competent services, such as social workers, with particular concern for the children's health, housing, education and inheritance rights. Special attention should be given to ensuring that the head of such a household retains all rights inherent to his/her child status, including access to education and leisure, in addition to his/her rights as a household head.

The 2006 draft includes the term 'child-headed household', acknowledging this to be a household in which children have remained together with their siblings after the loss of parents or other caregivers and which is headed by one of the children. As of the 2007 draft version, the term 'child-headed household' has been replaced by the depiction of a household consisting of siblings in which the eldest child acts as the head of the household.

Apart from the change in terminology, the 2006 draft indicates that the head of the household is not necessarily the eldest child, nor are any requirements included relating to the capability of the child heading the family. Later drafts, as well as the final version of the Guidelines specifically state that it is the eldest sibling that may head the family and only when he is deemed willing and capable of doing so. Although more specific details are not provided, the later phrasing implies an assessment by a competent body or organisation with regard to the willingness and capability of the eldest child.

The drafts and the final version contain the obligation for States to ensure that children living in a child-headed household are protected from all forms of exploitation and abuse and that they are supervised and supported by the local community and competent services. The 2007 draft and the final version include the appointment to the household of a legal guardian or other recognised suitable adult. It is not clear whether the 2006 draft presupposes that the child head has guardianship over his siblings or that omission of guardianship was merely an oversight. It may be derived from the final version of the UN Guidelines that guardianship of children belonging to the household is not considered to be one of the responsibilities of the child head.

All versions contain a clause stipulating that the head of the household should be given special attention in that all his rights – including the right to education and leisure – should be safeguarded.

2.7.3.2 UN Guidelines in relation to the CRC and the ACRWC

Paragraph 37 UN Guidelines acknowledges the existence of child-headed households, under the following conditions:

- The eldest child should be both willing and capable of acting as head of the household.
- Support and services should be available to the household.
- A legal guardian, a recognised responsible adult or a public body should be appointed to the household by the State.
- The State should ensure full protection from all forms of abuse and exploitation.
- Services provided to the household should include those relating to children's health, housing, education and inheritance rights.
- Special attention should be given to the child head, ensuring that he enjoys all rights inherent to childhood.

However, the UN Guidelines lack any provisions on how each of these conditions should be met. There is no elaboration on a method to establish whether a child is “willing and capable” to take on the role of head of household. In addition, it does not become clear which support and services are to be made available to the household to ensure adequate protection, nor has the role of the legal guardian been defined or expanded on. The Guidelines leave unanswered the question of how States should ensure the protection from abuse and exploitation. Lastly, the stipulation that the child heading the household should retain all his rights is ambivalent in that it is practically impossible for a child to have the responsibility of a parent and to run a household on the one hand and to exercise his rights as a child, such as the right to care, education and an adequate standard of living, on the other. Although the role of the legal guardian has not been defined in the UN Guidelines, it is clear that this guardian is not responsible for the day-to-day running of the household; the guardian is not part of the household and decisions concerning the family are taken by the child head.

One can therefore conclude that the UN Guidelines fail to provide a clear insight into how States should and could ensure the protection of the rights of all children living in a child-headed household.

In addition, the UN Guidelines prescribe that all individuals providing formal alternative care for children should be monitored and reviewed by the competent authorities; “authorities should develop appropriate criteria for assessing the professional and ethical fitness of care providers and for their accreditation, monitoring and supervision”.²¹² Monitoring and review in relation to child-headed households, in which the child head effectively provides alternative care for the other children in the household, is not elaborated on in the UN Guidelines, nor do the regulations in the Guidelines on determination of the most appropriate form of care – such as the utilisation of “rigorous assessment, planning and review”²¹³ – relate to child-headed households.

2.8 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993)

On account of the UN Guidelines not recognising adoption as a form of alternative care, a brief discussion of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter: 1993 Hague Convention) forms part of this chapter; this Convention is regarded as an implementation instrument for Article 21 CRC.²¹⁴

The vast increase in the number of intercountry adoptions in the 1980s – with often serious human and legal ramifications – called for a multilateral approach and an international legal instrument supplementary to the CRC and the Declaration on Foster Placement and Adoption.²¹⁵ In 1993 the Hague

212 Paragraph 55 UN Guidelines.

213 Paragraph 57 UN Guidelines.

214 Vité & Boéchat 2008, p. 5.

215 Parra-Aranguren 1994, p 3.

Conference on Private International Law²¹⁶ concluded this Convention, which entered into force in 1995.²¹⁷ Currently, there are 83 Contracting States to the Convention.²¹⁸ By outlining minimum standards for procedures of intercountry adoption, the 1993 Hague Convention brought Article 21 CRC, containing general rules on adoption, into effect.^{219, 220}

The Convention, containing a Preamble and 48 Articles, recognises that a child should grow up in a family environment and that for a child for whom a suitable family cannot be found in his or her own country, intercountry adoption may be an appropriate solution. On this point, the Convention deviates from Article 21 CRC and Article 24 ACRWC in that it prescribes that intercountry adoption may be considered as a form of alternative care if a suitable family cannot be found for a child in need of permanent alternative care, thus categorising intercountry adoption as a form of alternative care in preference to non-family-based care such as residential care in a child's country of origin, rather than as a measure of last resort.²²¹ The Preamble indicates that the family is considered to be the centre of a child's upbringing, essential for the harmonious development of his personality.²²²

The primary objectives of the Convention are the prevention of the violation of children's fundamental rights and the safeguarding of the best interests of the child. Despite increasing pressure on African countries to release children for intercountry adoption – especially when so-called celebrities are the prospective adoptive parents – the number of African ratifications

216 The Hague Conference on Private International Law is a global intergovernmental organisation, its main objective being the unification of the rules of private international law; <http://www.hcch.net/index_en.php?act=text.display&tid=4>, accessed on 21/08/2010.

217 Parra-Aranguren 1994, p. 8.

218 <http://www.hcch.net/index_en.php?act=conventions.status&cid=69>, accessed on 11/06/2011.

219 Hague Conference on Private International Law 2008.

220 Also, note the European Convention on the Adoption of Children (revised) 2008, aimed at the attainment of more uniformity on legislation relating to adoption in European countries. This Convention does not provide any significant new insights in comparison with the 1993 Hague Convention.

221 Vité & Boéchat 2008, p. 45.

222 Parra-Aranguren 1996, p. 65.

has remained remarkably low.²²³ To date only six African countries²²⁴ have ratified this Convention; a possible explanation for this may lie in the fact that a number of countries do not recognise adoption. In an effort to attain intercountry cooperation on matters relating to child protection, governments have been urged by UNICEF to consider ratification.²²⁵ Given that most of the countries of origin experience severe economic hardship, frequently leading to illicit intercountry adoptions, support and assistance from Member States of the Convention is required in order to bring rules and regulations of the former countries in compliance with the Convention.²²⁶ Ratifying the Convention and implementing its stipulation is an important step in the battle against illegal adoption.²²⁷ In its Concluding Observations of various African Countries, the CRC Committee has urged States Parties to ratify the 1993 Hague Convention.²²⁸

The Preamble states that for a full and harmonious development of its personality, a child should grow up in a family environment, preferably within the biological family. Intercountry adoption should only be considered for children for whom a suitable family environment cannot be found in their country of origin. However, measures should be taken to prevent the abduction, sale or trafficking of children; the best interests of a child should be of overriding importance, respecting the child's fundamental rights.

223 Sloth-Nielsen 2008a, p. 8.

224 The only African countries to have ratified the 1993 Hague Convention are: Botswana, Burundi, Kenya, Madagascar, Rwanda and South Africa.

225 UNICEF Press Centre, 'African Governments urged to adopt Hague Conventions on children', 23 February 2010; <http://www.unicef.org/media/media_52823.html>, accessed on 16/08/2010.

226 Doek 1996, p. 226.

227 Recently, concern has been raised – in both the international community and the Ethiopian government – about the adoption of thousands of children every year from Ethiopia, mainly by American and European adoptive parents. The legitimacy of these adoptions is questionable and in most cases the incentive is financial (an adoption is worth \$20,000 – \$35,000) rather than the best interests of the child; <<http://www.voanews.com/english/news/Under-Pressure-Ethiopia-Plans-Crackdown-on-Baby-Business-111848424.html>>, accessed on 20/01/2011.

228 See in this regard the last Concluding Observations of the following countries: Ethiopia (2006), Kenya (2007), Malawi (2009), Rwanda (2004), Sierra Leone (2008), South Africa (2000) and Swaziland (2006). Note that Kenya, Rwanda and South Africa have followed the Committee's recommendations in the meantime; these countries have ratified the 1993 Hague Convention.

The Convention focuses on establishing common provisions in the field of intercountry adoption, recalling the Declaration on Foster Placement and Adoption. The 48 articles of the Convention are divided into 7 chapters.

I Scope of the Convention (Articles 1 – 3)

The Convention aims to establish safeguards and a system of cooperation ensuring intercountry adoption is in the best interests of a child and upholds his fundamental rights. Intercountry adoption is defined as the permanent movement of a child from his country of origin to another country, for the purpose of adoption, forming a permanent parent-child relationship. The Convention only applies when the authorities of both the State of origin and the receiving State have agreed that adoption may proceed and when a permanent child-parent relationship is created, indicating the strong preference for a permanent family environment.²²⁹ Although the existence and importance of other care options is not disregarded, the Convention explicitly does not apply to other care arrangements such as long-term foster care or *kafalah*.²³⁰

II Requirements for intercountry adoption (Articles 4 and 5)

Obligations for both the State of origin and the receiving State are laid down in this chapter, spreading the responsibilities of the adoption procedure. The main requirement is that all parties involved have been duly informed about the implications of their consent, particularly with regard to the consequences of the adoption for the legal relationship between the child and his biological family. Consent for adoption has to have been given freely, in the originating country's required legal format and should not be motivated by any (financial) gain.

The prospective adoptive parents should be suitable and eligible for adoption in every respect and the child should be able to enter and live permanently in the receiving State.²³¹

229 Parra-Aranguren, p. 67.

230 Duncan 1996, p. 79.

231 Parra-Aranguren, p. 68.

III Central authorities and accredited bodies (Articles 6 to 13)

In every Member State there should be a Central Authority, carrying out the duties imposed on it by the Convention. Central Authorities should cooperate with each other and provide relevant information where required; they should ensure that adoption procedures comply with the principles of the Convention.

IV Procedural requirements in intercountry adoption (Articles 14 to 22)

Procedural rules concerning intercountry adoption – prior to and during the actual adoption – for the State of origin and the receiving State are outlined in this chapter and are aimed at the protection of the interests of all parties involved. The procedures are based on cooperation between both States. The criteria for prospective adoptive parents have to be met, taking into account background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care. They should be informed about the identity, adoptability, background, social environment, family history, medical history, including that of the child's family, and any special needs of the child. The child should be legally adoptable and due consideration should be given to the child's upbringing and to his or her ethnic, religious and cultural background.²³²

V Recognition and effects of adoption (Articles 23 to 27)

All Member States should recognise the adoption carried out according to the principles of the Convention. This includes recognition of the legal parent-child relationship between the adopters and the child, parental responsibility of the adopters for the child and the termination of a pre-existing legal relationship between the child and his parents, should adoption have this effect in the other Contracting State.

VI General provisions (Articles 28 to 42)

These provisions cover subjects such as contact between the child and the prospective adoptive parents (there should be no contact until it is absolutely certain that the adoption will in fact take place); the preservation of information held by a Member State, concerning a child's origin (to be

²³² Parra-Aranguren, pp. 69, 70.

ensured by Member States); and potential reservations to the Convention (which are not permitted).

VII Final clauses (Articles 43 to 48)

The last six articles concern formalities on signature, ratification, acceptance, approval or accession to the Convention.

2.9 Framework for alternative care

In chapter 3 the situation of children in need of alternative care in the nine countries central to this study will be evaluated; in chapter 5 national legislation on alternative care in these countries will be assessed. For the purposes of the alternative care assessment in these chapters, it is essential to elaborate on the concept of such care, in order to gain a clearer understanding of its nature and meaning. On the basis of the aforementioned international documents governing alternative care, a framework containing key elements of the right to alternative care is proposed by the author. Before presenting this framework, a summary of the main aspects of alternative care is outlined below.

Both the CRC and the ACRWC stipulate that parents are primarily responsible for the care, upbringing and development of their children. Since these treaties impose an obligation upon States to support and enable parents to provide adequate care and a safe family environment for their children, this responsibility is a 'shared' one.²³³ Furthermore, the CRC and the ACRWC oblige States Parties to provide alternative care for children who are permanently or temporarily deprived of a family environment.²³⁴

In contrast with the restrictive explanation of the term 'family environment' of the Declaration on Foster Placement and Adoption – in which the term 'family' solely includes the biological parents of a child²³⁵ – the CRC follows

²³³ Article 27 CRC and Article 20 ACRWC.

²³⁴ Article 20 CRC and Article 25 ACRWC.

²³⁵ Article 4 Declaration on Foster Placement and Adoption.

a broader interpretation,²³⁶ Article 5 CRC being referred to as the relevant umbrella article.²³⁷ The meaning of a ‘family environment’ is derivable from this Article: it does not only encompass a home situation comprising the biological parents, but also a care setting provided by members of the extended family, legal guardians or others legally responsible for a child.²³⁸ According to General Comment No. 7, the family is considered to be not only the nuclear family, but also the extended family and – in some cases – members of the community.²³⁹ The ACRWC identifies the family as the natural unit and basis for society; the Charter does not elaborate further on the concept of the family.²⁴⁰

The term ‘alternative care’ is equally open to discussion. Article 20 CRC stipulates that alternative care could include foster placement, *kafalah*, adoption or placement in suitable institutions, the latter form of care being viewed as a measure of last resort. Possible forms of alternative care mentioned in Article 25 ACRWC are foster care and placement in suitable institutions. The care provisions mentioned in both treaties are non-exhaustive and it may be derived from the aforementioned stipulations that States have a duty to implement various care options, including other arrangements than those cited.

Both the CRC and the ACRWC are inconclusive with regard to a specification as to how States should approach their obligation to provide children with alternative care.

According to General Comment No. 3, children should be cared for in a family-based setting and siblings should not be split up.²⁴¹ Institutional care should be employed as a measure of last resort and placements in institutions should be for as short a period as possible.²⁴²

236 Cantwell & Holzscheiter 2009, p. 18.

237 Detrick 1999, p. 121.

238 Cantwell & Holzscheiter 2009, p. 37.

239 UN General Comment No. 7 (2005), para 15.

240 Article 18 ACRWC.

241 UN General Comment No. 3 (2003), para 34.

242 UN General Comment No. 3 (2003), para 35.

When children have been placed into care by governmental authorities, these care placements should be under periodic review (Article 25 CRC). According to the ACRWC, special monitoring units should be established, aimed at the provision of necessary support for children and their carers in order to prevent any form of abuse or neglect of the child (Article 16 ACRWC); this Article applies to all caregivers.

General Comment No. 12 prescribes that a competent monitoring mechanism should be established to oversee alternative care arrangements.²⁴³

Article 27 CRC and Article 20 ACRWC provide that States are responsible for ensuring that a child has an adequate standard of living (his physical, mental, spiritual, moral and social development) when parents are unable to provide this. By the same token, this obligation also applies to children in alternative care situations.

According to General Comment No. 12, children's views are taken into account in all matters concerning alternative care²⁴⁴ and children should be able to express their opinions in any alternative care setting they find themselves in.²⁴⁵

The UN Guidelines contain a number of paragraphs on the framework for alternative care.

The UN Guidelines prescribe that care should be aimed at the psycho-emotional, social and other needs of children. Alternative care should preferably be received in a family environment or be community-based.²⁴⁶

States should ensure that a variety of care options is available for emergency care, temporary care and long-term care.²⁴⁷ According to the UN Guidelines, forms of alternative care are: kinship care, foster care, other family-based care, residential care and supervised living arrangements.²⁴⁸ It may be

243 UN General Comment No. 12 (2009), para 97.

244 UN General Comment No. 12 (2009), paras 54 – 56.

245 UN General Comment No. 12 (2009), para 97.

246 Paragraph 53 UN Guidelines.

247 Paragraph 54 UN Guidelines.

248 Paragraph 29 sub c UN Guidelines.

derived from this summation of alternatives that these are the minimum care options States should provide.

Every person or organisation providing alternative care should be authorised by a competent governing body. States should ensure regular monitoring and review of such care, for which purpose appropriate standards must be made available. These standards are to be utilised to assess the professional and ethical suitability of caregivers, as well as their supervision and monitoring.²⁴⁹

According to the UN Guidelines, all care providers should be accountable to a designated public authority which must establish a suitable monitoring mechanism, including regular inspections of care arrangements. This monitoring system should be easily accessible for children, parents and caregivers.²⁵⁰

The UN Guidelines stipulate that informal care arrangements which are intended for a longer period be formalised where possible and appropriate. In situations where formalisation is not an option, States should encourage caregivers to inform the authorities in charge in order for the child and themselves to receive child benefit and other necessary support.²⁵¹

On the basis of this international legal framework governing alternative care, the author proposes that national legislation concerning alternative care should include the following key elements, incorporating provisions from both the CRC and the ACRWC:

1 A variety of care options should be available.²⁵²

In order to enable the determination of the form of alternative care that is in the best interests of a child, various options should be available. Although the term 'variety' does not express an exact number, it may be derived from the aforementioned instruments that States should provide

249 Paragraph 55 UN Guidelines.

250 Paragraphs 129 – 130 UN Guidelines.

251 Paragraph 56 UN Guidelines.

252 Based on Article 20 CRC and Article 25 ACRWC, discussed in paragraph 2.5.2 and paragraph 2.6.2 respectively.

for at least two different care arrangements. Both treaties mention foster care and residential care, while the CRC also refers to adoption or kafalah.

2 Alternative care should preferably be family-based and institutional care should be considered as a measure of last resort.²⁵³

The phrasing of the relevant provision in the CRC – although not explicitly stated – indicates that family-based care is the type of alternative care that is generally preferred. The ACRWC prescribes unambiguously that alternative care should preferably be family-based.

3 Caregivers should (be enabled to) provide children with an adequate standard of living.²⁵⁴

According to both the CRC and the ACRWC, children have the right to an adequate standard of living and their parents are primarily responsible for providing them with such a standard. In addition, both treaties contain the obligation for States Parties to assist parents and others responsible for a child in ensuring this standard of living.

4 All care arrangements should be subject to monitoring and review at national level.²⁵⁵

There are no general provisions on the monitoring and review of alternative care in the CRC. The Convention prescribes a periodic review of residential care and foster care placements if these have been ordered by a competent authority, but it lacks similar provisions in relation to other care options and provisions relating to the monitoring of alternative care. According to the CRC Committee, however, the right to periodic review extends over all forms of alternative care. In contrast, the ACRWC provides that children, whether in the care of their parents or in the care of others, should be protected from abuse and neglect and that special monitoring units should be established. Furthermore, the ACRWC stipulates that

²⁵³ Based on Article 20 CRC and Article 25 ACRWC, discussed in paragraph 2.5.2 and paragraph 2.6.2 respectively.

²⁵⁴ Based on Article 27 CRC and Article 20 ACRWC, discussed in paragraph 2.5.2 and paragraph 2.6.2 respectively.

²⁵⁵ Based on Article 25 CRC and Articles 16 and 24 ACRWC, discussed in paragraph 2.5.2 and paragraph 2.6.2 respectively.

“a machinery to monitor the well-being of the adopted child” should be set up. Although the CRC Committee and the ACERWC function as a monitoring body in relation to all children’s rights, monitoring and review of all care arrangements at national level has a much more far-reaching effect, particularly in the prevention of potentially harmful situations for children. Human Rights Treaties generally do not include explicit provisions for monitoring at national level as opposed to monitoring by international Committees; national monitoring, however, could be considered a requirement on the basis of current practices, as is confirmed by, inter alia, the Paris Principles.²⁵⁶

5 Provisions for national and intercountry adoption should be included in legislation on alternative care.²⁵⁷

Contrary to the UN Guidelines, in which adoption is not acknowledged as a form of alternative care but considered to be equivalent to parental care, the CRC explicitly recognises adoption as a form of alternative care. The ACRWC contains a detailed stipulation on adoption. In order to protect children in need of care against illegitimate (intercountry) adoptions, legal provisions are essential.

In addition, the following elements of alternative care can be drawn from the CRC General Comments and the UN Guidelines:

6 Siblings should be enabled to remain together.²⁵⁸

It is widely considered to be in the best interests of children for siblings to remain together and to grow up in the same family or care situation. According to General Comment No. 3, orphaned children are best protected when they are enabled to stay together with their siblings while cared for by family members.

²⁵⁶ UN General Assembly, A/RES/48/134, 1993.

²⁵⁷ Based on Articles 20 and 21 CRC and Article 24 ACRWC, discussed in paragraph 2.5.2 and paragraph 2.6.2 respectively.

²⁵⁸ Based on paragraphs 17, 22, 37 and 62 UN Guidelines and paragraph 34 General Comment No. 3, discussed in paragraph 2.7.2 and 2.5.3 respectively.

7 Care arrangements should be available for emergency care, temporary care and long-term care.²⁵⁹

In addition to the CRC in which the availability of various care options is prescribed, the UN Guidelines state that for all situations – i.e. in emergencies, temporarily or long-term – care options should be available, as every situation requires a unique approach.

8 Available care options should include: kinship care, foster care, institutional care and supervised living arrangements.²⁶⁰

In order to ensure that a variety of care options is available, these forms of alternative care should in any case be on offer. Due to the fact that the UN Guidelines do not consider adoption to be a form of alternative care, adoption is not included here. The author has interpreted supervised living arrangements to reflect a period of transition between foster or residential care to independent living, as is the case with children who have nearly reached the age of majority.

9 Alternative care should meet the psycho-emotional, social and other needs of children and caregivers should be provided with financial support and supportive social services by the State.²⁶¹

Children in need of alternative care have endured severe traumatic experiences, such as the loss of one or both parents – potentially having witnessed their death – or a home situation in which they can no longer remain, removal from their habitual place of residence and estrangement from family members. Besides care, these children need, inter alia, psycho-emotional support. Caregivers should receive financial assistance enabling them to provide sufficient care for their children; caregivers should also have access to emotional support when they are incapable of adequately caring for a child.

259 Based on paragraph 54 UN Guidelines, discussed in paragraph 2.7.2.

260 Based on paragraph 29 UN Guidelines, discussed in paragraph 2.7.2.

261 Based on paragraphs 15, 34 and 53 UN Guidelines, discussed in paragraph 2.7.2.

10 Informal care arrangements should be formalised where possible or at least be registered and monitored by competent authorities should formalisation not be an option.²⁶²

The most prevalent form of alternative care is informal kinship care. The informal character of this type of care frequently leads to the situation that caregivers are not eligible for financial or other support, which is patently not in a child's best interests. Other disadvantages of informal care are the lack of monitoring and review of the arrangement; as a result potential abuse or neglect of a child may go unnoticed. It is therefore of the utmost importance that informal arrangements be formalised.

11 Every child should, at all times, have a legal guardian.²⁶³

The CRC and the ACRWC lack provisions with regard to the legal guardianship of a child. Children who remain without a legal guardian are extremely vulnerable, owing to the fact that, in most countries, minors are not entitled to carry out legal transactions or to act independently. Without a legal guardian, children's property rights, amongst others, may not be recognised and many of their rights – such as the right to education and access to health care services – are likely to be violated.

Note that the General Comments and the UN Guidelines are non-binding and that States are not legally obliged to adhere to them. Consequently, States are – strictly speaking – not under any obligation to act according to the aforementioned proposed elements 6 – 11. However, the explicit support by the UN General Assembly and civil society for the UN Guidelines, as well as the references in the Concluding Observations of the CRC Committee, add weight to the importance of the UN Guidelines.

²⁶² Based on paragraph 56 UN Guidelines, discussed in paragraph 2.7.2.

²⁶³ Based on paragraph 19 UN Guidelines, discussed in paragraph 2.7.2.

Conclusions

This chapter provides an overview of international legislation relevant to children's rights, more in particular with regard to the alternative care of children. The genesis of and advancement in the awareness and acknowledgement of the need for the formalisation of universal children's rights is a developmental process which took place throughout the twentieth century, two world wars providing a compelling incentive, as it were. This process set out with the first universal declaration – the 1924 Geneva Declaration, merely containing a set of basic principles concerning the well-being of children, urging the world to provide children in need of care (orphans and waifs) with protection and support – and has resulted in the near-universal ratification of the CRC, complemented by the ratification of the ACRWC by most African countries. Both documents contain an extensive coverage of all aspects of children's rights.

The right to alternative care for children, provided by the State, is embodied in the CRC as well as in the ACRWC; other documents relevant to this right are: the UN Guidelines and the 1993 Hague Convention. In addition to the CRC, the CRC Committee has issued several General Comments in which key terms from the CRC are elaborated on; although non-binding, these General Comments have an authoritative status.

In the Preambles of both the CRC and the ACRWC it is acknowledged that, for the full development of a child's personality, he should grow up in a family environment.

When a child is deprived of family care – which includes care by extended family members or, in some instances, community members – the government is legally and morally obliged to fulfil a child's right to alternative care and is responsible for ensuring such care is provided. The ACRWC provides an extra condition to this right in that it prescribes alternative care to be family-based. Foster care and institutional care are recognised as forms of alternative care by both treaties, while the CRC indicates that institutional care should be a measure of last resort. In addition, adoption and *kafalah* are regarded as a form of care only by the

CRC. Other modes of alternative care are explicitly permitted by the CRC as well as by the ACRWC.

According to both the CRC and the ACRWC, the responsibility for providing a child with an appropriate and adequate upbringing lies primarily with the parents or others in whose care the child resides. The State Party bears additional responsibility: the government should assist parents or others responsible for the care of a child; where appropriate, material assistance and support programmes – in particular with regard to food, clothing and housing – should be provided.

The relevant stipulations in the CRC and the ACRWC are formulated broadly and the terms ‘parental care’ and ‘alternative care’ are not defined in either treaty. However, the care required for a child’s physical and psychosocial well-being is acknowledged to encompass love and physical, material, emotional, social, educational and spiritual care. In situations where a child does not receive such care – whether temporary or permanent – from his own family, he has the right to alternative (family) care. It may thus be concluded that the frame of reference for a child’s right to alternative care should encompass the aforementioned elements (of care).

The obligation of States as regards alternative care for children derived from the CRC and the ACRWC, is to ensure that alternative care – whether provided by public or private organisations, facilities or persons – is available to every child in need of care. Although the relevant stipulations in both treaties are strongly worded, neither the CRC nor the ACRWC include indicators with respect to the content of care or on the care options that should be available. Neither treaty contains clear and concise provisions on the monitoring and review of alternative care at national level; the CRC prescribes periodic review for institutional care, while the ACRWC stipulates monitoring of adoption placements.

The implementation of both the CRC and the ACRWC is monitored and assessed by independent bodies: the CRC Committee and the ACERWC respectively. States Parties are under the obligation to submit to these Committees a country report on the status of children’s rights and on the

level of implementation of the treaties within two years of ratification and on a three-year interval basis (ACRWC) or a five-year interval basis (CRC) subsequently. When States default on fulfilling their duty of submission, as is the case in respect of all countries central to this study, neither Committee has effective methods at its disposal to enforce timely reporting. The failure to execute the Observations and Recommendations of the Committees cannot be addressed via specific actions by the Committees, other than through repeated recommendations in the next set of Concluding Observations.

This raises the question as to whether the CRC and the ACRWC represent an enrichment of the 1959 Declaration. Is there any merit to the treaty-status of the CRC and the ACRWC, documents which are – theoretically – legally binding for Member States, but to the implementation of which they cannot be held accountable? Currently, the strength of the treaties is that governments are apprehensive of negative publicity stemming from critical reports from either Committee. Although the potentially deterrent effects of negative publicity is not disputed by the author, receiving less favourable Recommendations has shown to be insufficient motivation for some countries to significantly improve rules and regulations with regard to children's rights. This is compounded by the fact that the failure by States Parties to submit timely reports is not given publicity and therefore is not 'harmful' to them.

As a result, despite the ratification by the majority of nations, these treaties could be seen to have a somewhat optional or voluntary character, lacking as they do an adequate sanction for non-compliance. However, the right to remedy in cases of violation of either treaty at national level, represents an enhancement of the 1959 Declaration, which by its very nature cannot be utilised in a national court of law. The proposed Optional Protocol to the CRC with regard to a complaints mechanism is expected to lead to empowerment of the CRC Committee in that the Committee will be enabled to receive communications from or on behalf of individuals concerning violations of the rights embodied in the CRC.

The fact that adequate alternative care had been unattainable for many children – especially children growing up in developing countries, in regions afflicted by HIV/AIDS, armed conflict as well as man-made and natural disasters – instigated an international call for action and led to the development of the UN Guidelines. These Guidelines are intended to fill the void left by the two treaties, by setting out “desirable orientations for policy and practice with the intention of enhancing the implementation of the Convention on the Rights of the Child” with regard to children in need of alternative care. The UN Guidelines contain provisions on a wide range of topics relating to alternative care, including kinship care; they provide a reference for States, enabling them to carry out their responsibilities with regard to children’s right to alternative care.

Civil society has shown interest in the UN Guidelines from the moment that their drafting process was initiated by ISS and UNICEF. In some instances, the UN Guidelines were regarded (by governments as well) to be highly significant while still in drafting stage. For instance, the 2009 ‘Minimum Standards for Residential Child Care Facilities in Namibia’ were developed on the basis of the – then draft – UN Guidelines.

It is interesting to note that the UN Guidelines rule out adoption as a form of alternative care – children who have been placed with adoptive parents are considered to be in parental care – whereas the CRC explicitly categorises adoption as an alternative care option. A possible explanation may be that intercountry adoption is not only a politically sensitive but also a controversial topic. Although the author is of the opinion that – in conformity with the CRC – adoption should be seen as an alternative care arrangement (albeit a permanent one) an extensive analysis of both national and intercountry adoption does not fall within the scope of this research and the subject of adoption will for the greater part be left out of consideration in this study.

Equally noteworthy is the fact that the UN Guidelines are unique in that they acknowledge the existence of child-headed households and the need for support and assistance to be made available to these households. Although the UN Guidelines do not explicitly promote legal recognition of child-

headed households, acknowledgement of their existence is tantamount to legal recognition. The UN Guidelines are non-specific on questions of assistance, supervision or other protective measures in relation to child-headed households.

Although the UN Guidelines are non-binding, the author is of the opinion that they are not without significance: the Guidelines should be regarded as a supplement to the CRC and the ACRWC in which capacity they can provide States with direction for policies and standards concerning alternative care. Their acceptance by the UN General Assembly and the CRC Committee, as well as strong support by civil society are likely to gain (further) support at governmental level for the UN Guidelines. At this stage, it is perhaps premature to judge whether the UN Guidelines will be successful in improving the national systems of alternative care efficaciously and adequately. Their provisions span a wide range of elements of alternative care, covering the most prevalent situations at a universal level. At the same time, the universal coverage of alternative care by this instrument may lead to the conclusion that some provisions are too specifically aimed at a certain region, while other rules are considered to be too non-specific. Paragraph 37 UN Guidelines (child-headed households) is an example of such a provision: on the one hand, the phenomenon of child-headed households is a topic which is not relevant to most industrialised countries and the relevance of this provision is subsequently limited to certain regions; on the other hand, this provision fails to provide States with any practical guidance as to how the protection of the rights of children living in a child-headed household can be ensured. In this regard it is worth recalling that one of the strengths of the Q4C Standards is that they were specifically designed for European countries on the basis of European practices.

What the UN Guidelines have realised is the focusing of attention at universal and national level on children's right to alternative care. Previously, this particular right had not enjoyed a high status and had not featured prominently on national and international agendas. The UN Guidelines have undoubtedly brought about a change in the public perception of this hitherto somewhat subordinate right.

On the basis of the analysis of the provisions relating to alternative care in this chapter, the author has presented a universal framework for the alternative care of children, containing 11 key factors. The first five elements are based on the CRC and the ACRWC, while the other six were derived from the UN Guidelines. These key factors may be employed as the foundation for national rules and regulations on alternative care, by means of which compliance of national legislation with international rules and regulations may be achieved and used as indicators for reports to the CRC Committee.

Causes, nature and situations of alternative care in sub-Saharan Africa

Introduction

The family unit is considered to be the natural environment for children. According to the CRC, children should grow up in a family environment, in an atmosphere of happiness, love and understanding. However, a considerable number of children live without parental care.²⁶⁴ For the purpose of this study, parental care is defined as the care and love for a child provided by a biological or legal parent, ensuring both the physical and the psychosocial well-being of that child. Parental care is crucially important in children's lives²⁶⁵ and it is widely acknowledged that the rights of children deprived of parental care are often violated.²⁶⁶ Children – especially those below the age of three years – may be severely disadvantaged in their psychosocial development when there is no opportunity to form a parental bond, resulting in long-term or permanent damage.²⁶⁷

The UN Guidelines define children without parental care as “all children who are not in the overnight care of at least one of their parents, for whatever reason under whatever circumstances”.²⁶⁸ They include children living in

264 UN General Assembly, S-27/2, 2002, p. 5.

265 Steinbock 2005, p. 305.

266 SOS Children's Villages International 2010.

267 Innocenti Insight 2006, p. 7.

268 Paragraph 29 sub a UN Guidelines.

family-based care settings, in residential care facilities and in child-headed households. These children are regarded as being in need of alternative parental care. Parents are considered to be either the biological parents or adoptive parents. Children living with one or both parents who are not able to provide them with adequate care – for instance parents who are incapacitated as a result of HIV/AIDS – are not always regarded as ‘without parental care’.²⁶⁹ Although these children theoretically grow up with one or both parents present within the household, in reality they do not receive adequate parental care and have to fend for themselves. In the framework of this research, they shall be considered as being in need of alternative parental care.

In the majority of countries in sub-Saharan Africa, little relevant data and statistics are available on the number of children in need of alternative care and the circumstances under which they live. Their situation is often concealed and adequate support systems are lacking.²⁷⁰ Due to the fact that in most countries these children are not accorded high priority in terms of policymaking, too little research has been carried out in this field; hence the lack of reliable statistical data.²⁷¹ This issue was addressed by the Vice President of Malawi during the Global Conference on Research and Child Rights, *Children’s Rights at Crossroads*, held in November and December 2009 in Addis Ababa, Ethiopia. The Rt Hon. Joyce Banda recommended that measures should be taken to prevent the unnecessary deaths of parents due to HIV/AIDS and noted that children with special needs – including children without parental care – are not adequately protected by means of policies and programmes.²⁷²

In addition to public apathy, children in need of alternative care may be ‘hidden’, owing to the fact that in most cases the extended family and sometimes the community carry the burden of providing a form of care, mostly without any governmental assistance. Furthermore, children in rural areas may be hard to reach and in some cases they are itinerant. The

269 Delap 2009, p. 12.

270 SOS Children’s Villages International 2010.

271 Delap, Georgalakis & Wansbrough-Jones 2009, p. 10.

272 Malawi Vice President Statement 2009, pp. 7, 8.

geographical spread – over numerous countries – of children without care, fragmenting the problem as it were, is another contributory factor to their fate going largely unnoticed and unrecorded.²⁷³

In recent years, an increase in interest at government and policymaking level in the plight of children without parental care has become evident. For example, at the *First International Conference in Africa on Family Based Care for Children*, held in September 2009 in Nairobi, Kenya, practitioners and political leaders from various African countries expressed their concern with regard to the care situation of children. In the Conference Declarations and Recommendations, delegates from 45 countries noted “the internal and external pressures on the families and communities to adequately meet their obligations to children due to poverty, HIV/AIDS, conflicts, violence and erosion of traditional values”.²⁷⁴

A number of countries have recently implemented or amended legislation concerning alternative care, or are in the process of doing so:

- The 2010 Constitution of the Republic of Kenya contains a provision with regard to the right to alternative care.
- In June 2010 the Malawian government passed the Child Care, Protection and Justice Act.
- Namibia is due to pass an extensive new Child Care and Protection Bill; Namibia has also issued national standards for residential care facilities (2009) and is in the process of developing guidelines and standards for foster care.
- Sierra Leone adopted a Child Rights Act in 2007 which includes stipulations on alternative care.
- South Africa has been in the process of an extensive legislative review during the past decade, leading, *inter alia*, to the adoption of the 2005 Children’s Act, the 2007 Children’s Amendment Act, the 2010 General Regulations regarding Children and the National Social Development Children’s Act Practice Note no. 1 of 2010.
- The 2005 Constitution of the Kingdom of Swaziland Act contains a number of provisions relating to alternative care; Swaziland is currently in the process of drafting a Children’s Act.

²⁷³ UNICEF 2006a, p. 26.

²⁷⁴ ANPPCAN 2009, p. 3.

- The 1997 Children Act of Uganda is to be amended by an Amendment Bill which is currently being drafted.

Last but by no means least, the development of the UN Guidelines – welcomed by the UN General Assembly in 2009 – is a strong indicator that the international community has taken cognisance of this hitherto somewhat neglected issue.

This chapter reviews relevant studies and reports with regard to alternative care, the focus being a discussion of the causes of the loss of parental care, the nature and the meaning of alternative care, as well as a situational portrayal of alternative care in the nine countries central to this research.

Child-headed households will be discussed separately in chapter 4 of this study.

3.1 Causes of the loss of parental care

One of the main causes of the loss of parental care is the death of one or both parents. Data from 21 sub-Saharan countries, ranging between the years 1991 – 2006, reveals that in many countries orphanhood is widespread, the numbers varying considerably per country.²⁷⁵ In this study, the author has used the definition of an orphan as a person younger than 18, whose parents are both deceased; data which is based on other definitions of orphanhood has been adapted accordingly.

The chief agents of orphanhood in sub-Saharan Africa are: HIV/AIDS, armed conflicts and natural disasters. In 2009, 9.1 million children in this region were orphaned, in addition to which an estimated 47 million children had lost one parent.²⁷⁶ The majority of children having lost one or both parents fall into the age group 12 – 17 years; in the category 0 – 5 years of age, less

²⁷⁵ Beegle et al. 2008, p. 20.

²⁷⁶ UNAIDS 2010b, p. 48.

than 10% of children had lost one or both parents.²⁷⁷ In figure 3.1 the relevant data for the countries central to this study is given.

Figure 3.1 Percentage of children (0 – 17 years of age) who have lost one or both parents²⁷⁸

Country	Both parents	One parent
Ethiopia	1.3%	10.0%
Kenya	1.7%	9.4%
Malawi	2.8%	9.6%
Namibia	2.5%	14.9%
Rwanda	3.8%	16.7%
Sierra Leone	1.9%	9.5%
South Africa*	4.6%	19.3%
Swaziland	4.4%	19.9%
Uganda	3.1%	11.8%
* Meintjes & Hall 2010, p. 102.		

Although worldwide the number of children orphaned by HIV/AIDS is declining, those countries most severely affected by the disease are still experiencing an increase in orphan rates. These countries are mainly situated in sub-Saharan Africa; 24 of the 25 countries with the highest HIV/AIDS prevalence are to be found in this part of the African continent. The infection rates of adults per country vary from less than 2% up to over 30%. In a number of countries the rate of infection has stabilised or even declined; in others infection rates are still on the increase. Due to the often lengthy interval between infection and death, the number of children orphaned by the disease will continue to grow.²⁷⁹

In 2009, 68% of all HIV-infected people were living in the sub-Sahara and 72% of all AIDS-related deaths occurred in this region. The number of HIV infections is still very high, with an estimated 1.8 million new infections in 2009, bringing the total number of infected people to 22.5 million

²⁷⁷ UNICEF 2006a, p. 36.

²⁷⁸ UNICEF 2009a, pp. 64, 65; figures are based on data from 2005 – 2008.

²⁷⁹ Innocenti Insight 2006, p. 5.

(33.3 million worldwide). Note that there is a decline in the increase of new infections compared to the year 2001, during which period an estimated 2.2 million people were newly infected. One of the effects of sub-Saharan Africa being the most heavily affected region, is the large number of children having lost or at risk of losing their parents to HIV/AIDS; in 2009, an estimated 14.9 million children had lost either one or both parents to the disease (16.6 million worldwide).²⁸⁰ However, the surge in the availability of antiretroviral therapy – in 2009 treatment coverage was 37%, while in the year 2003 the coverage rate was a mere 2% – has boosted the survival rate significantly.²⁸¹ In the period 2001 – 2009 the incidence rate of HIV infection in the nine focus countries has either remained stable (Kenya and Uganda) or declined (Ethiopia, Malawi, Namibia, Rwanda, Sierra Leone, South Africa and Swaziland).²⁸² As a consequence, the number of children orphaned by HIV/AIDS is expected to decline over time. Figure 3.2 outlines the number of people living with HIV/AIDS, the number of new infections and the number of AIDS-related deaths in the year 2009.

In sub-Saharan Africa HIV/AIDS is considered to be the primary catalyst for children being deprived of a family environment, resulting in the need for alternative care.²⁸³ Parents' ability to protect and care for their children will already diminish during the period before death, leaving children to provide for themselves and – in most cases – to care for the chronically ill parent(s).²⁸⁴ Although one or both parents might still be alive, these children too are in need of alternative care as in this situation they do not receive adequate parental care; the author accordingly regards children who fall into this category as 'without parental care', despite the presence of one or more adults in the household.

280 UNAIDS 2010a, pp. 11 – 21.

281 UNAIDS 2010a, p. 96.

282 UNAIDS 2010a, pp. 60, 61.

283 Innocenti Insight 2006, p. 1.

284 Human Rights Watch 2005, p. 9.

Figure 3.2 HIV/AIDS prevalence, infection rate and related deaths²⁸⁵

Year: 2009	Number of people with HIV	Number of new HIV infections	Number of AIDS-related deaths
Sub-Saharan Africa	22.5 million	1.8 million	1.3 million
Middle East / North Africa	460,000	75,000	24,000
South and South-East Asia	4.1 million	270,000	260,000
East Asia	770,000	82,000	36,000
Oceania	57,000	4,500	1,400
Central and South America	1.4 million	92,000	58,000
Caribbean	240,000	17,000	12,000
Eastern Europe / Central Asia	1.4 million	130,000	76,000
Western and Central Europe	820,000	31,000	8,500
North America	1.5 million	70,000	26,000
Total	33.3 million	2.6 million	1.8 million

The economic impact of HIV/AIDS on families and children generally comprises three consecutive stages: the period of sickness, the time of death and the period following death. During the first phase the household is confronted with direct costs – mainly for medical treatment – and indirect costs through decline and eventually loss of household income, both of the chronically ill and of other household members who have no choice but to divert time from generating income to providing care. At the time of death, there are – often substantial – funeral expenses. During the final stage, additional indirect costs may be incurred through loss or dispossession of household assets and repayment of loans taken out to cover medical and funeral expenses.²⁸⁶ In most cases, the household impoverishes beyond the stage of recovery.²⁸⁷

²⁸⁵ UNAIDS 2010a, Table 2.2 (adapted) pp. 20 – 21.

²⁸⁶ Foster 2005, pp. 13, 14.

²⁸⁷ UNICEF 2006a, p. 10.

In the 1980s, support by the extended family and community members was the only response to the emergence of vulnerable and orphaned children due to HIV/AIDS. From the 1990s onwards, when the number of children orphaned by HIV/AIDS began to rise steadily, NGOs and international agencies became involved in this process. The role of governments has been negligible: at the end of 2003, in only 6 of 40 sub-Saharan countries a national policy on orphaned and vulnerable children was in place; the vast majority of countries (26 in total) had none and in 8 countries a policy was in the process of being drafted.²⁸⁸ Most governments have – to date – contributed minimally to the alleviation of the situation of vulnerable and orphaned children.²⁸⁹ It is estimated that US\$2.5 billion is required for the protection and care of children affected by HIV/AIDS worldwide, more than 90% of this amount in sub-Saharan Africa, to be used for cash grants to affected households, the provision of health care, education and family and community support.²⁹⁰

Besides the scourge of HIV/AIDS, sub-Saharan Africa has been plagued by instability, conflict and natural disasters, factors which have contributed substantially to the loss of parental care. Nonetheless, poverty is seen as the main impetus of the aforementioned factors leading to children not receiving adequate parental care.²⁹¹ Children from poor backgrounds are over-represented amongst children in alternative care settings, economic and social strains forcing parents to find alternative (care) arrangements for their children or leading to parents' untimely deaths.²⁹²

HIV/AIDS, in combination with one or more other factors (such as droughts, earthquakes and civil unrest) may lead to an inordinate increase in the number of children in need of alternative care. To illustrate this point, the situation of a number of countries will be described briefly.

Ethiopia

The severe 1984 – 1985 drought, combined with internal conflict, led to widespread famine, resulting in the death of approximately one million

²⁸⁸ UNICEF 2003, p. 36.

²⁸⁹ Richter, Foster & Sherr 2006, pp. 19, 20.

²⁹⁰ UNAIDS 2009c, p. 32.

²⁹¹ UNICEF 2009a, p. 19.

²⁹² UN Committee on the Rights of the Child, CRC/C/153, 2006, para 658.

people. Subsequently, HIV/AIDS, recurring droughts and armed conflict have resulted in more than five million children losing one or both parents.²⁹³

Rwanda

In Rwanda, the 1994 genocide was the main cause of children being deprived of parental care; the country was known to have the highest proportion of orphaned children worldwide.²⁹⁴ Many children had lost their parents to the atrocities of the war, either because they were murdered or due to displacement and the subsequent failure to reunite families. Additionally, many women who had managed to survive the war, had contracted HIV/AIDS through systemic rape during that period; their subsequent demise from AIDS also resulted in children being left parentless.²⁹⁵ After a sharp rise in the number of infections from the 1980s onwards, prevalence declined significantly in the period 2001 – 2005. At present, the HIV infection rate is relatively low compared to surrounding countries and especially so compared to countries in Southern Africa.²⁹⁶

Uganda

Uganda is an example of a country where HIV/AIDS has taken a severe toll, robbing many children of a normal childhood with parental care. In the first years of the twenty-first century, an estimated 20% of children had been orphaned, mainly due to the effects of the pandemic.²⁹⁷ The number of people infected with HIV/AIDS in Uganda peaked in 1991 when 15% of adults and more than 30% of pregnant women were infected. As a result of an intensive government-led campaign, the HIV/AIDS prevalence was reduced to 6% of the adult population by 2001. By the year 2006, however, this number had slowly crept back up to 6.4%. Taking into account that the population of Uganda is also on the increase, the rise in actual numbers of infections is higher. It is expected that the number of orphans will continue

293 FHI 2010a, p. 24.

294 Rwanda Prime Minister's Office in charge of Gender and Family Promotion 2008, p. 3.

295 MacLellan 2005, p. 4.

296 Rwanda Prime Minister's Office in charge of Gender and Family Promotion 2008, pp. 22, 23.

297 Mkhize 2006, p. 81.

to rise.²⁹⁸ Additionally, continuous conflict and civil war have contributed to a rise in the number of children in need of alternative care.²⁹⁹

As indicated earlier, reliable data on the number of children in need of alternative care is not available. Nonetheless, various factors such as the increase in the number of residential care facilities, the number of HIV/AIDS deaths, poverty, instability, conflict and natural disasters point to a rise in the number of children without parental care.³⁰⁰ In this regard reference should be made to the Millennium Development Goals (hereinafter: MDGs): during the Millennium Summit in 2000, world leaders committed themselves to further worldwide improvements to economic and social conditions; during this Summit the UN General Assembly adopted the United Nations Millennium Declaration.³⁰¹ Eight development principles, known as the MDGs, were derived from this Declaration. Although all these goals affect children's lives, the following three directly relate to the need for alternative care:

- Goal 1: Eradicate extreme poverty and hunger
- Goal 5: Improve maternal health
- Goal 6: Combat HIV/AIDS, malaria and other diseases.

The 2010 progress report indicates that, with regard to the aforementioned goals, sub-Saharan Africa has made either no progress at all or is insufficient to reach the targets.³⁰²

3.2 Nature and meaning of alternative care

For the purpose of this study, alternative care is defined as physical, material, emotional, social, educational and spiritual care³⁰³ for a child, not provided by the biological or adoptive parents.³⁰⁴ The breadth of this

298 Dalen, Nakitende & Musisi 2009, p. 2.

299 Human Rights Watch 2005, p. 19.

300 Delap, Georgalakis & Wansbrough-Jones 2009, p. 11.

301 UN General Assembly, A/RES/55/2, 2000.

302 UN Department of Economic and Social Affairs 2010, pp. 6 – 15; 31 – 51.

303 Tolfree 2005, p. v.

304 Dunn 2009.

definition indicates that – in keeping with the CRC, the ACRWC and the UN Guidelines – alternative care may take on a wide variety of forms.³⁰⁵ Due to the diversity of underlying factors leading to the necessity for alternative care, an equally diverse range of care options is called for; the primary factors being:

- parental death or the death of the main caregiver(s)
- temporary or permanent incapacitation of the parent(s) or the main caregiver(s), often due to a chronic illness
- abandonment
- separation
- relinquishment to a third party, often due to poverty
- children who feel they have no other option but to leave home.³⁰⁶

As indicated in paragraph 3.1, the major cause of these situations is poverty, which is a factor in itself, but which also influences the manner in which people are able – or not, as the case may be – to cope with adversity in the form of HIV/AIDS or natural disasters.

Children living outside their family environment are considered to be amongst the most vulnerable, suffering an increased risk of their rights being violated. Governments carry a special responsibility for these children; they should provide protection and assistance to them through the endorsement and implementation of policies.³⁰⁷ The obligation to provide children with protection and support covers all children's rights and requires legal and financial measures to ensure that children are cared for and protected against abuse and neglect. This obligation, however, remains – more often than not – unfulfilled. For instance, as at November 2010 in an unprecedented 156 States there is no prohibition of corporal punishment of children in alternative care settings: a mere 6.3% of all children worldwide growing up in alternative care settings are legally protected against corporal punishment, while the vast majority of children are not afforded such protection.³⁰⁸ States should accept that the care and safekeeping of

³⁰⁵ Cantwell & Holzscheiter 2009, p. 4.

³⁰⁶ Cantwell 2005, p. 6.

³⁰⁷ UN General Assembly S-27/2, 2002, p. 15.

³⁰⁸ Global Initiative to End All Corporate Punishment of Children & Save the Children Sweden 2010, p. 8.

children deprived of adequate care, including the protection of children against violence, is their responsibility and should act accordingly.³⁰⁹

The UN Guidelines offer key principles for the provision of alternative care and define a broad spectrum of suitable alternative care options:³¹⁰ firstly, a distinction is made between informal and formal care.

Informal care is “any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body”.³¹¹

Formal care is “all care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures”.³¹²

The UN Guidelines define the main categories of alternative care, which are discussed hereafter. In addition to these definitions, generally accepted descriptions of other forms of care are provided.

Kinship care is “family-based care within the child’s extended family or with close friends of the family known to the child, whether formal or informal in nature”.³¹³ Kinship care is mostly a private arrangement between the parents of the child in question and extended family members who have indicated a willingness to raise the child. It may also be the result of the loss of parents, following which a child is absorbed into the extended family.³¹⁴

309 Tolfree 2005, p. 19.

310 SOS Children’s Villages International 2009, p. 5.

311 Paragraph 29, sub b, i UN Guidelines.

312 Paragraph 29, sub b, ii UN Guidelines.

313 Paragraph 29, sub c, i UN Guidelines.

314 Oswald 2009, p. 24.

Foster care placements are “situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family, that has been selected, qualified, approved and supervised for providing such care”.³¹⁵

Foster care may be:

- Emergency care, for children who are in a dangerous situation from which urgent removal is required.
- Temporary care, for children in need of an interim care measure, prior to being placed in a more permanent setting or for children who may return to their parents after a certain period of time.
- Long-term care, for children who are not able to return to their parents.³¹⁶

Foster care provided to groups of children is known as cluster foster care.

A form of alternative care which is classified ‘between’ foster care and residential care are so-called community-based family group homes. These are settings in which a group of (related and/or unrelated) children are cared for by one or more specific adults within a family-like environment, allowing for a close and continuous child-to-carer relationship to develop. These family-like homes are part of the local community.³¹⁷ Practically, this form of alternative care is very similar to cluster foster care; legally there may be differences in terms of eligibility for specific types of grants as well as legal parental responsibilities.

Residential care is “care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short and long-term residential care facilities including group homes”.³¹⁸

³¹⁵ Paragraph 29, sub c, ii UN Guidelines.

³¹⁶ Oswald 2009, p. 32.

³¹⁷ Tolfree 2006, p. 30.

³¹⁸ Paragraph 29, sub c, iv UN Guidelines.

Additional care options encompassed in the UN Guidelines, but not defined as such, are: “other forms of family-based or family-like care placements”³¹⁹ and “supervised independent living arrangements for children”.³²⁰

Cluster foster care may be understood to fall into the category ‘family-like care placements’. It is not clear whether the UN Guidelines consider child-headed households to be “supervised independent living arrangements”; the factual meaning of the term could include these households. A more accepted understanding of the term relates to children nearing the age of adulthood, who are being prepared for life after care and temporarily live on their own under the supervision of a caregiver. In line with the latter perception, the author does not categorise child-headed households as supervised independent living arrangements.

Adoption is regarded as a permanent care arrangement which equals parental care and is not categorised as alternative care in the UN Guidelines. Nonetheless, the pre-adoption period and the probationary placement of a child with the prospective adoptive parents fall within the scope of the UN Guidelines and these two stages are deemed to be forms of alternative care.³²¹ Although adoption is not analysed as a form of alternative care in this study (*cf* chapter 2, conclusions), references to adoption are made as the subject within the framework of current alternative care arrangements cannot be ignored.

As discussed in chapter 2, neither the CRC nor the ACRWC explicitly indicate which form of care is most appropriate or the criteria States should employ to determine this. Ascertaining the most suitable form of alternative care depends on the child and the underlying reason for the need for care. However, the CRC views residential care as a measure of last resort, whereby children should only be placed in a suitable institution “if necessary”.³²² UNICEF and other international organisations concerned with children’s rights and child protection, such as Save the Children and USAID, have adopted the unanimous viewpoint that the placement of children in residential care should be avoided where possible and only be used if

319 Paragraph 29, sub c, iii UN Guidelines.

320 Paragraph 29, sub c, v UN Guidelines.

321 Paragraph 30, sub b UN Guidelines.

322 Cantwell & Holzscheiter 2009, pp. 53, 54.

other options are not available.³²³ It is widely accepted that children are best cared for when they grow up in a caring family, surrounded by a supportive community, within a protective state and an international community that demonstrates solidarity where appropriate.³²⁴ Care provided in the natural environment of children enables them to maintain regular contact with their next of kin, extended family and friends.³²⁵ The focus should therefore lie on kinship and foster care, as well as on supporting families to provide family-based care, rather than on institutional care.³²⁶

Placement in institutional care may be deemed expedient when a child cannot be cared for in another setting as a result of unavailability of other forms of care or in case the child is unable to cope with other care situations. A child should not be placed in an institution unless this is in his best interests. With regard to the suitability of care institutions, Article 20 CRC does not provide any standards whatsoever. According to Article 3 paragraph 3 CRC, States must ensure that institutions adhere to “standards established by competent authorities”, standards on issues of safety, health, the number and suitability of staff, as well as competent supervision. Further indicators as to the contents of these standards are not given and States are required to establish suitable benchmarks. Some countries already have minimum standards in place for certain forms of alternative care or have recently implemented them.³²⁷ However, without the requisite financial resources, trained staff and adequate monitoring mechanisms to ensure the quality of care, the provision of suitable institutional care is not feasible.³²⁸

The UN Guidelines provide that “use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests.”³²⁹ Where large institutions exist, alternative forms of care should be developed in order to progress deinstitutionalisation and to eliminate

323 Meintjes et al. 2007, p. 9.

324 Innocenti Insight 2006, p. 11.

325 Meintjes et al. 2007, p. 49.

326 UNAIDS 2009c, p. 35.

327 See in this regard the Namibia Minimum Standards for Residential Care 2009 and the South Africa Government Notice, General Regulations regarding Children 2010.

328 SOS Children’s Villages International 2010.

329 Paragraph 21 UN Guidelines.

such institutions. States must develop national standards, ensuring the quality and conditions of care, with a focus on individualised and small group settings.³³⁰ It is not obligatory for alternative care to be provided by a public body or entity. States are merely obliged to ensure that alternative parental care is received by every child when required; this care may be provided by public as well as private organisations, facilities or persons, on the proviso that States ensure that all care is of a given standard.³³¹ The question that arises is: why should alternative care for children be considered as a priority and as a matter of urgency? Orphaned children, and by extension all children without care, face an increased risk of their rights of survival, development, protection and participation being violated. In figure 3.3, the potential violations of the aforementioned rights are outlined.

Figure 3.3 Potential infringements of rights of children without adequate (parental) care³³²

Right	Situation	Infringement
Survival	no access to health care	Article 24 CRC
	no access to social security	Article 26 CRC
	reduced access to food	Article 27 CRC
	reduced access to shelter	Article 27 CRC
	poverty	Article 27 CRC
Development	stigma and discrimination	Article 2 CRC
	lack or loss of identity and inheritance rights	Article 7 CRC Article 8 CRC
	psychosocial distress	Article 24 CRC
	reduced school attendance	Article 28 CRC
	reduced time to play	Article 31 CRC
Protection	increased risk of being neglected and abused	Article 19 CRC
	increased risk of sexual abuse and exploitation	Article 34 CRC
	increased risk of child labour and exploitation	Article 32 CRC
Participation	no opportunity to participate in decision-making	Article 12 CRC Article 13 CRC
	no opportunity for interpersonal relationships outside the institution	Article 15 CRC
	lack of access to information	Article 17 CRC

330 Paragraph 23 UN Guidelines.

331 Cantwell & Holzscheiter 2009, p. 51.

332 SOS Children's Villages International 2008, p. 6.

3.3 Situations of alternative care

In accordance with the UN Guidelines, alternative parental care may be categorised in three genres: kinship care, foster care and residential care. In this paragraph, these concepts are further elaborated on, making use of representative examples from the nine focus countries. Additionally, a number of other non-standard forms of care will be discussed.

3.3.1 Kinship care

Care provided by closely related family members or, alternatively, by more distant relatives or close family friends, is known as kinship care or extended family care. Within the framework of this study both terms are used interchangeably.

It is generally seen to be the most favourable alternative care environment for children, in most cases ensuring continuity in their upbringing and family values. However, kinship care is not necessarily suitable and appropriate in every situation. Due to the vast number of children in need of alternative care in sub-Saharan Africa, the extra burden has overstretched the extended family's capacity. As a result, kinship caregivers lack the financial resources to provide sufficient care, siblings may be separated, they may be treated differently from biological children belonging to the household and children's emotional needs may be disregarded.³³³ Also, the suitability of family members as carers is generally not assessed. In combination with the lack of a monitoring system, children may find themselves in an inappropriate environment and subjected to abuse or exploitation.³³⁴ These children are more at risk of receiving corporal punishment from their kinship carers than the caregivers' biological children.³³⁵

When children are absorbed by the extended family, the decision on where they will live and who will raise them is based on the willingness and capability of the extended family members, rather than derived from children's own wishes and based on their best interests. Another possible

³³³ Innocenti Insight 2006, p. 19.

³³⁴ UNICEF/ISS 2004, p. 3.

³³⁵ Pinheiro 2006, p. 69.

disadvantage is that children may lose their inheritance to extended family members.³³⁶ The stigma associated with HIV/AIDS may lead to extended families abusing affected children.³³⁷

A growing trend can be discerned where orphans and other children in need of alternative care are being looked after by one or both of their grandparents, who had hitherto already played an active role in their upbringing; children generally value care provided by a grandmother as the most preferred form of care. These households are also known as skip-generation households or granny-headed households. Depending on the age of the children and the health of the grandparents, the latter may not live long enough for children to reach adulthood while in their care. Consequently, children will be confronted with another loss of their caregiver and are faced with yet another – dramatic – change in their care situation.³³⁸

Kinship care, whether temporary or long-term, is the most practised type of alternative care in sub-Saharan Africa³³⁹ and is also encountered in situations where biological parents are alive. In figure 3.4 the percentage of children in countries with an HIV prevalence of 5% or more in the period 2004 – 2008 are categorised by living arrangements.³⁴⁰

Figure 3.4 Living arrangements of children in countries with an HIV prevalence \geq 5%

Living with:	both parents	mother only	father only	neither parent
Ethiopia*	73%	12%	4%	10%
Malawi	59%	20%	2%	18%
Namibia	26%	33%	5%	36%
Swaziland	22%	38%	6%	34%
Uganda	55%	20%	6%	20%

* FHI 2010a, p. 22.

336 Tolfree 2006, p. 15.

337 Human Rights Watch 2005, p. 10.

338 UNICEF 2006a, p. 16.

339 Cantwell 2005, p. 6.

340 UNAIDS 2009c, p. 24. Note that the source is not quite accurate in that not all columns add up to 100%.

From the data in figure 3.4 it is clear that the percentage of children living with neither parent is significantly higher than the percentage of children having lost both parents (figure 3.1); it may therefore be concluded that numerous children do not reside with either parent even though one or both parents are still alive.

In Malawi, orphaned children were traditionally raised by members of the extended family. Due to the many HIV/AIDS related deaths, however, the number of children who have lost one or both parents has surged to an estimated 1 million as at 2009, overloading the traditional kinship care system.³⁴¹ Nonetheless, most alternative care today is still provided (informally) by the extended family.³⁴² Family ties are still strong in Malawi and when a child is in need of alternative care, the form of care that is considered first is kinship care. If the extended family is not capable of caring for the child, the District Social Affairs Office assumes responsibility for alternative care arrangements.³⁴³ Malawian adults consider orphans to be in need of alternative care, provided by an adult in the form of love and guidance. Children generally prefer to be raised by female family members rather than by unrelated caregivers.³⁴⁴

More than one-third of children in Namibia live with neither parent even in cases where both parents are alive. Although no exact figures are available, the majority of children not living with either parent are thought to reside informally with extended family members, mainly with grandparents.³⁴⁵

In Rwandan culture, the family comprises persons related by blood as well as very close friends; children are traditionally cared for by their parents or by one or more members of the (extended) family.³⁴⁶ Both before and after the 1994 genocide, kinship care has been the most practised form of alternative care. Two-thirds of orphans are raised informally by the

341 UNAIDS 2010a, p. 47.

342 Personal communication, UNICEF child protection specialist, Malawi, 03/12/2009.

343 UNCRC NGO Group, Malawi, 2009, pp. 5, 6.

344 Mann 2002, pp. 47, 52.

345 Namibia Ministry of Gender Equality and Child Welfare 2008, pp. 5, 7.

346 Doná, Kalinganire & Muramutsa 2001, p. 12.

extended family; 93.7% of children who have lost one or both parents are cared for by a relative.³⁴⁷

In Sierra Leone, the majority of children who are in need of alternative care are cared for by the extended family. Alternatives for kinship care provided by the government are practically non-existent.³⁴⁸ One-fifth of all Sierra Leonean children live apart from their (still living) biological parents; the majority of these children are raised by extended family members.³⁴⁹

In South Africa, children who have lost one or both parents are also traditionally cared for by the extended family. In addition, 17% of children with both parents alive are not resident with their biological parents but raised by extended family members and – sometimes – close family friends.³⁵⁰ There was an overall increase in the number of children, orphans and non-orphans, living in a household headed by a grandparent during the period 1993 – 2005. The majority of single orphaned children lived in such a household, rather than with their remaining parent. In 2005, 51% of double orphans lived in a grandparent-headed household and 40% in households headed by other relatives.³⁵¹

In general, children in Swaziland are more likely to live with extended family members than with both parents; in total, 34% of children are raised in a kinship care setting – irrespective of whether parents are still alive – and only 22% by both parents.³⁵²

Kinship care in Uganda is often provided by elderly family members. Where the family income has been reduced, resources have to be augmented by the government.³⁵³

347 Rwanda Prime Minister's Office in charge of Gender and Family Promotion 2008, pp. 33, 34.

348 UNICEF 2007, p. 10.

349 UNICEF 2008c, p. 6.

350 UNICEF 2008b, pp. 9, 20.

351 Ardington 2008, pp. 4, 14.

352 UNAIDS 2009c, p. 24.

353 UNCRC NGO Group, Uganda, 2005, p. 7.

3.3.2 Foster care

Across sub-Saharan Africa, the term ‘foster care’ is open to variable interpretation which differs from the definition provided by the UN Guidelines and the accepted use in the more industrialised countries (the legal placement of a child within a family other than its biological family³⁵⁴).³⁵⁵ In the latter, foster care is formal and in most cases temporary, carried out by non-family members. It includes emergency care for babies, transitional care – this is short-term care, provided by trained caregivers, during which a suitable and permanent care facility is found³⁵⁶ – and short-term or medium-term care for children who are temporarily unable to remain in their own home situation. Foster care allows the time and the space to improve the home situation after which children may return to their parents.³⁵⁷

The biological parents usually retain parental authority.³⁵⁸ In comparison to kinship care, the quality of care provided by unrelated foster caregivers may be higher due to the fact that family members generally feel pressured to care for next of kin whereas unrelated carers do so voluntarily, out of a selfless motivation.³⁵⁹

Informal foster care can be encountered in most countries on the African continent; it is often a permanent arrangement, provided by the extended family. Although this type of foster care is *de facto* kinship care, in a number of countries there might be an important factor at play for kinship carers’ preference to be classified as a foster parent. In some countries foster parents are eligible for grants or other forms of welfare; for instance, in order for a child to be eligible for a foster care grant – often higher than other grants³⁶⁰ – the caregiver must be identified as a foster parent.³⁶¹ For the purpose of this study foster care provided informally by extended family

354 Williamson 2004, p. 12.

355 Dunn & Parry-Williams 2008, p. 15.

356 Nott & Brisbane 2008, p. 11.

357 Cantwell 2005, p. 8.

358 Tolfree 2005, p. iv.

359 Tolfree 2006, p. 21.

360 In South Africa the Foster Care Grant is approximately three times higher than the Child Support Grant (Hall 2010, p. 107).

361 UNAIDS 2009c, p. 24.

members, is categorised as informal foster care. The situation where a child is formally fostered by a family member is referred to as formal foster care or formal kinship care.³⁶²

Formal foster care is not common practice in most sub-Saharan countries.³⁶³ However, in a number of countries it has been successfully introduced as a form of alternative care both for younger children and for adolescents. Where foster care is not formalised by national law or in situations of informal foster care, the legal positions of foster parents and foster children remain unclear. As a result children's rights may not be respected. Children in informal foster care settings are more at risk of abuse and exploitation through being put to work as domestic servants in exchange for care.³⁶⁴ By means of legal recognition of foster care, including a monitoring system, the rights of both parents and children enjoy a higher level of protection. Foster care – when provided on a long-term basis – may *de facto* be very similar to adoption; however, *de jure* there is a major difference in that foster care does not alter the legal kinship status of the foster child.³⁶⁵

In Malawi, foster care has not been formalised and fostering is not common practice.³⁶⁶

Foster care provided by non-relatives is not common in Namibia. Informal kinship arrangements are known to have been formalised in order to secure grants for children in care; in 2008, 13,003 children received such a grant. Eligibility can only be obtained through a court order, following recommendation by a social worker.³⁶⁷ New legislation does not allow for foster care by extended family members; this form of care is categorised as kinship care (*ut infra*, chapter 5, paragraph 5.4.1).

In Rwanda, before the 1994 genocide, foster care was not commonly practised and usually occurred informally. After the war, fostering became a frequently

362 UNICEF/ISS 2004, p. 2.

363 Innocenti Insight 2006, p. 20.

364 Tolfree 2006, pp. 18, 19.

365 Innocenti Insight 2006, pp. 21, 34.

366 Dunn & Parry-Williams 2008, p. 15.

367 Namibia Ministry of Gender Equality and Child Welfare 2008, pp. 7, 8, 13.

encountered phenomenon³⁶⁸ as a result of the active promotion of formal foster care by the government and NGOs.³⁶⁹ An estimated 93,000 children had been separated from their parents and large numbers of children had permanently lost their parents.³⁷⁰ Approximately 28,300 children are known to have been fostered within Rwanda; thousands of other children were temporarily fostered in neighbouring countries. In order to protect children's best interests, national guidelines on formal fostering were composed and made available. It was found that formal fostering enjoyed a better chance of success when both parents and children were thoroughly prepared and monitoring by agencies responsible for placements was in place. Nonetheless, informal fostering still exists.

In Rwanda, foster care is considered to be a permanent arrangement, unless the biological family of a child can be traced, in which case family reunion may take place.³⁷¹ More than a quarter of all Rwandan orphans are fostered.³⁷²

Well before the 1991 – 2002 civil war, informal fostering occurred on a large scale in Sierra Leone. After the war, which deprived many children of their primary caregiver, the number of children informally fostered by family or community members increased.³⁷³ In comparison: formal foster care is relatively uncommon and was mainly evidenced in the post-war period.³⁷⁴ The Ministry of Social Welfare, Gender and Children's Affairs (MSWGCA) is responsible for the overall supervision and monitoring of formal foster care; in practice, local Child Welfare Committees determine the suitability of potential foster parents and monitor foster placements.³⁷⁵

In South Africa, foster care is encouraged as a form of alternative care for children who have lost one or both parents. The number of formal foster

368 Thurman et al. 2008, p. 1558.

369 Innocenti Insight 2006, p. 20.

370 UNICEF 2001, p. 16.

371 Doná, Kalinganire & Muramutsa 2001, pp. 14 – 81.

372 Rwanda Prime Minister's Office in charge of Gender and Family Promotion 2008, p. 33.

373 Gale 2008, p. 2.

374 Personal communication, UNICEF child protection specialist, Sierra Leone, 12/11/2009.

375 Gale 2008, p. 4.

care placements increased by more than 700% from 49,843 in the year 2000 to 511,479 in 2009.³⁷⁶ Due to the subsequent increase in the workload of social workers, the social care system has become severely overstretched, resulting in children being placed in residential care in order to relieve demands on the system.³⁷⁷ The majority of foster placements, a total of 91%, are with extended family members, such as grandmothers and aunts. Almost half of all fostered children are orphans and their care arrangements are long-term or permanent; the remaining 52% have one or both parents alive.³⁷⁸ Foster parents are eligible for a foster care grant for children in their care, which is significantly higher than the ordinary child support grant. To obtain a foster care grant, a social worker has to assess the child in order to determine whether he is in need of alternative care, which decision is then subject to court approval. In 2007 a total of 449,009 foster care grants were paid out, the majority to related foster carers: 41% to grandmothers and 30% to aunts.³⁷⁹ The availability of the foster care grant has resulted in many hitherto informal foster carers formalising their care arrangements.³⁸⁰

South African law has provisions for so-called cluster foster care. The Children's Amendment Bill stipulates this form of foster care to be:

"a scheme for providing for the reception of children in foster care in accordance with a foster care programme operated by –

- (a) a social, religious or other non-governmental organisation; or
- (b) a group of individuals, acting as caregivers of the children, and managed by a provincial department of social development or a designated child protection organisation".³⁸¹

This section, however, does not provide any further details with regard to the practical side of cluster foster care and as to what the contents and parameters are. An indication as to the interpretation of cluster foster care may be derived from a number of relevant sections of the Children's Amendment Bill and the Children's Act; this form of care "relates to the care of a child, and by persons who are not parents or guardians, and after

376 Hall 2010, p. 108.

377 Meintjes et al. 2007, p. 70.

378 Sloth-Nielsen 2008b, p. 6.

379 Csáky 2009, p. 16.

380 Sloth-Nielsen 2008b, p. 7.

381 Section 3(d) South Africa Children's Amendment Act 2007.

placement by a children's court". In conjunction with the definition of a foster parent, which "includes an active member of an organisation operating a cluster foster care scheme and who has been assigned responsibility for the foster care of the child", the concept of foster cluster care is perhaps gaining some clarity. An unambiguous definition is nonetheless not available and the notion of foster cluster care remains open to interpretation.³⁸² It may be derived from the aforementioned descriptions that cluster foster care is a form of alternative care by means of which groups of children can be cared for in a family-like setting, while avoiding institutionalisation. Although data on cluster foster care is scarce, some examples of this form of care have been identified, such as a private home in which a group of six children is being cared for by two designated foster parents and a site on which a number of foster homes is grouped together.³⁸³

In Swaziland, foster care has been found to be relatively rare.³⁸⁴ In 2006, the government declared that the number of foster care placements was declining due to the untimely demise of extended family members, who had hitherto been responsible for most foster care placements.³⁸⁵

3.3.3 Residential care

Residential care is temporary or long-term care provided on a 24-hour basis in a group-based setting, by remunerated adult staff,³⁸⁶ in a building or buildings owned or provided by the implementing organisation.³⁸⁷ Residential care facilities are also known as institutions or institutional care facilities, children's homes, orphanages and care homes.³⁸⁸ Within the framework of this study, this form of care is referred to as residential care (facilities), institutional care (facilities) or institutions, which terms are used interchangeably.

382 Gallinetti & Sloth-Nielsen 2010, pp. 4 – 16.

383 Dunn & Parry-Williams 2008, pp. 63, 64.

384 Dunn & Parry-Williams 2008, p. 15.

385 UNCRC NGO Group, Swaziland, 2006, p. 3.

386 Innocenti Insight 2006, p. 35.

387 Tolfree 2006, p. 32.

388 Pinheiro 2006, p. 175.

Residential care facilities come in several forms and sizes and can be divided into dormitory-style institutions and household-style set-ups.

In dormitory-style settings a large number of children, from 20 to several 100, are usually clustered in groups based on age. They share spaces and facilities for sleeping, eating and socialising; care is provided by – many different – rotating care-workers.

In household-style settings, children from different age groups, including groups of siblings, live together in a family-like unit where care is provided by a full-time housemother; the maximum number of children per unit is usually ten. These set-ups may be clustered into a so-called children's village.³⁸⁹ The model of SOS Children's Villages – care provided within a family setting by one or two adults, in buildings owned by the organisation, concentrated in villages – is an example of this form of residential care.³⁹⁰ Residential care is usually provided on a long-term basis.³⁹¹

As indicated above, the distinction between community-based group care and types of residential care is not always easily made. In practice, they may be very similar; in terms of legal aspects there are differences, though, such as the legal responsibility for a child and eligibility for welfare.

In Africa, institutional care facilities were a largely unknown phenomenon for most of the twentieth century. Children who had lost their parents would be absorbed by the extended family. However, when the HIV/AIDS pandemic, as well as armed conflict and natural disasters led to an unforeseen increase in the number of children in need of alternative care, privately funded 'orphanages' proliferated.³⁹² In 2003, an estimated 34 million children under the age of 15 were living in an institution in sub-Saharan Africa.³⁹³ Due to the fact that most care institutions are unregistered, the accuracy of these estimates is debatable and it is unknown how many children currently reside in residential care facilities.³⁹⁴ In addition to the aforementioned factors,

389 Meintjes et al. 2007, p. 29.

390 Tolfree 2006, p. 32.

391 Pinheiro 2006, p. 176.

392 Pinheiro 2006, p. 184.

393 Dunn, Jareg & Webb 2003, p. 16.

394 UNICEF 2009a, p. 19.

the impoverishment of a substantial part of the population increased. In most sub-Saharan countries residential care has provided a 'solution' and it has become an acceptable alternative to parental care for non-orphans in situations of poverty: the majority of children living in residential care still have one or both parents alive.³⁹⁵ The overriding reason for children being placed in this type of care is poverty and parents' attempts to ensure access to education and food for their children.³⁹⁶

Although materially their upbringing may in certain cases be better than in the home-situation, it is widely documented and acknowledged that for most children residential care is harmful, with adverse effects on health and well-being, causing long-term or permanent damage.³⁹⁷ Many institutions fail to meet the minimum standards of care, mainly due to inadequate carer-to-child ratios and the absence of individual attention and love for a child from a parental figure.³⁹⁸ Residential care facilities run by faith-based organisations mainly provide care through volunteers, who more often than not have no training in working with (traumatised) children and who leave after a short period of time, ranging from a number of weeks to a year.³⁹⁹ Under these circumstances, it is virtually impossible for attachments to be formed between a child and a main caregiver. As a result, children are at risk of developing long-term psychological problems; when placed in an institution, younger children are more likely to be affected by the placement and the damage to their development likely to be more serious.⁴⁰⁰

Children who are raised in institutional care facilities tend to lack the experience and psychosocial skills needed to integrate into society on reaching adulthood. Additionally, children may experience learning difficulties, long-term or permanent developmental impairment and medical problems.⁴⁰¹ The separation from parents and siblings may cause behavioural problems in children⁴⁰² and their physical condition may suffer

395 Csáky 2009, p. 1.

396 Williamson 2004, p. 13.

397 Tolfree 2005, p. 4.

398 Csáky 2009, p. 10.

399 Delap 2009, p. 22.

400 Williamson 2004, p. 21.

401 Innocenti Insight 2006, p. 36.

402 Csáky 2009, p. 7.

while living in an institution due to the fact that they are sometimes left in a state of total inactivity for years, without adequate opportunities for mobility, resulting in the underdevelopment of muscles and spine. In some cases, privation of sufficient adult contact results in children resorting to self-harm.⁴⁰³ In addition, children are not able to build and rely on social connections; the lack of a social safety net leads to an increased long-term vulnerability.⁴⁰⁴

In practice, institutional care often becomes a long-term or permanent solution,⁴⁰⁵ increasing the risk of the aforementioned detrimental effects on children. It is worth noting though, that even short-term residential experiences, for example while awaiting another care solution, may cause serious developmental delays, especially in infants and very young children.⁴⁰⁶

Although exact figures are not available, evidence suggests that children living in residential care are extremely vulnerable to violence and abuse by staff members,⁴⁰⁷ such as humiliation, beatings, torture, rape, isolation, restraints and harassment. Few staff members have been trained in child care, child development or children's rights and therefore staff may resort – under often stressful circumstances – to violence in an attempt to maintain order and discipline. Violence and abuse in non-registered institutions which are not being monitored, often remains undetected for years and perpetrators are rarely held accountable for their deeds.⁴⁰⁸

Amongst others, the following rights are especially at risk of being violated when children are cared for in institutions:

- Article 2 CRC (non-discrimination): children living in residential care facilities are often segregated from the community and are frequently stigmatised and discriminated against.

403 Pinheiro 2006, p. 190.

404 Williamson 2004, p. 21.

405 Cantwell 2005, p. 13.

406 Innocenti Insight 2006, p. 37.

407 Csáky 2009, p. 7.

408 Pinheiro 2006, pp. 175 – 182.

- Article 3 CRC (best interests of the child): most children are placed in institutional care due to family poverty; the best interests of the child is not the primary consideration.
- Article 8 CRC (preservation of identity): family ties, both with the immediate family and with the extended family, often deteriorate during the child's stay in an institution.
- Article 9 CRC (separation from parents): as most children living in residential care have at least one remaining parent, placement in such a facility violates their right to live with or to maintain contact with their parents.
- Article 19 CRC (protection from abuse and neglect): abuse of children in residential care occurs regularly; children usually do not receive individual attention and care.
- Article 25 CRC (review of treatment in care): many residential care facilities are not monitored, especially those that have remained unregistered, and review of the care provided does not occur.
- Article 31 CRC (leisure, recreation and cultural activities): in many institutions there are few or no opportunities for purposeful activities for children.
- Article 34 CRC (sexual exploitation and abuse): some of the abuse taking place in institutions is known to be of a sexual nature.⁴⁰⁹

Institutions are usually funded and run by NGOs, faith-based organisations, private enterprises and individuals; in some cases facilities are financed and operated by governments.⁴¹⁰ Institutional care is considered to be the most expensive form of alternative care, the cost of residential care being between 5 – 20 times higher than other forms of care, such as foster care or kinship care.⁴¹¹

Generally speaking, the following factors are regarded as the main reasons for residential care to be deemed an inappropriate care solution and to acknowledge this form of alternative care to be a measure of last resort:

⁴⁰⁹ Tolfree 2003, pp. 8, 9.

⁴¹⁰ Csáky 2009, p. 3.

⁴¹¹ Innocenti Insight 2006, p. 36.

- no continuity of care, due to high staff turnover rates;
- a lack of adequate care, due to high child-to-carer ratios and untrained staff;
- inadequate psychological care;
- an increased risk of physical and mental health problems;
- an increased vulnerability to violence and abuse;
- an absence of after care, resulting in problematic reintegration into society on reaching adulthood;
- a lack of standards for institutional care and of monitoring systems;
- high costs in comparison to family-based care.⁴¹²

Another risk faced by children in residential care is (illegal) intercountry adoption or child trafficking. Intercountry adoption is a relatively new form of alternative care which notably started during and after World War II when children from countries under siege were sent to safe and less affected regions in other parts of the world.⁴¹³ In more recent years, the most popular countries from which children are adopted are China and Russia, while adoption from certain African countries is on the increase. The majority of children who are placed with adoptive parents in another country is younger than five years old.⁴¹⁴ Although children may be adopted from an institution or directly from their biological parents, data shows that most children in the intercountry adoption system are not adopted from a residential care facility; for instance, in Swaziland less than 3% of children who are adopted by foreigners originate from an institution.⁴¹⁵ While many children living in institutions are older than five and may be traumatised, sick or disabled, potential adoptive parents wish to adopt healthy babies without any 'baggage' and those are usually not to be found in residential care. Intercountry adoption has become an industry which is driven by financial gain and the perception that a child is a commodity rather than a human being.⁴¹⁶ Notwithstanding the low percentages of intercountry adoptions from residential care facilities, children living in institutions – especially those under the age of five – are at a higher risk of being drawn

412 UNICEF 2006a, p. 20.

413 UN DESA ST/ESA/SER.A/292 2009, p. 18.

414 UN DESA ST/ESA/SER.A/292 2009, pp. 82, 91.

415 UN DESA ST/ESA/SER.A/292 2009, pp. 120, 121.

416 Graff 2008, pp. 1, 2.

into the intercountry adoption industry than children living in a family-based care setting.

Following the 1984 – 1985 drought, in a concerted effort to find a solution for the large numbers of children deprived of parental care, residential care facilities proliferated in Ethiopia. Although government policy has been aimed at deinstitutionalisation since 1986, NGOs and faith-based organisations have continued to operate institutions and even start new facilities.⁴¹⁷ The majority of residential care facilities is owned and run by NGOs, while a small percentage is operated by the government.⁴¹⁸ Monitoring and evaluation systems on national level are not in place and regional bodies lack the capacity to carry out active monitoring.⁴¹⁹

In 2010, Kenya counted 830 Charitable Children’s Institutions (CCIs).⁴²⁰ These are residential care facilities (“a home or institution”) which have been approved by the National Council for Children Services to provide, *inter alia*, care and protection for children. These institutions have to operate according to the 2005 Charitable Children’s Institutions Regulations which contain standards for residential care.⁴²¹

In Malawi, regulations for residential care facilities do exist; these regulations, however, are generally unknown within institutions. Monitoring activities have been started up, but are not yet carried out on a regular basis.⁴²² Where alternative care is provided by NGOs, it usually concerns institutional care; data on how many institutions operate in Malawi and the number of children living in them is not available.⁴²³ The Malawian government views institutional care as a measure of last resort.⁴²⁴

417 FHI 2010a, pp. 24, 25.

418 FHI 2010a, p. 31.

419 FHI 2010a, p. 44.

420 <<http://www.gender.go.ke/index.php/About-Us/mission-vision-functions.html>>, accessed on 24/11/2010.

421 <<http://www.gender.go.ke/index.php/Divisions/charitable-childrens-institutions.html>>, accessed on 24/11/2010.

422 Dunn & Parry-Williams 2008, p. 12.

423 Personal communication, UNICEF child protection specialist, Malawi, 03/12/2009.

424 UNCRC NGO Group, Malawi, 2009, p. 5.

In Namibia, the number of residential care facilities increased from 9 in the year 2002 to 42 in 2008; half of these facilities are registered, while just 1 is government-operated. A total of 1,008 children are known to be living in 36 of the institutions; data from the other facilities are not available. Reasons for admission are the death of the main caregiver, abandonment, neglect and abuse. In registered institutions, the majority of children are placed by court order. A small percentage of care facilities aim to reunite children with (extended) family members, while in most facilities children remain until they are able to live independently. In the majority (all but one) of residential institutions the accommodation is adequate. The experience and level of training of staff ranges from untrained carers and volunteers to adequately trained and experienced caregivers. The carer-to-child ratio is generally very high. The majority of children of school-going age are enrolled in the educational system. In general, children's health is found to be good. Registered care facilities receive grants or allowances for children's maintenance, while unregistered facilities are funded by NGOs and international donors.⁴²⁵

Most institutions in Rwanda were founded after the 1994 genocide, leading to a staggering 12,705 children living in residential care facilities, also known as unaccompanied children centres. Since 1996, government policy has been geared towards deinstitutionalisation and no new official residential care facilities have been established. By 2002 reunion of most children and their (extended) family had taken place and the number of children living in institutional care had diminished to 3,475; the majority of these children live in institutions due to socio-economic difficulties.⁴²⁶ Parents are known to have placed their children in institutions in order for them to receive better care than the care they, the parents, have to offer.⁴²⁷

In Sierra Leone, residential care facilities are operated and funded by NGOs, donor organisations and individuals, not by the government. In December 2007, 1,871 children officially had their residence in an institution. Research carried out in the period 2007 – 2008 identified 48 institutions, the majority

425 Namibia Ministry of Gender Equality and Child Welfare 2008, pp. 14 – 18.

426 UNICEF 2002, pp. 11 – 21.

427 Thurman et al. 2008, p. 1558.

situated in the western part of the country,⁴²⁸ the number of unlicensed institutions is estimated to be considerably higher.⁴²⁹ It is government policy to encourage residential care facilities to reunite children with their families or to place them with a foster family.⁴³⁰

Over half of these registered institutions emerged during the 1991 – 2001 war, when a large number of children lost their parents or were separated from them; 19 care facilities were established during the post-war era. All institutions are registered with the Ministry of Social Welfare, Gender and Children's Affairs or another government authority, although generally not as child care institutions. As a result, the government is unable to enforce the use of the national guidelines for residential care and most facilities utilise internally developed guidelines and standards.⁴³¹

The majority of institutions in Sierra Leone provide long-term care, while short-term and community-based group care are provided by a small percentage of facilities. The number of staff and their level of training differ significantly: whereas some institutions rely mainly on untrained volunteers and/or have high child-to-carer ratios, others employ a sufficient number of experienced and trained child carers, social workers and teachers. In two-thirds of institutions children receive three meals a day; the remainder serve two meals, with the exception of one institution where children have only one meal per day. The majority of residences maintain satisfactory to very good hygiene standards and provide adequate toilet and bathroom provisions. Although the state of the buildings is generally good, children sleep in overcrowded bedrooms with little space for personal belongings or activity. In 96% of care facilities children sleep in bunk beds with foam mattresses, each child having its own mattress; in the other institutions children sleep on mats on the floor. Only a small percentage of children living in residential care are below the age of 6; 46% of children fall in the age group 6 – 11 and 46% in the category 12 – 18.⁴³²

428 UNICEF 2008c, pp. 14 – 28.

429 Gale 2008, p. 4.

430 UNCRC NGO Group, Sierra Leone, 2008, p. 5.

431 UNICEF 2008c, pp. 17 – 20.

432 UNICEF 2008c, pp. 21 – 30.

Although formally children can only be placed in residential care by court order, the majority of admissions are performed by staff, while others are admitted by parents or family; standard procedures for the admission of children are rare. Factors playing a role in children being placed in institutions are: death of the primary caregiver (30%), abandonment (8%) and neglect or abuse (5%). Although 43% of children are known to be orphans and 36% of children have lost one parent, poverty is the overriding factor for children's admission.

Only a small percentage of institutions keep adequate documentation, such as admission, case review and monitoring forms, of each child.

The overall health situation of children is good and those requiring medical attention are seen to receive treatment in hospitals or community health centres.

All but 1% of school age children are enrolled in the educational system and education enjoys a reasonable degree of prominence. In addition, children are given sufficient time for play and leisure.⁴³³

In 90% of residential institutions in Sierra Leone no policy exists on the length of stay and most children live in institutions until they reach adulthood and are able to live independently; care-leaver programmes are not available. Some children become institutionalised and remain in the establishment after reaching adulthood. Most residential care facilities are not monitored by the Ministry of Social Welfare, Gender and Children's Affairs, due to insufficient human resources and the fact that facilities are situated in remote areas which are not easily accessible. In addition, a number of institutions have moved without notification to the authorities and are therefore difficult to trace. Monitoring visits that were carried out appear not to have had much effect in terms of recommended improvements.⁴³⁴

In South Africa, an estimated 1.3% of all children in the age group 0 – 14 live in institutional care; this number is made up of both orphans and non-orphans.⁴³⁵ Although residential care facilities have to be registered with the Department of Social Development, many so-called children's homes

433 UNICEF 2008c, pp. 33 – 39.

434 UNICEF 2008c, pp. 40 – 42.

435 Ardington 2008, p. 12.

do not comply with this legislative requirement and operate illegally and are subsequently unmonitored. For this reason, accurate statistical data on residential care is not available. In 2007, the number of registered residential care facilities stood at 193.⁴³⁶

The majority of children living in residential care fall into the age category 6 – 18; however, some 30% of children are below the age of 6. Between 80 – 90% of children have at least one remaining parent; in 15% of cases both parents are known to be alive. The main reasons for children living in residential care are: abuse, neglect and abandonment, with poverty and HIV/AIDS as underlying causes. Most residential care institutions house 11 – 60 children. There is a wide range of residential care settings, from converted shipping containers and corrugated iron shacks to residential cottages or brick buildings with extensive facilities such as pre-schools, clinics and swimming pools. In non-registered institutions only 18% of care workers are known to have received a form of child-care training, as opposed to some 80% in registered facilities. In 87% of registered care facilities children have access to a social worker, as opposed to 18% of children in unregistered care facilities. In the main, registered facilities receive funding from the government, whereas unregistered care facilities usually do not receive any such funding. Their source of income includes donations from individuals, companies, charities, NGOs and churches.⁴³⁷

Most children living in institutional care receive long-term care and remain in these care facilities for a period of more than two years. Children placed in unregistered facilities are more likely to remain in these settings than children in registered homes. In registered institutions 77% of children are placed by a social worker and 4% by the police; in unregistered facilities 28% are placed there by a social worker – usually when there is no place available in a registered facility – and 40% by caregivers or a relative.⁴³⁸

436 Meintjes et al. 2007, pp. 5, 16.

437 Meintjes et al. 2007, pp. 19 – 54.

438 Meintjes et al. 2007, pp. 58 – 72.

In Swaziland, there are no national standards or rules with regard to institutional care facilities. A monitoring system is not in place.⁴³⁹

In 1991, the government of Uganda embarked on a process of moving away from residential care towards community-based care. Due to the civil war and the impact of HIV/AIDS, however, the need for alternative care for children increased, leading to an expansion of the number of institutions.⁴⁴⁰

Conclusions

This chapter has looked at the concept of alternative care for children without parental care and at different existing forms of alternative care in nine African countries. Despite the dearth of relevant data, a realistic portrayal of various aspects of alternative care situations in these countries has been presented.

The need for alternative care occurs when adequate parental care is lacking or when a child is deprived of care altogether. The chief agent leading to the need for alternative care is the loss of parents, the main cause for this being poverty and its related ills. Other major factors resulting in children being left without parental care are man-made and natural disasters, as well as chronic illnesses.

Sub-Saharan Africa is most heavily affected by the HIV/AIDS pandemic and the majority of all AIDS-related deaths occur in this region. This disease usually confines parents to their sickbed for an extensive period of time during which parental care diminishes progressively to the point where children should be regarded as being without (adequate) parental care.

Children deprived of parental care are amongst the most vulnerable, many of their rights frequently being violated. According to the CRC and the ACRWC, States have an obligation to provide children with alternative care when parents are – temporarily or permanently – incapable of doing

⁴³⁹ Dunn & Parry-Williams 2008, p. 12.

⁴⁴⁰ Tolfree 2005, p. 5.

so; alternative care is regarded as the love and the physical, material, emotional, social, educational and spiritual care for a child, not provided by the biological or adoptive parents. Despite this obligation, millions of children in sub-Saharan Africa remain without adequate parental care.

The UN Guidelines are a tool offering guidance in augmenting the implementation of the CRC and other relevant international instruments. At this stage, it is too early to assess the true value of the Guidelines; indications are that various countries have been utilising them in drawing up national standards or have expressed interest in doing so.

The UN Guidelines distinguish and elaborate on three main forms of alternative care, namely kinship care, foster care and institutional care. Other types of care recognised are family-like care arrangements, independent living arrangements and child-headed households. There is not always a clear-cut distinction between forms of care; furthermore, regional understanding of certain concepts may differ from universally accepted definitions.

Kinship care is the most prevalent form of alternative care in all of the nine focus countries as well as in sub-Saharan Africa as a whole. In the main, children without parental care are absorbed into the extended family, generally cared for informally. This form of care is also provided on a large scale to children who still have one or both parents alive; in some countries, being raised by extended family members is more common than growing up in the nuclear family.

Kinship care is considered to be the type of care that best serves the interests of children. The advantages are manifold: most importantly, kinship care is family-based care, the family being universally recognised as the natural environment for a child to grow up in. Extended family members are usually known to the child and family values are often alike. When the family resides in the same region as the child, kinship care offers the child the opportunity to remain in his natural habitat.

Along with positive characteristics, there are disadvantages to kinship care. First of all, due to the fact that this form of care is mostly informal

and unregistered, the suitability of family caregivers is not assessed. Family members may feel morally obliged to take on the responsibility of care, but are incapable of loving and nurturing the child; in these situations a child will almost certainly feel 'unwanted', in which case kinship care is not the most suitable form of alternative care. In addition, monitoring and review of care is nonexistent. The quality of care is therefore not safeguarded. Furthermore, the best interests of the child are not considered in a decision on which form of care is most suitable for that child as kinship care is often the only option available.

Kinship caregivers may display favouritism towards their biological children, especially when the household's resources are insufficient to provide all children an equal level of care. This may lead to biological children receiving more or better quality food, better education and better healthcare.

It is generally accepted that it is in the best interests of children for them to grow up with their siblings. However, in kinship care, siblings may be divided over different households when the maximum capacity for absorbing children has been reached.

Another disadvantage might be the violation of the child's inheritance rights when parental property 'disappears' into the assets of the extended family.

It may be concluded that kinship care is a form of care that has many positive aspects and that has the potential to serve the best interests of children. However, the negative aspects will have to be given due consideration and States should invest in a monitoring system as well as in financial and other support for kinship caregivers.

Various African countries consider foster care to be another term for kinship care, whereas the industrial countries of the West understand foster care to be formal care, provided by caregivers who are unrelated to the child in question; in some countries – the Netherlands, for example – foster care includes both. The concept of non-kinship foster care is not common in most of the countries central to this study. Nonetheless, Rwanda implemented this form of care successfully after the 1994 genocide. In South Africa kinship carers are encouraged to formalise care arrangements; consequently, these care arrangements are converted into foster care. There are also countries –

as will be the case under Namibia's new legislation – where kinship carers are not allowed to become formal foster carers.

The main advantage of foster care is that it is care provided in a family environment. As most foster care arrangements are formal, a certain degree of monitoring is expected to take place. In comparison with kinship care, there are more drawbacks to foster care. Firstly, the latter does not provide a child with the same family values and caregivers are usually not known to the child beforehand. In addition, there is a stronger chance of the child being removed from his own community. Furthermore, the aforementioned issues of favouritism, the violation of inheritance rights and the separation of siblings also occur in foster care settings.

On the basis of the arguments put forward in this chapter it may be concluded that for many children foster care may well be an option which best serves their interests. It is beyond doubt a form of care that should be made available by States.

Various risks for children growing up in institutional care have been addressed in this chapter, such as the infringement of children's right to live with their parents and the right to protection from abuse and neglect. Residential care is seen in all nine focus countries. Although tens of millions of children are estimated to reside in institutional care facilities in sub-Saharan Africa, most institutions operate on an unregistered basis and the circumstances in which the majority of children live is unknown. Nearly all children in residential care have at least one remaining parent, their placement mainly being the result of poverty. The advantage of this form of care is that larger groups of children can be provided with care, for example in cases of natural disaster. The disadvantages, however, far outweigh the benefits, primary of which is the fact that children do not grow up in a family environment and are mostly cared for by different carers on a rotational basis, preventing them from forming a personal bond with a parental figure. Other disadvantages range from high carer-to-child ratios and estrangement from society to an increased vulnerability to systemic abuse and permanent physical or behavioural problems. The relatively high cost of institutional care is another important factor for this form of care to be categorised as least favourable.

Residential care may have the form of family-like settings, such as children's villages or clusters of household-style units. In these situations a number of disadvantages are eliminated; children are raised in an environment which resembles a family, caregivers are not rotated as frequently and the carer-to-child ratio is lower. In practice, this form of institutional care bears a strong resemblance to cluster-foster care; there may be differences with regard to guardianship.

On the basis of the above considerations, residential care may be regarded as less favourable in comparison to kinship care and foster care. However, it is the author's opinion that the advantages of residential care – particularly in emergency situations as well as in the form of household-style settings, provided that children receive adequate care – should not be underestimated.

In relation to all forms of alternative care, improvements can be achieved when adequate monitoring and review mechanisms are established. In this regard, accurate birth registration – which is still lacking in many parts of sub-Saharan Africa – as well as an ongoing registration of children's factual residence are factors that deserve urgent attention. Child-carers should be screened on suitability and receive training and support where necessary. Last but not least, sufficient financial resources should be allocated to the provision of alternative care for children; governments have to accept responsibility for children without adequate parental care and act accordingly.

Chapter 5 focuses on the national rules and regulations governing alternative care in the nine countries central to this study. It will become clear that in some countries adequate laws and standards exist, by means of which numerous of the aforementioned disadvantages may be improved or eliminated. The often inadequate implementation of these regulations, however, results in situations as described in this chapter.

Child-headed households

Introduction

In sub-Saharan Africa, alternative care is found to be increasingly provided not solely by adults – primarily members of the extended family – but also by children, a phenomenon which has come to be known as child-headed households.⁴⁴¹ A child-headed household is one in which a child has taken on the majority of parental responsibilities, including – in some cases – care for an incapacitated adult caregiver, during a longer period of time. Childhood is regarded as a period in which children “learn, build character, acquire necessary social and technical skills and finally mature into adulthood”.⁴⁴² Despite the fact that caring for siblings and carrying out housework may – to a certain extent – be considered an integral part of childhood, the responsibilities of child heads are significantly further-reaching: a child heading a family is in charge of taking the greater part of day-to-day decisions, in addition to being the decision-maker in important matters concerning the household. Additionally, the onus of providing necessary material and immaterial support is on the child head. In other words: in a child-headed household the role of the principal caregiver has been transferred to a child.

As discussed in chapter 2, the CRC Committee categorises children living in child-headed households as vulnerable, urging States to provide the necessary legal, economic and social protection. Governments should

⁴⁴¹ Cantwell 2005, p. 8.

⁴⁴² Kaime 2009, p. 17.

ensure that these children have access to shelter, health and social services, education and inheritance.⁴⁴³

Although the emergence of child-headed households is known to have started in the early 1980s,⁴⁴⁴ scant research has been carried out into the causes, extent, nature and circumstances of this phenomenon.⁴⁴⁵ When information is available, it is often based on small-scale research projects and on anecdotal evidence.⁴⁴⁶ The CRC does not define child-headed households, nor do any of the other documents discussed in chapter 2, although the 2009 UN Guidelines do refer to these households, describing them as “siblings who have lost their parents or caregivers and choose to remain together in their household” whereby the eldest sibling acts as head of the household.⁴⁴⁷ As a result, various definitions are in use for similar situations and, *vice versa*, dissimilar situations are categorised under the same term.⁴⁴⁸ In order to discuss the topic of child-headed households accurately and effectively and to aid comparison of research results of future studies, formulation and deployment of a definitive and universal description of child-headed households is essential.

In paragraph 4.1, a number of relevant studies on child-headed households in sub-Saharan Africa will be discussed. In paragraph 4.2, a universal definition of child-headed households shall be proposed, drawing on the texts of various concepts which are currently in use, as well as on the factual situation of children in child-headed households as described in paragraph 4.1. Paragraph 4.3 discusses the categorisation of child-headed households as a form of alternative care.

This chapter draws on research conducted in sub-Saharan Africa in its entirety and more specifically the countries highlighted in the previous chapters. In cases where the aforementioned studies focus on a district, a designated region or a particular country, these studies should also

443 UN Committee on the Rights of the Child, CRC/GC/2003/5, 2003, para 31.

444 Dalen, Nakitende & Musisi 2009, p. 2.

445 Meintjes et al. 2010, p. 41.

446 Bequele 2007, p. 6.

447 Paragraph 37 UN Guidelines.

448 Innocenti Insight 2006, p. 16.

be regarded as microcosms from which more general knowledge about child-headed households may be generated. In this chapter, the following elements will be distinguished where possible: causes and prevalence of the formation of child-headed households, constitution of these households, type of housing and household income, as well as issues concerning education and health and a number of related problems faced by these children. Data is not available on all these aspects from every country.

4.1 Causes, extent, nature and circumstances of child-headed households

It is widely acknowledged that children living in child-headed households are extremely vulnerable: they are confronted with a multitude of difficulties in their everyday lives, principal of these being a lack of adult care and protection. Other – generally related – problems are: poverty, poor housing, child labour, exploitation, failure at school, lack of adequate medical care, psychological problems, stunted growth and hunger, discrimination and early marriage. In the main, children who lose and remain deprived of parental care encounter a serious disruption of their childhood.⁴⁴⁹ Children heading households spend most of their time on caregiver activities, such as child care, household management and the generation of income.⁴⁵⁰ Not being able to rely on adult care, guidance and protection distinguishes children living in child-headed households from children receiving alternative parental care as discussed in chapter 3.⁴⁵¹

4.1.1 Underlying causes of the formation of child-headed households

Countries strongly affected by AIDS-related deaths have witnessed the emergence of child-headed households⁴⁵² and HIV/AIDS is regarded as a major factor leading to the establishment of and the increase in the number

449 Nelson Mandela Children's Fund 2001, p. 14.

450 Evans 2010, pp. 8 – 10.

451 Bequele 2007, p. 3.

452 Pinheiro 2006, p. 50.

of these households in sub-Saharan Africa, causing as it does initially an increase in the number of single orphans, followed by a rise in the rate of double orphans.⁴⁵³

Another frequently cited leading agent for children living in child-headed households is poverty and the concomitant inability of the extended family to cope with the care for children in need of care.⁴⁵⁴ The vast majority of children orphaned by HIV/AIDS are cared for by extended family members or by the community, without any governmental support. However, when these family members themselves are affected by HIV/AIDS and poverty, it becomes extremely difficult – if not impossible – to cope with the extra care for one or more children.⁴⁵⁵ The traditional social safety net, in which children without parental care are absorbed into the extended family, has been eroded by the increasing number of parental deaths⁴⁵⁶ and in most countries this social institution is no longer able to cope.⁴⁵⁷ In addition, the stigma attached to HIV/AIDS often transfers from parents to their children and in some cases the children themselves might be infected; as a result, these children are not welcome in the extended family.⁴⁵⁸

The third important reason given for the formation of child-headed households is that children choose to remain together despite the lack of adult support, the primary motivations being that they do not want to be separated from their siblings, they wish to protect their late parents' property, out of fear of being exploited or ill-treated by their potential carers and a promise to a dying parent to keep the family together.⁴⁵⁹

Although the aforementioned factors indubitably are contributory to the formation and existence of child-headed households, the actual and prime cause is that currently there are no sufficient and suitable alternative care options available in sub-Saharan Africa (see in this regard chapter 3).⁴⁶⁰ In a

453 MacLellan 2005, p. 3.

454 Plan Finland 2005, p. 1.

455 Innocenti Insight 2006, pp. 10, 19.

456 Ardington 2008, p. 2.

457 Nelson Mandela Children's Fund 2001, p 37.

458 MacLellan 2005, p. 5.

459 Bequele 2007, pp. 2 – 4.

460 Innocenti Insight 2006, p. 17.

number of the focus countries, care facilities such as institutions, have been found to be insufficient in number and filled beyond capacity, a situation which leaves children with no choice but to remain in a child-headed household.⁴⁶¹ In chapter 3 the most prevalent forms of alternative care were discussed. Notwithstanding the fact that States hold responsibility for the provision of alternative parental care, this care is primarily provided by the extended family, without or with limited governmental support. When kinship care is not an option, the community may lend a helping hand and provide some form of – mostly – material support, such as food and clothing. In these situations, however, there is no adult caregiver present in the household. The impression of States shifting the burden of alternative care onto the extended family, the community and eventually onto siblings, is therefore inescapable.

4.1.2 Prevalence of child-headed households

Due to the dearth of accurate survey data and the use of varying definitions, the number of children living in child-headed households can only be roughly estimated.⁴⁶² Official figures are relatively low; however, these estimates frequently relate to child-only households⁴⁶³ and do not include households in which one or more adults are present who are unable to provide parental care, usually as a result of chronic illness.⁴⁶⁴ The aforementioned estimates imply that a total of 0.5% of all households in sub-Saharan Africa are headed by a child.⁴⁶⁵ Other estimates are much higher, but have not been found to be verifiable.⁴⁶⁶ Further complicating factors are the fact that child-headed households are generally difficult to identify, for reasons outlined previously.

461 Horsten 2005, p. 11.

462 Cantwell & Holzscheiter 2009, p. 11.

463 Child-only household: a household in which all members are below the age of 18 and where no adult is present.

464 Monasch & Boerma 2004, p. 65.

465 Innocenti Insight 2006, p. 16.

466 Mbugua 2007, p. 6.

The following data have become available:

- With an estimated 77,000, Ethiopia has one of the highest numbers of child-headed households in sub-Saharan Africa.⁴⁶⁷
- A 1997 study carried out amongst 1,101 households in Kenya revealed that in 5.2% of families no caregiver was present and that the household was headed by a child.⁴⁶⁸
- Despite the fact that in Malawi orphaned children are acknowledged as needing alternative care provided by an adult, and that child-headed households are considered to be an unsuitable living-arrangement for children,⁴⁶⁹ nationwide the number of children living in such arrangements is known to be growing on a daily basis.⁴⁷⁰
- In Namibia, child-headed households have become more common since 2006;⁴⁷¹ research indicates that approximately 2% of households are headed by a child.⁴⁷²
- Estimates in Rwanda put child-headed households at 13% of all households.⁴⁷³ As early as 2003, child-headed households were common in many parts of the Rwandan society.⁴⁷⁴
- The existence of child-headed households is acknowledged in Sierra Leone. However, relevant data on the number of children living in this type of family-unit are not available and child-headed households are not monitored in any way.⁴⁷⁵
- Research in South Africa identified more than 248,000 child-headed households in 2001.⁴⁷⁶ Figures from the 2008 South African General Household Survey show that 100,000 children were living in a household headed by a child, reflecting 0.5% of all children and 0.6% of all households. However, these numbers are purely a reflection of *child-*

467 Lynch, Radeny & Bunkers 2009, p. 5.

468 Ayieko 1997, p. 11.

469 Mann 2002, p. 52.

470 Personal communication, UNICEF child protection specialist, Malawi, 03/12/2009.

471 UNICEF 2006b, p. 25.

472 Ruiz-Casares 2007, p. 151.

473 Bequele 2007, pp. 2 – 4.

474 Rwanda National Policy for Orphans and Vulnerable Children 2003, p. 8.

475 Personal communication, UNICEF child protection specialist, Sierra Leone, 12/11/2009.

476 Skweyiya 2006, p. 4.

only households and should be treated with considerable caution as the range of the survey is very narrow.⁴⁷⁷

- The community in Swaziland was called upon to participate in an assessment to determine the situation of children without parental care in 2002; through this method 10,664 children were identified as living in a child-headed household.⁴⁷⁸ In the National Plan of Action 2006 – 2010 an increase in children living without parents is noted.⁴⁷⁹ Nationwide estimates for the year 2009 show that 15% of households were headed by children who had lost either one or both parents.⁴⁸⁰
- Recent estimates on the number of child-headed households in Uganda indicate that slightly less than 1% of households are headed by a child, while it is acknowledged that these numbers are on the rise.⁴⁸¹

The variance in prevalence in these studies indicates that accurate numbers cannot be determined and that further research is needed to reach a more realistic estimation. The main obstacle lies in the fact that, to date, no consensus has been reached on the definition of the child-headed household. Secondly, child-headed families may be 'hidden' because the role of a child as head remains concealed, the denial of the existence of child-headed households by community members or local authorities forming a contributory factor.⁴⁸² Furthermore, they may not be identified in household surveys due to the fact that in most cases adults are required to fill out the questionnaires for such surveys.⁴⁸³ Additionally, a distinction should be made between a head of a family *de jure*, such as an incapacitated adult or a migrant worker and a head of a family *de facto*, such as a child who carries the responsibility for running the household, taking the majority of important decisions, caring for members of the household and raising younger members.

477 Meintjes 2010, pp. 1, 2.

478 Innocenti Insight 2006, p. 25.

479 Swaziland National Plan of Action for OVC 2006 – 2010, p. 15.

480 Amnesty International 2010, p. 310.

481 Dalen, Nakitende & Musisi 2009, p. 2.

482 Personal communication, Director residential care facilities, Namibia, 28/04/2009.

483 Monasch & Boerma 2004, p. 65.

When adopting a broader frame of reference, utilising wider criteria in terms of definition and identification, numbers of child-headed households are expected to be significantly higher.

Although actual figures are not given, in the Concluding Observations of most countries central to this study, the CRC Committee reveals details on the subject of child-headed households, which suggest that the problem is more widespread than some studies purport it to be.

In its 2006 Concluding Observations on Ethiopia, the CRC Committee notes with deep concern the impact of extreme poverty and the high rate of HIV/AIDS on children and the urgent need for adequate alternative care. The Committee explicitly recommends assistance for child-headed households.⁴⁸⁴

With regard to Malawi, in its 2009 Concluding Observations, the CRC Committee expresses its concern regarding the impact of HIV/AIDS on child-headed households; the lack of inheritance rights' protection and the very limited services available to such households has contributed in equal measure to a precarious situation.⁴⁸⁵

In the 2004 Concluding Observations concerning Rwanda, the CRC Committee expresses its disquiet over large numbers of single-parent and child-headed households facing financial and other difficulties. It recommends that assistance be provided to these households, as well as effective implementation of the Rwandan National Policy for Orphans and Other Vulnerable Children. Another matter of serious concern for the Committee is the widespread poverty in Rwanda and the increasingly high numbers of children without an adequate standard of living. The Committee expressly recommends provision of support and material assistance to child-headed households and a guarantee to their right to an adequate living standard.⁴⁸⁶

484 UN Committee on the Rights of the Child, CRC/C/ETH/CO/3, 2006, p. 8.

485 UN Committee on the Rights of the Child, CRC/C/MWI/CO/2, 2009, p. 9.

486 UN Committee on the Rights of the Child, CRC/C/15/Add.234, 2004, pp. 8 – 13.

In its Concluding Observations of 2000, the CRC Committee expresses its concerns with regard to the increase in the number of single-parent and child-headed families in South Africa and the financial and psychological effect of this development on children. The Committee recommends that governmental measures be taken in order to reduce the increasing numbers of child-headed households and to prevent their formation. The Committee further recommends the introduction of adequate support mechanisms for existing child-headed families.⁴⁸⁷

The 2006 Concluding Observations on Swaziland indicate that the CRC Committee expresses deep concern about the need for adequate alternative care for children who have lost one or both parents. The Committee recommends that child-headed households be provided with psychosocial and financial support.⁴⁸⁸

With regard to Uganda, in its 2005 Concluding Observations, the CRC Committee notes with deep concern the impact of the high prevalence of HIV/AIDS and the situation of children who have lost one or both parents. The Committee recommends effective support for child-headed families.⁴⁸⁹

4.1.3 Composition of child-headed households

In general, the majority of child-headed household members are below the age of 18; the child heading the family is seen to be responsible for the provision of leadership and sustenance. It is nonetheless not uncommon for one or more incapacitated adults to belong to the household, such as a chronically ill parent or a grandparent too old to provide the children with care.⁴⁹⁰

It is conceivable that a sibling who has already reached adulthood and lives independently returns to the household in order to look after younger siblings. Although such households are sometimes taken up in

487 UN Committee on the Rights of the Child, CRC/C/15/Add.122, 2000, p. 7.

488 UN Committee on the Rights of the Child, CRC/C/SWZ/CO/1, 2006, p. 8.

489 UN Committee on the Rights of the Child, CRC/C/UGA/CO/2, 2005, pp. 7, 8.

490 Bequele 2007, pp. 2 – 4.

studies, strictly speaking, a family in which a young adult acts as head of the household does not fit the definition of a child-headed household, neither does a family in which the head child has reached the age of 18. These situations may be deemed to be kinship care arrangements, as it is care provided by a family member. The concept of kinship care, however, is defined as care by the *extended* family (cf chapter 3, paragraph 3.2), whereas a sibling is part of a child's nuclear family. The term 'kinship' is therefore reserved for extended family care while a household in which care is provided by a sibling is referred to as a sibling-headed or youth-headed household.

Alternatively, the situation may arise that a teenage girl – who has not yet reached the age of maturity – who has a child of her own, may raise one or more siblings in addition. Although a mother herself, the care for siblings at a very young age, without the guidance of an adult caregiver, makes this, also, a child-headed household.

Some studies demonstrate that in the majority of child-headed households at least one older teenager (15 years or older) is present, usually the head of the household. Although in most cases they have by necessity become more mature, they remain children who need adult guidance and support, as well as the opportunity and space to be children in order to develop into responsible and balanced adults.⁴⁹¹

In Namibia, it was found that the presence of one or more adults – regardless of them being elderly or incapacitated by illness – in a child-headed household, may alleviate the burden of the child head, when these adults are still capable of taking part in the decision-making process of the household, whereas children who have lost both parents end up with no adult support at all.⁴⁹² In contrast with this finding, other research suggests that during the illness, a parent is incapable of providing children with care, emotional support and protection.⁴⁹³

491 Ayieko 1997, p. 8.

492 Ruiz-Casares 2007, pp. 158, 159.

493 Germann 2005, p. 238.

Studies in Rwanda revealed that child-headed households do not consist only of siblings; other formations, such as vulnerable children without any blood ties and children from the extended family are known to exist. In most cases the eldest child heads the household; however, a younger sibling may also carry the responsibility for the household when the eldest lacks maturity or is otherwise less adept. Most child-headed households in Rwanda consist of children under the age of 18. There are circumstances though, where an incapacitated adult forms part of the household, in which case the child head does not only have the care and responsibility for other underage members of the family, but also for the adult requiring care.⁴⁹⁴ Two-thirds of household heads were found to be female.⁴⁹⁵

In 2001, it became known that in some parts of South Africa children in the age category 6 – 11 were heading a household.⁴⁹⁶ Recent studies indicate that 52% of children living in child-only households are younger than 15,⁴⁹⁷ but in 88% of households there is at least one child present who is 15 years or older.⁴⁹⁸ Compared to mixed-generation households,⁴⁹⁹ the average age of children living in child-only households is higher: 15 as opposed to an average age of 9 in mixed-generation households. Also, child-only households usually consist of fewer members;⁵⁰⁰ the average number of children in these households is between one to three individuals,⁵⁰¹ while 44% of such households consist of only one child.⁵⁰²

In Uganda, the average number of children per household was found to be four to six in almost two-thirds of child-headed households, while in 29% of cases the household consisted of one to three children; the largest household counted 12 children. Most children living in child-headed households were aged 12 and above, 20% of children were between 6 and 11 years old and 5% fell in the age category of 5 years and younger. Most heads are aged 14

494 MacLellan 2005, pp. 2, 5.

495 Luzze 2002, p. 31.

496 Dunn 2005, p. 9.

497 Meintjes 2010, p. 2.

498 Meintjes et al. 2009.

499 Mixed-generation household: a household comprising both children and adults.

500 Meintjes et al. 2010, p. 44.

501 Coetzee & Streak 2004, p. 18.

502 Meintjes et al. 2009.

or older; however, children as young as 10 are known to head a household. The majority of child-headed households continue to exist in the same or in a similar formation for several years, until children reach adulthood.⁵⁰³ Research carried out in the Rakai District until the year 2009 revealed similar data.⁵⁰⁴ In Uganda the majority of children heading households are male. Although no apparent reason was found, factors such as inheritance rights – in Uganda attached to males – may play a role.⁵⁰⁵ The majority of children living in a child-headed household are siblings. However, a small percentage of children were found to be cousins or not related at all.⁵⁰⁶

4.1.4 Type of housing and household income

The household in which a child is raised determines the level of well-being as well as the developmental process of the child.⁵⁰⁷ Children in child-headed households usually live in inadequate dwellings and in extreme poverty, with close to half of these families surviving without any financial support. Response from social workers is generally too slow or is non-existent.⁵⁰⁸ In some cases land and other assets have been sold during the illness of the parent(s) to pay for medication and medical treatment, reducing family-resources to the barest minimum. Due to these financial constraints, children as young as eight succumb to various forms of exploitative labour or even prostitution to make ends meet. They engage in begging and have been known to become involved in criminal activities. Girls may feel compelled to marry when still underage and boys may join (illegal) military troops.⁵⁰⁹ It is evident that children – in an effort to generate income – are at higher risk of being exposed to the worst forms of child labour, as defined

503 Luzze 2002, pp. 32, 33.

504 Dalen, Nakitende & Musisi 2009, p. 4.

505 Luzze 2002, p. 31.

506 Luzze 2002, p. 36.

507 Beegle et al. 2008, p. 19.

508 Nelson Mandela Children's Fund 2001, pp. 20, 21.

509 Bequele 2007, p. 5.

in Article 3 of the ILO's Worst Forms of Child Labour Convention.⁵¹⁰ As of June 2011, this Convention had been ratified by 174 countries.⁵¹¹ However, more than 100 million children throughout the world remain involved in this form of child labour.⁵¹²

Children living in child-headed households generally have no access to grants due to the fact that they are minors and as such ineligible to apply for support without the requisite assistance of an adult. In countries where minors do have access to grants, children may be confronted with the issue that banks will not allow them to open an account, effectively excluding them from the grants system.⁵¹³ Children are often unaware of their eligibility for grants and Social Welfare Services are frequently inaccessible to them. In addition, individuals and organisations purporting to be NGOs have been found to abuse the situation of child-headed households for own financial gain, applying for and receiving government grants or donor support, without the children benefiting.⁵¹⁴

In Rwanda, the ability to generate sufficient funds by child-headed households has proven to be extremely difficult, resulting in children – often the head – being (sexually) exploited in exchange for money, food or the waiver of siblings' school fees. An estimated 80% of girl heads have suffered sexual abuse when going about providing a livelihood for their households.

510 Article 3 Worst Forms of Child Labour Convention:

For the purposes of this Convention, the term “ the worst forms of child labour” comprises:

- (a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

511 <<http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C182>>, accessed on 15/06/2011.

512 <<http://www.ilo.org/global/topics/child-labour/lang--en/index.htm>>, accessed on 14/06/2011.

513 Save the Children UK, HelpAge International & Institute of Development Studies 2005, p. 46.

514 Nelson Mandela Children's Fund 2001, p. 19.

The ILO reports that 41% of children in the age group 10 – 14 carry out some form of labour, despite the legal minimum age for employment in Rwanda being 16. Working under these circumstances, the risk of children being exploited through the payment of low wages, long hours, poor conditions and sexual abuse is high. Minors are not allowed to singlehandedly claim social benefits; they require the assistance of an adult to do so on their behalf. Children are frequently unaware of assistance on government or NGO level they are eligible for and therefore do not avail themselves of such assistance. Child-headed households receiving assistance from the government or from NGOs may be faced with jealousy and hostility from families around them who do not qualify for these benefits themselves.⁵¹⁵

In South Africa, living conditions of child-headed households have in most cases been found to be worse than that of other households: children frequently have no access to proper housing, adequate sanitation, water and electricity.⁵¹⁶ Children are prevented from owning the parental home due to the fact that minors are not allowed to sign for ownership; the person who has signed the ownership documents is regarded as the proprietor of a house.⁵¹⁷ In 77% of child-headed households, the main source of income is an unstructured, irregular allowance provided by relatives or other adults.⁵¹⁸ As a result, child-headed households experience a substantially higher poverty rate.⁵¹⁹ In a study of 50 selected child-headed households, most children were living as derelicts; only 66% of households make use of electricity which is often illegally obtained and 90% make use of a pit latrine, while for most households the only access to water is via a communal tap.⁵²⁰

South Africa has three main social grants for the benefit of children: the Foster Care Grant, the Care Dependency Grant and the Child Support Grant. A Foster Care Grant may be obtained solely by foster parents when a child is formally placed in their care by the Children's Court. Caregivers of children with a severe mental or physical disability who require permanent home-

515 MacLellan 2005, pp. 10 – 13.

516 Meintjes et al. 2010, pp. 44, 45.

517 Unity, Charity & Tsekelo 2005, p. 147.

518 Meintjes et al. 2009, p. 3.

519 Meintjes et al. 2010, pp. 44, 45.

520 Coetzee & Streak 2004, p. 18.

based care are eligible for a Care Dependency Grant. The Child Support Grant is payable to the primary caregiver of children up to the age of 18; the applicant of this grant has to be over the age of 16. Children heading a household may apply for this grant when they are 16 or 17 years old. Although children living in child-headed households are theoretically eligible for one or more of the grants available, applications are complicated, time-consuming and frequently unsuccessful, owing to the fact that required documents or information cannot be supplied, resulting in disqualification of the application. In cases where the application is successful, receipt of the first payment generally takes several months.⁵²¹ Compared to mixed-generation households, there are fewer recipients of social security grants within child-headed households.⁵²² Other sources of income are casual labour, begging, borrowing and grants from charities or NGOs.⁵²³

Children living in child-headed households in Uganda are amongst the most vulnerable due to their living circumstances, with no proper housing and sanitation. In the Rakai District, the dwellings occupied by child-headed households were found to be in very poor condition and dangerous in at least one-third of cases, with collapsed walls and leaking roofs. In most households there is only one bed – if at all – so that children are forced to sleep on the floor. Children have to work for other people in order to earn a livelihood for themselves and their siblings.⁵²⁴

4.1.5 Education

Children belonging to child-headed households may be excluded from the education system, frequently compelled to leave school, as a consequence of poverty or in order to comply with the responsibilities of household head.⁵²⁵

521 Sloth-Nielsen 2004, pp. 27 – 30.

522 Meintjes et al. 2010, pp. 44, 45.

523 Coetzee & Streak 2004, p. 18.

524 Dalen, Nakitende & Musisi 2009, pp. 2, 5.

525 Nelson Mandela Children's Fund 2001, p. 22.

Heavy household duties are the main cause of non-school attendance of children from child-headed households in Kenya.⁵²⁶

In Namibia, the school attendance of children living in a child-headed household suffers due to a number of factors, the main being care duties and hunger, as well as pregnancies, often as a result of transactional sex.⁵²⁷

In Rwanda, the dropout rate of children belonging to child-headed households is high, especially where it concerns the head child. Although primary education (until the age of 12) is free, there are enrolment fees to be paid, uniforms and school material to be purchased and sometimes other contributions are required. Even when child-headed households receive benefits to cover these expenses, the household head usually lacks the time to attend school, being too occupied with the responsibilities of caring for siblings and having to generate an income to supply food and other essentials for the family.⁵²⁸ An estimated 72% of child heads of school-going age do not attend school.⁵²⁹

The rate of non-attendance amongst children heading households in South Africa is high.⁵³⁰ The primary factor leading to children discontinuing their schooling is the lack of funds for school fees, books and other school essentials. Despite legal provisions for exemption for poor and vulnerable children, children are known to have been suspended from school for failing to pay fees.⁵³¹ The inability to produce birth certificates or identification documents results in schools refusing to register children.⁵³² Other reasons are the care for siblings and/or a sick parent, remote location of the school and emotional problems.⁵³³ Children heading a household may experience difficulties in focusing on their own education while bearing the responsibility for a household.⁵³⁴ A recent study contradicts the findings of

526 Ayieko 1997, p. 9.

527 Ruiz-Casares 2007, p. 159.

528 MacLellan 2005, p. 10.

529 Thurman et al. 2006, pp. 223, 224.

530 Masondo 2006, pp. 5, 35.

531 Sloth-Nielsen 2004, p. 33.

532 Coetzee & Streak 2004, p. 18.

533 Mkhize 2006, p. 188.

534 Masondo 2006, pp. 36 – 51.

the majority of researches and suggests that the attendance rate of children living in child-only households was not found to be significantly lower.⁵³⁵ However, the findings of the aforementioned study are at best disputable (the assertion of the researchers involved, to wit, that their findings are based on national surveys, perhaps provides a clue to their sources and its findings) as they are in no way congruent with any other research on this topic.

In Uganda, 61% of children heading a household do not attend school,⁵³⁶ in most cases as a result of their responsibilities as primary caregiver.⁵³⁷ Other reasons include the inability to pay school fees, uniforms and scholastic material.⁵³⁸

4.1.6 Healthcare

The health status of children living in child-headed households is in 21% of cases abominable, their impoverished situation preventing them from accessing medical care systems. A number of specific healthcare problems are encountered by these children: first and foremost, children tend to suffer from psychological trauma as a result of parental loss during childhood. Such trauma may be increased due to rejection by extended family members or the community, as well as frequently experienced social stigma.

Child heads are seldom emotionally capable of coping with their role of primary caregiver, which leads to further psychological problems. Compared to other children belonging to the household, the head child has been found to experience a higher level of psychological and emotional strain.⁵³⁹ One study suggests that when siblings are able to stay together, even while living in a child-headed household, their psychosocial and emotional well-being is no worse than that of children who are separated and live with

535 Meintjes et al. 2010, p. 44.

536 Dalen, Nakitende & Musisi 2009, p. 9.

537 Luzze 2002, p. 36.

538 Dalen, Nakitende & Musisi 2009, p. 6.

539 Nelson Mandela Children's Fund 2001, pp. 20, 27.

different families.⁵⁴⁰ Here again, this particular study contradicts all other research on this topic.

In Rwanda, children living in child-headed households frequently suffer from poor health. Not only do they lack access to nutritious food, medical care is equally inaccessible to these children. Screening for HIV/AIDS does not take place and for those who are aware of their condition, anti-retroviral drugs are not readily available. Diagnosis of and treatment for psychological trauma, mostly as a result of the 1994 genocide and the loss of parents to HIV/AIDS, is practically non-existent. Inability to obtain birth registration and identity documentation thwarts children's access to healthcare.⁵⁴¹

Healthcare services in South Africa are mostly inaccessible to and unavailable for children living in child-headed households. Child heads were found to harbour feelings of fear and to experience a strong longing for their parents while having to take care of the physical and psychological needs of younger siblings and provide them with emotional support following parental loss.⁵⁴² Children may have to live with the psychological trauma of having witnessed their parent's illness and subsequent demise, without recourse to therapy or other forms of aid.⁵⁴³

In Uganda, access to medical care is extremely limited due to the fact that children lack the means to buy medication or pay for transport to healthcare facilities. All child heads experience high levels of anxiety with regard to their own living circumstances and that of their siblings. In the Rakai District, children living in child-headed households have no access to mosquito nets, while this is considered to be of vital necessity in the District. Some of the households manage to have two or more meals a day, whereas others go for days without any food. None of the child-headed households are able to afford meat or fish.⁵⁴⁴

540 Germann 2005, p. 274.

541 MacLellan 2005, p. 13.

542 Masondo 2006, pp. 36 – 51.

543 Sloth-Nielsen 2004, p. 3.

544 Dalen, Nakitende & Musisi 2009, pp. 5, 6.

4.1.7 Related problems

Apart from the difficulties discussed in the previous paragraphs, child-headed households are confronted with a number of other specific challenges. Children not being able to rely on daily adult care, support and protection, represents one of the major dangers.⁵⁴⁵ While the heads are responsible for supplying the household with material and emotional support, these children are both physically and mentally immature and not adequately equipped for the role of principal caregiver. Children live in permanent fear due to the fact that they have to fend for themselves and as a result of the high risk of neglect, violence, sexual assault and other abuses they are frequently exposed to.⁵⁴⁶

A household without an adult caregiver does not provide children with the chance to learn the skills essential to their development. The natural bond between a child and his parents or main caregivers forms during early childhood; this bond is believed to provide the foundation for relationships in later life. The relationship between a child and his parents remains of the utmost importance in children's lives. Parents provide a secure zone in which children feel protected. In general, children learn ways of coping with stress and anxiety from their parents, parental behaviour in times of stress forming an example. Children model themselves on their parents in other behaviour as well, either by precept (a child is told by his parents what he should and should not do) or by percept (a child observes and copies his parents' behaviour). Parents teach their children moral standards: parents encourage positive behaviour and they discourage unwanted behaviour displayed by a child.⁵⁴⁷

It may therefore be concluded that children in child-headed households are severely disadvantaged in that they do not have the opportunity to learn much-needed life skills.

In Rwanda, children living in child-headed households are considered to be the most vulnerable of society, many of their fundamental rights and

545 Nelson Mandela Children's Fund 2001, pp. 20, 27.

546 Bequele 2007, pp. 2 – 4.

547 Rutter 1982, pp. 139 – 144.

freedoms being structurally violated. These children are usually confronted with more difficulties than other vulnerable groups who are formally or informally cared for, since they cannot rely on adult protection and support; other problems encountered are the inaccessibility of social benefits and the loss of possessions to property grabbers. The head child will almost certainly lose his rights as a child when taking on the responsibilities of caring for the family. Furthermore, growing up without parental care and adult role models may lead to irresponsible behaviour and related behavioural problems.⁵⁴⁸ Children from child-headed households have perceptions of marginalisation in which family history in relation to the genocide is an important factor;⁵⁴⁹ they tend to feel powerless and excluded from society as a whole.⁵⁵⁰ Children receiving financial or material support from NGOs are often begrudged this assistance by neighbours and other community members who are poverty-stricken themselves. As a result, initial sympathy from the community wanes, eventually leaving these children without any community support whatsoever and at the receiving end of resentment, envy and abuse.⁵⁵¹ Adult care and love, security and a sense of belonging are the main psychosocial needs of children.⁵⁵²

Under Rwandan law, children are entitled to legal representation and a guardian during court cases; however, children seldom receive any such representation and legal issues are therefore rarely pursued. Girls are particularly vulnerable to sexual abuse and assault and they often feel pressurised into accepting marriage at a young age in an attempt to improve their own (financial) security and possibly that of their siblings.⁵⁵³ Heads of youth-headed households have been found to experience high levels of depression.⁵⁵⁴ The results of a mentor project for youth-headed households – during which the head to the household received guidance, attention and advice from trained adult community members on a weekly, two-weekly or monthly basis – indicate that such support improves the psychosocial well-

548 MacLellan 2005, pp. 3, 7.

549 Thurman et al. 2008, p. 1564.

550 MacLellan 2005, p. 8.

551 Thurman et al. 2008, p. 1563.

552 Veale et al. 2001, p. 110.

553 MacLellan 2005, p. 9.

554 Boris et al. 2008, pp. 841, 842.

being of the beneficiaries to a certain extent: the higher the frequency of the mentor's visits, the better the outcome. However, although decreased, levels of depression are still relatively high and children's living conditions remain extremely difficult.⁵⁵⁵ Another NGO-led mentor scheme was found to have established state benefits, school fee support and health insurance for child-headed households.⁵⁵⁶ Child-headed households generally experienced more difficulties than youth-headed households, although child heads themselves appear to receive more support from the community in comparison to youth heads. Both children and youth feel a strong need for adult care, protection, love and support.⁵⁵⁷

In South Africa, children without adequate parental care often experience abuse and exploitation.⁵⁵⁸ Problems specifically encountered by children in child-headed households have been found to be: the burden of parental responsibility – such as guidance and discipline – without having the requisite experience, no safe or stable environment to grow up in and lack of access to documents such as birth certificates and identity cards.⁵⁵⁹ In addition to these problems, children live in a setting lacking love and security;⁵⁶⁰ they experience feelings of helplessness and hopelessness, vulnerability, loneliness, emptiness, a desire for a fulfilling life and fear of the unknown.⁵⁶¹ Children living in child-headed households are at a high risk of sexual abuse, exposure to child labour and child prostitution⁵⁶² and of pursuing a life on the streets.

When children are orphaned and have not been appointed a guardian, they fall under guardianship of the High Court. However, this is a symbolic role, rather than a practical one; the function is often unknown to children, making the 'guardian' inaccessible to them. In addition, an application to have the guardianship transferred to a natural person is prohibitively

555 Brown et al. 2007, pp. 8 – 10.

556 Save the Children UK 2009, p. 2.

557 Brown, Thurman & Snider 2005, pp. 7, 8.

558 APRM Country Review Report South Africa 2007, p. 280.

559 Masondo 2006, pp. 35 – 51.

560 Sloth-Nielsen 2004, pp. 3, 25.

561 Masondo 2006, p.38.

562 Maqoko & Dreyer 2007, p. 724.

expensive, so that children who are aware of the guardianship of the Court are unable to carry out the transfer.⁵⁶³

Research carried out in Uganda has found that time for play and leisure is non-existent or very limited for children in child-headed households, as most children have to work to survive. Children not receiving help and care from extended family or members of the community do not understand why their needs are being ignored; they feel misunderstood with regard to their situation as well as unwanted. Lack of understanding, acceptance and respect for children living in a child-headed household by the community has a negative influence on the material and psychosocial needs of these children.⁵⁶⁴

4.2 Definition child-headed household

Both in research reports and in (un)official policies the definitions of child-headed households vary widely.

A household may be defined as a group of people – whether or not related by blood, marriage or adoption⁵⁶⁵ – sharing shelter and food, who are involved in continuous social interaction, based on loyalty and authority⁵⁶⁶ and where there is a division of tasks and roles.⁵⁶⁷ Apart from a group of people sharing a housing unit, a single person occupying a dwelling on his own is also regarded as a household.⁵⁶⁸

The UN Guidelines recognise the existence of children living in households without parental care and acknowledge their need for specific care and protection.⁵⁶⁹ Although the term ‘child-headed household’ does not feature in the UN Guidelines, the following description of this type of household

⁵⁶³ Sloth-Nielsen 2004, pp. 2, 31.

⁵⁶⁴ Dalen, Nakitende & Musisi 2009, pp. 6, 11.

⁵⁶⁵ Barnes 2003, p. 11.

⁵⁶⁶ Mkhize 2006, p. 12.

⁵⁶⁷ MacLellan 2005, p. 6.

⁵⁶⁸ US Census Bureau 2003, p. B-14.

⁵⁶⁹ Cantwell 2008a, p. 3.

is enshrined in Paragraph 37: siblings choosing to remain together in their household after having lost their parents or caregivers, while the eldest sibling acts as the head of the household.⁵⁷⁰ This description presupposes a child-headed household to consist of two or more children; it infers that all members belonging to the household are siblings and that the eldest child has assumed the role of household head. However, the studies discussed in paragraph 4.1 suggest that the description given by the UN Guidelines is not in line with reality in that it provides too narrow a summation of the factual situation.

Child-headed households occur either temporarily or on a permanent basis; their composition may change due to the naturally changing composition of households, as a result of existing members leaving or new members entering the household. When the child head reaches the age of 18, the household is – strictly speaking – not child-headed any longer. These households are usually referred to as ‘youth-headed households’ or ‘sibling-headed households’. The term ‘child-headed household’ is not used consistently and does not always reflect the same situation. This does not only complicate the identification of these households, but also precludes the finding of solutions for the deplorable situation of children living in such households. Initially, child-headed households were seen as a group of siblings, led by the eldest child. As discussed previously, this view has been adopted in the UN Guidelines; the formulation used in the Guidelines has – justifiably – been called into question.⁵⁷¹

To establish a clear, concise and correct definition of child-headed households, the descriptions currently most in use shall be analysed.

Child-headed households are described or defined as:

- A household run by children younger than 18 who have lost both parents or whose parents or primary caregivers are (chronically) ill.⁵⁷²
- The parent, guardian or caregiver of the household is terminally ill, has died or has abandoned the children and no adult family member

⁵⁷⁰ Paragraph 37 UN Guidelines.

⁵⁷¹ Cantwell & Holzscheiter 2008, p. 41.

⁵⁷² Bequele 2007, p. 3.

is available to provide care. As a result, a child over the age of 16 years has assumed the role of caregiver in respect of the children in the household.⁵⁷³

- A household consisting solely of children younger than 18.⁵⁷⁴
- A unit constituting siblings who are children, in which the caring role has to be performed by one or more of these siblings.⁵⁷⁵
- A household in which the main caregiver is under the age of 18.⁵⁷⁶
- A household in which children are looked after by an older sibling, who is still a child himself.⁵⁷⁷
- Due to the fact that there is no adult family member available to provide care for the children in the household, a child has assumed the role of primary caregiver, providing food, clothing and psychosocial support for the other children in the household.⁵⁷⁸
- A unit, comprising siblings who are children, in which the caring role is performed by a child.⁵⁷⁹
- A household consisting of one or more young people, legal or social minors, of whom one or more have taken on adults' caring tasks for themselves and/or others and who are not eligible for formal support, or lack the means to access support.⁵⁸⁰

Although some are detailed, none of the above descriptions fully encompasses all aspects of the factual situation. The area in which the descriptions of child-headed households is least clearly defined, is the composition of the household in question. However, it is clear from these portrayals that a child-headed household is one in which a person below the age of 18 is essentially in charge.

Child-headed households may consist solely of siblings as some of the definitions suggest, but (distantly-related) cousins or even unrelated

573 South Africa Children's Amendment Act 2007/41, Section 137.

574 Meintjes et al. 2010, p. 41.

575 Mkhize 2006, p. 14.

576 Maqoko 2006, p 29.

577 Sloth-Nielsen 2004, p. 1.

578 Walker 2009.

579 Mkhize 2006, p. 14.

580 Van Dijk 2008, p. 242.

children may also be living in the same household. The author is of the opinion that the term 'siblings' should not form part of the description.

A child remaining on his own, without any other members belonging to the household, should be considered to be heading his own household. For that reason, it is the author's view that a definition should not presume a household to always and exclusively consist of more than one person.

Some definitions imply that all children living in child-headed households are orphans. However, where the primary caregiver has been incapacitated by HIV/AIDS or other diseases, but still belongs to the family, responsibility for running the household may already have been transferred to a child.⁵⁸¹ In addition, children living without parental care may still have a remaining parent whose whereabouts are unknown or who has abandoned the household. Under these circumstances, the household is led by one of the children, while one or both parents are still alive.

Children who live with a caregiver incapacitated by illness or old age, are increasingly categorised as a child-headed household. In these households children *de facto* head the family, as the caregiver is incapable of doing so any longer and needs care himself.⁵⁸² In these situations the household consists of one or more children and one or more adults and the child – who has been given the responsibility of leading the household – should be regarded as multiple care-giving, not only burdened with the care of siblings or other children, but also with the care of a chronically sick parent or another adult.

Although fairly accurate figures on orphans have been readily available for almost two decades, the hardship of children living with and taking care of an ill parent or other adult has not been adequately spotlighted.⁵⁸³ In a situation where a child has taken over the caregiver role – regardless of whether an orphan or not – such a child should be categorised as living in a child-headed household. A definition should therefore not include the term 'orphan', nor should it be limited to households consisting of children only, as adults may be part of the household.

581 Innocenti Insight 2006, p. 5.

582 Sloth-Nielsen 2004, p. 2.

583 Richter, Foster & Sherr 2006, p. 20.

When a child takes over (the majority of) the responsibilities of an adult caregiver, acting as the principal carer, such a household should be regarded as a child-headed household. Accordingly, the author proposes that a child-headed household be defined as:

“A household, consisting of one or more members, in which the role of principal caregiver has by necessity been taken over by a child under the age of 18.”

4.3 Child-headed households as a form of alternative care

Various studies claim that children themselves actively choose to live in a child-headed household or that they have a right to such a choice.⁵⁸⁴ However, this view does not take into account the fact that although children may appear to have chosen to remain together, in most cases they have not been given the choice, one of the children having taken on the role of main caregiver out of necessity because of the unavailability of other alternatives. In families where the primary carer is HIV/AIDS-infected, the prospective head already starts taking over the main tasks of the household – including earning the household income – during the early stages of manifestation of the disease. When the caregiver dies and neither the family nor the community is capable of providing alternative care, children are left with no option but to form their own household. Although this is generally referred to as a coping mechanism,⁵⁸⁵ the factual situation is one in which children are compelled to effectively relinquish their childhood.

In Paragraph 29, sub c (V) UN Guidelines, one of the recognised forms of alternative care is “supervised independent living arrangements for children”. As indicated in chapter 2, it is not clear whether Paragraph 29 also refers to children in child-headed households, but this term is commonly used for a form of alternative care whereby youngsters nearing the age of adulthood branch out on their own with a certain degree of

⁵⁸⁴ Germann 2005, p. 339.

⁵⁸⁵ Bequele 2007, pp. 2 – 4.

adult supervision; the author endorses this understanding of this form of alternative care.

The position of Paragraph 37 within the UN Guidelines – in section IV: *Preventing the need for alternative care*, under A: *Promoting parental care* – would seem to suggest that child-headed households are regarded as a form of parental care. There is nevertheless no research-based evidence to support the notion that child-headed households are viewed as parental care and the reason for positioning this Paragraph under the header *Promoting parental care* is obscure. If this reflects an attempt to keep child-headed households outside the category of alternative care, in so doing effectively labelling them as a ‘new’ type of family, then this should be actively discouraged. Within a child-headed household, a child has practically taken on the care for other children and in essence – in line with Article 20 CRC and Article 25 ACRWC – this equates to the provision of alternative care. This viewpoint is further supported by recent legal reviews of countries such as South Africa and Namibia: the legal systems of these countries recognise child-headed households as a form of alternative care.⁵⁸⁶ Whether it should be an acceptable and legally recognised form of alternative care, is a different matter altogether.

Increasingly, child-headed households have become accepted as a form of alternative care and as a placement option for children in need of care.⁵⁸⁷ The question arises as to whether it is justifiable and legitimate to regard child-headed households as a novel alternative care mechanism to cope with the increasing number of children without parental care. In one study, child-headed households are posed as third in the line of preferred forms of alternative care, the order of preference being:

- 1 kinship care
- 2 adoption and fostering
- 3 community-supported child-headed households
- 4 household type institutions
- 5 residential institutions.⁵⁸⁸

⁵⁸⁶ Cantwell & Holzscheiter 2008, pp. 41, 42.

⁵⁸⁷ Cantwell 2005, p. 8.

⁵⁸⁸ Germann 2005, pp. 384, 385.

It has been suggested that the formation of child-headed households is unavoidable and that – with appropriate support – these households should be accepted as a care option. They are seen to have positive characteristics in that siblings are enabled to remain together and they are supposedly consistent with children’s wishes. Despite the acknowledgement of the risks children are exposed to, child-headed households are increasingly viewed as a solution for overburdened traditional social safety nets and the unavailability of other alternative care options.⁵⁸⁹ One study indicates that living in a child-headed household may not be easy, but being ill-treated by extended family members is worse, implying that kinship care automatically leads to ill-treatment. The same study states that children who have been living without an adult caregiver may not wish to be controlled by an adult carer again, which leaves them with no other option than to live in a child-headed household.⁵⁹⁰

Conclusions

In a child-headed household, a child has taken over the majority of responsibilities of the main caregiver. The emergence of this type of household in sub-Saharan Africa has been caused by the considerable increase of children in need of alternative care in conjunction with the insufficiency of alternative care options made available by governments (*cf* chapter 3). Due to a lack of sufficient data, accurate information on child-headed households is unavailable. As a result, the magnitude of the problem of children growing up without the care and protection provided by an adult caregiver may be seriously underestimated. In this regard, ambiguity with regard to the definition of these households presents another obstacle.

Estimates on the prevalence of child-headed households vary considerably from 0.5% to 15%. Notwithstanding the fact that more accurate information is not at hand, the seriousness of the problem has been recognised by the CRC Committee since the beginning of the twenty-first century, the recommendation of the Committee being that urgent attention needs

⁵⁸⁹ Cantwell 2005, p. 8.

⁵⁹⁰ Van Dijk 2008, pp. 128, 195.

to be paid to the situation of children living in households without adult care. Children living in child-headed households are regarded as extremely vulnerable – many of their rights being violated on a daily basis – and in need of economic, social and legal protection.

Child-headed households mostly live in extreme poverty, under harmful living conditions. Household income has to be generated by the children themselves, frequently exposing them to (sexual) exploitation and abuse. In comparison to their peers, access to education may prove to be immensely difficult and the non-attendance rate of child heads is high, mainly due to lack of time. As indicated in paragraph 2.7.3.2 of this study, it is impossible to expect of a child who has the responsibility of a caregiver and runs a household to be able to attend school. The inability to pay for school fees and other essentials presents yet another obstacle.

Lack of financial resources, as well as the difficulty in obtaining identity documents prevent children in child-headed households from receiving necessary healthcare. Health issues range from psychological trauma and emotional problems to somatic complaints and chronic diseases such as HIV/AIDS. In many instances children's state of health – both mental and physical – has been found to be deplorable.

In addition to the aforementioned circumstances, children in child-headed households are faced with numerous other problems all relating to the lack of adult care, guidance, support and protection. Allocation of a mentor or supervisor to a child-headed family provides for only a partial solution as this person is not resident in the household and cannot be regarded as a caregiver.

In order to find adequate solutions for this category of children as well as for universal monitoring and research purposes, a global definition of child-headed households is of vital importance. The proposed definition reads as follows: "A household, consisting of one or more members, in which the role of principal caregiver has by necessity been taken over by a child under the age of 18."

Once a universal definition has been accepted, identification of child-headed households can be improved significantly, which is essential to finding a solution for a complex phenomenon.

Categorisation of child-headed households as a form of alternative care will be elaborated on further in chapter 6.

Children's Rights and Legislation in relation to child-headed households and other children in need of alternative care

Introduction

In chapter 3 an overview of the alternative care provisions available in the focus countries was presented; chapter 4 outlined one of the potential consequences of a lack of adequate alternative care systems, namely the formation of child-headed households. In order to ascertain whether sufficient legislation is in place to protect the rights of children in need of alternative care, this chapter focuses on implementation of the stipulations on alternative care of the CRC and the ACRWC and reviews relevant national legislation concerning the alternative care of children and child-headed households in the nine countries central to this study.

A comparison is drawn between universal children's rights enshrined in the CRC and the ACRWC, more specifically Article 4 CRC and Article 1 ACRWC, as well as the UN Guidelines on the one hand and national rules and regulations on the other. The formal compliance of national legislation with international law standards will be assessed; in addition, the legal recognition of child-headed households is examined in further detail. In this regard, specific provisions for children affected and infected by HIV/AIDS in the consulted documents on alternative care will be highlighted,

this disease being one of the principal catalysts for the emergence of child-headed households.

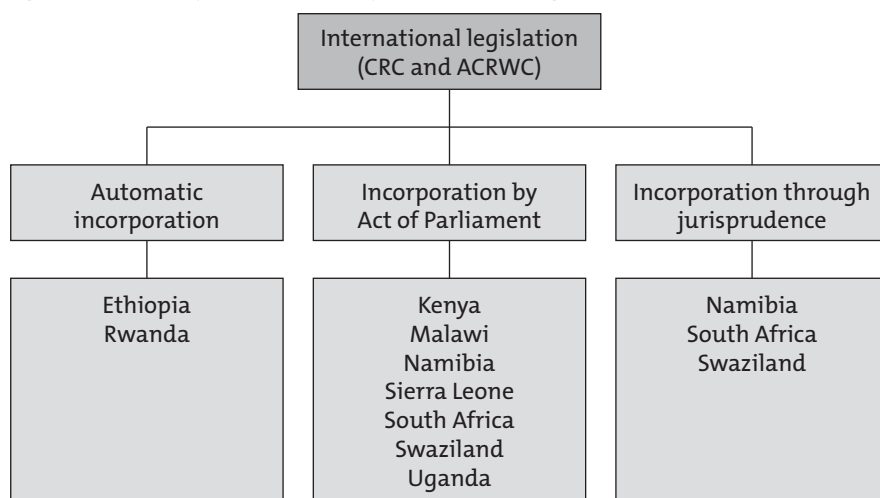
The legal provisions with regard to the alternative care for children on a national level vary widely in the nine focus countries. Whereas in some countries a separate Children's Bill, Act or Code does not exist and children's rights are merely mentioned in broad terms in the Constitution, in others detailed legislation on a wide range of children's rights – including alternative parental care and with regard to child-headed households – has been developed and implemented. Besides providing a starting point for further national regulations, the main advantage of stipulations on children's rights laid down in constitutions is that the latter usually remain unchanged for a longer period of time, ensuring a stable basis for national policies.⁵⁹¹ A common denominator in the countries in question is that legislation from the colonial era – containing outdated and discriminatory stipulations, fragmented in numerous statutes – had to be brought in line with the CRC and the ACRWC.⁵⁹²

The mode of implementation of the provisions of the CRC and the ACRWC depends on the legal system in a country. A number of countries follow a monistic approach, whereby the ratification of the CRC and the ACRWC incorporates these documents automatically into national law: ratified international legislation applies, without translation into national law. In other countries a dualistic legal system is in use and ratification of the CRC and the ACRWC has to be followed by domestication: international legislation has to be transformed into national laws before it can be applied. Incorporation may follow by Act of Parliament or – where enactment has not yet taken place – through jurisprudence. Schedule 5.1 indicates the mode of incorporation of international legislation in the countries central to this study.⁵⁹³

⁵⁹¹ Duncan 2008, p. 59.

⁵⁹² Sloth-Nielsen 2008b, p. 1.

⁵⁹³ African Child Policy Forum 2007a, pp. 17, 18.

Figure 5.1 Mode of incorporation of international legislation⁵⁹⁴

The harmonisation of national laws with the CRC and the ACRWC should be regarded as an ongoing process, systematically reviewing existing and proposed legislation, rather than a one-off event following ratification.⁵⁹⁵

Notwithstanding the obligation of governments to provide alternative care, in most cases civil society organisations dispense assistance to children in need of care; these organisations are usually the first to become aware of a potentially harmful situation, for example where a child does not receive (adequate) parental care. However, the help and provisions offered by these organisations are mostly funded by (irregular) donations or financial aid by third parties and/or provided by volunteers and an adequate level of care is therefore not guaranteed.⁵⁹⁶

In this chapter, relevant passages from the Concluding Observations of the CRC Committee are discussed on the basis of the last report of each of the nine countries. As indicated in paragraph 2.5.1 of this study, most States Parties have not submitted their reports on time or with regular intervals. As a result, some of the Concluding Observations are based on country

⁵⁹⁴ Adaptation from: African Child Policy Forum 2007a, Figure 3: Domestication of international standards, p. 18.

⁵⁹⁵ Doek 2007b, p. 5.

⁵⁹⁶ Nelson Mandela Children's Fund 2001, p. 18.

reports which are – at this stage – inaccurate; in one case the Observations are outdated to such an extent that they are of no value any longer.

Furthermore, the Observations and Recommendations of the ACERWC are reviewed. The number of States Parties having submitted their initial report is low and – in combination with the difficulties the ACERWC has encountered from its inception in 2001 (*cf* paragraph 2.6.1 of this study) – the generation of Observations and Recommendations has been delayed significantly: only two of the nine countries that feature in this study – namely Kenya and Uganda – have had their Observations and Recommendations of the ACERWC published.

Rather than outline an exhaustive account of national legislation on the topic of alternative care and child-headed households, this chapter aims to discuss the stipulations relevant to this study and to examine the extent to which these provisions comply with international children's rights that States Parties are bound to uphold, as well as with the universal framework of alternative care proposed in chapter 2, paragraph 2.9. Additionally, conformity with the UN Guidelines is considered.

For convenience's sake, criteria 1 to 5 of the proposed framework for alternative care are included in this introduction, whereas criteria 6 to 11 are not taken into consideration as these are mainly based on the relatively new UN Guidelines (*cf* paragraph 2.9 of this study). The latter criteria are not enforceable, for which reason a detailed evaluation will not be carried out. Nonetheless, the author wishes to emphasise the relevance and importance of these criteria in terms of future policymaking.

Framework for alternative care

- 1 A variety of care options should be available.
- 2 Alternative care should preferably be family-based and institutional care should be considered as a measure of last resort.
- 3 Caregivers should (be enabled to) provide children with an adequate standard of living.
- 4 All care arrangements should be subject to monitoring and review at national level.

- 5 Provisions for national and intercountry adoption should be included in legislation on alternative care.

5.1 Ethiopia

In its 2006 Concluding Observations, the CRC Committee expresses concern that Ethiopia lacks a systematic legislative review and that a Children's Code is not in place. The fact that the CRC has not been published in the Official Gazette is equally a matter of concern. The Committee recommends that the State Party ensures that national legislation complies with the CRC and the ACRWC and that an extensive Children's Code is adopted; official publication of the CRC is also strongly recommended in order to further public awareness of the provisions of the Convention.⁵⁹⁷

The concerns expressed by the Committee have thus far failed to lead to either legislative review or to establishment of a Children's Code by the Ethiopian government. Laws containing care provisions for children are the 1994 Constitution of the Federal Democratic Republic of Ethiopia and the 2000 Revised Family Code; in addition, National Guidelines on the Alternative Care of Children have been issued.

5.1.1 Constitution of the Federal Democratic Republic of Ethiopia (1994)

The 1994 Constitution of Ethiopia proclaims that every child has the right to care provided by his parents or legal guardians. However, it does not state who should bear the responsibility for the adequate provision of such care, nor is the right to alternative parental care or family care embedded in the Constitution.⁵⁹⁸

Corporal punishment, as well as cruel and inhumane treatment in institutions responsible for the care of children are explicitly forbidden in

⁵⁹⁷ UN Committee on the Rights of the Child, CRC/C/ETH/CO/3, 2006, pp. 2, 3.

⁵⁹⁸ Article 36 paragraph 1(c) Constitution of the Federal Democratic Republic of Ethiopia.

the Constitution.⁵⁹⁹ This provision indicates that residential care facilities are available in Ethiopia; insight into the nature of these institutions is not provided.

The situation of orphaned children – there is no specification as to whether these are single or double orphans, or both – are explicitly addressed in the Constitution. These children are entitled to special protection by the government and establishment of institutions aimed at the adoption of such children, as well as the improvement of children's welfare and their education, is encouraged.⁶⁰⁰ This is another indicator alluding to the existence of residential care, while no mention of other care options is made.

Children without parental care are entitled to assistance by the government in accordance with available resources; a description of the form this assistance should take, is not given.⁶⁰¹ The dependence of assistance on the availability of resources should be a matter of concern, as a guarantee that suitable assistance will be provided cannot be given under such conditions.

5.1.2 Revised Family Code (2000)

Although a separate Children's Code does not exist in Ethiopia, the Revised Family Code contains various provisions concerning children. One of the objectives of the Revised Family Code is to establish and safeguard "the well-being, upbringing and protection of children in accordance with the Constitution and International Instruments which Ethiopia has ratified".⁶⁰² The Code provides a number of stipulations on alternative care.

Chapter 10 of the Code (Articles 180 – 196) deals with the adoption of children. A child is adoptable when he is younger than 18 years and under

⁵⁹⁹ Article 36 paragraph 1(e) Constitution of the Federal Democratic Republic of Ethiopia.

⁶⁰⁰ Article 36 paragraph 5 Constitution of the Federal Democratic Republic of Ethiopia.

⁶⁰¹ Article 41 Constitution of the Federal Democratic Republic of Ethiopia.

⁶⁰² Preamble Revised Family Code, Ethiopia, 2000.

guardianship.⁶⁰³ Adoption is established by an agreement between the adoptive parent and the guardian of the child.⁶⁰⁴ Each adoption agreement is to be approved by the court; approval is only granted when the adoption is deemed to be in the best interests of the child.⁶⁰⁵ The child's biological parents – when they are alive and their whereabouts are known – both have to consent to the adoption. When one of the parents is unwilling to consent, the court may nevertheless approve the adoption after hearing the other parent and the child, if the child is ten years or older. Where only one of the biological parents is available to give permission for the adoption, the consent of this one parent is sufficient. In situations where neither parent is capable of or available for consent, the court may approve the adoption when this is considered to be in the best interests of the child.⁶⁰⁶ When a child is under the custody of a governmental or private institutional care facility, he may be made available for adoption.⁶⁰⁷ After completion of the adoption, the child shall be deemed to be the child of the adoptive parent.⁶⁰⁸ However, the court may revoke the adoption when the adoptive parent does not provide the child with parental care but instead treats the child “as a slave, or in conditions resembling slavery”, engages the child in immoral behaviour or harms his future in another manner.⁶⁰⁹

It is worth noting that, despite its high occurrence, only one stipulation refers specifically to intercountry adoption. Figures for the period 1999 – 2003 show that a mere 130 children were adopted nationally, whereas in the same period 2,760 children were placed with adoptive families outside Ethiopia.⁶¹⁰ This number has grown significantly in the years following, with estimates of more than 2,500 children adopted by families in the US alone in the year 2010; a similar number is thought to have been adopted from Ethiopia by other countries. The estimated costs of these adoptions range between \$20,000 – \$35,000 per child, which supports the claims that the

603 Article 185 Revised Family Code, Ethiopia, 2000.

604 Article 190 Revised Family Code, Ethiopia, 2000.

605 Article 194 Revised Family Code, Ethiopia, 2000.

606 Article 191 Revised Family Code, Ethiopia, 2000.

607 Article 192 Revised Family Code, Ethiopia, 2000.

608 Article 181 Revised Family Code, Ethiopia, 2000.

609 Article 195 Revised Family Code, Ethiopia, 2000.

610 African Child Policy Forum 2007a, p. 94.

sale of children is particularly lucrative and that it is highly probable that these adoptions are illegal.⁶¹¹

Chapter 11 of the Revised Family Code relates to the obligation of maintenance. Maintenance is defined as the provision of or access to food, a home, clothing, health and education for another person.⁶¹² Parents are responsible for the maintenance of their children.⁶¹³

Both parents have guardianship of their child.⁶¹⁴ When parents are deceased and there is no will stipulating who the guardian of a child is, guardianship transfers by virtue of law to the following family members consecutively: grandparents, siblings who have attained majority and the aunt or uncle of the child.⁶¹⁵ Where a child remains without guardianship, or when none of the aforementioned relatives is capable of exercising his responsibilities, the court will appoint a guardian.⁶¹⁶ The Code explicitly states that a minor is not qualified to hold guardianship over another child.⁶¹⁷ Guardianship includes the provision of a home, care concerning the child's health, the upbringing of the child and the regulation of social contacts, as well as ensuring that the child receives general education or professional training. A person may apply for assistance from the government for the purposes of fulfilling his obligations as a guardian.⁶¹⁸

5.1.3 Alternative Childcare Guidelines on Community-based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service (2009)

In 2001, the Ethiopian Ministry of Labor and Social Affairs – at the time responsible for the implementation of the CRC and the ACRWC – developed

611 <<http://www.voanews.com/english/news/Under-Pressure-Ethiopia-Plans-Crackdown-on-Baby-Business-111848424.html>>, accessed on 01/02/2011.

612 Article 197 Revised Family Code, Ethiopia, 2000.

613 Article 198 Revised Family Code, Ethiopia, 2000.

614 Article 219 Revised Family Code, Ethiopia, 2000.

615 Article 225 Revised Family Code, Ethiopia, 2000.

616 Article 227 Revised Family Code, Ethiopia, 2000.

617 Article 242 Revised Family Code, Ethiopia, 2000.

618 Articles 255 – 260 Revised Family Code, Ethiopia, 2000.

the National Guidelines on the Alternative Care of Children.⁶¹⁹ After a revision process, during which the UN Guidelines were also taken into consideration, the aforementioned National Guidelines were approved and newly introduced as the Alternative Childcare Guidelines on Community-based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service (hereinafter: Alternative Childcare Guidelines) by the Ministry of Women's Affairs – currently accountable – in 2009. The first training of representatives from institutional care facilities and from regional and local governmental staff took place at the end of 2009.⁶²⁰

The Alternative Childcare Guidelines cover various forms of alternative care, including community-based childcare, foster care and institutional care and a comprehensive set of regulations on the major aspects of alternative care is provided.⁶²¹ In the Preface, the Alternative Childcare Guidelines state that the government of Ethiopia has the obligation to provide suitable alternative care to children who are temporarily or permanently deprived of their family environment. Furthermore, it is acknowledged that residential care should be a measure of last resort.⁶²² The main objective is to provide an instrument to be utilised for the improvement of the quality of alternative care for children by means of clear and realistic regulations and childcare programmes.⁶²³

The Alternative Childcare Guidelines contain an extensive list of definitions of terminology relevant to alternative care. The description of 'orphaned and vulnerable children' lists various categories, including children living in child-headed households and children infected or affected by HIV/AIDS.⁶²⁴ Section II of the Alternative Childcare Guidelines encompasses directions for community-based childcare, aimed at the mobilisation of community members with regard to care and support for orphaned and vulnerable

619 FHI 2010a, p. 25.

620 FHI 2010b, p. 4.

621 Ethiopia Alternative Childcare Guidelines 2009.

622 Ethiopia Alternative Childcare Guidelines 2009, p. 1.

623 Ethiopia Alternative Childcare Guidelines 2009, p. 6.

624 Ethiopia Alternative Childcare Guidelines 2009, pp. 11, 12.

children in their community.⁶²⁵ The placement of orphaned siblings with the eldest sibling as the main caregiver, where he is 15 years or older, is considered to be an alternative for community-based childcare.⁶²⁶

5.1.4 Concluding summation

The Constitution of Ethiopia enshrines the right to special protection and assistance for orphaned children by the government, which right is dependent on available resources. The only form of alternative care mentioned in the Constitution is institutional care.

The Revised Family Code includes stipulations on adoption. The Code also contains regulations with regard to guardianship, which transfers from deceased parents to other family members. Through this legal process formal kinship care is established.

Notwithstanding the recommendations by the CRC Committee, national legislation concerning alternative care is not in place and neither of the aforementioned documents impose an obligation on the State to provide children who are in need of parental care with alternative care.

Assessing the national laws on the basis of the proposed legal framework for alternative care, it may be concluded that Ethiopian laws are not entirely compatible with the criteria of the framework.

- In Ethiopia, 'a variety of care options' may be deemed to be available as the law provides for kinship care (transfer of guardianship to members of the extended family), guardianship by non-family members and residential care.
- Institutional care is not regarded as a measure of last resort in Ethiopian law; in fact, the Constitution of Ethiopia encourages the establishment of residential care facilities for the purposes of care for or adoption of orphaned children.
- Guardians are obliged to provide a child with an adequate standard of living; where necessary they may seek assistance from the State to fulfil this obligation.

⁶²⁵ Ethiopia Alternative Childcare Guidelines 2009, p. 14.

⁶²⁶ Ethiopia Alternative Childcare Guidelines 2009, p. 19.

- There are no provisions in the law for monitoring and review mechanisms.
- The Revised Family Code does contain a full chapter dedicated to adoption, both national and intercountry.

Despite the regulations concerning adoption, thousands of children are taken out of the country for (illicit) adoption by foreigners paying large sums of money to privately run children's homes and agencies for the privilege.

On the basis of the above details, it may be concluded that Ethiopian legislation does not fully comply with the CRC and the ACRWC.

It is noteworthy that, notwithstanding the lack of legal provisions, the Ethiopian government has developed and approved Alternative Childcare Guidelines, in which the State's responsibility to provide alternative care is laid out. Various forms of alternative care are regulated in the Alternative Childcare Guidelines and residential care is acknowledged as a last measure. In addition, a monitoring and review mechanism is included. These Guidelines are for the most part in line with both the CRC and the ACRWC and to some extent they are in conformity with the UN Guidelines as well. However, the non-binding character of the Alternative Childcare Guidelines does not allow for legal enforcement. It is the author's opinion that the provisions of these Guidelines could be utilised as a basis for a separate Children's Act.

Child-headed households are not formally legally recognised. In the Alternative Childcare Guidelines they are, nonetheless, categorised as vulnerable, as are children affected and infected by HIV/AIDS; these Guidelines are aimed at the improvement of care and services for vulnerable children. Given the fact that the government acknowledges the spread of HIV/AIDS throughout the country and recognises the devastating effects of the disease on children, the Alternative Childcare Guidelines might have been expected to contain more provisions specifically aimed at this vulnerable group.

The Alternative Childcare Guidelines portray child-headed households as an alternative for community-based care when the child heading the family is 15 years or older and these households are therefore acknowledged as a form of alternative care for children, conforming to the UN Guidelines. Given that Article 242 of the Revised Family Code explicitly states that a minor is not qualified to hold guardianship over another child, this constitutes a contrariety between the Family Code and the Alternative Childcare Guidelines, leading to the conclusion that there is a need for internal harmonisation of regulations.

5.2 Kenya

The 2007 Concluding Observations of the CRC Committee mention the realisation of the 2001 Children's Act, as well as other legislative measures that had been accomplished. There are concerns, however, regarding the need for further harmonisation and the strengthening of said legislation. The Committee therefore recommends that the State Party complete the legislative review concerning orphaned and other vulnerable children. The application of the 2001 Children's Act should be prioritised by means of the adoption and implementation of laws and policies aimed at the protection of children.⁶²⁷

In its 2010 Observations and Recommendations, the ACERWC notes that the State Party has drawn up and adopted various documents aimed at the well-being and protection of children, though some documents do not conform to the ACRWC.⁶²⁸ Due to a lack of sufficient resources for implementation and procedures to that effect, the aforementioned documents run the risk of being left dormant. The ACERWC advises that the government of Kenya brings national legislation into compliance with the Charter and that procedures for the implementation of the adopted documents be put in place.⁶²⁹

⁶²⁷ UN Committee on the Rights of the Child, CRC/C/KEN/CO/2, 2007, p. 3.

⁶²⁸ The Observations and Recommendations do not specify which documents fail to comply with the ACRWC.

⁶²⁹ African Committee of Experts on the Rights and Welfare of the Child, Observations and Recommendations on Kenya's first Report, 2010, p. 6.

Provisions on care for children are to be found in the Constitution of Kenya and in the Children Act (No. 8 of 2001).

5.2.1 Constitution of the Republic of Kenya (2010)

In August 2010, a new Constitution was passed at referendum and subsequently promulgated and signed into law by the Kenyan president. The right to parental care and protection – together with a number of other specific children’s rights – is enshrined in the Bill of Rights, chapter 4 of the Constitution.⁶³⁰ This provision may well contribute to the strengthening of laws and policies aimed at improvement of the well-being of orphaned and other vulnerable children, as recommended by the CRC Committee.

5.2.2 Children Act (2001)

The Kenyan Children Act was adopted in 2001. According to the Act, a child has the right to grow up with his parents and to be cared for by them.⁶³¹ However, when it is in the best interests of a child, the court or the Director of the Department of Children’s Services⁶³² may decide on the separation of the child from his parents.⁶³³ When a child has been separated from his parents without a judicial intervention, the government is liable to assist in the reunion procedure.⁶³⁴

In the Children Act, parental responsibilities are defined as “all the duties, rights, powers, responsibilities and authority which by law a parent has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child”.⁶³⁵ A number of parental duties are listed, including the responsibility to care for a child and to provide him with proper

630 Article 53 paragraph 1(e) Constitution of the Republic of Kenya.

631 Section 6 subsection 1 Children Act, Kenya, 2001.

632 The Department of Children’s Services is part of the Ministry of Gender, Children and Social Development. The Director of Children’s Services is appointed by the Minister (Article 37 subsection 1 Children Act, Kenya, 2001). The Director is responsible for safeguarding the welfare of children and for advancing their well-being and that of their family (Article 38 subsection 1 Children Act, Kenya, 2001).

633 Section 6 subsection 2 Children Act, Kenya, 2001.

634 Section 6 subsection 3 Children Act, Kenya, 2001.

635 Section 23 subsection 1 Children Act, Kenya, 2001.

food, accommodation, clothing, medical care, education and guidance. Additionally, parental duties include the protection of a child from neglect, discrimination and abuse.⁶³⁶ The Act offers the possibility for parents to be discharged of parental responsibility by the Minister when separated from their children for longer periods of time due to employment migration, which has resulted in the inability to fulfil their duties.⁶³⁷ A person without parental responsibility who has a child in his care, should act in accordance with the Children Act and protect or advance the child's well-being to the best of his ability.⁶³⁸ A person with parental responsibility shall continue to bear this responsibility (unless he is discharged of his parental duties subject to the aforementioned Section 23 subsection 3 Children Act).⁶³⁹

When both parents of a child are deceased, parental responsibilities may be transferred to a guardian who is appointed either by the parents or by the court, to a person with a residence order,⁶⁴⁰ to a capable person appointed by the court or – in the absence of the aforementioned persons – to a relative of the child.⁶⁴¹

Part V of the Act provides regulations on institutional care facilities. A distinction is made between governmental rehabilitation schools⁶⁴² and Charitable Children's Institutions established by civil society and approved by the government.⁶⁴³ To these institutions, children in need of care and protection and underage offenders may be admitted by court order or in cases of emergency.⁶⁴⁴ In compliance with Section 72 Children Act, regulations relating to Charitable Children's Institutions were developed and implemented. These regulations include the following topics: the registration of institutions, children's welfare, the health needs of children,

636 Section 23 subsection 2 Children Act, Kenya, 2001.

637 Section 23 subsection 3 Children Act, Kenya, 2001.

638 Section 23 subsection 5 Children Act, Kenya, 2001.

639 Section 24 subsection 5 Children Act, Kenya, 2001.

640 A residence order is a court order containing the name of the person in whose care a child is ordered to reside, Section 114(b) Children Act, Kenya, 2001.

641 Section 27 subsection 1(c) Children Act, Kenya, 2001.

642 Section 47 Children Act, Kenya, 2001.

643 Section 58 Children Act, Kenya, 2001.

644 Sections 56 and 63 Children Act, Kenya, 2001.

behaviour management policy, staff issues and the management of institutions.⁶⁴⁵

In the Children Act the term a ‘child in need of care and protection’ is defined. Various categories are listed in Section 119, starting with a child without parents or a guardian, a child who has been abandoned or a child who is indigent (sub a). Children whose parents or guardian are unfit to raise them (sub e) and children with a terminally ill parent (sub l) are considered to be in need of care and protection. A child displaced through war, civil disturbances or natural disasters is also recognised as in need of care and protection (sub p).⁶⁴⁶

Section 125 looks at the situation of children in need of care. The court is authorised to order a child to be returned to his parent or guardian when the child is considered to be in need of care (sub a). This parent or guardian may be instructed by the court to guarantee the provision of adequate care (sub b). The Director of Children’s Services may be ordered to provide a child who is a victim of man-made or natural disasters with care; whenever possible, children should be reunited with their parents (sub e). In case reunion is not possible, the child may be ordered to continue living in the custody of a local authority, a Charitable Children’s Institution or a person suitable to care for children until the age of 18 (subsection 5).⁶⁴⁷

A child may be brought under a supervision order by the court, whereby he remains in the care of his caregiver while being supervised by a children’s officer or another authorised official.⁶⁴⁸

A care order is defined as an order through which the care, control and possession of a child is transferred by the court from a parent or guardian to a local authority or an institutional facility.⁶⁴⁹ Such an order may only be made by the court if other possible solutions have proven to be unsuccessful

645 Children Regulations, Kenya, 2005.

646 Section 119 subsection 1 Children Act, Kenya, 2001.

647 Section 125 subsection 2 Children Act, Kenya, 2001.

648 Section 130 Children Act, Kenya, 2001.

649 Section 132 subsection 1 Children Act, Kenya, 2001.

and when the order is in the best interests of the child.⁶⁵⁰ Another situation in which this particular order may be applied, is when a child is being harmed or at risk of harm, as a result of the inadequacy of care the child receives.⁶⁵¹ A care order may also be made when a child is found to be in a dangerous situation from which he is required to be moved immediately.⁶⁵² A care order may be subject to conditions, directions and restrictions given by the court.⁶⁵³

According to Section 132 subsection 8 each care order is aimed at providing a child with adequate care until he reaches majority or for a shorter period where suitable. The Director of Children's Services has the obligation to supervise, monitor and assess the care received by a child.⁶⁵⁴

In addition to a full care order, the court has an interim care order at its disposal when there is reason to presume that a care order is required or during a deferment in the application process of a care order.⁶⁵⁵ The interim order may be made for a maximum of eight weeks after which period it may be extended for a further four weeks.⁶⁵⁶

Both a care order and an interim care order may be discharged by the court when replaced by an adoption order, a residence order or a supervision order or when the court deems the order no longer necessary.⁶⁵⁷

Sections 147 – 153 Children Act concern foster care. When a child has been made the subject of a care order and been placed in a Charitable Children's Institution, the Director of Children's Services may transfer the child to the care of a foster parent. The responsibility for supervision and monitoring of the child's well-being lies with the Director. A foster parent has parental responsibilities in respect of the maintenance of the child.⁶⁵⁸

650 Section 132 subsection 2(a) Children Act, Kenya, 2001.

651 Section 132 subsection 2(b) Children Act, Kenya, 2001.

652 Section 132 subsection 2(c) Children Act, Kenya, 2001.

653 Section 132 subsection 3 Children Act, Kenya, 2001.

654 Section 132 subsection 9 Children Act, Kenya, 2001.

655 Section 132 subsection 10 Children Act, Kenya, 2001.

656 Section 132 subsection 11 Children Act, Kenya, 2001.

657 Section 132 subsection 12 Children Act, Kenya, 2001.

658 Section 147 Children Act, Kenya, 2001.

Provisions for adoption are to be found in Sections 154 – 183. The High Court may make an adoption order on application, under the auspices of the Children Act.⁶⁵⁹ Kenya has ratified the 1993 Hague Convention.⁶⁶⁰

The Children Act is currently under review in order to strengthen clauses concerning alternative care and adoption. The Department of Children Services has announced that National Guidelines on Foster Care and National Guidelines on Guardianship are to be developed.⁶⁶¹

5.2.3 Concluding summation

The State's responsibility to provide children with alternative parental care is firmly embedded in the new Constitution. In addition, the Children Act contains various provisions for children without parental care and refers to both the CRC and the ACRWC. Parental responsibilities as well as the transfer of these responsibilities – when parents are temporarily or permanently unable to carry out their duties – are mapped out in the Act. A number of care options are to be found in the Children Act, including foster care and institutional care.

In conjunction with the Constitution, the Children Act conforms to the CRC and the ACRWC as far as alternative care is concerned and on the basis of the proposed framework for alternative care, with the exception that institutional care has not been acknowledged as a measure of last resort.

- There is a variety of care options available (foster care, transfer of guardianship and institutional care).
- Section 125(b) is aimed at the provision of adequate care, which includes a certain standard of living for a child in care.
- The monitoring and assessment of alternative care is required by the Children Act.
- Adoption is addressed in 30 separate Sections of the Children Act in which both domestic and international adoption are regulated.

⁶⁵⁹ Section 154 Children Act, Kenya, 2001.

⁶⁶⁰ In this regard, see chapter 2, paragraph 2.8 of this study.

⁶⁶¹ Sloth-Nielsen 2008b, p. 2.

The considerations on the reunion of children with their parents – possibly aided by a supervision order – are in line with the UN Guidelines, which promote the care for a child in his own family.

It is notable that, although the Constitution of Kenya in conjunction with the 2001 Children Act virtually 'ticks all the boxes' and may be regarded as a model Bill on children's rights, the implementation process has not yet materialised; this has been observed by both the CRC Committee and the ACERWC and is illustrated by the situational analyses on alternative care and on child-headed households in respectively chapters 3 and 4.

The proposed Guidelines on Foster Care are expected to contribute to the realisation of implementation measures, recommended by both the CRC Committee and the ACERWC.

Neither the 2010 Constitution nor the 2001 Children Act contain provisions on child-headed households and there are no provisions specifically aimed at children affected by HIV/AIDS; these households are not regarded as 'vulnerable' in either law. Although HIV/AIDS was announced to be a national disaster by a Kenyan Presidential Order in 1999,⁶⁶² provisions relating to the disease did not find their way into the legislation discussed in this paragraph. However, the Government of Kenya has issued a number of National Strategic Plans⁶⁶³ as well as legislation relating to HIV/AIDS, namely the HIV and AIDS Prevention and Control Act, 2006.⁶⁶⁴

5.3 Malawi

The CRC Committee welcomes the comprehensive constitutional review process by the Malawi Law Commission in its 2009 Concluding Observations. It also expresses support for amendments in legislation

662 <http://nacc.or.ke/index.php?option=com_content&view=article&id=53&Itemid=126>, accessed on 16/03/2011.

663 The Kenya National AIDS Strategic Plan 2000 to 2005; the Kenya National HIV and AIDS Strategic Plan 2005/6 – 2009/10; the Kenya National AIDS Strategic Plan (2009/10 – 2012/13).

664 Kenya Act no. 14 of 2006 – HIV and AIDS Prevention and Control Act.

in order to harmonise national legislation with the CRC and other international instruments. However, the proposed reviews have not yet been implemented due to political circumstances. The Committee strongly recommends that the State Party adopts the proposed legislation as soon as possible, ensuring the harmonisation of national laws with the CRC.⁶⁶⁵

Stipulations concerning alternative care for children are laid down in the Child Care, Protection and Justice Act which came into effect in 2010. The Constitution of Malawi merely prescribes that a child has the right to be raised by his parents; children are considered to be persons below the age of 16.⁶⁶⁶

5.3.1 Child Care, Protection and Justice Act (2010)

In June 2010 the new Child Care, Protection and Justice Act was passed by the Malawian government.⁶⁶⁷ The Act merges a number of laws and policies into one document: children's rights, child care and protection as well as juvenile justice. In keeping with the Constitution of Malawi, a child is defined as a person younger than 16 years of age.⁶⁶⁸ However, in the 2003 National Policy on Orphans and other Vulnerable Children it is stated that an orphan is defined by the Malawian government as "a child who has lost one or both parents because of death and is under the age of 18 years", a definition based on Policy Guidelines dating back as far as 1992.⁶⁶⁹

The parents of a child are primarily responsible for his care, maintenance and protection. Parental responsibility includes protection from neglect and all harm such as abuse and exploitation, as well as provision of care, maintenance and guidance, ensuring the welfare of a child.⁶⁷⁰

An extensive list of situations in which a child is considered to be in need of care and protection is embodied in the new Act, a number of which are

665 UN Committee on the Rights of the Child, *CRC/C/MWI/CO/2*, 2009, pp. 2, 3.

666 Article 23 Constitution of the Republic of Malawi, 1994.

667 Child Care, Protection and Justice Act, 2010 (No. 22 of 2010).

668 Section 2 Child Care, Protection and Justice Act, Malawi, 2010.

669 Malawi National Policy on Orphaned and other Vulnerable Children 2003, p. 8.

670 Section 3 Child Care, Protection and Justice Act, Malawi, 2010.

highlighted here. In the first place, a child who is physically or mentally harmed, or at risk of becoming so, is categorised as being in need of care and protection. A child whose parents are not capable of providing adequate care or who have neglected the child, is equally considered to be in need of care and protection, as are children without parents or a guardian and children who have been abandoned by their parents or their guardian. Furthermore, children who are denied medical care or treatment and those who cannot be controlled by their parents or guardian are to be regarded as in need of care and protection. Lastly, a child falls into this category when classified as such by a social welfare officer.⁶⁷¹

A child who, on reasonable grounds, is believed to be in need of care and protection may be taken to a place of safety by any person or taken into temporary custody by that person.⁶⁷² This child must be presented to the Child Justice Court within 48 hours. The place of safety or the suitable adult in whose care a child is placed, carries the responsibility for the child's maintenance.⁶⁷³

Family members have a duty to inform a social welfare officer or a police officer when they have reason to believe that a child to whom they are related is physically or mentally abused, neglected or abandoned; non-compliance with this duty is an offence.⁶⁷⁴ The same obligation rests on child care providers and members of the community.⁶⁷⁵

A guardian is defined as "a person who has lawful or legitimate custody, care or control of a child in place of a parent".⁶⁷⁶ Somebody may be appointed as a guardian to any child who resides in Malawi by a will or by choice of a parent, a court order or a child's family.⁶⁷⁷ The court may make an order, allocating a guardian to a child in the following circumstances:

- the child's parents are deceased or cannot be traced;
- the child has no guardian or a person who has parental responsibility;

671 Section 23 Child Care, Protection and Justice Act, Malawi, 2010.

672 Section 24 Child Care, Protection and Justice Act, Malawi, 2010.

673 Section 25 Child Care, Protection and Justice Act, Malawi, 2010.

674 Section 34 Child Care, Protection and Justice Act, Malawi, 2010.

675 Sections 35 and 36 Child Care, Protection and Justice Act, Malawi, 2010.

676 Section 2 Child Care, Protection and Justice Act, Malawi, 2010.

677 Section 38 Child Care, Protection and Justice Act, Malawi, 2010.

- the child's parents are separated and it is in the best interests of the child to have a guardian appointed.⁶⁷⁸

The fourth division of the Act is dedicated to foster care, which is defined as the placement of a child with a foster parent or in a foster home.⁶⁷⁹ The district social welfare officer is responsible for supervising and monitoring foster care.⁶⁸⁰ Places or residences shall be instituted by the Minister as public foster homes, to be managed by a person designated by the Minister.⁶⁸¹ Private foster homes may be established by a person or an organisation after approval by the Minister.⁶⁸² The Child Justice Court may make a foster order, placing the child in a foster home when he is considered to be in need of care and protection. Once a child is committed to a foster home, parental rights and responsibilities transfer to the manager of the home.⁶⁸³ The manager, in cooperation with the district social welfare officer, may place a child from the foster home with a foster parent.⁶⁸⁴ While in his care, the foster parent bears the same responsibilities for the child as if he were the biological parent.⁶⁸⁵

A foster child may be adopted by his foster parent at the latter's request and when in conformity with the 1964 Adoption of Children Act;⁶⁸⁶ this Act is currently under revision. Changes include the recognition of intercountry adoption as a care alternative for children who cannot be placed in a foster family or with a Malawian adoptive family and for whom other suitable alternative care options are not available within the country. Another proposed amendment is that adoptive children enjoy the same inheritance rights and other rights as the biological children of adoptive parents.⁶⁸⁷

678 Section 41 Child Care, Protection and Justice Act, Malawi, 2010.

679 Section 2 Child Care, Protection and Justice Act, Malawi, 2010.

680 Section 60 Child Care, Protection and Justice Act, Malawi, 2010.

681 Section 46 Child Care, Protection and Justice Act, Malawi, 2010.

682 Section 47 Child Care, Protection and Justice Act, Malawi, 2010.

683 Sections 49 and 50 Child Care, Protection and Justice Act, Malawi, 2010.

684 Section 51 Child Care, Protection and Justice Act, Malawi, 2010.

685 Section 53 Child Care, Protection and Justice Act, Malawi, 2010.

686 Section 68 Child Care, Protection and Justice Act, Malawi, 2010.

687 African Child Policy Forum 2007a, p. 95.

In addition to the responsibilities of parents to care for and maintain their children, the local government authority has the duty to promote and safeguard the welfare of children.⁶⁸⁸ Children who are abandoned, lost or seeking shelter are to be provided with accommodation by the local government.⁶⁸⁹ The local government authority also bears responsibility for tracing parents when children are lost or abandoned.⁶⁹⁰ This authority must keep a register of children affected by HIV/AIDS, intended to ensure that these children have – without discrimination – access to social services, healthcare, material support and alternative care.⁶⁹¹

The Minister is responsible for the establishment of Public safety homes;⁶⁹² private safety homes may be approved by the Minister on application.⁶⁹³ A safety home may double as a reformatory centre for young offenders; however, all safety homes have to adhere to the 'Reformatory Centre and Safety Home (Management) Rules', laid down in the Eighth Schedule of the Act.⁶⁹⁴ These rules stipulate that a safety home should at the very least provide the following services:

- adequate food, clothing and bedding;
- education, healthcare and recreation;
- counselling;
- parent/child interaction facilities.⁶⁹⁵

A child's parent or guardian may be given a contribution order by the court to pay a periodic contribution to a safety home, a foster home or a foster parent or another person in whose care the child has been placed.⁶⁹⁶

A person in whose care a child is committed by court order is obliged to

688 Section 70 Child Care, Protection and Justice Act, Malawi, 2010.

689 Section 71 Child Care, Protection and Justice Act, Malawi, 2010.

690 Section 71 Child Care, Protection and Justice Act, Malawi, 2010.

691 Section 77 Child Care, Protection and Justice Act, Malawi, 2010.

692 Section 157 Child Care, Protection and Justice Act, Malawi, 2010.

693 Section 158 Child Care, Protection and Justice Act, Malawi, 2010.

694 Section 159 Child Care, Protection and Justice Act, Malawi, 2010.

695 Eighth Schedule, Reformatory Centre and Safety Home (Management) Rules, Child Care, Protection and Justice Act, 2010.

696 Section 177 Child Care, Protection and Justice Act, Malawi, 2010.

care for the child and to maintain the child as if he were the biological parent.⁶⁹⁷

The intrinsic benefits of keeping siblings together are acknowledged in the Act.⁶⁹⁸

5.3.2 Concluding summation

The Child Care, Protection and Justice Act provides an extensive but non-exhaustive list of children who should be considered as being in need of care; child-headed households and children affected by HIV/AIDS are not explicitly listed as in need of care, which the author regards as a notable omission.

Although responsibility for the care of children lies primarily with the parents, local government authorities bear responsibility for facilitating care provisions as a means of securing the welfare of children. This responsibility may be interpreted as an obligation of the State to ensure alternative care for children without adequate parental care.

The Act defines guardianship relating to children; in addition, foster care and residential care feature prominently in the Act.

Both the Constitution and the Child Care, Protection and Justice Act are in violation of the ACRWC in that the age of majority is set at 16 as opposed to 18; the CRC, on the other hand, allows for Member States to deviate from the preferred age of 18. Malawi's legislation represents a clear example of the further reaching protection offered by the ACRWC (*cf* chapter 2, paragraph 2.6.1); at the same time Malawi's legislation demonstrates that non-conformity with the treaties – in this case the ACRWC – is not sanctionable.

⁶⁹⁷ Section 179 Child Care, Protection and Justice Act, Malawi, 2010.

⁶⁹⁸ Section 8 paragraph 4 Child Care, Protection and Justice Act, Malawi, 2010.

In terms of the criteria formulated in the proposed legal framework for alternative care, the Child Care, Protection and Justice Act should be considered to be largely in conformity with the CRC.⁶⁹⁹

- Various forms of alternative care are provided for, to wit: temporary custody in a place of safety or by a suitable adult, guardianship, foster care by a natural person or by a foster home and institutional care.
- Although institutional care is not deemed to be a measure of last resort, strict rules are provided for this form of care.
- Parents are primarily responsible for the provision of adequate care and maintenance of a child; this responsibility is shared with the State. Parents may also be required to contribute to the alternative care received by their child. These measures may be seen as provisions ensuring an adequate standard of living.
- All forms of alternative care are subject to supervision or inspection by the Child Case Review Board.
- An Adoption Children Act is available, but is currently under review.

Acknowledgement of the importance of siblings remaining together in Section 8 of the Act is in line with the UN Guidelines.

The lack of protective measures specifically aimed at child-headed households in the new Child Care, Protection and Justice Act is remarkable considering the continuous increase of the emergence of this type of household. However, the provisions for children affected by HIV/AIDS apply to many children in child-headed households as most of these households are affected by the disease. These provisions notably include local authorities' obligation to keep a register of children affected by HIV/AIDS. Although a potentially negative side of such registers is the risk that they may lead to discrimination and stigmatisation, the benefits – such as access to alternative care, social services, healthcare and material support – far outweigh potentially negative aspects.

⁶⁹⁹ Although the age of 18 as the age of majority is not one of the criteria of the proposed framework, it would be inaccurate to consider the Act to be in compliance with the ACRWC as the latter explicitly sets the age of majority at 18 years.

Considering the various stipulations relating to alternative care, the Act provides the onset for the harmonisation process recommended by the CRC Committee. However, the issue concerning the limitation of childhood to the age of 15 years remains a matter of great concern as this excludes children from protection, provisions and services from the age of 16 onwards.

5.4 Namibia

The 1993 initial report of Namibia is the only report submitted by the State Party to the CRC Committee on which Concluding Observations have been issued. Due to the fact that – almost two decades later – the information is completely outdated and far-reaching law reforms have in the interim taken place, the Concluding Observations have become obsolete; they will therefore be excluded from consideration.

The 1990 Constitution of Namibia states that a child has the right to be cared for by his parents where possible and when it is in the best interests of the child.⁷⁰⁰ The topic of alternative care is not addressed in the Constitution.

Following a drafting process of more than a decade, with extensive nationwide consultation procedures – including an intensive media campaign, children and youth consultations, as well as regional and national workshops⁷⁰¹ – the final draft of the Namibian Child Care and Protection Bill is expected to be tabled by the cabinet in April 2011. It repeals the outdated 1960 Children's Act and all its amendments as well as the 2006 Children's Status Act, which documents will, therefore, not be discussed in this study. The new Bill has been modelled on South African legislation and bears much similarity to the South African Children's Act (2005) and to the South African Children's Amendment Act (2007).⁷⁰²

700 Article 15 Constitution of the Republic of Namibia, 1990.

701 Namibia Ministry of Gender Equality and Child Welfare 2010.

702 Sloth-Nielsen 2008b, p. 2.

5.4.1 Child Care and Protection Bill (2011)

The main objectives of the new Child Care and Protection Bill are the protection and promotion of the well-being of all children in Namibia; the Bill is meant to give effect to the children's rights enshrined in the Constitution of Namibia, as well as to Namibia's obligations derived from the CRC, the ACRWC and other international documents.⁷⁰³

The Bill explicitly declares a child's right to care, the responsibility for which lies with the child's parents, guardian or other caregiver⁷⁰⁴ and the importance of siblings being raised together is acknowledged.⁷⁰⁵

The definitions of a number of key terms are provided in the first chapter of the new Bill.⁷⁰⁶ Alternative care is defined as temporary or long term care of a child in foster care, kinship care by order of the Children's Court or care in a place of safety, a shelter, a children's home or an education and development centre. Foster care is described as care of a child which is ordered by the Children's Court to be provided by a person other than a parent, guardian or (extended) family member.⁷⁰⁷ Kinship care is care provided by (extended) family members. Places of safety or care, shelters, children's home and education and development centres are categorised as residential child care facilities. Children should only be placed in residential care when this is in their best interests.⁷⁰⁸

A shelter is a facility where basic services, including accommodation, are provided for street children, abused children and other children presenting themselves in the facility. A shelter may be established and operated by any person, as well as by the (local) government and NGOs, provided that the facility is registered and operates in accordance with the law. Governmental funding may be administered when a shelter operates in compliance with the provisions of this Bill.⁷⁰⁹

703 Article 2 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

704 Articles 7 and 8 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

705 Article 4 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

706 Article 2 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

707 The definition of foster care is repeated in Article 150.

708 Article 59 subsection 6 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

709 Article 62 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

A children's home is a residential care facility for non-family based care of children who are orphaned or abandoned or for whom suitable kinship care or foster care is not available. Where possible, children should be placed in a home in their own community. Children's homes may only be run by private persons and organisations when they are registered in conformity with this Bill and when run in compliance with set conditions of registration.⁷¹⁰ In 2009, the Ministry of Gender Equality and Child Welfare introduced Minimum Standards for Residential Child Care Facilities, containing standards for the care for children, organisation of facilities, management and staff, premises, and administration and finances.⁷¹¹ These standards were developed on the basis of the then draft UN Guidelines.

An extensive number of situations in which a child is considered to be in need of protective services – also categorised as vulnerable – are listed in the new Bill. Abandoned and orphaned children as well as those without adequate care are acknowledged as vulnerable. Other categories of children regarded as being in need of protective services include: street children, neglected or abused children, children addicted to alcohol or drugs and unaccompanied migrant or refugee children. Children affected by HIV/AIDS are not specifically distinguished; nonetheless, these children can be categorised as vulnerable given that they may be regarded either as orphaned, neglected or exposed to harmful circumstances. A chronically or terminally ill child deprived of a suitable caregiver is equally categorised as vulnerable.⁷¹²

Furthermore, circumstances are listed in which a child may be in need of protective services and where a social worker will have to investigate the situation. Children belonging to a child-headed household are categorised as potentially in need of protective services and investigation and assessment by a social worker is prescribed.⁷¹³

710 Article 63 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

711 Namibia Minimum Standards for Residential Care 2009.

712 Article 127 subsection 1 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

713 Article 127 subsection 2 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

Kinship care is described as care provided by the (extended) family of the child. A child may be placed in kinship care by court order or on the basis of a written and signed care agreement between the parent or guardian and the kinship caregiver. When the aforementioned agreement is registered at the Children's Court and complies with the provisions of this Bill, the kinship caregiver may be eligible for maintenance grants for the child.⁷¹⁴

A kinship caregiver carries parental responsibility for a child placed in his care; the right of custody and control over the child is transferred to this caregiver.⁷¹⁵ A detailed list of what custody and control includes is provided, such as the promotion of a child's well-being and development, encouraging the child to maintain contact with family and friends and arranging for trial visits home when this is in the child's best interests. Additionally, the kinship caregiver is obliged to arrange medical care, including surgical operations, when such care is required.⁷¹⁶

A foster parent has parental duties towards the child, as well as responsibilities as set out in Article 145 Child Care and Protection Bill (outlined above) and obligations contained within the court's placement order. The total number of children living in a foster care family is limited to six, unless the court considers it to be in the best interests of all children belonging to the family to exceed this maximum.⁷¹⁷

The Children's Court may make adoption orders on application.⁷¹⁸ A child may be adopted under the following circumstances: he has no parents or other suitable caregiver, the parents or guardian are missing, the child is abandoned, the parents or guardian have given the child up for adoption or permanent alternative care is needed. A child placed in permanent kinship care or permanent foster care is considered to be no longer in need of alternative care. A social worker, specifically assigned to each case, should assess whether it is in the best interests of a child to be adopted.⁷¹⁹

714 Article 114 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

715 Article 115 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

716 Article 145 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

717 Article 154 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

718 Article 164 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

719 Article 165 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

The new Bill contains provisions concerning child-headed households. A household may be designated as child-headed by the Minister under the following four conditions:

- the household is not headed by a parent or other caregiver due to death, chronic or terminal illness or abandonment of the household;
- no appropriate adult family member is available to care for the children belonging to the household;
- a child has taken over the role of primary caregiver for another child or for other children in the household;
- the arrangement should be in the best interests of all children belonging to the household.

Once a household has been recognised as child-headed, it should be brought under the supervision of a designated adult by the Children's Court or by an organ of government or NGO assigned by the Minister. On behalf of the household, the head child or the designated adult may apply for and administer grants and other assistance to which the family is entitled. Decisions on behalf of the household may only be taken after consulting the head child, as well as – possibly – the other children when their age and level of maturity require this. The child heading the household carries the responsibilities of an adult caregiver and is in charge of day-to-day decisions concerning the family. Child-headed households should enjoy the same status as any other household; they may not be excluded from any government assistance they would otherwise be entitled to.⁷²⁰

Children may be placed in a child-headed household by court order under the care of the head child, under supervision of a designated adult.⁷²¹

A parent, guardian, caregiver or a child heading a household, may apply for and – when eligible – receive a maintenance grant for children provided by the government. Additionally, the adult supervising a child-headed household – or the governmental organ or NGO designating this adult to the household – may apply for the maintenance grant.⁷²²

Foster parents, caring for a child on the basis of a court order, as well as

720 Article 206 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

721 Article 141 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

722 Article 218 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

registered and approved residential child facilities may be entitled to a specific grant if such grant is made available by the government.⁷²³

Emergency grants or assistance may be made available in the following critical situations: loss of a child's family or home, natural disasters and armed conflict and illness of a child or its caregiver.⁷²⁴

As stated earlier, the Ministry of Gender Equality and Child Welfare has issued standards for residential care facilities. The Ministry will develop guidelines and standards for foster care.⁷²⁵

5.4.2 Concluding summation

The new Namibian Child Care and Protection Bill is one of the most comprehensive of all Children's Acts featuring in this study. The Bill lists and defines a wide variety of key terms and offers a detailed description of situations in which children are to be categorised as being in need of alternative care. Various modes of institutional care, such as places of safety, shelters and children's homes, are distinguished in the Bill which contains regulations for each type of care facility. The Bill provides separately for foster care and kinship care. Adoption – both domestic and intercountry – is covered and child-headed households are legally recognised. A system of grants, specified per caregiver, is embodied in the Bill.

The obligation to provide a child with care is carried by parents, guardians or other caregivers. As the State accepts responsibility for child welfare, development and protection laid down in the CRC and the ACRWC, however, the obligation is a shared one between parents and the government. This is in conformity with the CRC and the ACRWC.

Taking into account the proposed legal framework, the Child Care and Protection Bill largely meets its criteria:

723 Articles 219 and 220 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

724 Article 222 Child Care and Protection Bill, Namibia, revised final draft, May 2010.

725 Namibia Ministry of Gender Equality and Child Welfare 2009, p. 28.

- The Bill contains stipulations on various forms of alternative care, viz foster care, kinship care and a variety of residential care facilities such as places of safety, shelters and children's homes.
- The Bill states that children should only be placed in residential care when this is in their best interests, which equates to 'a measure of last resort'.
- All care facilities, both registered and unregistered, as well as all care orders by the courts, are to be monitored.
- Parents have to ensure that their children enjoy an adequate standard of living; there are no regulations aimed at the provision of such standards by other caregivers.
- Chapter 14 of the Child Care and Protection Bill is devoted to adoption, both domestic and intercountry. Despite the fact that intercountry adoptions in Namibia are rare, the Bill aspires to implement the Principles of the 1993 Hague Convention.

The provisions concerning kinship care are noteworthy in that it is by no means the norm that this form of alternative care is embodied in national law. By implementing a legal distinction between foster care and kinship care, the Bill creates clarity on these forms of alternative care. The term foster care only applies when children are placed with a (professional) foster carer by court order. All care provided by extended family members – friends and community members known to a child are included – is categorised as kinship care.

Kinship caregivers' eligibility for a maintenance grant is significant in that it creates a form of equality between kinship carers and foster carers; in most countries, foster parents are eligible for financial support whereas kinship caregivers receive no assistance.

By specifying and regulating both forms of alternative care, the Bill is in full compliance with the UN Guidelines.

The recognition that siblings should remain together and the provisions on child-headed households in the Namibian Child Care and Protection Bill are equally compatible with the UN Guidelines. Under the Bill, a household may be legally recognised as a child-headed household by the Minister when the prospective head is deemed capable of acting as head of the family.

The assessment of the capability of this child does not depend on age (the Bill does not contain a minimum age for a child head), but is based on the child's expected ability to provide care for the other household members, as well as his ability to take the decisions for the family and to fulfil a parental role. It is noteworthy that elements such as the opinion of the child and his right to be heard do not feature in the criteria for households to be recognised as child-headed. Whether these elements should be considered to be implicitly embodied in the relevant stipulation is unclear. A child-headed family should be brought under supervision of a designated adult, by order of the court. As a result, siblings are able to remain together, in line with the UN Guidelines.

Children affected or infected by HIV/AIDS are not specifically categorised in the Child Care and Protection Bill. However, from 1999 onwards Namibia has issued National Strategic Plans on HIV/AIDS at regular intervals and policies and campaigns on HIV/AIDS aimed at both adults and children are available.

The 2009 Namibia Minimum Standards for Residential Care are evidently based on the UN Guidelines, providing a practical instrument for those involved in residential care and advancing the implementation of the Child Care and Protection Bill. The proposed standards for foster care may further this implementation process.

5.5 Rwanda

In its 2004 Concluding Observations relating to Rwanda, the CRC Committee questions whether Law No. 27/2001 on the Rights of the Child and Protection of Children against Abuse has been fully implemented. It also expresses concerns about the compatibility of national legislation with the CRC. Consequently, the Committee recommends that further measures be taken by the State Party to bring national legislation in full compliance with the

CRC. The Committee encourages the State Party to advance the creation of an extensive Children's Code.⁷²⁶

The obligations of the government of Rwanda concerning children's rights with regard to alternative care are laid down in the Constitution, as well as in Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence and the National Policy for Orphans and Vulnerable Children.

5.5.1 Constitution of the Republic of Rwanda (2003)

The 2003 Constitution of Rwanda states that parents have a duty to raise their children; the State is obliged to protect the family, particularly mothers and children.⁷²⁷ The Constitution further provides that every child has the right to special protection by his family, by society and by the State.⁷²⁸

5.5.2 Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence (2001)

In Law No. 27/2001, a number of articles relate to parental care and alternative care for children.

The Law stipulates that families and childcare organisations should ensure the welfare of children.⁷²⁹ When a child cannot reside with his parents, he is entitled to necessary (material) assistance from his parents and he has the right to visit them whenever possible.⁷³⁰

When a child is orphaned, he has the right to care by a guardian, an adoptive parent or a specialised institution. The responsibility to ensure this right lies with the State.⁷³¹ A child is only adoptable when this is in his

726 UN Committee on the Rights of the Child, CRC/C/15/Add.234, 2004, pp. 2, 3.

727 Article 27 Constitution of the Republic of Rwanda, 2003.

728 Article 28 Constitution of the Republic of Rwanda, 2003.

729 Article 3 Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence, Rwanda.

730 Article 7 Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence, Rwanda.

731 Article 8 Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence, Rwanda.

best interests; the government regulates the reviewing process.⁷³² In April 2009, Rwanda adopted national guidelines for international adoption, regulating intercountry adoption of Rwandan children.⁷³³ Additionally, the government of Rwanda ratified the 1993 Hague Convention in May 2010. In order to pave the way for implementation of the aforementioned Convention and to align national laws, the Ministry of Gender and Family Promotion suspended all new applications for intercountry adoption from Rwanda as of 31st August 2010 until further notice.⁷³⁴

Parents, guardians and caregivers have to act in accordance with the rights of the child concerning welfare, healthcare and education. The government must ensure these rights are adhered to and to provide assistance to parents in need.⁷³⁵ When the aforementioned actors fail to provide a child with suitable protection against violence or with adequate care, they may be ordered to pay a fine or sentenced to imprisonment.⁷³⁶

5.5.3 National Policy for Orphans and Vulnerable Children (2003)

In the 2003 National Policy for Orphans and Vulnerable Children, vulnerable children are defined as persons younger than 18 years of age who live under conditions which deprive them of the fundamental rights essential for their development. The National Policy distinguishes a total of 15 categories of vulnerable children: children growing up in a child-headed household feature as the first category; other groups include children affected by HIV/AIDS, children in foster care and children in care centres.⁷³⁷

732 Article 16 Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence, Rwanda.

733 Guidelines on International Adoption, Rwanda, 2009.

734 <http://www.migeprof.gov.rw/index.php?option=com_content&task=blogcategory&id=96&Itemid=229> accessed on 12/10/2010.

735 Article 14 Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence, Rwanda.

736 Article 46 Law No. 27/2001 Relating to Rights and Protection of the Child Against Violence, Rwanda.

737 Rwanda National Policy for Orphans and Vulnerable Children 2003, pp. 8, 9.

One of the specific objectives of the National Policy is the establishment of community-based care for child-headed households through the appointment of mentors. As to foster care,⁷³⁸ the issue concerning the lack of legal instruments aimed at the protection of foster children is raised. Targets include development of a protection mechanism by means of a legal framework for fostering and adoption, as well as a monitoring and supervising system for foster care. For children in centres, specific objectives encompass the reduction of children living in residential care and the development of guidelines, procedures and a monitoring system for centres by means of alternative care models.⁷³⁹

Children affected by HIV/AIDS are not only recognised as vulnerable, but also as potentially at a higher risk of establishing child-headed households. At the same time, it is acknowledged that drawing a distinction between these children and other vulnerable children may result in stigmatisation and exclusion from society. The National Policy therefore aims to integrate assistance to this specific group of children in regular OVC programmes.⁷⁴⁰

5.5.4 Concluding summation

The Constitution states that children have the right to special protection by the government. Although not specifically mentioned, it may be inferred from this stipulation – in conjunction with Law No. 27/2001 – that this includes the right to alternative care.

Law No. 27/2001 contains the explicit obligation for the government to provide orphaned children with alternative care by the appointment of a guardian, through adoption or in a residential care facility.

Although the stipulations in both the Constitution and Law No. 27/2001 may not appear to be in violation of the CRC and the ACRWC, these laws contain minimum basic provisions on alternative care and none of the criteria of the proposed legal framework for alternative care are met. The National

⁷³⁸ This category encompasses the following situations: children in supervised foster care, children in spontaneous foster care, children living with the extended family and adopted children.

⁷³⁹ Rwanda National Policy for Orphans and Vulnerable Children 2003, pp. 14 – 16.

⁷⁴⁰ Rwanda National Policy for Orphans and Vulnerable Children 2003, p. 21.

Policy for Orphaned and Vulnerable Children fills the void partly in that it defines the term 'vulnerable children', to which category children living in child-headed households as well as children affected by HIV/AIDS belong. However, additional regulations are not provided.

Despite the concerns voiced by the CRC Committee in 2004 and the recommendations regarding the lack of a Children's Act, the government of Rwanda has – to date – not issued this vital legislation. As a result, Rwanda's national legislation cannot be considered to be in line with the CRC and the ACRWC, or with the UN Guidelines for that matter.

It should therefore be concluded that children without parental care in Rwanda are not adequately protected by law, which may explain the high rate of children living in child-headed households (*cf* paragraph 4.1.2 of this study).

5.6 Sierra Leone

The 2008 Concluding Observations concerning Sierra Leone is positive as regards the establishment of the Child Rights Act in 2007 by the State Party. The CRC Committee welcomes the proposed implementation plan and the promulgation of the Act. The State Party is encouraged by the Committee to safeguard that the Child Rights Act enjoys precedence over existing law. In addition, the Committee advises the government to make available sufficient funding and staff in order to fully and successfully implement the provisions enshrined in the Child Rights Act.⁷⁴¹

The Constitution of Sierra Leone contains no regulations concerning alternative care. The duty of parents is laid down in the Constitution: parents are obliged to ensure the adequate upbringing of their children.⁷⁴²

⁷⁴¹ UN Committee on the Rights of the Child, CRC/C/SLE/CO/2, 2008, pp. 2, 3.

⁷⁴² Article 13 Constitution of Sierra Leone (Act No. 6 of 1991), 1991.

5.6.1 Child Rights Act (2007)

The Child Rights Act of 2007 is aimed at the implementation of the CRC into national legislation; it provides the framework for child protection in Sierra Leone.⁷⁴³ The Act contains various provisions on parental and alternative care. According to the Act, parents are primarily responsible for ensuring that a child's right to life, survival and development is adhered to. Assistance by the State must be provided when required.⁷⁴⁴

A variety of situations is listed in which a child is categorised as being in need of care and protection. Children who are orphaned or who are deserted by their parents and relatives fall into this category. Children who are neglected or ill-treated by their caregiver are also classified as such. Homeless and destitute children, as well as children found to be begging are considered to be in need of care and protection. Children whose parents or caregivers are involved in criminal activities or who suffer from alcoholism are equally graded, as well as children who are involved with prostitutes or who are morally or physically threatened. The child of a prostitute, who has been deemed capable of providing the child with adequate parental care, does not fall into this category.⁷⁴⁵

The Family Court may make a care order for a child in need of care and protection, by means of which parental responsibility for the child is transferred to the district council, after which the child in question may be placed in a residential care facility, with a suitable person or at the home of a guardian or relative.⁷⁴⁶ For a child who is able to remain with his parents, a supervision order may be made by the Family Court, with a view to preventing the child being harmed.⁷⁴⁷

743 Personal communication, UNICEF child protection specialist, Sierra Leone, 12/11/2009.

744 Article 23 Child Rights Act, Sierra Leone, 2007.

745 Article 60 Child Rights Act, Sierra Leone, 2007.

746 Article 63 Child Rights Act, Sierra Leone, 2007.

747 Article 64 Child Rights Act, Sierra Leone, 2007.

Foster care is described as care of and support for a child provided by an adult other than the biological or legal parent;⁷⁴⁸ a foster parent is responsible for the care and maintenance of a child.⁷⁴⁹ A child living in a residential care facility or who is recommended for this type of alternative care may be placed in the care of a foster parent; in other cases, an application for foster care may be made. A foster parent has parental responsibilities for a child while in his care.⁷⁵⁰

A foster parent aged 30 or above, who has cared for a child during a period of six months or more, may apply for adoption of the child.⁷⁵¹

Institutional care ("a home for the care of children") must be made available for orphaned children for whom family care or foster care is not available. Children awaiting a decision on a protection order by the Family Court and children for whom institutional care is the most suitable form of care, may also be admitted to a children's home. The staff of the residential care facility, the probation officer and social welfare officer are responsible for facilitating the reunion of a child with his parents, caregiver of family wherever possible. A child who cannot be reunited and for whom foster care is not available or suitable shall remain in residential care and be encouraged to become self-reliant.⁷⁵²

Residential staff carry parental responsibility for a child in their care; they have an obligation to ensure that the rights of each child are adhered to, including protection of a child's best interests by means of an application to the Family Court when required.⁷⁵³

When it is in his best interests, a child in residential care may be made available for adoption. The decision concerning adoption must be taken by the district council in consultation with the institution.⁷⁵⁴

An extensive policy on alternative care for children is in the process of being developed by the Ministry of Social Welfare, Gender and Children's Affairs

748 Article 2 Child Rights Act, Sierra Leone, 2007.

749 Article 107 Child Rights Act, Sierra Leone, 2007.

750 Article 105 Child Rights Act, Sierra Leone, 2007.

751 Article 108 Child Rights Act, Sierra Leone, 2007.

752 Article 113 Child Rights Act, Sierra Leone, 2007.

753 Article 114 Child Rights Act, Sierra Leone, 2007.

754 Article 116 Child Rights Act, Sierra Leone, 2007.

in conjunction with UNICEF;⁷⁵⁵ details on the finalisation of this policy have not yet been made available.

5.6.2 Concluding summation

The Child Rights Act lays responsibility for the care of children primarily with the parents. However, where necessary the State is obliged to assist parents in an effort to ensure that they are able to carry out their responsibility. The Act defines when a child is in need of care and protection and provides a number of alternative care options.

Although the Child Rights Act of Sierra Leone is not a very comprehensive document compared to other Children's Acts, it does contain a number of stipulations concerning alternative care. The joint responsibility for providing children with care resting on parents and the State is in line with the CRC and the ACRWC, as are the regulations with regard to foster care and residential care.

Taking the proposed framework for alternative care into consideration, it may be concluded that the Child Rights Act complies with the criteria:

- The Act contains provisions for a variety of care options: foster care, guardianship, kinship care (placement "at the home of a relative") and residential care.
- Although residential care is not explicitly categorised as a measure of last resort, the Act stipulates that a child may only be placed in an institution if this is the most suitable place for him or if family care and foster care are not available. Effectively, this categorises residential care as an option which is least desirable.
- Parents are responsible for providing a child with an adequate standard of living, assisted by the government where necessary; it is not clear whether this obligation transfers to other caregivers if a child is placed in alternative care.
- The monitoring of alternative care arrangements is prescribed by the Act.

⁷⁵⁵ Personal communication, UNICEF child protection specialist, Sierra Leone, 12/11/2009.

- The subject of adoption is addressed in a number of Articles in the Act and reference is made to the 1989 Adoption Act of Sierra Leone.

The proposed national policy on alternative care for children is expected to advance the implementation process.

The acknowledgement of the prevalence of child-headed households in Sierra Leone notwithstanding, the 2007 Child Rights Act does not contain any specific provisions for this category of children, nor are children affected by HIV/AIDS distinguished as vulnerable. In combination with the fact that data on child-headed households is not available (*cf* chapter 4, paragraph 4.1.2), it may be concluded that to date the topic of child-headed households has received scant attention.

5.7 South Africa

The last Concluding Observations of the CRC Committee on South Africa date from the year 2000 and are based on outdated national laws. The Committee encourages the State Party to continue its legislative review and to ensure that national legislation conforms to the Principles of the CRC.⁷⁵⁶ In the meantime, extensive legal reforms with regard to the protection of children have taken place in South Africa, through the 2005 Children's Act, the 2007 Children's Amendment Act, the 2010 General Regulations regarding Children and the National Social Development Children's Act Practice Note no. 1 of 2010.

5.7.1 Constitution of the Republic of South Africa (1996)

A child's right to care is enshrined in the 1996 Constitution of South Africa. Children have the right to family care or parental care; when neither is available to a child, he has the right to alternative care.⁷⁵⁷ In the 'Government of the Republic of South Africa and others vs. Grootboom and others' case,⁷⁵⁸

⁷⁵⁶ UN Committee on the Rights of the Child, CRC/C/15/Add.122, 2000, p. 3.

⁷⁵⁷ Article 28 Constitution of the Republic of South Africa, 1996.

⁷⁵⁸ Constitutional Court, 4th October 2000, BCLR 1169.

also known as the Grootboom case, the Constitutional Court of South Africa based the interpretation of this Section of the Constitution on a number of elements, the most important being the State's obligation to provide adequate housing.⁷⁵⁹ The Court decided *inter alia* that realisation of the socio-economic rights of children with parental care primarily lies with the parents. However, responsibility for meeting these rights for children deprived of parental care, lies with the State.⁷⁶⁰

5.7.2 Children's Act (2005)

The 2005 South African Children's Act is the first national legislation on the African continent in which reference is made to child-headed households and in which these households are legally recognised as a form of alternative care. However, the Act does not define this type of household.⁷⁶¹ The ongoing increase in the number of children without parental care and the chronic deficiency of formal alternative care places, has led to this legislation.⁷⁶² Legal recognition is aimed at the protection of families without an adult caregiver through access to social grants, provision of social services and adult supervision, as well as protection of property rights.⁷⁶³

The Preamble of the Children's Act affirms the rights of the child, including the right to alternative parental care, as laid down in the aforementioned Section 28 of the Constitution and refers to international declarations and treaties such as the ACRWC and the CRC.

Various key concepts concerning the care for a child are listed and defined.⁷⁶⁴ The term 'care' is described as the provision of an adequate place to live, in a suitable living environment, with sufficient financial support. The well-being of a child should be promoted and safeguarded and a child should be protected from any physical or emotional harm. Additionally, a child should

759 Sloth-Nielsen 2004, p. 12.

760 Constitutional Court, 4th October 2000, BCLR 1169, para 77.

761 Section 1 under caregiver, sub g; Section 46 subsection1(b); Section 150 subsection 2(b).

762 Sloth-Nielsen 2010, p. 23.

763 Sloth-Nielsen 2005, p. 77.

764 Section 1 Children's Act, South Africa, 2005.

be guided and directed in matters of education, development, behaviour and important decisions.

A caregiver is defined as any person, other than the parent or guardian, who *de facto* provides a child with day-to-day care; the following persons are regarded as caregivers: a foster parent, a person caring for a child with parental consent, a person running a Child and Youth Care Centre⁷⁶⁵ or a shelter, a child and youth care worker and a person who cares for a child in temporary safe care. In addition to the aforementioned actors, a child heading a household is also considered to be a caregiver.

South Africa has opted to classify a child without any surviving parents as an orphan.

Following the key terms, the main objectives of the Children's Act are stated, including recognition of the right of the child to parental or family care and – where necessary – alternative care. Children in need of care and protection should be provided with this care by the government.⁷⁶⁶

Parental responsibility includes both the care for a child as well as guardianship. The parental responsibilities for a child may lie with one person, who is fully responsible; parental responsibilities may also be shared amongst others.

The duties of a parent or a guardian encompass responsibility for a child's property rights and assistance or representation in any legal issues. Furthermore, a parent or guardian has to consent or refuse consent in matters such as application for a passport, adoption and marriage.⁷⁶⁷

A person without parental duties in whose care a child resides has the responsibility for protecting the health, well-being and development of the child and for safeguarding him from any physical and mental harm. This responsibility may extend to consent for medical treatment in situations where the child's parent or guardian is not able to grant permission.⁷⁶⁸

⁷⁶⁵ A Child and Youth Care Centre is the generic term used for residential care facilities.

⁷⁶⁶ Section 2 Children's Act, South Africa, 2005.

⁷⁶⁷ Section 18 Children's Act, South Africa, 2005.

⁷⁶⁸ Section 32 Children's Act, South Africa, 2005.

The Children's Act provides the Children's Court with a wide range of care orders: the court may make an alternative care order, which includes foster care, care in a Child and Youth Care Centre and temporary safe care. Additionally, the court may make an order placing a child in a child-headed household in the care of the head child. Other orders include (intercountry) adoption, partial care, supervision and a child protection order. The latter may lead to measures such as giving consent for medical treatment, instructing the removal of a specific person from the child's home and instructing a child's participation in a professional assessment.⁷⁶⁹

The Act provides various situations in which a child is categorised as being in need of care or protection: orphaned or abandoned children without support, street children, addicted or exploited children and those who are harmed physically or mentally, or who are acknowledged as in need of care and protection. Children who are victims of child labour and those belonging to a child-headed household may also fall into this category; their situation should be investigated and assessed by a social worker. Should the social worker conclude that the children in question are not in need of care and protection, a form of assistance may be provided should this be necessary.⁷⁷⁰ Section 150 therefore ensures protective measures for children belonging to child-headed households, either by formally categorising them as in need of care and protection (subsection 1) or via measures of assistance where necessary (subsection 3).⁷⁷¹

Whether a child is in need of care and protection is a decision taken by the Children's Court.⁷⁷² When the court affirms the status of a child, an order as described in the aforementioned Section 46 may be made. For a child without adequate parental care, the court may also order placement in foster care, including cluster foster care, temporary safe care, shared care or placement in a Child and Youth Care Centre. While awaiting the execution of an order, a child may be placed in temporary safe care.⁷⁷³ The Act stipulates that very young orphaned and abandoned children should be

769 Section 46 Children's Act, South Africa, 2005.

770 Section 150 Children's Act, South Africa, 2005.

771 Couzens & Zaal 2009, p. 306.

772 Section 155 Children's Act, South Africa, 2005.

773 Section 156 Children's Act, South Africa, 2005.

legally adopted into a permanent family environment, unless adoption is not in their best interests.⁷⁷⁴

Placement by the Children's Court in a Child and Youth Care Centre may only be considered if other care options are not deemed to be suitable for the child in question. The court has the duty to decide on an appropriate care programme; the provincial head of social development carries out the child's placement in a Child and Youth Care Centre and is responsible for execution of the care programme. The centre selected by the provincial head should be situated in or as near as possible to the child's home environment.⁷⁷⁵

Adoption is defined as the placement of a child in the permanent care of adoptive parents.⁷⁷⁶ It is aimed at the provision of a permanent, safe and healthy family environment for the child.⁷⁷⁷

Through adoption, all parental responsibilities and rights of parents and any other persons are terminated and transferred to the adoptive parents, who are regarded as the parents of the child. The child takes on the name of the adoptive parents, unless the adoption order states otherwise. Adoption does not affect any property rights the child may have.⁷⁷⁸

5.7.3 Children's Amendment Act (2007)

The 2007 Children's Amendment Act contains further provisions concerning child-headed households.

A household may be recognised as child-headed when the parent, guardian or caregiver has died, is terminally ill or has abandoned the children while care by an adult family member is not available and where a child of 16 years or older has adopted the role of caregiver, when this is in the best interests of all children. The classification of a family as a child-headed household is

774 Section 157 Children's Act, South Africa, 2005.

775 Section 158 Children's Act, South Africa, 2005.

776 Section 228 Children's Act, South Africa, 2005.

777 Section 229 Children's Act, South Africa, 2005.

778 Section 242 Children's Act, South Africa, 2005.

carried out by the provincial head of social development on the basis of the aforementioned four criteria.⁷⁷⁹

Categorising families in which the primary adult caregiver is terminally ill as child-headed enables earlier identification of such households – at a stage when the caregiver is still alive.⁷⁸⁰

A child who is 16 years or older while living on his own is not considered to be a child-headed household; the understanding of a child-headed household as regulated by the Children’s Amendment Act and additional regulations, is that a child (16 or 17 years old) runs a household formed by himself *and* one or more other children.⁷⁸¹

A child-headed household should be supervised by an adult, designated by the Children’s Court, by a government organ or by an NGO appointed by the provincial head of social development. The probability that a conflict of competence arises is very low. Firstly, the recognition of a household as child-headed and the designation of an adult to the household are registered in a specific provincial register (*ut infra*, paragraph 5.7.5) and it is therefore not likely that a second supervisor will be allocated. Furthermore, a designation ordered by the court, by definition ranks highest.⁷⁸² The adult should possess the requisite competence to provide the household with supervision and carry out his responsibilities in accordance with the court’s instructions.

The child heading the family and the supervising adult may apply for and administer any grant or assistance the household is eligible for; in cases where the designated adult performs these tasks, he is accountable to the NGO or the government organ. The adult may not take any decisions relating to the household without consulting the child head and – when required by age and maturity – of other children belonging to the household. Child-headed households may not be excluded from any grants or other (local) government assistance as a consequence of their status. Day-to-day decisions concerning the household are taken by the child head;⁷⁸³ although the Act does not specify what these day-to-day decisions entail, it may be

779 Section 137 subsection 1 Children’s Amendment Act, South Africa, 2007.

780 Couzens & Zaal 2009, p. 307.

781 Personal communication, children’s rights specialist, South Africa, 14/03/2011.

782 Personal communication, children’s rights specialist, South Africa, 21/03/2011.

783 Section 137 Children’s Amendment Act, South Africa, 2007.

understood to be all decisions pertaining to the running of the household and those relating to custodial responsibilities for the other children belonging to the family.⁷⁸⁴

It is noteworthy that a 16 or 17 year old child who lives alone is not eligible for a Child Support Grant due to the fact that he cannot be recognised as a child-headed household, whereas a child head – of the same age – is able to apply for a grant for himself (as well as the children he cares for).⁷⁸⁵

The designated adult is likely to be a paid community worker, supervising more than one family, rather than an individual providing a service on a voluntary basis.⁷⁸⁶ The hierarchy of child-headed households is illustrated in figure 5.2.⁷⁸⁷

Alternative care encompasses foster care, institutional care on the basis of a court order, and temporary safe care. A child should not remain in residential care for a period longer than six months without an order from the court.⁷⁸⁸

Foster care is defined as the placement of a child in the care of a person other than the child's parent or guardian by order of the Children's Court or the provincial head of social development. A child placed in temporary safe care or in a Child and Youth Care Centre is not considered to be in foster care.

The foster parent appointed by the Children's Court may be a member of the child's family, a non-relative or a person in a registered cluster foster care setting.⁷⁸⁹ Although the Act does not clearly define the concept of cluster foster care, it is considered to be a form of alternative care whereby groups of children are collectively cared for by foster parents (*cf* chapter 3, paragraph 3.3.2).

784 Couzens & Zaal 2009, p. 315.

785 Personal communication, children's rights specialist, South Africa, 21/03/2011.

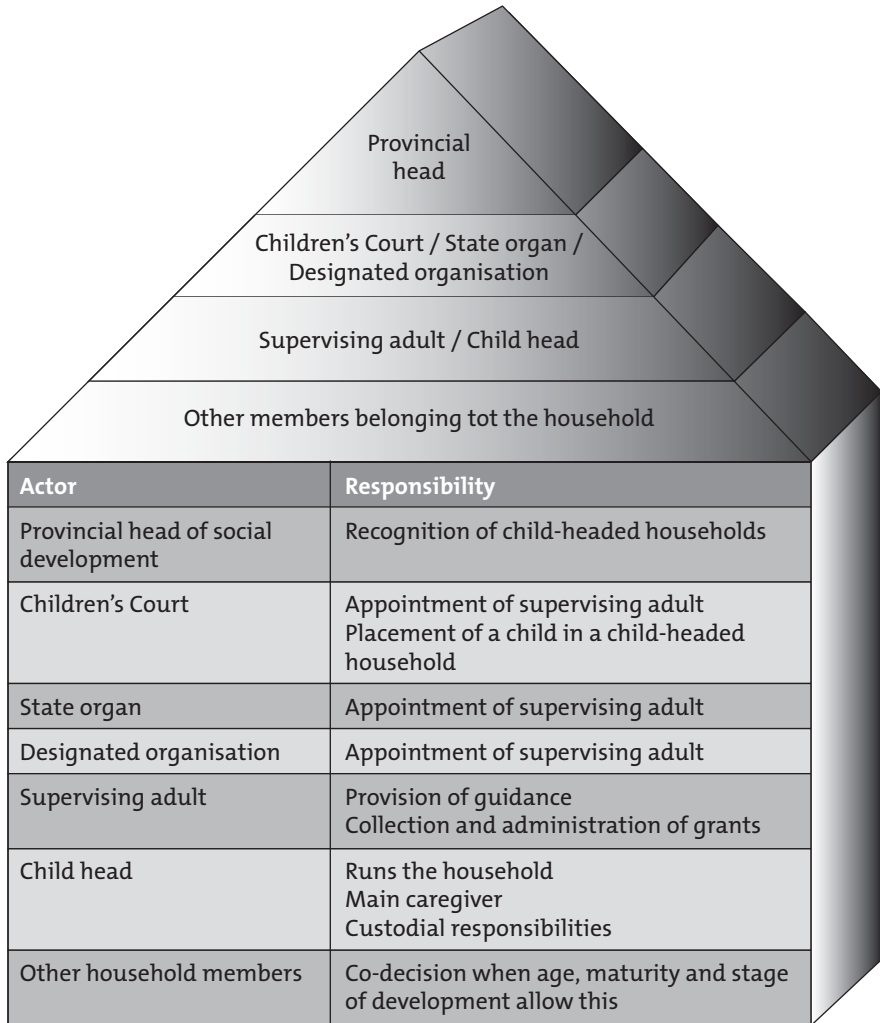
786 Sloth-Nielsen 2010, p. 26.

787 Couzens & Zaal 2009, p. 309.

788 Section 167 Children's Amendment Act, South Africa, 2007.

789 Section 180 Children's Amendment Act, South Africa, 2007.

Figure 5.2 Hierarchy child-headed household



Cluster foster care arrangements should be registered with the provincial head of social development.⁷⁹⁰ The Amendment Act provides that a maximum of six children may be placed in a foster family; an exception may be made when the children in question are siblings or blood-related, or when the court considers the placement of more than six children to be in their best interests. In a registered cluster foster care scheme the maximum number of six children is not applicable.⁷⁹¹

⁷⁹⁰ Section 3(e), Children's Amendment Act, South Africa, 2007.

⁷⁹¹ Section 185 Children's Amendment Act, South Africa, 2007.

Foster care is regarded to be a temporary measure and a foster care order expires after two years.⁷⁹²

Due to the fact that the Foster Care Grant (payable when a child has been formally placed with a foster parent) is approximately three times higher than the Child Support Grant (available to non-foster carers), many informal carers – mostly extended family members – have applied for foster parentage, leading to an unprecedented 700% surge in foster placements within a period of seven years.⁷⁹³ This increase has not (yet) led to scarcity of resources for paying out these grants; however, the costs of alternative care have evidently risen steeply. The character of these foster placements with extended family members differs in that they are usually intended for a longer period. When a foster placement exceeds the aforementioned period of two years, the placement may be extended by the Children's Court until the child reaches the age of majority, when this provides stability in the child's life and it is in his best interests.⁷⁹⁴

A Child and Youth Care Centre is a residential care facility in which more than six children reside outside a family environment. These centres should offer therapeutic programmes specifically designed for children who are cared for in a non-family setting.⁷⁹⁵

5.7.4 General Regulations regarding Children (2010)

In April 2010, the Department of Social Development issued a Government Notice containing regulations regarding children.⁷⁹⁶ This Notice elaborates on various provisions laid down in the Children's Act and the Children's Amendment Act.

In the Government Notice, the duties of the adult supervising a child-headed household are outlined: these include facilitation of psychological,

792 Section 159 Children's Act, South Africa, 2005.

793 Sloth-Nielsen 2008b, p. 7.

794 Section 186 Children's Amendment Act, South Africa, 2007.

795 Section 191 Children's Amendment Act, South Africa, 2007.

796 Government Notice, Children's Act 2005, General Regulations regarding Children, South Africa, 2010 (No. R. 261, April 2010).

social and emotional support to the family. The adult has to ensure that children of school-going age do in fact attend school, as well as assist with the supervision of their homework. He has to educate the family in basic health and hygiene and, where appropriate, on sexually transmitted diseases. Additionally, the supervising adult has to assist the children in obtaining required legal documents and with medical issues, including access to health care facilities. The adult, in conjunction with the children, must regulate the responsibilities of children in the household in order to develop their self-reliance, in addition to which their involvement in issues affecting the household should be promoted. The supervisor has to ensure a suitable supply of resources required for the children's basic needs, as well as proper use of these resources and financial records are to be kept.

Where applicable, the adult should utilise available child protection services in order to safeguard the children's well-being and safety. Any occurrence of abuse or of the death of a child has to be reported to the appropriate authority or official. When required, the adult should be available after hours. The supervising adult, in consultation with social services, will endeavour to (re)establish contact between the children and their relatives or parents where possible and appropriate.

The head child must be aided in complying with his responsibilities by the supervising adult.⁷⁹⁷

Financial accountability of the supervising adult is covered in the Government Notice; in consultation with the children, a monthly budgetary plan must be composed and signed by the child heading the household. At the end of each month, this plan and all relating documentation have to be submitted to the government organ or the NGO which had determined the supervision by the adult in the first place. Any mismanagement of finances by the adult may lead to his prosecution and replacement by another adult.⁷⁹⁸

797 Section 50 Government Notice, General Regulations regarding Children, South Africa, 2010.

798 Section 51 Government Notice, General Regulations regarding Children, South Africa, 2010.

Annexure B to the Government Notice contains national norms and standards on various subjects; Part III relates to child protection and also provides regulations concerning child-headed households.

It is acknowledged that siblings should remain together whenever possible and that the right to family life should be respected. Children in a child-headed household should be supported to live as a family and their independence be promoted where possible.

Children belonging to a child-headed household are entitled to a safe, secure, supportive and nurturing environment. Suitable healthcare has to be available and psychosocial support accessible. Children should be enabled to exercise their right to rest, leisure and play.

Official birth registration, social and emergency assistance as well as social and community services have to be available to children in child-headed households. The educational system should be accessible and children should attend school normally. Additionally, children should be facilitated in developing socio-economic skills.

Child-headed households should be assisted with protecting their property and with assuming responsibility for the family possessions.

Children living in a child-headed household should not be exposed to any harm; they should be protected from violence, (sexual) abuse, ill-treatment, child labour, as well as from community risk factors.

A child-headed household to which a disabled or chronically ill child belongs should receive support to enable the ultimate development of this child. The household should be assisted in applying for special assistance such a child is eligible for.

Children belonging to a child-headed household are entitled to participate in all issues concerning the household.

A child-headed household – irrespective of whether a supervising adult has been appointed or not – must be visited at least once every two weeks in order to monitor and supervise the household (the regulations do not specify by whom these visits will be made).

The child head is to effectuate the norms and standards of this Annexure as much as possible in order to protect the other children from harm and to have their rights to survival and development adhered to.⁷⁹⁹ Specific

⁷⁹⁹ Annexure B, Part III, Section 11 Government Notice, General Regulations regarding Children, South Africa, 2010.

indicators as to how the child head should implement these norms and standards are not provided.

Besides the topic of child-headed households, a number of other relevant matters are included in the Government Notice, such as the determination of the status of an apparently abandoned or orphaned child. When a child appears to be orphaned or abandoned, an assigned social worker will attempt to clarify the child's factual status by publication of an advertisement in order to establish whether the child is in need of care and protection or can be made available for adoption.⁸⁰⁰

The Government Notice contains additional regulations on foster care. A foster parent is responsible for the provision of a child's day-to-day care as provided in Section 1 Children's Act. The foster parent has to ensure that the child fully benefits of any social assistance or financial allowance which is received for the child. The child should be able to have contact with his family members when this is in his best interests; foster parents may not block or restrict such contact and they should facilitate reunion between the child and his parents or other family members where possible. In order to monitor, review or extend a foster care order, the foster parent is obliged to allow a child protection agency or a social worker access to his home and to the child.⁸⁰¹

Additional rules for care in Child and Youth Care Centres are also provided in the Government Notice, ranging from a child's right to be informed and consulted to the right to adequate nutrition, clothing and nurturing. A child living in a Child and Youth Care Centre is entitled to programmes aimed at fulfilling his developmental, therapeutic and recreational needs. Developmental programmes relate to, among others, life skills, after care support and activities with regard to income generation. Therapeutic programmes include psychosocial support, various forms of guidance such as trauma counselling and other therapies such as conflict resolution.

⁸⁰⁰ Section 56 Government Notice, General Regulations regarding Children, South Africa, 2010.

⁸⁰¹ Section 65 Government Notice, General Regulations regarding Children, South Africa, 2010.

Recreational programmes are aimed at sport, art, drama, singing, dancing and board games.⁸⁰²

In Part IV of Annexure B to the Government Notice, outreach services, such as home-based care, to families affected by HIV/AIDS and other chronic illnesses are prescribed.⁸⁰³

5.7.5 National Social Development Children's Act Practice Note no. 1 of 2010

In addition to the Government Notice, the Department of Social Development has issued practical guidelines and instructions for provincial heads of social development, social (auxiliary) workers, child and youth care workers and community development practitioners for the purpose of a uniform interpretation and implementation of the Children's Act.⁸⁰⁴ In Practice Note no. 1 of 2010 further clarification is provided on child-headed households. For the assessment and determination of a child's ability to head the household, the process map in figure 5.3 has to be used.⁸⁰⁵

Currently there are no plans to issue any further Practice Notes.⁸⁰⁶

5.7.6 Concluding summation

The right to alternative care is firmly entrenched in South African legislation; a wealth of stipulations in the Constitution, the Children's Act, the Children's Amendment Act, the Government Notice and the Practice Note provide a solid framework, including practical guidelines.

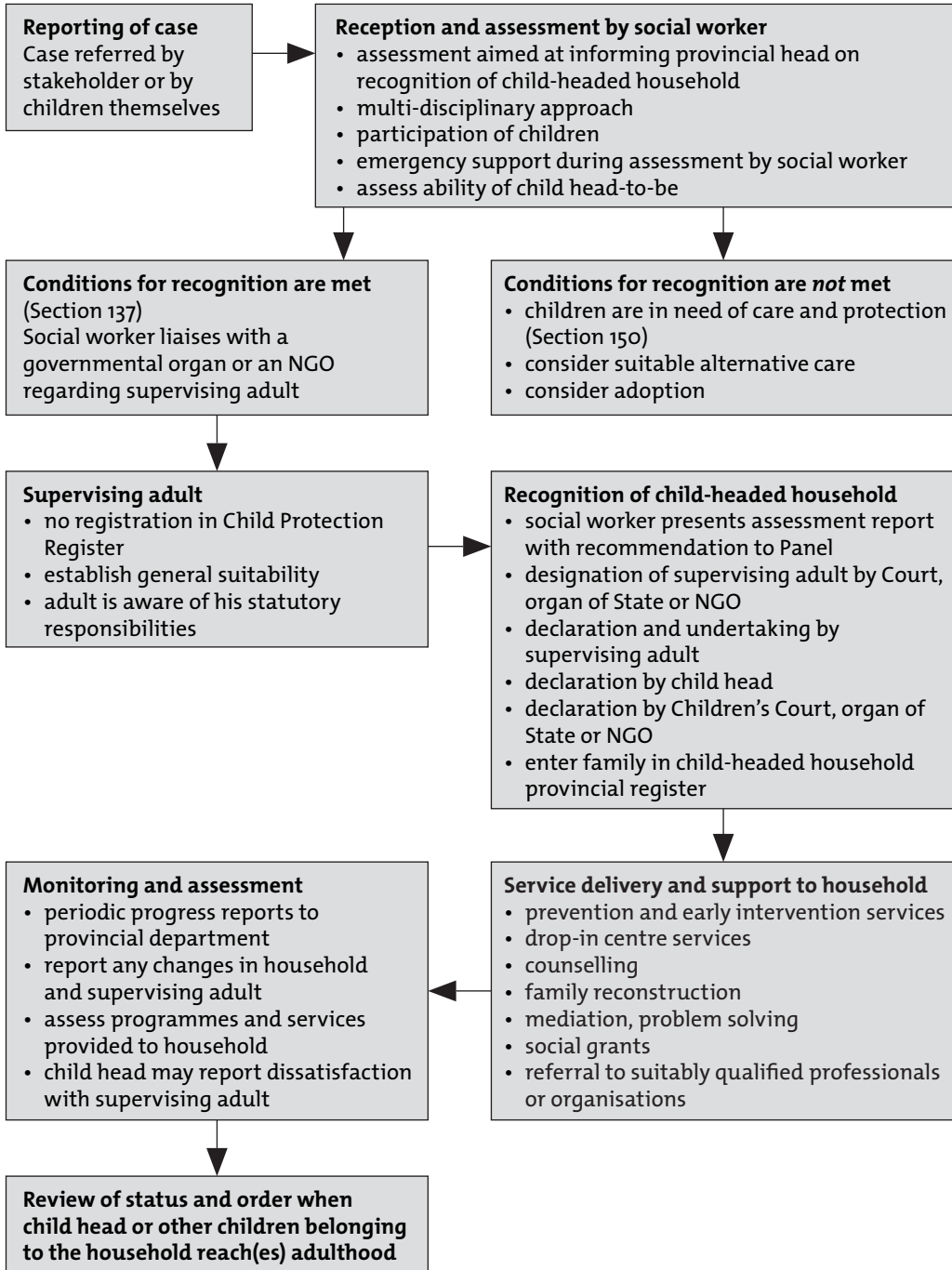
802 Section 73 Government Notice, General Regulations regarding Children, South Africa, 2010.

803 Annexure B, Part IV, Section 1 Government Notice, General Regulations regarding Children, South Africa, 2010.

804 National Social Development Children's Act Practice Note no. 1 of 2010, South Africa. Transitional matters: Implementation of the Children's Act 38 of 2005 as amended.

805 Section 20 National Social Development Children's Act Practice Note no. 1 of 2010, South Africa.

806 Personal communication, children's rights specialist, South Africa, 21/03/2011.

Figure 5.3 Determination of the ability to head a household⁸⁰⁷

⁸⁰⁷ Adaptation of process map National Social Development Children's Act Practice Note no. 1 of 2010, South Africa, p. 19.

The Constitution and the Children's Act impose an obligation to ensure alternative care for a child on both parents and the government of South Africa. A variety of care options is regulated, including foster care, cluster foster care and residential care. Despite the fact that kinship care does not feature in any of the laws or instruments as an independent legal form of alternative care, kinship care is incorporated in foster care as family members are explicitly named as potential foster caregivers.

All assessed documents, with the exception of the 1996 Constitution, contain Principles on child-headed households.

It is noteworthy that South African law provides for (extended) family members to perform as a foster carer, as in many other countries this form of alternative care is usually carried out by non-related caregivers.

The stipulations relating to the responsibility to care for a child, as well as the different care options provided for, are in line with both the CRC and the ACRWC. Noteworthy are the provisions concerning cluster foster care, a form of care which does not commonly appear in national legislation elsewhere. By means of cluster foster care, larger groups of children are cared for in a family-based environment, which is in conformity with the UN Guidelines.

On the basis of the proposed legal framework for alternative care, it may be concluded that South African legislation is fully in line with the criteria of the framework:

- Stipulations for a variety of care options are embodied in the law, *viz* foster care, cluster foster care, temporary safe care and placement in a Child and Youth Care Centre (residential care). As foster care includes care by extended family members, kinship care is also covered in the legislation.
- The law recognises the importance of family-based care and that institutional care is the least preferred form of alternative care. Placement of a child in a residential care facility may only be considered when other care options are not appropriate for a particular child.
- Parents are responsible for the care of a child; when they are unable to provide such care, responsibility transfers to the government. Although not explicitly stated, care may be seen to include provision of an adequate

standard of living. Other caregivers, including those without parental duties, are equally responsible for provision of an adequate standard of living, possibly with financial support from the government in the form of a grant.

- The execution of all care orders by the courts are to be monitored, in most cases the provincial head of social services bearing responsibility.
- The 2005 Children's Act devotes a substantial portion to national adoption (chapter 15) and to intercountry adoption (chapter 16).

The extensive legislation on child-headed households conforms to the UN Guidelines. Four criteria are given in the Children's Amendment Act for the recognition of these households; in the Government Notice and the Practice Note, the topic is expanded on and detailed regulations and indicators for the determination of the status of a household are provided. In addition, clear rules for the supervising adult are issued in these documents.

Furthermore, families (including children) affected by HIV/AIDS are recognised as being in need of extra services.

It is interesting to note that the rules and regulations on child-headed households in South African legislation are the most comprehensive and detailed in the whole of sub-Saharan Africa. Given the 'newness' of this legislation, the effects thereof on the lives of children living in child-headed households are difficult to predict.

The importance of siblings being raised together is acknowledged both in the Children's Amendment Act (the maximum of six children in foster care may be exceeded when the children are siblings) and in the Government Notice (explicitly stated); this is in compliance with the UN Guidelines.

5.8 Swaziland

In the 2006 Concluding Observations, the CRC Committee welcomes the efforts made by Swaziland concerning children's rights which have resulted in a number of provisions in the 2005 Constitution with regard to special protection of children. The Committee also takes note of the fact that the State Party is proposing to introduce a separate Children's Bill.

The Committee notes with concern, however, that Swaziland has not yet undertaken an extensive legislative review aimed at harmonisation of national legislation with the CRC. As a result, the Committee strongly advises the State Party to adopt the proposed Children's Bill and to ensure that national legislation conforms to the CRC. It is also recommended that the State Party calls upon UNICEF for assistance and advice to the government.⁸⁰⁸

5.8.1 Constitution of the Kingdom of Swaziland Act (2005)

The 2005 Constitution of Swaziland states that "childhood is entitled to special care and assistance" by the government and by society.⁸⁰⁹ The Constitution provides that children have the right to be adequately cared for by their parents or by another legally appointed caregiver. Children are entitled to the special care and assistance which is central to their full development.⁸¹⁰

Swaziland's government is currently in the process of drafting a Children's Act.⁸¹¹

In 2005, Swaziland issued a National Plan of Action for Orphans and Vulnerable Children.⁸¹² In this Plan of Action the violation of various children's rights, including that of the right to protection, is acknowledged.⁸¹³ Amongst other measures, the Plan proposes strengthening of the legal system regarding children's rights at all levels.⁸¹⁴

Swaziland, as one of the countries most heavily hit by the HIV/AIDS pandemic, recognises the disastrous effects of the illness and subsequent deaths of a large part of its population. As a result, the National Plan of

808 UN Committee on the Rights of the Child, CRC/C/SWZ/CO/1, 2006, pp. 2, 3.

809 Article 27 Constitution of the Kingdom of Swaziland Act, 2005.

810 Article 29 Constitution of the Kingdom of Swaziland Act, 2005.

811 Sloth-Nielsen 2008b, p. 2.

812 Swaziland National Plan of Action for OVC 2006 – 2010.

813 Swaziland National Plan of Action for OVC 2006 – 2010, pp. 15, 16.

814 Swaziland National Plan of Action for OVC 2006 – 2010, p. 20.

Action focuses on children affected by HIV/AIDS, considering these children to be extremely vulnerable.⁸¹⁵

Child-headed households are regarded as vulnerable, since the rights of children belonging to these households are frequently violated. Child-headed households are explicitly named in one of the priority programme areas, namely the right to food. Other priority programmes relate to the right to protection, education and access to basic services which are aimed at all vulnerable children.⁸¹⁶

5.8.2 Concluding summation

To date, neither a legal review nor the development of a Children's Act as recommended by the CRC Committee in 2006 has materialised. The lack of regulations on any form of alternative care is an infringement of the rights enshrined in the CRC (Swaziland has not ratified the ACRWC). It may be concluded, therefore, that the Kingdom of Swaziland has failed to honour the obligations imposed on it by the CRC; by extension, there is no compliance with the proposed legal framework for alternative care.

In the National Plan of Action for Orphans and Vulnerable Children, both children in child-headed households and children affected by HIV/AIDS are considered to be vulnerable; however, specific rules and regulations have not been issued.

It should therefore be concluded that implementation of the stipulations of the CRC by means of a Children's Act and related guidelines and/or standards must be viewed as a matter of great urgency.

815 Swaziland National Plan of Action for OVC 2006 – 2010, p. 11.

816 Swaziland National Plan of Action for OVC 2006 – 2010, pp. 37 – 53.

5.9 Uganda

Despite some progress, concerns are expressed by the CRC Committee in its 2005 Concluding Observations, pertaining to the absence of an extensive review of the legal system. The Committee recommends that Uganda reinforces the harmonisation process in order to conform national legislation to the Principles of the CRC. The State Party's Law Reform Commission should be given clear instructions as well as adequate financial and human resources.⁸¹⁷

The ACERWC welcomes the efforts of the State Party on the issue of safeguarding children's rights in its 2010 Concluding Observations. Notwithstanding this progress, the Committee notes that there is little awareness of the contents of the ACRWC amongst the general population. Consequently, the Committee advises the State Party to promulgate the ACRWC at a national level. It also recommends that the Charter be translated into the national languages of Uganda and that training on the provisions of the Charter be developed for those professionally involved with children.⁸¹⁸

The Constitution of Uganda stipulates that parents bear a duty of care to their children.⁸¹⁹ Furthermore, special protection must be provided for orphaned and other vulnerable children.⁸²⁰ No mention is made of the State's responsibility to provide children with alternative parental care.

5.9.1 Children Act (1997)

Uganda was the first African nation to develop and adopt a comprehensive Children's Act, in order to bring its legislation in compliance with the CRC and the ACRWC and to rid itself of the shackles of its colonial past in this respect.⁸²¹

817 UN Committee on the Rights of the Child, CRC/C/UGA/CO/2, 2005, p. 3.

818 African Committee of Experts on the Rights and Welfare of the Child, Observations and Recommendations on Uganda's first Report, 2010, p. 9.

819 Article 31 Constitution of the Republic of Uganda, 1995.

820 Article 34 Constitution of the Republic of Uganda, 1995.

821 Sloth-Nielsen 2008b, p. 1.

In the 1997 Children Act a number of key principles concerning alternative care are described.

An approved home is a facility which provides alternative care for children, either run by the government or by an NGO; in the latter case the home has to be officially recognised by the Minister.

A custodian is a person who is responsible for the care of a child who is physically placed with him.

Foster care is the provision – by means of a care order – of parental care by a person who is not the biological parent or a relative of the child.

A guardian is a person who has parental responsibility for a child.

Parental responsibility comprises the rights, duties and authority of parents in relation to a child as stipulated by law.

In a place of safety a child is provided with food, protection and accommodation by a suitable adult.⁸²²

A parent or a guardian has parental responsibility for his child. If a child's parents are deceased, this responsibility may be transferred to a family member or by means of a care order to a foster parent or an approved home.⁸²³

The Family and Children Court may make a supervision order or an interim supervision order, through which a child is placed under the charge of a social worker while remaining in his parents' custody. By means of a care order or an interim care order, a child may be placed in foster care or in the care of an approved home.⁸²⁴

Once a child has been placed in foster care or in residential care, parental responsibility is passed on to the foster parent or the warden of the residential care facility. They are obliged to ensure the child's development, especially in matters of health and education. They must inform a child's parents or guardian about his progress and encourage a trial return home

822 Article 1 Children Act, Uganda, 1997.

823 Article 6 Children Act, Uganda, 1997.

824 Article 19 Children Act, Uganda, 1997.

when possible. Contact between the child and his family or friends should be stimulated except in situations where this is not in his best interests.⁸²⁵

A child who has been placed in a residential care facility may be placed with a foster parent by the district social welfare officer and the warden of the home. A foster parent in whose care a child has been placed has full parental responsibility for the child's maintenance.⁸²⁶

Additional regulations for foster care placements are attached to the Children Act, in which the procedures of foster care, including monitoring, and the duties of foster parents are elaborated on.⁸²⁷

A child may be adopted by means of an adoption order made by the court. Through this order all parental rights, obligations and responsibilities as well as the custody of a child permanently transfer to the adoptive parents.⁸²⁸

Residential care facilities, both governmental and non-governmental, must be approved by the Minister.⁸²⁹

An approved facility may only admit a child on the basis of a care order or an interim care order. Additionally, a child in an emergency situation may be admitted without such an order for a maximum of 48 hours.⁸³⁰ The warden and staff of an approved home carry parental responsibility for a child placed in their care under the provisions of a care order.⁸³¹

A child in institutional care who is not in a position to return to his parents and who cannot be placed in foster care shall be encouraged to become independent.⁸³²

825 Article 31 Children Act, Uganda, 1997.

826 Article 43 Children Act, Uganda, 1997.

827 Foster Care Placement Rules, Children Act, Uganda, 1997, Second Schedule.

828 Article 51 Children Act, Uganda, 1997.

829 Article 56 Children Act, Uganda, 1997.

830 Article 57 Children Act, Uganda, 1997.

831 Article 59 Children Act, , Uganda 1997.

832 Article 58 Children Act, Uganda, 1997.

The Act contains guiding implementation principles, explicitly stating that children have the right to exercise all the rights set out in the CRC and the ACRWC in addition to the rights stated in the Act.⁸³³

The Children Act 1997 is to be revised by an Amendment Bill, currently in the process of being drawn up. The envisaged legislation proposes that the Family and Children Court may make a supervision order for a child-headed household. Under such an order, one of the children is appointed as the head of the household; a supervising adult may be appointed and his role and responsibilities may be prescribed by the order. Appointment of a supervising adult is not obligatory.⁸³⁴

5.9.2 National Orphans and Other Vulnerable Children Policy (2004)

The 2004 National Orphans and Other Vulnerable Children Policy acknowledges the increasing number of children being orphaned by HIV/AIDS and the emergence of child-headed households.⁸³⁵ The policy recognises family-based care as preferential and regards institutional care as a measure of last resort.⁸³⁶ Both child-headed households (children in need of alternative family care) and children affected by HIV/AIDS are categorised as a so-called target group, requiring measures of support and protection.⁸³⁷

5.9.3 Concluding summation

The Constitution contains a child's right to care by his parents and the obligation for parents to care for their child. Although the State bears the responsibility for special protection for orphaned and vulnerable children, the right to alternative parental care is not laid down in the Constitution.

833 Guiding Principles in the implementation of the Act, Children Act, Uganda, 1997, First Schedule.

834 Article 36, 1st Proposed Draft Amendment Bill for the Children Act, 11th December 2009, Uganda Law Reform Commission.

835 Uganda National Orphans and Other Vulnerable Children Policy 2004, pp. 2, 3.

836 Uganda National Orphans and Other Vulnerable Children Policy 2004, pp. 5, 8.

837 Uganda National Orphans and Other Vulnerable Children Policy 2004, pp. 9 – 11.

The Children Act provides for parental responsibilities for orphaned children to be transferred to a family member, a foster parent or an approved home. However, other children in need of alternative care – such as children with an incapacitated parent – are not included. The Act contains various stipulations on foster care and residential care.

Although the Children Act does not state the right to alternative care, through the explicit recognition of all rights in the CRC and in the ACRWC, the right to alternative care forms an integral part of the Act. Nonetheless, this construction does not give a clear insight into the responsibility of the government and how this right may be exercised. A profound effect is not to be expected from a right that is 'submerged' in an attached schedule in which a reference in broad terms is made to the CRC and the ACRWC, the more so in light of the fact that the ACRWC has been seen to be relatively unknown in Uganda. On this issue, therefore, doubts remain about the compatibility of national legislation with the CRC and the ACRWC. The stipulations on foster and residential care may be seen to be in conformity with the CRC and the ACRWC.

The provisions on alternative care partly conform to the proposed legal framework.

- Recognised forms of alternative care are foster care and institutional care; the transfer of parental responsibility to a family member on the basis of Article 6 Children Act, may be regarded as kinship care. Therefore, 'a variety of care options' may be deemed to be available.
- Residential care is not considered to be a measure of last resort.
- The responsibility for providing a child with an adequate standard of living is laid down in the Children Act as a parental 'duty to maintain a child'; the State's responsibility is not included.
- There are no provisions for monitoring alternative care arrangements; however, care orders should be reviewed annually.
- Part VII of the Children Act contains regulations on both domestic and intercountry adoption.

The National Policy recognises child-headed households and children affected by HIV/AIDS as vulnerable; however, regulations or guidelines are

not provided. The proposed Children Act Amendment Bill is expected to contain provisions on recognising child-headed households as a form of alternative care.

It is noteworthy that in 1997 the government of Uganda had already adopted a Children's Act. The above comparison of the aforementioned Act to the legal framework indicates, however, that it is not in compliance with the CRC and the ACRWC; at this stage it is unclear to what extent the proposed Children Act Amendment Bill will bring about improvement to the shortcomings of this Act.

Conclusions

In this chapter national legislation concerning alternative care and child-headed households from the nine focus countries has been analysed and compatibility with the CRC, the ACRWC and – to some extent – with the UN Guidelines has been discussed; in addition, an analysis on the basis of the author's proposed legal framework for alternative care is included.

Alternative care for children in need of care

In figure 5.4 an overview is provided of the ratification dates of both the CRC and the ACRWC as well as the dates of the foundation of constitutions and national legislation relevant for alternative care in the nine focus countries.

Figure 5.4 Ratification of the CRC and the ACRWC and adoption of national legislation.

	CRC	ACRWC	Constitution	National legislation
Ethiopia	1991	2002	1994	2000
Kenya	1990	2000	2010	2001
Malawi	1991	1999	1994	2010
Namibia	1990	2004	1990	2011
Rwanda	1991	2001	2003	2001
Sierra Leone	1990	2002	1991	2007
South Africa	1995	2000	1996	2005 – 2007
Swaziland	1995	-	2005	-
Uganda	1990	1994	1995	1997

Analysis of the national rules and regulations of the nine countries central to this study reveals that both treaties have influenced national legislation concerning alternative care for children; in a broader perspective, the CRC and the ACRWC are believed to have had a significant impact on the implementation of children's rights at national level.⁸³⁸

In all Constitutions reference to parental care is made; however, the right to alternative care is solely enshrined in the constitutions of Kenya and South Africa. Conversely, all countries – with the exception of Swaziland – have embodied the right to alternative care in national legislation, either explicitly or tacitly. The right to care is explicit when a stipulation states that a child in need of parental care must be provided with alternative care.⁸³⁹

838 Arts 2010, p. 23.

839 A prime example can be found in the Child Act, 2008 of Sudan:

“The Duty of the Government to a Parentless Child (Section 70)

(1) The Government shall ensure that any child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interests cannot be brought up or allowed to remain in that environment, shall be provided with alternative family care in his or her community, including care by relatives, a foster placement or an adoptive family.

(2) Where possible, a child being adopted or placed in foster care shall not be separated from his or her sibling(s).

(3) Where possible a permanent solution shall be found for children who fall under subsection (1), above.”

Where legislation lacks an explicit section, but does contain regulations concerning alternative care provided by the State (for instance, formal foster care and governmental institutional care), it may be inferred that the right to alternative care lies in these provisions. In the majority of countries, these regulations are laid down in a Children's Act or Bill.⁸⁴⁰ It is noteworthy that both countries where the right to alternative care is integrated in the constitution (Kenya and South Africa), have had an extensive Children's Act in place for some time now. In addition, both countries' adherence to the author's legal framework for alternative care is strong (*ut infra*, figure 5.4); this may lead one to the conclusion that embodying the right to alternative care in a constitution is a measure of the importance attached to this right by a State, resulting in sufficient legislation as is the case in both these countries.

The stipulations relating to different forms of alternative care vary considerably, ranging from minimalistic provisions, as can be found in Rwandan legislation, to detailed and extensive regulations, such as the legal systems of Namibia and South Africa. Note that both Namibia and South Africa have issued guidelines, standards and/or notices to complement the Children's Acts and to make national legislation accessible to local governments and to all persons involved in child care. These supplementary standards and regulations are essential for the implementation of national laws.

Namibia's new Child Care and Protection Bill is prominent in that it contains provisions for kinship care, the prevalent form of alternative care in all countries which, nevertheless, usually remains unregulated and informal. In Namibian law, a clear distinction is drawn between kinship care and foster care, the latter being care provided by selected non-family members with sufficient training. It is interesting to note that Namibia's understanding of foster care corresponds with that of the more industrialised nations, an issue raised in paragraph 3.3.2 of this study.

⁸⁴⁰ In the following countries provisions on alternative care are included in a Children's Act or Children's Bill: Kenya, Malawi, Namibia, Sierra Leone, South Africa and Uganda.

Under South African law, foster parentage is not strictly reserved for unrelated caregivers, but also open to (extended) family members, an interpretation of the concept of foster care that is more in line with the practice in sub-Saharan Africa. With financial motivation frequently the catalyst, many kinship carers have successfully applied for fosterage, the Foster Care Grant being almost three times higher than the Child Support Grant, which is available to kinship caregivers. As a consequence, more than 500,000 Foster Care Grants were paid out in 2009, a number that is expected to have risen in the meantime.⁸⁴¹

In addition to the impact on financial resources, foster care weighs heavily on human resources as well, due to the lengthy application procedures and the monitoring processes which are inherent in this type of care. This will undoubtedly in time result in the care system becoming overstretched even further than is the case now, potentially depriving the most vulnerable children of their rights.

Money as an incentive to act as a foster parent has both positive and negative aspects. On the one hand, people might be encouraged to come forward as prospective foster parents when they know the State will provide them with sufficient financial means to adequately care for a child. Without financial support, many people simply cannot afford to care for an extra child. On the other hand, people might be attracted to foster parentage for financial gain rather than by the willingness to provide foster care to a child. At the same time, drawing a distinction between foster caregivers and kinship caregivers in that the former category receives support whereas the latter is not eligible for such support, appears unjust, since – in practice – both foster and kinship caregivers essentially provide the same kind of care. It is the author's opinion that equalising the (financial) assistance for foster and kinship care is advisable as it will contribute to the choice between these forms of alternative care being based on the best interests of the child rather than on financial reward. The new Child Care and Protection Bill of Namibia – stipulating the eligibility of kinship caregivers for a maintenance grant when the kinship care arrangement is registered by the Children's Court – illustrates the feasibility of this issue.

⁸⁴¹ Hall 2010, pp. 107, 108.

This chapter provides an insight into the adherence to the legal framework for alternative care as proposed in paragraph 2.9 of this study. Adherence to this framework is illustrated in figure 5.5, in which a “–” denotes non-compliance and a “+” represents conformity with the relevant key element.

Figure 5.5 Framework for alternative care

	Variety of care	Family-based care	Standard of living	Monitoring and review	Adoption legislation
Ethiopia	+	–	+	–	+
Kenya	+	–	+	+	+
Malawi	+	–	+	+	+
Namibia	+	+	–/+	+	+
Rwanda	–	–	–	–	–
Sierra Leone	+	+	–/+	+	+
South Africa	+	+	+	+	+
Swaziland	–	–	–	–	–
Uganda	+	–	–	–	+

Having examined the stages of implementation of the CRC and the ACRWC in various countries, the question arises as to whether having national legislation in place which conforms to the aforementioned treaties, guarantees the adherence to these documents. Although the importance of national legislation being in conformity with these international instruments is abundantly clear – it is the first and foremost step to structural improvement⁸⁴² – there appears to be a considerable disparity between legal provisions and day-to-day life.

This issue of implementation of national legislation still proves to be a formidable challenge for (local) governments, requiring translation of laws into workable guidelines, standards and work processes, investment in training personnel and an adequate monitoring system.

⁸⁴² Boerefijn 2009, p. 205.

Kenya is an example of a country where laws may be largely considered to be formally compatible with the CRC and the ACRWC; however, although formal compliance may have been achieved, in the *de facto* situation in local society the violation of children's rights continues to take place.⁸⁴³ The situation in Kenya indicates that, although countries are in the process of developing policies relating to the alternative care of children, or have already done so, this has not brought about a significant improvement in the situation of most children without parental care, often due to the immensity of the problem. The lack of adequate implementation structures, specifically on local governmental level, as well as the need for more resources, prevent the efforts already made from having the desired effect.⁸⁴⁴

In developing countries, the implementation process is undoubtedly influenced by the economic situation and the (im)possibility of making available sufficient resources.⁸⁴⁵ However, this should by no means lead to the de-universalisation of children's rights, effectively making available certain rights only to children in developed countries. With a near-universal ratification rate of the CRC and the ratification of the ACRWC by the majority of African countries, a legal obligation rests on all Member States to ensure children's rights are not being violated.

It has been suggested that the focus should not be the shortfall of financial and human resources; instead, legislative reviews concerning children's rights should also be regarded as a 'planning tool' for the future, to be put to use in the identification of the extent of resources required in order to effectuate the implementation.⁸⁴⁶ Although the CRC and the ACRWC are not intended to be a mere planning tool and the value of these international instruments should not be compromised, this proposal is certainly a valid one, as a more detailed insight into the shortcomings of national legislation and the causes thereof is an essential step towards the actual implementation of both treaties.

843 African Child Policy Forum 2008, p. 5.

844 African Child Policy Forum 2007a, p. 90.

845 Sloth-Nielsen 2008b, p. 5.

846 Sloth-Nielsen 2008b, p. 11.

There remains the issue that the correlation between the State's responsibility and that of parents in relation to children is not clearly defined, nor is it apparent at which stage governmental duties commence or what exactly these duties entail.⁸⁴⁷

According to the CRC and the ACRWC, parents are primarily responsible for – adequately – caring for their children; where children are deprived of parental care, alternative (family) care should be provided. The UN Guidelines define this obligation, prescribing that States are responsible for adequate alternative care and that they ensure a framework of care options. Furthermore, they contain a definition of children without parental care, clarifying when children have the right to alternative care. However, although encouraged by the UN General Assembly to take the UN Guidelines into account, it remains a non-binding document. Moreover, the provisions in the UN Guidelines are not directly applicable and they too require translation into national legislation.

In addition, or as a result, national legislation often contains discretionary obligations, as becomes clear from phrases such as 'may establish' and 'may provide' rather than explicitly imperative commitments.

Taking the above-mentioned observations into consideration, leads the author to conclude that both international and national legislation contain provisions with regard to States' obligations relating to alternative care; however, due to the broad terminology and the discretionary phrasing in the relevant provisions, they remain partly or largely ineffective.

Child-headed households

In its 2009 Alternative Childcare Guidelines, Ethiopia categorises child-headed households as 'vulnerable'. These Guidelines consider the placement of a child with a sibling who is 15 years or older as an alternative care option. The Family Code does not contain stipulations regarding these families; however, the Code expressly does not allow a minor to have guardianship over another child, thus prohibiting the legal recognition of child-headed households.

It should be concluded, therefore, that Ethiopia's Alternative Childcare Guidelines are in conflict with the Family Code and that legal recognition

⁸⁴⁷ African Child Policy Forum 2008, p. 12.

of child-headed households is not feasible under Ethiopia's current Family Code.

On the basis of Namibia's Child Care and Protection Bill, child-headed households may be legally recognised and placed under supervision of an adult when a number of conditions have been met. There is no minimum age for a child to be designated head of the household; his capability is judged on the basis of the child's projected ability to fulfil his duties as head. Child-headed households explicitly have access to grants and other services.

The lack in the Bill of a minimum age for the child head is remarkable, allowing – in theory – a child of any age to be designated as head of a household. It is evident that very young children cannot be deemed capable of running a household, however, where should the line be drawn according to the government? Another issue which requires attention is the nebulous method of determining a child's ability to act as head of a household; there are no criteria provided as to how a child's capability should be assessed and measured, potentially leading to unsound decisions. A similar omission in the provisions is a child's right to be heard, whereas the decision on designating a child as head of a household indisputably is a matter that affects the child directly.

Taking the abovementioned factors into consideration, the author concludes that the stipulations concerning child-headed households in Namibia's Child Care and Protection Bill currently provide a mere framework. It is expected, however, that the Bill will be supplemented by additional regulations as in the case of the South African Children's Act on which the Namibian Bill has been modelled.

In the 2003 Rwandan National Policy for Orphans and Vulnerable Children, child-headed households are identified as 'vulnerable'. The Policy suggests a mentor system for these households, but provides neither a description of this type of household, nor does it provide additional rules.

The mere mention of child-headed households and the categorisation of these households as vulnerable in a policy document cannot be expected to have much impact. It is surprising that in a country like Rwanda, with such a large number of child-headed households, no legislative provisions

are in place. In combination with the fact that Rwanda to date has failed to develop an extensive Children's Act as recommended by the CRC Committee, it may be concluded that children's best interests are perhaps regarded as 'a' primary consideration, but certainly not as 'the' primary consideration (cf chapter 2, paragraph 2.5.2).

As indicated previously, South Africa is the first country to have regulated the subject of child-headed households in national legislation and to make provisions for legal recognition of these households. A number of other countries have followed South Africa's example in the meantime or are in the process of doing so.

The South African 2005 Children's Act and the 2007 Children's Amendment Act allow for the legal recognition of child-headed households as a form of alternative care when certain conditions are met. The decision on the competence of the child head is bound by a minimum age of 16 and a supervising adult is to be designated. Child-headed households are given explicit access to grants and services available to other families.

It is noteworthy that the stipulations laid down in the Children's Act and the Children's Amendment Act are worked through in additional regulations. These regulations are much more detailed than the legal provisions they have been derived from and they provide practicable directions for the application of said provisions. These regulations *inter alia* prescribe that assessment of a child's capability to head a household be carried out by a designated social worker on the basis of which recommendations are made to the court. The opinion of the head-to-be is taken into consideration by the court. Due to the fact that the regulations are relatively new, assessment of their effect is premature at this stage. However, it has become apparent that with the application for grants a problem may arise; at present the computer systems of the National Social Security Agency do not entirely correspond with the current legislation and regulations, which may lead to the refusal of grants.⁸⁴⁸

848 Personal communication, children's rights specialist, South Africa, 21/03/2011.

The Swaziland 2005 National Plan of Action for Orphaned and Vulnerable Children acknowledges child-headed households to be 'vulnerable', without providing a definition or any regulations.

Although the situation in Swaziland appears to be similar to the one in Rwanda in that a Children's Act is not in place and the estimated number of child-headed households is high, the government of Swaziland is currently in the process of developing a Children's Act. Although at this stage nothing is known about the content thereof, the mere fact that a Children's Act will be adopted in the course of time, should be regarded as a positive development, in line with recommendations by the CRC Committee.

The 2004 National Orphans and other vulnerable Children Policy of Uganda recognises child-headed households as 'vulnerable'. The Ugandan 2009 draft Children Act Amendment Bill contains references to child-headed households.

Although there is as yet no clarity regarding the content of the final text of the Amendment Bill, provisions on child-headed households will be included as well as – following South African and Namibian laws – legal recognition of these households as a form of alternative care.

The only two countries where child-headed households currently enjoy legal recognition are Namibia and South Africa. The additional South African regulations are progressive, covering a wide range of topics relevant to these households. Due to the fact that the regulations are relatively new, the effects on society and on the lives of children belonging to child-headed households cannot as yet be assessed.

Uganda is currently in the process of legal recognition of child-headed households, while Ethiopia, Rwanda and Swaziland consider these households to be vulnerable, qualifying for specific care and protection measures. The laws and regulations of Kenya, Malawi and Sierra Leone contain no specific references to child-headed households.

It is argued that legislation specifically aimed at child-headed households is not a necessity as these households automatically fall into the category of vulnerable children. However, child-headed households encounters situations

and problems which are unfamiliar to regular households (*cf* chapter 4). It is therefore the author's opinion that in most sub-Saharan countries there is a need for specific legal provisions on child-headed households. However, this should not lead to the recognition of child-headed households as a form of alternative care, as propounded in chapter 4.

Children affected by HIV/AIDS

Specific provisions for children affected by HIV/AIDS are scarce in the documents assessed in this study. Malawi is the only country in which national legislation contains stipulations aimed at this particular group of children.

Ethiopia, Rwanda, South Africa, Swaziland and Uganda recognise children affected by HIV/AIDS as vulnerable in national plans of action, policies, guidelines or notices.

Although the consulted documents on Kenya, Namibia and Sierra Leone do not explicitly address children affected by HIV/AIDS, in these countries various National Policies relating to this topic have been issued by the government.

Due to the fact that children who are affected by HIV/AIDS in sub-Saharan Africa are at an increased risk that their family transforms from a regular household into a child-headed household, the topics HIV/AIDS and child-headed households should be considered to be inextricably intertwined. In order to provide adequate protection to children who find themselves in the vulnerable position whereby one or both parents or caregivers are infected by HIV/AIDS, development and embracement of regulations and policies specifically aimed at this particular group of children is vital. These regulations and policies should provide for care and protection for children and parents from the onset of the illness, primarily aimed at keeping parents alive and ensuring their capability to care for their children. In addition, these regulations and policies should contain specific measures on future planning for the household, including the care of all children belonging to the household in anticipation of the situation where parents are no longer able to provide adequate care.

In chapter 6, recommendations relating to the above-mentioned issues will be presented.

Conclusions and recommendations

Introduction

This research provides an insight into a child's right to alternative care on the basis of treaties, declarations, universal guidelines and other international instruments. National legislation relating to alternative care in nine countries in sub-Saharan Africa is analysed and conformity thereof with universal requirements is considered. In addition, the *de facto* provision of alternative care, as well as the situation of children in need of care in the focus countries is outlined; special attention is given to child-headed households and a universal definition of this type of household is proposed.

The author recommends a global legal framework for alternative care derived from the aforementioned international rules and regulations, which should be the foundation of national legislation, guidelines and standards on alternative parental care for children.

In this final chapter, both the feasibility of the legal recognition of child-headed households as a form of alternative care and the question of whether growing up in such a household is in conformity with the right to alternative care as well as with other children's rights will be discussed. Conclusions will be drawn and recommendations aimed at the improvement of both legal and policymaking issues will be made.

6.1 International rules and regulations on alternative care for children

Both the CRC and the ACRWC contain the obligation for States Parties to ensure the provision of alternative care, but these documents do not provide for enforcement at international level. It does not fall within the scope of this research to provide a detailed analysis of the hiatuses in international legislation; this is a topic of research in its own right. It should be noted, however, that the adoption of the new Optional Protocol for Complaints Procedure has the potential of providing the CRC Committee with a more effective tool than the Concluding Observations, currently the only means by which the Committee can address States Parties who violate the rights enshrined in the CRC.⁸⁴⁹ Furthermore – but this requires a whole new approach – it would be a decided advancement if the CRC Committee and the ACERWC were to be complemented by an International Children’s Court where violations of children’s rights can be reported and dealt with effectively.

The UN Guidelines deal solely with alternative care; they do not only reflect an elevated level of concern about the situation of children without parental care, but also elaborate on the topic of alternative care as outlined in the CRC and the ACRWC and serve to provide insight into the tenets of these treaties. The Guidelines are the first international instrument to address the phenomenon of child-headed households. The wide variety of regulations contained in the UN Guidelines – some more detailed than others – require integration in national policies, rules and standards. However, a Commentary – with concrete suggestions as to how to achieve this integration – has not been provided; this potentially leaves a number of questions unanswered and may hamper the process of harmonisation of national rules and regulations with the UN Guidelines. The author is therefore of the opinion that a Commentary on the UN Guidelines should be made available as soon as possible.

⁸⁴⁹ Cf paragraph 2.5.1.

The UN Guidelines are recommendatory and as such not legally enforceable; however, the strength of the Guidelines is the universal acknowledgement they have generated for the need to address children's right to alternative care. In contrast, their fundamental weaknesses lie in their non-binding character as well as in the inaccessibility of some of the Guidelines' phraseology, compounded by the lack of a Commentary. The latter may lead to wrongful implementation of the UN Guidelines in that discrepancies could arise between the intended regulations on alternative care and what States interpret them to entail. Another undesirable consequence may be that governments refrain from implementing the Guidelines altogether on the basis of incompatibility with the situation on the ground.⁸⁵⁰ The aforementioned proposed Commentary has the potential to provide a solution for this issue.

According to the UN Guidelines, adoption is considered to be a permanent care arrangement equal to the situation in which a child is raised by his biological parents; adoption is therefore not regarded as a form of alternative care. This is remarkable given the fact that adoption is explicitly mentioned as a form of alternative care in Article 20 paragraph 2 CRC. Excluding adoption from the UN Guidelines is a serious shortcoming. Adoption does not only form the most permanent type of care for a child, not addressing the issue of adoption in the Guidelines is a missed opportunity to further regulate the subject of intercountry adoption, a politically sensitive issue which does not receive sufficient international attention, leading to situations whereby children are removed from their countries while this is not in their best interests.⁸⁵¹ The 1993 Hague Convention is therefore an instrument to which a high level of significance should be attached within the scope of alternative care. Children without parental care are extremely vulnerable and prone to abuse. When children are deprived of adult protection and care, there is an increased risk of them falling prey to child traffickers and illegitimate adoption practices. The author therefore considers it to be imperative for countries to ratify the 1993 Hague Convention, a stance also

⁸⁵⁰ Cf paragraph 2.7.

⁸⁵¹ Cf chapter 2 and paragraphs 3.3.3 and 5.1.2.

taken by the CRC Committee and frequently propagated in its Concluding Observations.⁸⁵²

In order for countries to establish suitable and sufficient alternative care arrangements, a universal framework for alternative care is proposed by the author; this framework contains 11 key elements of care (*ut infra*, paragraph 6.5: Recommendations).⁸⁵³

6.2 Alternative care for children without parental care in sub-Saharan Africa

Chapters 3 and 5 contain detailed information on alternative care (legislation and practice) in sub-Saharan Africa; the findings of these sections of the study can be summarised as follows:

In sub-Saharan Africa, millions of children live without adequate parental care; these may be children with one or both parents who are not capable of providing them with parental care, children in an alternative care setting where they do not receive suitable alternative care or children without any caregiver present in the household.

HIV/AIDS has had – and still has – a devastating impact on the sub-Saharan region, where the infection rate and AIDS-related deaths are highest in the world. Due to these deaths many children have lost one or both parents, leading to a significantly high need for alternative care; approximately one-third of cases are caused by HIV/AIDS. Other factors causing the loss of parental care are: poverty, armed conflict and natural disasters. In every situation, children have the right to suitable alternative care and it is incumbent upon States to provide these children with such care.⁸⁵⁴

The CRC and the ACRWC identify foster care, *kafalah*, adoption and institutional care as forms of alternative care; in practice, many other

852 Cf paragraph 2.8.

853 Cf paragraph 2.9.

854 Cf paragraph 3.1.

models of alternative care exist. The UN Guidelines define and categorise the most prevalent forms of care. A distinction is made between formal care (care provided in an institution or family-based care ordered by a court or a competent administrative body) and informal care (privately arranged care provided by extended family members or others). Within these two categories, various concepts of care are provided for in the UN Guidelines, viz residential care, foster care, kinship care, other family-based or family-like placements and independent living arrangements.⁸⁵⁵

In Africa, orphaned and vulnerable children are traditionally cared for by the extended family, but the considerable number of children in need of care has given rise to the situation that the kinship care system has become chronically overburdened. Traditionally, States relied on families to fulfil a role which is essentially the responsibility of governments; however, HIV/AIDS has eroded the very fabric of the traditional African family, whereby kinship care no longer automatically falls within the range of every family.

Despite this process of erosion, the majority of children in need of parental care are still cared for – informally – by extended family members. The financial resources for this form of alternative care are generally provided by these caregivers. Most kinship caregivers perform their tasks unaided, both materially and emotionally; in some instances financial assistance by means of a grant is provided by the State. Although for the majority of children kinship care – when carried out well – is a suitable solution, provision of alternative care cannot and should not be deemed to be solely the responsibility of the extended family. The obligation of national and local governments to provide children with alternative care includes the duty to provide caregivers – both formal and informal – with adequate financial and other support.⁸⁵⁶

It is universally accepted that it is in a child's best interests to grow up in a family environment and family-based care is acknowledged and recognised as the most suitable form of alternative care for children. Both kinship and foster care are arrangements in a family setting, the main advantage of

⁸⁵⁵ Cf paragraph 3.2.

⁸⁵⁶ Cf paragraph 3.3.

kinship care being the continuity of a child's upbringing by people known to him; the merit of foster care lies in the fact that foster parents make a conscious decision to care for another person's child (the child is 'wanted') and that these arrangements are formal and therefore more likely to be monitored and reviewed.

In most African countries, a significant number of children – irrespective of whether or not having lost one or both parents – reside temporarily or for longer periods of time with a family member. Ergo, kinship care is considered to be 'normal' in many societies and (partly) being raised by an extended family member is a perfectly acceptable and natural state of affairs. Due to the fact that kinship care in the sub-Saharan enjoys this status, this form of alternative care is the most natural and least intrusive for a child in terms of lifestyle, family relations and upbringing.⁸⁵⁷

Despite the positive aspects of kinship care, the disadvantages thereof, as outlined in chapter 3, paragraph 3.3.1 should not be underestimated.

The fact that impoverished families are stretched beyond their ability to care for more children, leads to situations in which an adequate standard of living is no longer attainable and infringement of children's rights is practically a given. However, with a minimum of financial or material support by the government, extended family members may well be able to cope with the additional care for related children. Research indicates that social cash transfers, payable by the government – rather than by civil society organisations as funding from the latter is not guaranteed – to the poorest households with children result in sustainable and long-term improvements for children, in most cases instantly and effectively achieving a rise in children's standards of living.⁸⁵⁸ Civil society could nonetheless play an important role at grassroots level in the distribution of cash transfers.

The informality of kinship care and the concomitant lack of a monitoring mechanism for these care arrangements may add to the vulnerability of a child and the risk of his rights being violated. In this regard a kinship caregiver's potential lack of suitability as a carer should also be taken into account. In the author's view, the formalisation of kinship care or, alternatively, registration of informal kinship care arrangements in

⁸⁵⁷ Cf paragraph 3.3.1.

⁸⁵⁸ Richter 2010, pp. 86 – 88.

conjunction with an assessment and monitoring system and training of caregivers – as prescribed by the UN Guidelines – will obviate these potential risks.

The provision of social cash transfers inevitably requires registration of details on living arrangements, details which could additionally be utilised to record children's care situations and for the purpose of monitoring.

Foster care provided by non-family members is still relatively unknown in sub-Saharan Africa. This form of alternative care, however, has successfully been introduced in a number of countries in the region; particularly when families have been decimated or virtually wiped out by HIV/AIDS, genocide or natural disasters – effectively destroying the traditional kinship care system – the availability of foster care is of paramount importance. Also, in situations where kinship care is available, it is not per se in a child's best interests to be raised by a particular family member. It is therefore imperative for a variety of care options, as well as a national monitoring and review system to be in place in order to determine the form of care best suited to a child in a particular situation. It is the author's view that foster care should be one of these care options and that governments should embark on the introduction and promotion of foster care where this is not yet available.

The classification of residential care as a measure of last resort is based on extensive research and is widely acknowledged: the detrimental effects of this form of care on children's lives – especially in the larger, dormitory-style institutions – are well-documented. Also, it is recognised that the majority of placements in residential care facilities are avoidable as in many cases parents give up their children for purely economic reasons. Making available – less costly – support to biological parents or other legal caregivers will contribute to the prevention of the need for institutional care for children who, effectively, have a caregiver.⁸⁵⁹

On the other hand, institutional care may be provided in a family-like setting where care is provided by a full-time housemother, as is the case in so-called children's villages, but also in smaller set-ups. This model of institutional

⁸⁵⁹ Williamson 2004, p. 21.

care is in practice, from a child's point of view, not radically different from (cluster) foster care and should therefore be promoted – within the context of residential care as a last resort – as a preferred option. Given that this type of care is almost always formal, it is therefore more likely to be subject to a monitoring mechanism; in addition, it is probable that caregivers will have been provided with some form of training in child care and that they are supported when dealing with traumatised children.^{86o}

Despite the fact that residential care is classified as a measure of last resort, it is the author's opinion that this form of care should not be ruled out altogether. Residential care may be the only way to protect children from harm and abuse in situations where large numbers of children find themselves – suddenly and unexpectedly – without parental care, as in the case of natural disasters or during conflict. Institutional care in family-like units resembles forms of family-based care; as every child is unique, with different needs and vulnerabilities, this may be the best care option for certain children.

All the aforementioned forms of care have the potential to adequately serve the needs of children without parental care. The recommendations at the end of this chapter may provide for a useful frame of reference.

All countries central to this study are plagued by a lack of adequate resources, either financial, human or both. Calculation of the resources required for suitable and sufficient alternative care is – to a greater or lesser extent – defined by the following elements:

- investigation into the situation of children who are (potentially) in need of alternative care
- assessment of required care
- provision of care
- monitoring and review.

Putting actual figures to these factors is practically impossible, given the range and scope of this issue; however, it is patently obvious that investigation alone of the situation of children potentially deprived

^{86o} Cf paragraph 3.3.3.

of alternative care, requires a high input of both financial and human resources. It is thus of the utmost importance to prevent the need for alternative care wherever possible (*ut infra*).

Based on the findings in chapter 3, it may be concluded that a State's failure to provide a child without adequate parental care with a suitable alternative is an infringement of the rights of that child; not only is it a violation of the right to alternative care, it also functions as a catalyst for any number of rights abuses, leading to failure to fulfil a child's right to survival, development, protection and participation.

6.3 Child-headed households

One of the consequences of the failing system of alternative care in sub-Saharan Africa is the emergence of households in which a child has taken over the majority of parental responsibilities. Although accurate data on these households is not available, their increase in number is acknowledged by UN bodies, governments and civil society.⁸⁶¹

6.3.1 Definition of child-headed households

The phenomenon of children running a household is known under the generic term of child-headed households. Definition of such households varies considerably: whereas some countries or researchers employ the term strictly in respect of families consisting entirely of members younger than 18 without an adult present, others use a broader definition and consider families where a child performs the main household duties – irrespective of the presence of adults – as child-headed households. This terminological ambiguity only serves to impede the process of providing solutions to the problems encountered by child-headed households.

Where a study is based on child-only households (in which no adults are present), data is relevant for that particular situation, providing an obstacle to comparison with more broadly-based research, which has

⁸⁶¹ Cf paragraph 4.1.2.

a wider field of reference. By solely recognising child-only households as child-headed households, the estimated numbers of these families remain low, concealing the true magnitude of the problem. The author therefore proposes that a universal definition – based on the factual situation children find themselves in – shall be applied; when the proposed definition is employed, the estimated number of child-headed households is expected to be significantly higher than the current estimate of 0.5% in sub-Saharan Africa. This is confirmed by signals at grass roots level, from those with first-hand knowledge of the issue, who have witnessed a considerable increase in the number of children growing up without any adult care.

In order to judge the situation more accurately and to work towards a solution for the plight of children in child-headed households, it is, in the author's opinion, essential to identify these households on the basis of the proposed definition (*ut infra*, paragraph 6.5: Recommendations).⁸⁶²

6.3.2 Identification of child-headed households

In addition to the definition issue, there are complications in identifying child-headed families: where the illness of the main caregiver becomes an increasingly serious problem, the process of a household changing from being run by an adult to one that is headed by a child, is complex in that the actual turning point is not immediately perceptible. The presence of an adult means that these families are more often than not considered to be ordinary households, despite the fact that a child has become the main caregiver. The same applies to cases where – after the demise of the parents – a grandparent has taken over parental responsibility and over time becomes too old or too weak to act as a caregiver, needing care himself instead.

Circumstances under which vulnerable children live often remain concealed; in some instances unwillingly, while in others out of shame or for fear of stigmatisation or discrimination. Consequently, the status of these children is formally not that of a child-headed household.⁸⁶³

⁸⁶² Cf paragraph 4.2.

⁸⁶³ Cf paragraphs 4.1.2 and 4.1.3.

Another factor of significance – the extent of which is difficult to determine – is the lack of adequate birth registration systems in a number of countries in sub-Saharan Africa; in some countries the registration rate is as low as 20%.⁸⁶⁴ Birth registration is a legal obligation of States Parties to the CRC (Article 7); the lack of such registration not only hampers identification of households headed by children, but also makes adequate data collection and research very difficult.⁸⁶⁵ The author is therefore of the opinion that the issue of birth registration is vital to the discussion on child-headed households.

6.3.3 Child-headed households as a form of alternative care

The UN Guidelines may be understood to categorise child-headed households as a form of alternative care for children without parental care. The same applies in some countries and studies, whereby these households are promoted as family-based care, even ranked third in line of preferred forms of alternative care.

Whether child-headed households should be considered a legitimate form of alternative care is highly debatable.

Taking into consideration the definition of alternative care used in this study (love and physical, material, emotional, social, educational and spiritual care for a child without parental care)⁸⁶⁶, as well as other generally accepted definitions, there is no minimum or maximum age indicated. However, the care for a child is considered to be a responsibility of (adult) parents or other legal guardians. This may *inter alia* be derived from the fact that teenage parenthood is discouraged worldwide.⁸⁶⁷ Also, in most countries the minimum age for fostering or adoption of a child is 25 or 30 years, presupposing a certain level of maturity as one of the requisite criteria. For inexplicable reasons, in the situation of child-headed households, placing the role of main caregiver on a child – a young person, by any standards lacking the aforementioned level of maturity – is supposedly acceptable.

⁸⁶⁴ Cf paragraphs 1.4 and 2.6.1.

⁸⁶⁵ Arts 2010, p. 7.

⁸⁶⁶ Cf paragraph 3.2.

⁸⁶⁷ Eide 2006, pp. 24, 35.

Although children play an important role in the upbringing of younger siblings in many African countries,⁸⁶⁸ a child as head of a family has to be considered as a deviation from the norm. Care provided by child heads is mostly multi-dimensional as it encompasses care for self, for siblings and – in some instances – for one or more incapacitated adults. Children should not be compelled or manipulated into assuming an adult role, for which they – as children – simply are unprepared, as this constitutes a clear violation of their rights. In this regard, the following statement from a child in a child-headed household in Rwanda is pertinent:

“When you have someone you can depend on, every problem you have is addressed to them. But when you don’t have parents, you must face each problem as it comes and you mature. Through this suffering, I became an adult.”⁸⁶⁹

All children need time to be children; however, children living in child-headed households – in particular the heads of the family – are expected to carry adult roles and responsibilities, at the cost of their childhood, forced as it were into premature adulthood. In addition, children who are looked after by another child – rather than by an adult – do not receive the kind of alternative care they are entitled to. Children in child-headed households are generally traumatised by the loss or serious illness of their parents.

It is the author’s opinion that it cannot and should not be considered to be in children’s best interests to remain without an adult caregiver. Adults, providing day-to-day protection and care, are of paramount importance to all children⁸⁷⁰ and depriving children of adult parental care should therefore be regarded as a violation of Article 3 CRC and Article 4 ACRWC.

In the author’s view, the oft-cited argument that children are resilient and seemingly able to cope with the burden of caring for siblings – in some instances for unrelated children or sick adults – should not be a primary factor in the discussion on alternative care. The resilience frequently

868 Germann 2005, p. 90.

869 Cohen & Hendler 1997, p. 15.

870 UN High Commissioner for Refugees 1994, p. 44.

displayed by children in extremely difficult situations is a quality prone to misinterpretation or abuse.

Comparatively, in the issue of child labour – children under the age of 15 who are engaged in labour full-time – somehow appear to find a way of ‘dealing’ with their situation; this, however, should not open the door to the acceptance of child labour. Improving the circumstances in which children perform their labour does not represent a solution; the fact remains that children are involved in labour at far too young an age, that they are being exploited and that their rights as a child are systematically violated.

The author proposes that the same argument be applied to child-headed households: children in a child-headed household equally appear to cope with their situation; nevertheless, in practice children’s rights are infringed and they endure considerable hardship.⁸⁷¹ The ‘improvement’ of their situation by means of legal recognition of the household and allocation of a supervising adult cannot and will not correct this – in my view – blatant violation of their rights as a child.

Another argument posed is that formation of a child-headed household is an option and that children themselves choose for this option out of their own ‘free will’. When considering this justification, it is essential not to lose sight of the fact that – despite States being legally bound to provide children with alternative care – suitable forms of care are frequently not available and that children are left with no choice whatsoever. It is the author’s understanding that in these situations, the motivation for staying together or alone – as the case may be – is that other options are quite simply nonexistent or not suitable. When, for instance, the only form of alternative care available is residential care in a dormitory-style institution far away from children’s own habitual place of residence, the prospect for children to remain in the parental home, in their own community in a child-headed household may seem more attractive. In such a situation, however, children are faced with little more than Hobson’s choice.

Another incentive for the establishment of a child-headed household is the fulfilment of a child’s promise to a (dying) parent to look after the family

⁸⁷¹ Cf chapter 4.

and its assets. The unswerving loyalty of a child to a parent may result in children remaining in a situation without an adult caregiver present because they feel bound by their pledge; in these children's understanding, there is no other avenue open to them. Instead, children and parents should already be receiving support during parents' earlier stages of sickness and be guided into future planning, including provisions for alternative care.⁸⁷²

In conclusion, it is the author's opinion that child-headed households should not be regarded as a form of alternative care as children should not be burdened with the role of caregiver, nor should they remain without adult care. Children's resilience to cope with hardship and harmful situations should not be employed to support arguments in favour of the violation of children's rights, in casu the right to alternative care. While acknowledging Article 12 CRC (the right to participation) – that children should be involved in decisions concerning them and have a say in these matters – presenting children with an unjust choice whereby in reality they only have one option, viz a life in a child-headed household, is a matter entirely beyond the scope of Article 12 CRC.

Research has shown that children living in child-headed households frequently have insufficient resources to provide for their daily needs in terms of food, clothing, housing, healthcare and education; for these children an adequate standard of living is far beyond their reach, which represents an infringement of Article 27 CRC.⁸⁷³ Families often become impoverished during the period of illness of the main caregiver, followed by subsequent funeral costs. Consequently, children end up in a cycle of poverty as portrayed in figure 6.1, thus severely incapacitating future generations.

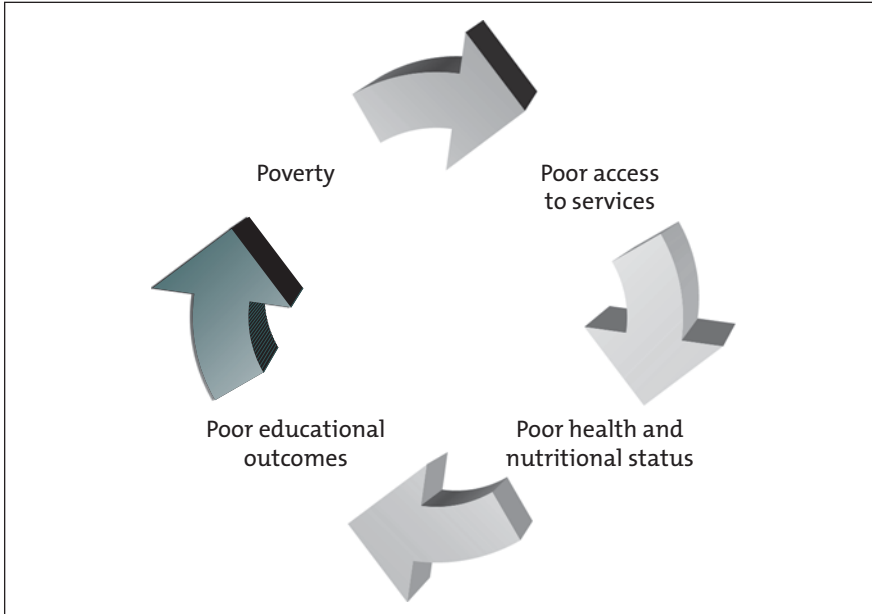
Legal measures of social support such as grants, guardianship and mentoring are no guarantee that children have access to such measures in practice. Although children may be eligible for support, they do not in fact receive it. Furthermore, the narrow definition of a child-headed household may exclude children from assistance. For example, in South Africa, children aged 16 years and older are entitled to apply for a Child Support Grant when

⁸⁷² Sloth-Nielsen 2004, p. 26.

⁸⁷³ Cf paragraphs 4.1.4 and 4.1.7.

caring for a child. However, a child remaining alone, heading a single-person household, does not qualify for such a grant as there is no recognition of a child being his own caregiver.⁸⁷⁴

Figure 6.1 Cycle of poverty⁸⁷⁵



These situations are avoidable when suitable and sufficient alternative care provisions are ensured by States. The responsibility for the provision of alternative care lies with the State where it should remain firmly. The implication of the categorisation of child-headed households as a form of alternative care is considerable in that it places the onus to provide alternative care for children on children, which is an abject abdication of responsibility by the State.

Considering the aforementioned, it is the author's opinion that child-headed households should not be employed as a form of alternative care as these households do not fit the legal and moral boundaries of alternative care. Provision of some material resources in combination with a supervising

⁸⁷⁴ Personal communication, children's rights specialist, South Africa, 14/03/2011.

⁸⁷⁵ SA Child Gauge 2009 – 2010, p. 83.

adult, who may merely offer an occasional word of advice, is in no way in line with the definition of alternative care.

6.3.4 Child-headed households – legal recognition

A number of the countries central to this study have provided for the legal recognition of child-headed households in national legislation (South Africa and Namibia) or are in the process of doing so (Uganda). Other countries do not provide for legal recognition but consider child-headed households to be vulnerable and in need of care and protection. A number of advantages to legally recognising child-headed households are posed; however, legal recognition also entails countervailing effects. Prior to outlining these, a brief analysis of the legal requirements is essential.

According to the UN Guidelines, siblings may remain together in a household without adult care when the eldest child is “both willing and deemed capable” of heading the household. The use of the term ‘willing’ presupposes that there is a choice. However, what determinant could possibly be used to establish whether a child is truly willing when the only other alternative on offer means, for instance, the separation of siblings? When should a child be ‘deemed capable’ of fulfilling the role of an adult caregiver? Who decides upon this issue and on the basis of which criteria? These are amongst the questions which remain unanswered as the UN Guidelines do not contain any other provisions relating to child-headed households.

For recognition as a child-headed household, South African legislation requires that a child of 16 or older take on the role of caregiver for the children in the household and that this should be in the best interests of all children belonging to that household. Apart from a very clear minimum age, the ‘best interests’ condition is an imperative stipulation which applies to all children, including the child heading the family.⁸⁷⁶ As there is still much debate on the actual meaning of the best interests principle,⁸⁷⁷ the

⁸⁷⁶ Cf paragraph 5.7.3.

⁸⁷⁷ Cf paragraph 2.5.2.

author feels that this condition does not provide sufficient safeguards for the children in question.

Namibian legislation is practically identical to the aforementioned South African provision with the exception of the age element: there is no legal minimum age for the child head.⁸⁷⁸ This implies that Namibian law accepts that it may be in the best interests of children younger than 16 to carry the responsibility of an adult caregiver.

Further to the advantages of legal recognition: it is considered to be a major advantage that siblings are enabled to remain together while living in a child-headed household. Legal recognition will also enable children to access grants and other social assistance. In addition, family assets remain in the possession of the children.

The merit of children growing up together with their siblings is not in dispute here; in general, this is in children's best interests. Nonetheless, the issue of children being raised by one of their siblings is not only an infringement of their right to alternative care, as has been expounded on by the author in the previous paragraph, but also has an overwhelming emotional impact. Firstly, the child head – having to act as the main caregiver – is incapable of providing care, guidance and protection for the other members of the household in the same manner as an adult would, regardless of how 'willing' or 'capable' he might be deemed to be. The awareness that he is inadequately equipped for such a responsibility places the child head under considerable pressure, causing undue stress and feelings of helplessness and hopelessness. The same applies *mutatis mutandis* to the other children, witnessing a brother or sister struggle to provide for them.

The lack of an adult role model's presence in the household, deprives children of the chance to acquire social skills which are essential to their full development and vitally important in preparation for adulthood. Although children are proficient at learning from one another, it is universally acknowledged that children need to learn the basic tenets of life and

⁸⁷⁸ Cf paragraph 5.4.1.

living from an adult. The bond that naturally forms during early childhood between a child and his parents or his main caregivers is generally believed to provide the foundation for relationships in later life. Although the relationship between a child and his parents is variable throughout his childhood, it retains a fair degree of importance: children learn from their parents how to deal with stress and anxiety, as parents represent a secure base or zone in which the child feels protected. Children copy parental behaviour and attitudes and they model themselves on their parents. In addition, adult authority is essential to learning the distinction between right and wrong, good and bad: elements of growing up which are equally seen to be vital to the development of children.⁸⁷⁹

Taking the above into consideration, it may be concluded that the absence of a parent or adult caregiver is likely to lead to children failing to gain much-needed skills for life.

The argument concerning access to grants and other social assistance is undermined by the fact that grants systems are frequently not in place or that the application procedures are slow and complicated, making successful application practically unattainable. For instance, in South Africa the Social Security Act and (the computer systems of) the National Social Security Agency do not tally with the 2005 Children's Act and the 2007 Children's Amendment Act. As a result, children who are legally eligible for a grant may not be able to obtain this support.⁸⁸⁰ The same applies to other forms of social assistance.

It may be argued that failure to acquire grants or other support also occurs when children find themselves in kinship care. In those cases, however, an adult caregiver carries the responsibility for securing social assistance and it is an adult bearing the frustration and concomitant despondency of not managing to obtain a vitally important commodity for the family.

In the author's opinion, it cannot and should not be expected of children to carry this emotional burden: children do not possess the requisite skills and experience and are therefore unable to adequately deal with these situations. Failure to obtain financial or other support may also lead to

⁸⁷⁹ Cf chapter 4, paragraph 4.1.7.

⁸⁸⁰ Personal communication, children's rights specialist, South Africa, 14/03/2011.

children resorting to underage marriage, exploitative labour, prostitution and criminal activities in an effort to secure an income for the family.⁸⁸¹

As to the safeguarding of family assets by means of the legal recognition of child-headed households: in most cases these assets have lost much of their value during the period of illness of the caregiver, due to the costs of medical treatment, to enable purchases for daily life or to cover funeral expenses.⁸⁸² It is the author's view that prevention of property grabbing by relatives or community members is unlikely to be realised by legal recognition of child-headed households; property grabbing frequently occurs following the funeral service or shortly after, by which time the formalities required for the legal status as a child-headed household will not have been completed yet. Furthermore, even if the property is preserved until the household is recognised as a child-headed household, the absence of an adult caregiver means that children (and their property) are not sufficiently protected.

In addition, legal recognition of child-headed households creates obligations for governments; courts must be available and accessible to recognise a household as child-headed, social workers are needed to assess the children's situation, governments should ensure that suitable and sufficient supervising adults are available and that these supervisors are allocated to child-headed households and sufficient financial support should be provided to these households. Taking into consideration that in most countries an adequate and fully functioning alternative care system is not in place, it would be reasonable to question whether States are currently adequately equipped to fulfil these obligations. Should an answer to this question be negative, children will find themselves in an extremely vulnerable position while awaiting recognition and for other measures to be taken, during an inconclusive period of time.

All in all, the author considers the arguments in favour of legal recognition of child-headed households as unsustainable, leading to the inevitable conclusion that growing up in a child-headed household should not be viewed as an option for children in need of alternative care. Even

⁸⁸¹ Cf chapter 4, paragraphs 4.1.4 and 4.1.7.

⁸⁸² Cf chapter 3, paragraph 3.1 and chapter 4, paragraph 4.1.7.

the safeguards embedded in South African legislation on child-headed households – thus far the most extensive of its kind – cannot prevent the erosion of the rights of children living in a child-headed household; the appointment of a supervising adult – an adult who does not reside with the children, who may only visit the children once every two weeks and with whom children are not able to form a child-caregiver relationship – is no more than a theoretical safeguard, which, in reality, does not fill the void left behind by a parent nor does it honour the right to alternative care.

The general consensus that children are regarded as vulnerable does not by that simple fact provide them with the necessary protection. The formation of child-headed households should therefore – at all costs – be prevented. Society should provide against a potential situation in which the harmful effects of the recognition of child-headed households will only be acknowledged after many decades – as witnessed with institutional care – in the interim negatively affecting innumerable children.

The right to alternative care as well as other rights of children living in child-headed households are systematically violated. This should be viewed as a continuation of the structural breaches of socio-economic rights, concerning which the Committee of Economic Social and Cultural Rights had voiced its concern as early as in 1992:⁸⁸³ the Committee stated that due to large-scale poverty, hunger, disease, illiteracy and insecurity billions of people are – under the watchful eye of the international community – deprived of their socio-economic rights; in addition, the Committee considered that denying people these rights is inhumane.⁸⁸⁴ Taking the aforementioned arguments into consideration, it is the author's opinion that promoting the unconditional recognition of child-headed households and actively sustaining these households effectively undermines the rights of children as enshrined in both the CRC and the ACRWC.

However, this should not be taken to mean that existing child-headed households should be ignored and left to fend for themselves: children already living in a child-headed household must be protected in full compliance with the rights enshrined in the CRC and the ACRWC. The

⁸⁸³ Cf chapter 2, paragraph 2.5.1.

⁸⁸⁴ UN Committee on Economic, Social and Cultural Rights, E/1993/22, para 8.

adoption of temporary national legislation may be a necessity; these legal provisions should be limited in time by a cut-off date. During the period of validity of the relevant stipulations, States should ensure the establishment of a suitable alternative care system, based on the proposed framework for alternative care. Formation of new child-headed households should be discouraged forthwith; after the aforementioned cut-off date, establishment of these households should not be permitted and sufficient care options must by then be available. The author's proposal that the UN Guidelines be supplemented by a Commentary aimed at furthering the compliance of national rules and regulations with the UN Guidelines, also applies to the issue of national legislation on child-headed households. As indicated in paragraph 6.1 of this chapter, the lack of a Commentary on the UN Guidelines may hinder implementation as some of its provisions require further explanation. In relation to Paragraph 37 UN Guidelines – concerning the recognition of child-headed households – the proposed Commentary should provide that legal recognition of these households must be limited in time.

6.3.5 Universality

Child-headed households are recognised by the UN Guidelines, a universal document aimed at enhancing the CRC and the ACRWC on the topic of the right to alternative care. In practice though, the provision on child-headed households appears to have bearing only on children in developing countries. In the developed world, it would be unthinkable for children to be placed in a situation without adult care as growing up without an adult caregiver present in the household is never – for children in the West – considered to be in a child's best interests.⁸⁸⁵ Does this imply that children in developed countries are entitled to more protection and that their counterparts elsewhere should be left to 'get by' as best they can, on their own? Is it a case of children in developing countries being considered to be more mature, as is often propounded? Would criticising the legality of the recognition of child-headed households be seen as a case of Western values being imposed on developing countries?

⁸⁸⁵ Apart from the situation of supervised independent living arrangements, *cf* chapter 3, paragraph 3.2.

The universality of human rights has been a subject of debate for many years, with some scholars advocating universal application of these rights and others supporting cultural relativism;⁸⁸⁶ the latter view is based on the perception that the concept of human rights is too Western-dominated.⁸⁸⁷ Cultural relativism permits the ‘interpretation’ of rights – including children’s rights – in any given cultural context, allowing for culturally determined views on a child’s position within society, which may lead to the violation of a child’s rights.⁸⁸⁸

As put forward previously, it is the author’s opinion that child-headed households should not be regarded as a form of alternative care, a stance based on the rights enshrined in the CRC and the ACRWC. Both these treaties contain a child’s right to alternative care when he is deprived of adequate parental care. Given that children’s rights are categorised as human rights, the principle of universality applies to the right to alternative care and in the event of a conflict between cultural tradition and children’s rights, the latter should prevail. Children’s rights – as human rights – should be perceived as rights to which *all* children are entitled, rather than simply privileges.⁸⁸⁹ In addition, the CRC proclaims that all the rights set forth in the treaty apply equally to all children (Article 2 subsection 1 CRC), whereas the ACRWC explicitly states that “any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged” (Article 1 subsection 3 ACRWC). By means of the ratification of both the CRC and the ACRWC, States accept the universality of the rights embodied in these treaties and should act accordingly.⁸⁹⁰

On the basis of the above, the right to alternative care should be regarded as a universal right. Providing children in need with alternative care is one of the obligations a State has a duty to fulfil. Irrespective of whether children grow up in a developing or in a developed country, they have the right to protection and care provided by an adult; any child deprived of

886 Pollis 2000, p. 9.

887 Shivji 1989, p. 10.

888 Cf chapter 2, paragraph 2.5.2.

889 Ayton-Shenker 1995.

890 Santor Pais, p. 130.

the care and protection of his biological parents should not be denied this right. Despite the fact that the realisation of the CRC may be considered to be Western-dominated, the ACRWC was specifically drafted for and by the African continent.⁸⁹¹ Moreover, the ACRWC rules out any conflict between stipulations from the Charter itself and cultural or customary practices, having precedence over such practices. Recognition of the right to alternative care should therefore be regarded as a conscious choice by African governments and not as an obligation imposed by the developed world. Thus, even if the CRC may be considered to be a Western oriented treaty, through the ratification of the ACRWC, African States are bound to honour their obligation towards children without adequate parental care.

The universality of the UN Guidelines is laudable in that they relate to the universal right to alternative care and provide sufficient leeway for global implementation in national rules and regulations. However, it remains questionable whether this extends to child-headed households, an issue that the author hopes may be partly resolved by means of the proposed Commentary on the UN Guidelines.⁸⁹²

6.4 National rules and regulations on alternative care and child-headed households

During the many years of colonial rule throughout the African continent, the development of children's rights suffered enormous damage, leaving nations with unjust legal systems in which children's rights were insufficiently recognised and played an insignificant role.⁸⁹³ With the end of colonialism and with the ratification of the CRC and the ACRWC, the recognition of children's rights – including the right to alternative care – gained momentum. During the past decade, the majority of countries have carried out extensive legislative reviews, implementing provisions from both treaties in a separate Children's Act or into other national legislation.

⁸⁹¹ Cf chapter 2, paragraph 2.6.

⁸⁹² Cf paragraph 6.3.4.

⁸⁹³ Cf chapter 5, introduction and paragraph 5.9.1.

A number of countries have embodied the right to alternative care in their constitutions.⁸⁹⁴

Although the right to alternative care has been underwritten by the overriding majority of States, there is considerable disparity between the legal provisions of the various countries central to this study. With regard to rules and regulations on alternative care, South Africa and Namibia lead the field in that they have introduced detailed provisions on various forms of alternative care and child-headed households.

National legislation frequently contains discretionary responsibilities, as becomes clear from phrases such as ‘may establish’ and ‘may provide’. As a result, these provisions are not legally enforceable and States cannot be held accountable for failure to ‘establish’ or ‘provide’. The author therefore endorses the need for legislation to be formulated in unequivocal terms, using modal verbs such as ‘should’ and ‘must’. Only then can permissive legislation be prevented and only then can States be called to account for non-compliance with the legislation in question.

States should acknowledge the importance of public support for children’s rights and related rules and regulations. In this respect children’s rights should not merely be translated into national legislation – often containing abstract terms – but also in more accessible guidelines, standards and norms, in concrete and familiar expressions. Only when there is public support and understanding for the need for adherence to children’s rights can full implementation be established.⁸⁹⁵

Apart from an adequate legal framework, the implementation of the CRC and the ACRWC requires investment of financial and human resources. Despite the fact that South African legislation is the most advanced and that it is fully in compliance with the CRC and the ACRWC, a chronic shortage of social workers jeopardises effective and adequate implementation. In the year 2009 an estimated 12,500 social workers were employed, whereas some 46,000 were required for the alternative care system to function

894 Cf chapter 5.

895 Kaime 2010, p. 645.

adequately.⁸⁹⁶ It may be derived from chapter 5 that the national legislation of most countries is to some extent in conformity with the CRC and the ACRWC; however, governments have – thus far – failed in their duty to sufficiently integrate this legislation.

Lack of resources is a frequently heard argument for the implementation process failing. The question arises as to whether insufficient resources are the source of the problem or whether it is a matter of political priority. Although children's rights – including the right to alternative care – have enjoyed more attention in recent years, a certain degree of indifference remains. This may, for instance, be inferred from the fact that most countries simply ignore their obligations with regard to the submission of reports to both the CRC Committee and the ACERWC.⁸⁹⁷

The African Report on Child Wellbeing 2011 (Budgeting for Children), issued by the African Child Policy Forum provides an insight into the level of budget allocation to sectors concerning and affecting children. A substantial number of sub-Saharan countries were categorised as allocating “a fair amount of available resources for children”, which categorisation is based on an assessment of expenditure as a percentage of GDP. Data on budget expenditure on social protection – a sector that pre-eminently benefits children – reveals a different picture: budgets for social protection in sub-Saharan countries are lowest worldwide. Only 2.8% of the national GDP is spent on social protection, whereas this percentage is 11.0 % in North Africa and 17.9% in Western Europe.⁸⁹⁸ On the basis of the latter comparison, it may be concluded that the results of the aforementioned categorisation are, comparatively speaking, not as positive as one might expect at first sight and allocation of sufficient resources remains a key issue in need of urgent attention.

Notwithstanding the tragic and – at times – horrific past of Africa, surely the time has come for African governments to shoulder responsibility for and accountability to all, including children, who represent the future. The perception that African nations have for several generations now been

⁸⁹⁶ <<http://www.ewn.co.za/articleprog.aspx?id=14698>>, accessed on 05/09/2009.

⁸⁹⁷ Cf chapter 2, paragraphs 2.5.1 and 2.6.1.

⁸⁹⁸ African Child Policy Forum 2010, pp. 95, 105.

mollycoddled by the West, in particular by the former colonial powers, is undoubtedly a valid one: while acknowledging that a debt of honour towards Africa remains and that to some extent the continent is still paralysed by the *damnosa hereditas* of the colonial past, there is a desperate need for awareness that the widespread problem of children without adequate parental care, as well as related issues, needs sufficient resources in order to put right what – for decades – has gone wrong. Africa needs a promise and a commitment from its leaders and from the international community: to eradicate poverty and hunger, to increase the availability of treatment for HIV/AIDS and to ensure that children are protected and cared for so that they can grow up into balanced and responsible adults.

In this regard, legal recognition of child-headed households should not be employed as a solution: ‘promoting’ children to the role of primary caregiver, thereby burdening them with adult responsibilities for which they are insufficiently equipped, is a clear and manifest infringement of their rights. In a child-headed household, children are expected to act like autonomous mini-adults, a perception which society rightly and successfully steered away from at the beginning of the twentieth century, but which is now apparently deemed acceptable for certain children, i.e. children in developing countries. The erosion of the universality of children’s rights equals the erosion of these rights. Professor M. Freeman, founding editor of the *International Journal of Children’s Rights*, has stated: “To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and on integrity”.⁸⁹⁹ The world must cease treating children as mini humans with mini rights; children are the bearers of absolute rights and it is the duty of governments and the international community to respect and fulfil these rights.

⁸⁹⁹ Freeman 2007b, p. 7.

6.5 Recommendations

The following recommendations for further actions regarding alternative care for children – in particular addressing the issue of child-headed households – are based on the findings presented in the previous chapters of this study. As indicated in the first chapter, the aim of this research is an analysis of the universal right to alternative care in relation to middle- and long-term policy. In this respect the author acknowledges that most countries in the sub-Saharan encounter seemingly insurmountable obstacles due to a lack of sufficient resources. However, the previously cited 2011 African Child Policy Forum report illustrates that even with limited resources significant progress can be and has been made. Furthermore, the author is fully cognisant of the fact that improvement cannot be accomplished overnight and that implementation of some of these recommendations requires a level of social and administrative reform beforehand.

At the risk of being perceived as one of those ‘Westerners about to tell Africa how to go about its business’, it is my personal hope that the governments of countries confronted with children without parental care for whom adequate alternatives are not available (including children belonging to child-headed households), UN organisations and those involved in the provision of alternative care for children familiarise themselves with the contents of these recommendations and take them into consideration.

6.5.1 Keeping parents alive and families together

Before embarking on the subject of alternative care, it should be noted that the first priority of society – in conformity with the CRC, ACRWC and the UN Guidelines – is to keep parents alive and families together. With poverty one of the leading agents for the need for alternative care, governments should allocate a budget for social security measures based on a realistic percentage of the national GDP in order to alleviate the worst cases of poverty; parents resorting to placing their children in alternative care for economic reasons, should at all costs be prevented. Social cash transfers, children’s grants and the implementation of school support programmes – not only consisting of scholastic material, but also through school meals

and psychosocial support – are measures which could meet this aim (*ut infra*).

Providing those suffering from HIV/AIDS and related illnesses with adequate treatment is another measure by means of which parents remain in a position to care for their children. When parents' lives are not cut short unnecessarily and when they are enabled to provide their children with adequate care, the number of children needing alternative care will decrease significantly. The fact that the sub-Saharan region will not meet the MDGs discussed in paragraph 3.1 of this study, should therefore be noted with great concern. As indicated in paragraph 6.2 of this chapter, the assessment alone as to whether a child is in need of alternative care, requires allocation of both financial and human resources; investment in keeping parents alive and families together would in the author's view be a more judicious choice.

When the need for alternative parental care arises, however, suitable and sufficient care options should be available.

6.5.2 Investment of financial and human resources

Meeting their obligations deriving from the CRC and the ACRWC requires that States allocate sufficient budget and resources to sectors concerning and affecting children.⁹⁰⁰ In relation to alternative care, governments have to acknowledge first and foremost that providing adequate care options for children in need of alternative care is of paramount importance to children and to society as a whole and that it is vital to make available sufficient resources. At the *First International Conference in Africa on Family Based Care for Children*, Professor J.E. Doek, keynote speaker, summed up this issue succinctly: "The implementation [of the CRC and the ACRWC] requires – to put it simply – MONEY and human resources".⁹⁰¹ In this respect it should be noted that the combination of political will and resources is a prerequisite for successful implementation.⁹⁰²

900 African Child Policy Forum 2010, p. 21.

901 Doek 2009.

902 Arts 2010, p. 10.

Taking into account the diversity of countries in terms of economics as well as issues such as HIV/AIDS and natural and man-made disasters, the determination of what is sufficient within the context of this study lies beyond the bounds of realism. However, according to the 2011 African Child Policy Forum report, the sub-Saharan region currently ranks bottom in budgeting for children (in percentage of GDP).⁹⁰³ If governments were to allocate an attainable, fixed percentage of the national GDP – irrespective of the state of a country's finances – for a longer period of time, sustainable advancement has a reasonable chance of success. This measure of budget allocation includes the designation of a significant part of the financial assistance received via international development aid to issues relating to children, amongst which the right to alternative care.

A substantial part of these financial resources will have to be allocated to the training of professional and kinship caregivers. The scarcity of adequately trained staff (*cf* the severe shortage of social workers in South Africa, paragraph 3.3.2 of this study) forms an insurmountable obstacle to implementation of the CRC and the ACRWC. A complicating factor in this regard is the brain drain of skilled professionals: recruitment by the developed world of doctors, health care workers and social workers from Africa should not only be actively discouraged, but curbed and reversed as much as possible, with financial incentives made available for skilled professionals to return. Africa has in the past experienced – and continues to experience – a massive drain of wealth from natural resources; the continent should not now be robbed in the same way of skilled and trained workers, so desperately needed in order to improve the socio-economic situation throughout the continent.

In addition to national budgeting, the global village has a responsibility to assist States Parties in realising the implementation of children's rights by means of international cooperation. Although the obligation imposed on States is unequivocal, actual cooperation at international level plays a minor role in issues concerning children's rights and further research into this topic is suggested.⁹⁰⁴

⁹⁰³ *Cf* paragraph 6.4.

⁹⁰⁴ Arts 2010, p. 24.

6.5.3 Universal framework for alternative care

It is of the utmost importance that the need for a universal framework containing 11 key elements of alternative care for children be accepted and recognised.⁹⁰⁵ In this framework the minimum requirements for alternative care are outlined; given that criteria 1–5 are based on both the CRC and the ACRWC, governments are accountable for ensuring compliance with these requirements. The framework should include the following criteria:

- 1 A variety of care options should be available.
- 2 Alternative care should preferably be family-based and institutional care should be considered as a measure of last resort.
- 3 Caregivers should (be enabled to) provide children with an adequate standard of living.
- 4 All care arrangements should be subject to monitoring and review at national level.
- 5 Provisions for national and intercountry adoption should be included in legislation on alternative care.

Additional criteria (based on the UN Guidelines and the CRC General Comments) to be considered are:

- 6 Siblings should be enabled to remain together.
- 7 Care arrangements should be available for emergency care, temporary care and long-term care.
- 8 Available care options should include: kinship care, foster care, institutional care and supervised living arrangements.
- 9 Alternative care should meet the psycho-emotional, social and other needs of children and caregivers should be provided with financial support and supportive social services by the State.
- 10 Informal care arrangements should be formalised where possible or at least be registered and monitored by competent authorities should formalisation not be an option.
- 11 Every child should, at all times, have a legal guardian.

⁹⁰⁵ Cf chapter 2, paragraph 2.9.

6.5.4 Adequate alternative care system

On the basis of the abovementioned framework, an adequate alternative care system should be established. With kinship care being the most practised form of alternative care, the traditional role of the extended family must be honoured; however, it should not be expected of kinship carers to shoulder the (financial) burden alone. This form of care must be formalised whenever possible, with kinship carers receiving remuneration and the provided care monitored by a governmental body, which also offers assistance other than financial support (such as emotional backup) for caregivers. In most countries kinship care is an unpaid responsibility, whereas foster caregivers usually receive a grant from the government. There is no justification for this discrepancy: the costs incurred by the caregiver are the same in all cases and should be compensated on an equal level. South Africa leads the way on this issue: both related carers and unrelated caregivers are potentially eligible for the Foster Care Grant. All forms of alternative care, including kinship care, have to meet set requirements and national standards for alternative care, as prescribed by the UN Guidelines.

To prevent young adults from being ‘forced into’ heavy care duties – in so-called youth-headed households, whereby a young adult takes over the main caregiver responsibility for younger siblings – a minimum age for kinship carers must be determined, as with adoption and foster care. The minimum age for these forms of care is usually 25 years, a threshold that may equally be applied to kinship care, unless a potential caregiver younger than 25 – but who is at least 18 years of age – is able to demonstrate his ability to provide kinship care at an earlier age.

Foster care is relatively unknown in Africa; however, this form of alternative care has been introduced successfully in a number of countries.⁹⁰⁶ The author recommends that governments explicitly acknowledge foster care as a form of alternative care and that awareness of this concept of care is advanced. In addition, existing foster caregivers should be deployed to

⁹⁰⁶ Cf paragraph 3.3.2.

promote this form of alternative care and to assist in finding new foster parents. The option of cluster foster care should also be utilised to its full extent, allowing for groups of children to be cared for by at least one, but never more than two foster caregivers; recruitment of specific foster carers for this purpose has to be prioritised.

Given that both kinship care and foster care are family-based and that these forms of alternative care – when formalised and carried out according to set standards – are in essence very similar in character, the author proposes that kinship care and foster care be integrated under the common denominator ‘family-based alternative care’.

Institutional care should be made available in a family-like setting where care is provided by a full-time housemother or a couple, who receive training and support.

6.5.5 Ratification of the 1993 Hague Convention

Owing to the fact that adoption is excluded as a form of alternative care in the UN Guidelines, it is essential that governments ratify the 1993 Hague Convention and implement the provisions of this convention in an effort to bring illegal intercountry adoption practices to a halt. The adoption of a child to another country should only be considered when this is in a child’s best interests and when no other care options are available for the child in question.

6.5.6 Monitoring and accountability

Although Member States of the CRC and the ACRWC are monitored by the CRC Committee and the ACERWC respectively, these Committees have no effective measures at their disposal to enforce observance of these treaties. Notwithstanding this, governments are under obligation to implement the CRC and the ACRWC, an obligation which involves monitoring both at national and international level.

In the first place, national governments should raise awareness about children's rights among local authorities, as well as in the community. In addition, education in children's rights – both for children and adults – will lead to an increase in awareness of this subject. Sufficient awareness and recognition of the importance of the observance of children's rights are basic requirements for the successful implementation of a monitoring system.

In order to meet the obligations with regard to the provision of alternative care, implementation of the criteria of the proposed legal framework (derived from both the CRC and the ACERWC) is essential. One of the key elements of an adequate alternative care system is a fully functional monitoring and review mechanism at national level; monitoring should be carried out by independent national bodies.

Children – like adults – have “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.⁹⁰⁷ To this end, awareness of and education in children's rights are important, as previously stated. Besides these two aspects, children should be enabled to communicate with a competent body or authority where they can lodge an official complaint concerning infringements of their rights. This should be possible at national level – for instance through the appointment of a national Children's Ombudsman and/or a Children's Rights Commissioner – as well as at international level, with the CRC Committee or the ACERWC. The ACERWC already contains provisions for individual communication with the ACERWC, while the proposed third Optional Protocol to the CRC with regard to a complaints mechanism will grant children access to the CRC Committee.

6.5.7 Universal definition of child-headed households

Recognition of a universal definition of child-headed households is essential so that all children who – by necessity – have taken on the role of primary caregiver, including children living with an incapacitated parent,

⁹⁰⁷ Article 8 Universal Declaration of Human Rights, 1948.

are categorised as this form of household. By the same token, acceptance of a global definition is vital for purposes of research and in order to provide solutions for the deplorable situation of a category of profoundly vulnerable children. This study has shown that acceptance of the following universal definition of child-headed households is advisable:

“A household, consisting of one or more members, in which the role of principal caregiver has by necessity been taken over by a child under the age of 18.”

6.5.8 Prevention of the emergence of child-headed households

Interventions to avoid the emergence of child-headed households should be at the forefront of policies relating to alternative care for children. Rules and regulations aimed at legal recognition of child-headed households in order to provide children access to social security and other necessities may be considered as an interim measure for a maximum period of three to five years, allowing governments to improve their care system in a drive to comply with the proposed framework for alternative care as well as with the UN Guidelines. However, the unconditional legal recognition of child-headed households should be avoided at all times as child-headed households should not form an integral part of countries' alternative care mechanisms.

Home-based care programmes should be available for households in which the parent or primary caregiver is suffering from HIV/AIDS. Bringing these households into a care system at an early stage, allows for the provision of assistance that the family requires at that point in time, as well as for the timely planning of the period to follow. The latter should include clarification of inheritance rights, the appointment of a legal guardian and acquisition of birth certificates and other formal documents. When it becomes clear that parents are terminally ill, drawing up a will is a measure which can prevent a void where the law does not provide (sufficient) safeguards.⁹⁰⁸

⁹⁰⁸ Sloth-Nielsen 2004, p. 26.

In the following States, mothers and other primary caregivers have made arrangements with potential guardians, to take over the care for their children in the event that they become incapable of doing so:⁹⁰⁹

- Ethiopia: 46.2%
- Namibia: 48.9%
- Rwanda: 19.4%
- Swaziland: 27.2%
- Uganda: 28.2%.

When a contingency plan has been drawn up and suitable arrangements have been made while parents are still alive, a – comparatively – smooth transfer of children from parental care into alternative care is likely to take place, contributing to the prevention of the establishment of child-headed households.

6.5.9 Commentary on the UN Guidelines and General Comment on Alternative Care for Children

For the purposes of universal and adequate implementation of the UN Guidelines, it is essential that a Commentary be issued. First and foremost, this document should contain explanatory principles that enable States to harmonise national rules and regulations with the UN Guidelines. Secondly, a Commentary should provide for limitations relating to Paragraph 37 on child-headed households: rules and regulations legally recognising this type of household should be an interim measure and they must be subject to a cut-off date, giving States a set period of time in which a proper alternative care system in line with the UN Guidelines is to be established. Finally, the Commentary should indicate that both kinship care and foster care should allow for siblings to remain together and to be cared for in the same household.

A number of issues concerning alternative care are not covered by the UN Guidelines, for instance, responsibility for the provision of financial and human resources and how to enforce the right to alternative care. The

⁹⁰⁹ UNICEF 2009a, pp. 19, 20.

author therefore suggests that the CRC Committee considers issuing a General Comment on the subjects of alternative care (Article 20 CRC) and adoption (Article 21 CRC). This General Comment should focus on family-based forms of alternative care, both formal and informal, in particular kinship care and foster care. The issue of child-headed households should also be included in this General Comment.

6.5.10 Further research

Carrying out this study has revealed the paucity of data and information on the subjects of alternative care for children in general and child-headed households in particular. In comparison to – for instance – institutional care, reliable and extensive empirical research into the subject of child-headed households has yet to be undertaken, as sufficient and adequate data are urgently required. In this regard, it is essential that children's experiences are given a central role: children should be the primary research goal and they should be actively involved in the setting up and carrying out of this research. Experiences of young people who have acted as heads of households in the past should also be included.

The feasibility of temporary legislation for the protection of existing child-headed households, as proposed in this chapter, is a subject equally worthy of research.

In this study the level of integration of the right to alternative care in national legislation has been analysed. However, this analysis is primarily based on desk research and the practical side of the implementation process (i.e. to what extent are children's living circumstances in compliance with the CRC and the ACRWC?) does not form part of this study. In order to measure the implementation of the right to alternative care, empirical research on this issue is vital.

Last but by no means least: the implications of the obligation of the international community in relation to the realisation of children's rights (international cooperation), derived from Article 4 CRC, is of paramount importance in further research.

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Appendix I

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced 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, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

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,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”,

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present

Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and

to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

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

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

Article 20

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

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable

international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or nongovernmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation,

education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
 - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical

or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational

institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - (a) Provide for a minimum age or minimum ages for admission to employment;
 - (b) Provide for appropriate regulation of the hours and conditions of employment;
 - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international cooperation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in

areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

Appendix II

African Charter on the Rights and Welfare of the Child

OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

PREAMBLE

The African Member States of the Organization of African Unity, Parties to the present Charter entitled 'African Charter on the Rights and Welfare of the Child',

CONSIDERING that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status,

RECALLING the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.I) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child,

NOTING WITH CONCERN that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

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,

RECOGNIZING that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security,

TAKING INTO CONSIDERATION the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child,

CONSIDERING that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

REAFFIRMING ADHERENCE to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child.

HAVE AGREED AS FOLLOWS:

PART I: RIGHTS AND DUTIES

CHAPTER ONE: RIGHTS AND WELFARE OF THE CHILD

Article 1: Obligation of States Parties

1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.
3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 2: Definition of a Child

For the purposes of this Charter, a child means every human being below the age of 18 years.

Article 3: Non-Discrimination

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 4: Best Interests of the Child

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Article 5: Survival and Development

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

Article 6: Name and Nationality

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

Article 7: Freedom of Expression

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

Article 8: Freedom of Association

Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

Article 9: Freedom of Thought, Conscience and Religion

1. Every child shall have the right to freedom of thought conscience and religion.
2. Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.
3. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

Article 10: Protection of Privacy

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

Article 11: Education

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;

(e) the preservation of national independence and territorial integrity;

(f) the promotion and achievements of African Unity and Solidarity;

(g) the development of respect for the environment and natural resources;

(h) the promotion of the child's understanding of primary health care.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

(a) provide free and compulsory basic education;

(b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;

(c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;

(d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.

5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.

7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States.

Article 12: Leisure, Recreation and Cultural Activities

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 13: Handicapped Children

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.
2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.
3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

Article 14: Health and Health Services

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
 - (a) to reduce infant and child mortality rate;
 - (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) to ensure the provision of adequate nutrition and safe drinking water;
 - (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

- (e) to ensure appropriate health care for expectant and nursing mothers;
- (f) to develop preventive health care and family life education and provision of service;
- (g) to integrate basic health service programmes in national development plans;
- (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;
- (i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;
- (j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

Article 15: Child Labour

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.
2. States Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children, States Parties shall in particular:
 - (a) provide through legislation, minimum wages for admission to every employment;
 - (b) provide for appropriate regulation of hours and conditions of employment;
 - (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;
 - (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

Article 16: Protection Against Child Abuse and Torture

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture,

inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

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

Article 17: Administration of Juvenile Justice

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

(b) ensure that children are separated from adults in their place of detention or imprisonment;

(c) ensure that every child accused in infringing the penal law:

(i) shall be presumed innocent until duly recognized guilty;

(ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

(d) prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Article 18: Protection of the Family

1. The family shall be the natural unit and basis of society, it shall enjoy the protection and support of the State for its establishment and development.
2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the even of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.
3. No child shall be deprived of maintenance by reference to the parents' marital status.

Article 19: Parent Care and Protection

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.
2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.
3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.
4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

Article 20: Parental Responsibilities

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:
 - (a) to ensure that the best interests of the child are their basic concern at all times;
 - (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and

(c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures;

(a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;

(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and

(c) to ensure that the children of working parents are provided with care services and facilities.

Article 21: Protection against Harmful Social and Cultural Practices

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Article 22: Armed Conflicts

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.

2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of

children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

Article 23: Refugee Children

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.
4. The provisions of this Article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

Article 24: Adoption

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

- (a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;
- (b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the

child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) establish a machinery to monitor the well-being of the adopted child.

Article 25: Separation from Parents

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;

2. States Parties to the present Charter:

(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;

(b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

Article 26: Protection Against Apartheid and Discrimination

1. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under Apartheid and in States subject to military destabilization by the Apartheid regime.

2. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes

practising racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilization.

3. States Parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.

Article 27: Sexual Exploitation

1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
- (b) the use of children in prostitution or other sexual practices;
- (c) the use of children in pornographic activities, performances and materials.

Article 28: Drug Abuse

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

Article 29: Sale, Trafficking and Abduction

States Parties to the present Charter shall take appropriate measures to prevent:

- (a) the abduction, the sale of, or traffick of children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.

Article 30: Children of Imprisoned Mothers

1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;

- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mothers;
- (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

Article 31: Responsibility of the Child

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty;

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;
- (f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

PART II

CHAPTER TWO: ESTABLISHMENT AND ORGANIZATION OF THE COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD

Article 32: The Committee

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called 'the Committee' shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

Article 33: Composition

1. The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.

2. The members of the Committee shall serve in their personal capacity.
3. The Committee shall not include more than one national of the same State.

Article 34: Election

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

Article 35: Candidates

Each State Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of the States Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

Article 36

1. The Secretary-General of the Organization of African Unity shall invite States Parties to the present Charter to nominate candidates at least six months before the elections.
2. The Secretary-General of the Organization of African Unity shall draw up in alphabetical order, a list of persons nominated and communicate it to the Heads of State and Government at least two months before the elections.

Article 37: Term of Office

1. The members of the Committee shall be elected for a term of five years and may not be re-elected, however. The term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.
2. Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to in sub-paragraph 1 of this Article.
3. The Secretary-General of the Organization of African Unity shall convene the first meeting of Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman whenever necessary, at least once a year.

Article 38: Bureau

1. The Committee shall establish its own Rules of Procedure.
2. The Committee shall elect its officers for a period of two years.
3. Seven Committee members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The working languages of the Committee shall be the official languages of the OAU.

Article 39: Vacancy

If a member of the Committee vacates his office for any reason other than the normal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term – subject to the approval of the Assembly.

Article 40: Secretariat

The Secretary-General of the Organization of African Unity shall appoint a Secretary for the Committee.

Article 41: Privileges and Immunities

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

CHAPTER THREE: MANDATE AND PROCEDURE OF THE COMMITTEE**Article 42: Mandate**

The functions of the Committee shall be:

(a) To promote and protect the rights enshrined in this Charter and in particular to:

(i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;

(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;

(iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.

(d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.

Article 43: Reporting Procedure

1. Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:

(a) within two years of the entry into force of the Charter for the State Party concerned: and

(b) and thereafter, *every three years*.

2. Every report made under this Article shall:

(a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and

(b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.

3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (a) of this Article, repeat the basic information previously provided.

Article 44: Communications

1. The Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity,

by a Member State, or the United Nations relating to any matter covered by this Charter.

2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

Article 45: Investigations by the Committee

1. The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter.

2. The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article 44 of this Charter.

3. The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.

4. States Parties shall make the Committee's reports widely available to the public in their own countries.

CHAPTER FOUR: MISCELLANEOUS PROVISIONS

Article 46: Sources of Inspiration

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

Article 47: Signature, Ratification or Adherence

1. The present Charter shall be open to signature by all the Member States of the Organization of African Unity.

2. The present Charter shall be subject to ratification or adherence by Member States of the Organization of African Unity. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.

3. The present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

Article 48: Amendment and Revision of the Charter

1. The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary-General of the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States Parties have been duly notified of it and the Committee has given its opinion on the amendment.
2. An amendment shall be approved by a simple majority of the States Parties.

Appendix III

UN Guidelines for the Alternative Care of Children

I. Purpose

1. The present Guidelines are intended to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so.

2. Against the background of these international instruments and taking account of the developing body of knowledge and experience in this sphere, the Guidelines set out desirable orientations for policy and practice. They are designed for wide dissemination among all sectors directly or indirectly concerned with issues relating to alternative care, and seek in particular:

(a) To support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and *kafala* of Islamic law;

(b) To ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development;

(c) To assist and encourage Governments to better implement their responsibilities and obligations in these respects, bearing in mind the economic, social and cultural conditions prevailing in each State; and

(d) To guide policies, decisions and activities of all concerned with social protection and child welfare in both the public and the private sectors, including civil society.

II. General principles and perspectives

A. *The child and the family*

3. The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be

directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members. The State should ensure that families have access to forms of support in the caregiving role.

4. Every child and young person should live in a supportive, protective and caring environment that promotes his/her full potential. Children with inadequate or no parental care are at special risk of being denied such a nurturing environment.

5. Where the child's own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care, with or through competent local authorities and duly authorized civil society organizations. It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided.

6. All decisions, initiatives and approaches falling within the scope of the present Guidelines should be made on a case-by-case basis, with a view, notably, to ensuring the child's safety and security, and must be grounded in the best interests and rights of the child concerned, in conformity with the principle of non-discrimination and taking due account of the gender perspective. They should respect fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities, and on the basis of his/her access to all necessary information. Every effort should be made to enable such consultation and information provision to be carried out in the child's preferred language.

7. In applying the present Guidelines, determination of the best interests of the child shall be designed to identify courses of action for children deprived of parental care, or at risk of being so, that are best suited to satisfying their needs and rights, taking into account the full and personal development of their rights in their family, social and cultural environment and their status as subjects of rights, both at the time of the determination and in the longer term. The determination process should take account of, inter alia, the right of the child to be heard and to have his/her views taken into account in accordance with his/her age and maturity.

8. States should develop and implement comprehensive child welfare and protection policies within the framework of their overall social and human development policy, with attention to the improvement of existing alternative care provision, reflecting the principles contained in the present Guidelines.

9. As part of efforts to prevent the separation of children from their parents, States should seek to ensure appropriate and culturally sensitive measures:

(a) To support family caregiving environments whose capacities are limited by factors such as disability, drug and alcohol misuse, discrimination against families with indigenous or minority backgrounds, and living in armed conflict regions or under foreign occupation;

(b) To provide appropriate care and protection for vulnerable children, such as child victims of abuse and exploitation, abandoned children, children living on the street, children born out of wedlock, unaccompanied and separated children, internally displaced and refugee children, children of migrant workers, children of asylum-seekers, or children living with or affected by HIV/AIDS and other serious illnesses.

10. Special efforts should be made to tackle discrimination on the basis of any status of the child or parents, including poverty, ethnicity, religion, sex, mental and physical disability, HIV/AIDS or other serious illnesses, whether physical or mental, birth out of wedlock, and socio-economic stigma, and all other statuses and circumstances that can give rise to relinquishment, abandonment and/or removal of a child.

B. Alternative care

11. All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.

12. Decisions regarding children in alternative care, including those in informal care, should have due regard for the importance of ensuring children a stable

home and of meeting their basic need for safe and continuous attachment to their caregivers, with permanency generally being a key goal.

13. Children must be treated with dignity and respect at all times and must benefit from effective protection from abuse, neglect and all forms of exploitation, whether on the part of care providers, peers or third parties, in whatever care setting they may find themselves.

14. Removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration. Removal decisions should be regularly reviewed and the child's return to parental care, once the original causes of removal have been resolved or have disappeared, should be in the best interests of the child, in keeping with the assessment foreseen in paragraph 49 below.

15. Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.

16. Attention must be paid to promoting and safeguarding all other rights of special pertinence to the situation of children without parental care, including, but not limited to, access to education, health and other basic services, the right to identity, freedom of religion or belief, language and protection of property and inheritance rights.

17. Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests.

18. Recognizing that, in most countries, the majority of children without parental care are looked after informally by relatives or others, States should seek to devise appropriate means, consistent with the present Guidelines, to ensure their welfare and protection while in such informal care arrangements, with due respect for

cultural, economic, gender and religious differences and practices that do not conflict with the rights and best interests of the child.

19. No child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body at any time.

20. The provision of alternative care should never be undertaken with a prime purpose of furthering the political, religious or economic goals of the providers.

21. The use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests.

22. In accordance with the predominant opinion of experts, alternative care for young children, especially those under the age of 3 years, should be provided in family-based settings. Exceptions to this principle may be warranted in order to prevent the separation of siblings and in cases where the placement is of an emergency nature or is for a predetermined and very limited duration, with planned family reintegration or other appropriate long-term care solution as its outcome.

23. While recognizing that residential care facilities and family-based care complement each other in meeting the needs of children, where large residential care facilities (institutions) remain, alternatives should be developed in the context of an overall deinstitutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination. To this end, States should establish care standards to ensure the quality and conditions that are conducive to the child's development, such as individualized and small-group care, and should evaluate existing facilities against these standards. Decisions regarding the establishment of, or permission to establish, new residential care facilities, whether public or private, should take full account of this deinstitutionalization objective and strategy.

Measures to promote application

24. States should, to the maximum extent of their available resources and, where appropriate, within the framework of development cooperation, allocate human and financial resources to ensure the optimal and progressive implementation of the present Guidelines throughout their respective territories in a timely manner.

States should facilitate active cooperation among all relevant authorities and the mainstreaming of child and family welfare issues within all ministries directly or indirectly concerned.

25. States are responsible for determining any need for, and requesting, international cooperation in implementing the present Guidelines. Such requests should be given due consideration and should receive a favourable response wherever possible and appropriate. The enhanced implementation of the present Guidelines should figure in development cooperation programmes. When providing assistance to a State, foreign entities should abstain from any initiative inconsistent with the Guidelines.

26. Nothing in the present Guidelines should be interpreted as encouraging or condoning lower standards than those that may exist in given States, including in their legislation. Similarly, competent authorities, professional organizations and others are encouraged to develop national or professionally specific guidelines that build upon the letter and spirit of the present Guidelines.

III. Scope of the Guidelines

27. The present Guidelines apply to the appropriate use and conditions of alternative formal care for all persons under the age of 18 years, unless, under the law applicable to the child, majority is attained earlier. Only where indicated do the Guidelines also apply to informal care settings, having due regard for both the important role played by the extended family and the community and the obligations of States for all children not in the care of their parents or legal and customary caregivers, as set out in the Convention on the Rights of the Child.

28. Principles in the present Guidelines are also applicable, as appropriate, to young persons already in alternative care and who need continuing care or support for a transitional period after reaching the age of majority under applicable law.

29. For the purposes of the present Guidelines, and subject, notably, to the exceptions listed in paragraph 30 below, the following definitions shall apply:

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

Children without parental care who are outside their country of habitual residence or victims of emergency situations may be designated as:

- (i) “Unaccompanied” if they are not cared for by another relative or an adult who by law or custom is responsible for doing so; or
 - (ii) “Separated” if they are separated from a previous legal or customary primary caregiver, but who may nevertheless be accompanied by another relative;
- (b) Alternative care may take the form of:
- (i) Informal care: any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body;
 - (ii) Formal care: all care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures;
- (c) With respect to the environment where it is provided, alternative care may be:
- (i) Kinship care: family-based care within the child’s extended family or with close friends of the family known to the child, whether formal or informal in nature;
 - (ii) Foster care: situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care;
 - (iii) Other forms of family-based or family-like care placements;
 - (iv) Residential care: care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes;
 - (v) Supervised independent living arrangements for children;
- (d) With respect to those responsible for alternative care:
- (i) Agencies are the public or private bodies and services that organize alternative care for children;
 - (ii) Facilities are the individual public or private establishments that provide residential care for children.

30. The scope of alternative care as foreseen in the present Guidelines does not extend, however, to:

(a) Persons under the age of 18 years who are deprived of their liberty by decision of a judicial or administrative authority as a result of being alleged as, accused of or recognized as having infringed the law, and whose situation is covered by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty;

(b) Care by adoptive parents from the moment the child concerned is effectively placed in their custody pursuant to a final adoption order, as of which moment, for the purposes of the present Guidelines, the child is considered to be in parental care. The Guidelines are, however, applicable to pre-adoption or probationary placement of a child with the prospective adoptive parents, as far as they are compatible with requirements governing such placements as stipulated in other relevant international instruments;

(c) Informal arrangements whereby a child voluntarily stays with relatives or friends for recreational purposes and reasons not connected with the parents' general inability or unwillingness to provide adequate care.

31. Competent authorities and others concerned are also encouraged to make use of the present Guidelines, as applicable, at boarding schools, hospitals, centres for children with mental and physical disabilities or other special needs, camps, the workplace and other places which may be responsible for the care of children.

IV. Preventing the need for alternative care

A. *Promoting parental care*

32. States should pursue policies that ensure support for families in meeting their responsibilities towards the child and promote the right of the child to have a relationship with both parents. These policies should address the root causes of child abandonment, relinquishment and separation of the child from his/her family by ensuring, inter alia, the right to birth registration, and access to adequate housing and to basic health, education and social welfare services, as well as by promoting measures to combat poverty, discrimination, marginalization, stigmatization, violence, child maltreatment and sexual abuse, and substance abuse.

33. States should develop and implement consistent and mutually reinforcing family-oriented policies designed to promote and strengthen parents' ability to care for their children.

34. States should implement effective measures to prevent child abandonment, relinquishment and separation of the child from his/her family. Social policies and programmes should, *inter alia*, empower families with attitudes, skills, capacities and tools to enable them to provide adequately for the protection, care and development of their children. The complementary capacities of the State and civil society, including non-governmental and community-based organizations, religious leaders and the media should be engaged to this end. These social protection measures should include:

(a) Family strengthening services, such as parenting courses and sessions, the promotion of positive parent-child relationships, conflict resolution skills, opportunities for employment and income generation and, where required, social assistance;

(b) Supportive social services, such as day care, mediation and conciliation services, substance abuse treatment, financial assistance, and services for parents and children with disabilities. Such services, preferably of an integrated and non-intrusive nature, should be directly accessible at the community level and should actively involve the participation of families as partners, combining their resources with those of the community and the carer;

(c) Youth policies aiming at empowering youth to face positively the challenges of everyday life, including when they decide to leave the parental home, and preparing future parents to make informed decisions regarding their sexual and reproductive health and to fulfil their responsibilities in this respect.

35. Various complementary methods and techniques should be used for family support, varying throughout the process of support, such as home visits, group meetings with other families, case conferences and securing commitments by the family concerned. They should be directed towards both facilitating intrafamilial relationships and promoting the family's integration within its community.

36. Special attention should be paid, in accordance with local laws, to the provision and promotion of support and care services for single and adolescent parents and their children, whether or not born out of wedlock. States should ensure that

adolescent parents retain all rights inherent to their status both as parents and as children, including access to all appropriate services for their own development, allowances to which parents are entitled, and their inheritance rights. Measures should be adopted to ensure the protection of pregnant adolescents and to guarantee that they do not interrupt their studies. Efforts should also be made to reduce the stigma attached to single and adolescent parenthood.

37. Support and services should be available to siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable of acting as the household head. States should ensure, including through the appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian, as stipulated in paragraph 19 above, that such households benefit from mandatory protection from all forms of exploitation and abuse, and supervision and support on the part of the local community and its competent services, such as social workers, with particular concern for the children's health, housing, education and inheritance rights. Special attention should be given to ensuring that the head of such a household retains all rights inherent to his/her child status, including access to education and leisure, in addition to his/her rights as a household head.

38. States should ensure opportunities for day care, including all-day schooling, and respite care which would enable parents better to cope with their overall responsibilities towards the family, including additional responsibilities inherent in caring for children with special needs.

Preventing family separation

39. Proper criteria based on sound professional principles should be developed and consistently applied for assessing the child's and the family's situation, including the family's actual and potential capacity to care for the child, in cases where the competent authority or agency has reasonable grounds to believe that the well-being of the child is at risk.

40. Decisions regarding removal or reintegration should be based on this assessment and should be made by suitably qualified and trained professionals,

on behalf of or authorized by a competent authority, in full consultation with all concerned and bearing in mind the need to plan for the child's future.

41. States are encouraged to adopt measures for the integral protection and guarantee of rights during pregnancy, birth and the breastfeeding period, in order to ensure conditions of dignity and equality for the adequate development of the pregnancy and the care of the child. Therefore, support programmes should be provided to future mothers and fathers, particularly adolescent parents, who have difficulty exercising their parental responsibilities. Such programmes should aim at empowering mothers and fathers to exercise their parental responsibilities in conditions of dignity and at avoiding their being induced to surrender their child because of their vulnerability.

42. When a child is relinquished or abandoned, States should ensure that this may take place in conditions of confidentiality and safety for the child, respecting his/her right to access information on his/her origins where appropriate and possible under the law of the State.

43. States should formulate clear policies to address situations where a child has been abandoned anonymously, which indicate whether and how family tracing should be undertaken and reunification or placement within the extended family pursued. Policies should also allow for timely decision-making on the child's eligibility for permanent family placement and for arranging such placements expeditiously.

44. When a public or private agency or facility is approached by a parent or legal guardian wishing to relinquish a child permanently, the State should ensure that the family receives counselling and social support to encourage and enable them to continue to care for the child. If this fails, a social worker or other appropriate professional assessment should be undertaken to determine whether there are other family members who wish to take permanent responsibility for the child, and whether such arrangements would be in the best interests of the child. Where such arrangements are not possible or are not in the best interests of the child, efforts should be made to find a permanent family placement within a reasonable period.

45. When a public or private agency or facility is approached by a parent or caregiver wishing to place a child in care for a short or indefinite period, the State should ensure the availability of counselling and social support to encourage and enable him or her to continue to care for the child. A child should be admitted to alternative care only when such efforts have been exhausted and acceptable and justified reasons for entry into care exist.

46. Specific training should be provided to teachers and others working with children in order to help them to identify situations of abuse, neglect, exploitation or risk of abandonment and to refer such situations to competent bodies.

47. Any decision to remove a child against the will of his/her parents must be made by competent authorities, in accordance with applicable law and procedures and subject to judicial review, the parents being assured the right of appeal and access to appropriate legal representation.

48. When the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration. States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other instances where separation is considered. Best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community.

B. Promoting family reintegration

49. In order to prepare and support the child and the family for his/her possible return to the family, his/her situation should be assessed by a duly designated individual or team with access to multidisciplinary advice, in consultation with the different actors involved (the child, the family, the alternative caregiver), so as to decide whether the reintegration of the child in the family is possible and in the best interests of the child, which steps this would involve and under whose supervision.

50. The aims of the reintegration and the family's and alternative caregiver's principal tasks in this respect should be set out in writing and agreed on by all concerned.

51. Regular and appropriate contact between the child and his/her family specifically for the purpose of reintegration should be developed, supported and monitored by the competent body.

52. Once decided, the reintegration of the child in his/her family should be designed as a gradual and supervised process, accompanied by follow-up and support measures that take account of the child's age, needs and evolving capacities, as well as the cause of the separation.

V. Framework of care provision

53. In order to meet the specific psychoemotional, social and other needs of each child without parental care, States should take all necessary measures to ensure that the legislative, policy and financial conditions exist to provide for adequate alternative care options, with priority to family- and community-based solutions.

54. States should ensure the availability of a range of alternative care options, consistent with the general principles of the present Guidelines, for emergency, short-term and long-term care.

55. States should ensure that all entities and individuals engaged in the provision of alternative care for children receive due authorization to do so from a competent authority and are subject to regular monitoring and review by the latter in keeping with the present Guidelines. To this end, these authorities should develop appropriate criteria for assessing the professional and ethical fitness of care providers and for their accreditation, monitoring and supervision.

56. With regard to informal care arrangements for the child, whether within the extended family, with friends or with other parties, States should, where appropriate, encourage such carers to notify the competent authorities accordingly so that they and the child may receive any necessary financial and other support that would promote the child's welfare and protection. Where possible and appropriate, States

should encourage and enable informal caregivers, with the consent of the child and parents concerned, to formalize the care arrangement after a suitable lapse of time, to the extent that the arrangement has proved to be in the best interests of the child to date and is expected to continue in the foreseeable future.

VI. Determination of the most appropriate form of care

57. Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings. It should be based on rigorous assessment, planning and review, through established structures and mechanisms, and should be carried out on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible. It should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians. To this end, all concerned should be provided with the necessary information on which to base their opinion. States should make every effort to provide adequate resources and channels for the training and recognition of the professionals responsible for determining the best form of care so as to facilitate compliance with these provisions.

58. Assessment should be carried out expeditiously, thoroughly and carefully. It should take into account the child's immediate safety and well-being, as well as his/her longer-term care and development, and should cover the child's personal and developmental characteristics, ethnic, cultural, linguistic and religious background, family and social environment, medical history and any special needs.

59. The resulting initial and review reports should be used as essential tools for planning decisions from the time of their acceptance by the competent authorities onwards, with a view to, inter alia, avoiding undue disruption and contradictory decisions.

60. Frequent changes in care setting are detrimental to the child's development and ability to form attachments, and should be avoided. Short-term placements should aim at enabling an appropriate permanent solution to be arranged. Permanency for the child should be secured without undue delay through reintegration in his/her

nuclear or extended family or, if this is not possible, in an alternative stable family setting or, where paragraph 21 above applies, in stable and appropriate residential care.

61. Planning for care provision and permanency should be carried out from the earliest possible time, ideally before the child enters care, taking into account the immediate and longer-term advantages and disadvantages of each option considered, and should comprise short- and long-term propositions.

62. Planning for care provision and permanency should be based on, notably, the nature and quality of the child's attachment to his/her family, the family's capacity to safeguard the child's well-being and harmonious development, the child's need or desire to feel part of a family, the desirability of the child remaining within his/her community and country, the child's cultural, linguistic and religious background, and the child's relationships with siblings, with a view to avoiding their separation.

63. The plan should clearly state, inter alia, the goals of the placement and the measures to achieve them.

64. The child and his/her parents or legal guardians should be fully informed about the alternative care options available, the implications of each option and their rights and obligations in the matter.

65. The preparation, enforcement and evaluation of a protective measure for a child should be carried out, to the greatest extent possible, with the participation of his/her parents or legal guardians and potential foster carers and caregivers, with respect to his/her particular needs, convictions and special wishes. At the request of the child, parents or legal guardians, other important persons in the child's life may also be consulted in any decision-making process, at the discretion of the competent authority.

66. States should ensure that any child who has been placed in alternative care by a properly constituted court, tribunal or administrative or other competent body, as well as his/her parents or others with parental responsibility, are given the opportunity to make representations on the placement decision before a court, are informed of their rights to make such representations and are assisted in doing so.

67. States should ensure the right of any child who has been placed in temporary care to regular and thorough review – preferably at least every three months – of the appropriateness of his/her care and treatment, taking into account, notably, his/her personal development and any changing needs, developments in his/her family environment, and the adequacy and necessity of the current placement in these circumstances. The review should be carried out by duly qualified and authorized persons, and should fully involve the child and all relevant persons in the child's life.

68. The child should be prepared for all changes of care settings resulting from the planning and review processes.

VII. Provision of alternative care

A. Policies

69. It is a responsibility of the State or appropriate level of government to ensure the development and implementation of coordinated policies regarding formal and informal care for all children who are without parental care. Such policies should be based on sound information and statistical data. They should define a process for determining who has responsibility for a child, taking into account the role of the child's parents or principal caregivers in his/her protection, care and development. Presumptive responsibility, unless shown to be otherwise, is with the child's parents or principal caregivers.

70. All State entities involved in the referral of, and assistance to, children without parental care, in cooperation with civil society, should adopt policies and procedures which favour information-sharing and networking between agencies and individuals in order to ensure effective care, aftercare and protection for these children. The location and/or design of the agency responsible for the oversight of alternative care should be established so as to maximize its accessibility to those who require the services provided.

71. Special attention should be paid to the quality of alternative care provision, both in residential and in family-based care, in particular with regard to the professional skills, selection, training and supervision of carers. Their role and functions should

be clearly defined and clarified with respect to those of the child's parents or legal guardians.

72. In each country, the competent authorities should draw up a document setting out the rights of children in alternative care in keeping with the present Guidelines. Children in alternative care should be enabled to understand fully the rules, regulations and objectives of the care setting and their rights and obligations therein.

73. All alternative care provision should be based on a written statement of the provider's aims and objectives in providing the service and the nature of the provider's responsibilities to the child that reflects the standards set by the Convention on the Rights of the Child, the present Guidelines and applicable law. All providers should be appropriately qualified or approved in accordance with legal requirements to provide alternative care services.

74. A regulatory framework should be established to ensure a standard process for the referral or admission of a child to an alternative care setting.

75. Cultural and religious practices regarding the provision of alternative care, including those related to gender perspectives, should be respected and promoted to the extent that they can be shown to be consistent with the rights and best interests of the children. The process of considering whether such practices should be promoted should be carried out in a broadly participatory way, involving the cultural and religious leaders concerned, professionals and those caring for children without parental care, parents and other relevant stakeholders, as well as the children themselves.

1. *Informal care*

76. With a view to ensuring that appropriate conditions of care are met in informal care provided by individuals or families, States should recognize the role played by this type of care and take adequate measures to support its optimal provision on the basis of an assessment of which particular settings may require special assistance or oversight.

77. Competent authorities should, where appropriate, encourage informal carers to notify the care arrangement and should seek to ensure their access to all available services and benefits likely to assist them in discharging their duty to care for and protect the child.

78. The State should recognize the de facto responsibility of informal carers for the child.

79. States should devise special and appropriate measures designed to protect children in informal care from abuse, neglect, child labour and all other forms of exploitation, with particular attention to informal care provided by non-relatives, or by relatives previously unknown to the children or living far from the children's habitual place of residence.

2. General conditions applying to all forms of formal alternative care arrangements

80. The transfer of a child into alternative care should be carried out with the utmost sensitivity and in a child-friendly manner, in particular involving specially trained and, in principle, non-uniformed personnel.

81. When a child is placed in alternative care, contact with his/her family, as well as with other persons close to him or her, such as friends, neighbours and previous carers, should be encouraged and facilitated, in keeping with the child's protection and best interests. The child should have access to information on the situation of his/her family members in the absence of contact with them.

82. States should pay special attention to ensuring that children in alternative care because of parental imprisonment or prolonged hospitalization have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard.

83. Carers should ensure that children receive adequate amounts of wholesome and nutritious food in accordance with local dietary habits and relevant dietary standards, as well as with the children's religious beliefs. Appropriate nutritional supplementation should also be provided when necessary.

84. Carers should promote the health of the children for whom they are responsible and make arrangements to ensure that medical care, counselling and support are made available as required.

85. Children should have access to formal, non-formal and vocational education in accordance with their rights, to the maximum extent possible in educational facilities in the local community.

86. Carers should ensure that the right of every child, including children with disabilities, living with or affected by HIV/AIDS or having any other special needs, to develop through play and leisure activities is respected and that opportunities for such activities are created within and outside the care setting. Contact with the children and others in the local community should be encouraged and facilitated.

87. The specific safety, health, nutritional, developmental and other needs of babies and young children, including those with special needs, should be catered for in all care settings, including ensuring their ongoing attachment to a specific carer.

88. Children should be allowed to satisfy the needs of their religious and spiritual life, including by receiving visits from a qualified representative of their religion, and to freely decide whether or not to participate in religious services, religious education or counselling. The child's own religious background should be respected, and no child should be encouraged or persuaded to change his/her religion or belief during a care placement.

89. All adults responsible for children should respect and promote the right to privacy, including appropriate facilities for hygiene and sanitary needs, respecting gender differences and interaction, and adequate, secure and accessible storage space for personal possessions.

90. Carers should understand the importance of their role in developing positive, safe and nurturing relationships with children, and should be able to do so.

91. Accommodation in all alternative care settings should meet the requirements of health and safety.

92. States must ensure through their competent authorities that accommodation provided to children in alternative care, and their supervision in such placements, enable them to be effectively protected against abuse. Particular attention needs to be paid to the age, maturity and degree of vulnerability of each child in determining his/her living arrangements. Measures aimed at protecting children in care should be in conformity with the law and should not involve unreasonable constraints on their liberty and conduct in comparison with children of similar age in their community.

93. All alternative care settings should provide adequate protection to children from abduction, trafficking, sale and all other forms of exploitation. Any consequent constraints on their liberty and conduct should be no more than are strictly necessary to ensure their effective protection from such acts.

94. All carers should promote and encourage children and young people to develop and exercise informed choices, taking account of acceptable risks and the child's age, and according to his/her evolving capacities.

95. States, agencies and facilities, schools and other community services should take appropriate measures to ensure that children in alternative care are not stigmatized during or after their placement. This should include efforts to minimize the identification of children as being looked after in an alternative care setting.

96. All disciplinary measures and behaviour management constituting torture, cruel, inhuman or degrading treatment, including closed or solitary confinement or any other forms of physical or psychological violence that are likely to compromise the physical or mental health of the child, must be strictly prohibited in conformity with international human rights law. States must take all necessary measures to prevent such practices and ensure that they are punishable by law. Restriction of contact with members of the child's family and other persons of special importance to the child should never be used as a sanction.

97. Use of force and restraints of whatever nature should not be authorized unless strictly necessary for safeguarding the child's or others' physical or psychological integrity, in conformity with the law and in a reasonable and proportionate manner and with respect for the fundamental rights of the child. Restraint by means of

drugs and medication should be based on therapeutic needs and should never be employed without evaluation and prescription by a specialist.

98. Children in care should be offered access to a person of trust in whom they may confide in total confidentiality. This person should be designated by the competent authority with the agreement of the child concerned. The child should be informed that legal or ethical standards may require breaching confidentiality under certain circumstances.

99. Children in care should have access to a known, effective and impartial mechanism whereby they can notify complaints or concerns regarding their treatment or conditions of placement. Such mechanisms should include initial consultation, feedback, implementation and further consultation. Young people with previous care experience should be involved in this process, due weight being given to their opinions. This process should be conducted by competent persons trained to work with children and young people.

100. To promote the child's sense of self-identity, a life story book comprising appropriate information, pictures, personal objects and mementoes regarding each step of the child's life should be maintained with the child's participation and made available to the child throughout his/her life.

B. Legal responsibility for the child

101. In situations where the child's parents are absent or are incapable of making day-to-day decisions in the best interests of the child, and the child's placement in alternative care has been ordered or authorized by a competent administrative body or judicial authority, a designated individual or competent entity should be vested with the legal right and responsibility to make such decisions in the place of parents, in full consultation with the child. States should ensure that a mechanism is in place for designating such an individual or entity.

102. Such legal responsibility should be attributed by the competent authorities and be supervised directly by them or through formally accredited entities, including non-governmental organizations. Accountability for the actions of the individual or entity concerned should lie with the designating body.

103. Persons exercising such legal responsibility should be reputable individuals with relevant knowledge of children's issues, an ability to work directly with children and an understanding of any special and cultural needs of the children to be entrusted to them. They should receive appropriate training and professional support in this regard. They should be in a position to make independent and impartial decisions that are in the best interests of the children concerned and that promote and safeguard each child's welfare.

104. The role and specific responsibilities of the designated person or entity should include:

- (a) Ensuring that the rights of the child are protected and, in particular, that the child has appropriate care, accommodation, health-care provision, developmental opportunities, psychosocial support, education and language support;
- (b) Ensuring that the child has access to legal and other representation where necessary, consulting with the child so that the child's views are taken into account by decision-making authorities, and advising and keeping the child informed of his/her rights;
- (c) Contributing to the identification of a stable solution in the best interests of the child;
- (d) Providing a link between the child and various organizations that may provide services to the child;
- (e) Assisting the child in family tracing;
- (f) Ensuring that, if repatriation or family reunification is carried out, it is done in the best interests of the child;
- (g) Helping the child to keep in touch with his/her family, when appropriate.

1. Agencies and facilities responsible for formal care

105. Legislation should stipulate that all agencies and facilities must be registered and authorized to operate by social welfare services or another competent authority, and that failure to comply with such legislation constitutes an offence punishable by law. Authorization should be granted and be regularly reviewed by the competent authorities on the basis of standard criteria covering, at a minimum, the agency's or facility's objectives, functioning, staff recruitment and qualifications, conditions of care and financial resources and management.

106. All agencies and facilities should have written policy and practice statements, consistent with the present Guidelines, setting out clearly their aims, policies, methods and the standards applied for the recruitment, monitoring, supervision and evaluation of qualified and suitable carers to ensure that those aims are met.

107. All agencies and facilities should develop a staff code of conduct, consistent with the present Guidelines, that defines the role of each professional and of the carers in particular and includes clear reporting procedures on allegations of misconduct by any team member.

108. The forms of financing care provision should never be such as to encourage a child's unnecessary placement or prolonged stay in care arrangements organized or provided by an agency or facility.

109. Comprehensive and up-to-date records should be maintained regarding the administration of alternative care services, including detailed files on all children in their care, staff employed and financial transactions.

110. The records on children in care should be complete, up to date, confidential and secure, and should include information on their admission and departure and the form, content and details of the care placement of each child, together with any appropriate identity documents and other personal information. Information on the child's family should be included in the child's file as well as in the reports based on regular evaluations. This record should follow the child throughout the alternative care period and be consulted by duly authorized professionals responsible for his/her current care.

111. The above-mentioned records could be made available to the child, as well as to the parents or guardians, within the limits of the child's right to privacy and confidentiality, as appropriate. Appropriate counselling should be provided before, during and after consultation of the record.

112. All alternative care services should have a clear policy on maintaining the confidentiality of information pertaining to each child, which all carers are aware of and adhere to.

113. As a matter of good practice, all agencies and facilities should systematically ensure that, prior to employment, carers and other staff in direct contact with children undergo an appropriate and comprehensive assessment of their suitability to work with children.

114. Conditions of work, including remuneration, for carers employed by agencies and facilities should be such as to maximize motivation, job satisfaction and continuity, and hence their disposition to fulfil their role in the most appropriate and effective manner.

115. Training should be provided to all carers on the rights of children without parental care and on the specific vulnerability of children, in particularly difficult situations, such as emergency placements or placements outside their area of habitual residence. Cultural, social, gender and religious sensitization should also be assured. States should also provide adequate resources and channels for the recognition of these professionals in order to favour the implementation of these provisions.

116. Training in dealing appropriately with challenging behaviour, including conflict resolution techniques and means to prevent acts of harm or self-harm, should be provided to all care staff employed by agencies and facilities.

117. Agencies and facilities should ensure that, wherever appropriate, carers are prepared to respond to children with special needs, notably those living with HIV/AIDS or other chronic physical or mental illnesses, and children with physical or mental disabilities.

2. *Foster care*

118. The competent authority or agency should devise a system, and should train concerned staff accordingly, to assess and match the needs of the child with the abilities and resources of potential foster carers and to prepare all concerned for the placement.

119. A pool of accredited foster carers should be identified in each locality who can provide children with care and protection while maintaining ties to family, community and cultural group.

120. Special preparation, support and counselling services for foster carers should be developed and made available to carers at regular intervals, before, during and after the placement.

121. Carers should have, within fostering agencies and other systems involved with children without parental care, the opportunity to make their voice heard and to influence policy.

122. Encouragement should be given to the establishment of associations of foster carers that can provide important mutual support and contribute to practice and policy development.

C. Residential care

123. Facilities providing residential care should be small and be organized around the rights and needs of the child, in a setting as close as possible to a family or small group situation. Their objective should generally be to provide temporary care and to contribute actively to the child's family reintegration or, if this is not possible, to secure his/her stable care in an alternative family setting, including through adoption or *kafala* of Islamic law, where appropriate.

124. Measures should be taken so that, where necessary and appropriate, a child solely in need of protection and alternative care may be accommodated separately from children who are subject to the criminal justice system.

125. The competent national or local authority should establish rigorous screening procedures to ensure that only appropriate admissions to such facilities are made.

126. States should ensure that there are sufficient carers in residential care settings to allow individualized attention and to give the child, where appropriate, the opportunity to bond with a specific carer. Carers should also be deployed within the

care setting in such a way as to implement effectively its aims and objectives and ensure child protection.

127. Laws, policies and regulations should prohibit the recruitment and solicitation of children for placement in residential care by agencies, facilities or individuals.

D. Inspection and monitoring

128. Agencies, facilities and professionals involved in care provision should be accountable to a specific public authority, which should ensure, inter alia, frequent inspections comprising both scheduled and unannounced visits, involving discussion with and observation of the staff and the children.

129. To the extent possible and appropriate, inspection functions should include a component of training and capacity-building for care providers.

130. States should be encouraged to ensure that an independent monitoring mechanism is in place, with due consideration for the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). The monitoring mechanism should be easily accessible to children, parents and those responsible for children without parental care. The functions of the monitoring mechanism should include:

- (a) Consulting in conditions of privacy with children in all forms of alternative care, visiting the care settings in which they live and undertaking investigations into any alleged situation of violation of children's rights in those settings, on complaint or on its own initiative;
- (b) Recommending relevant policies to appropriate authorities with the aim of improving the treatment of children deprived of parental care and ensuring that it is in keeping with the preponderance of research findings on child protection, health, development and care;
- (c) Submitting proposals and observations concerning draft legislation;
- (d) Contributing independently to the reporting process under the Convention on the Rights of the Child, including to periodic State party reports to the Committee on the Rights of the Child with regard to the implementation of the present Guidelines.

E. Support for aftercare

131. Agencies and facilities should have a clear policy and should carry out agreed procedures relating to the planned and unplanned conclusion of their work with children to ensure appropriate aftercare and/or follow-up. Throughout the period of care, they should systematically aim at preparing children to assume self-reliance and to integrate fully in the community, notably through the acquisition of social and life skills, which are fostered by participation in the life of the local community.

132. The process of transition from care to aftercare should take into consideration children's gender, age, maturity and particular circumstances and include counselling and support, notably to avoid exploitation. Children leaving care should be encouraged to take part in the planning of aftercare life. Children with special needs, such as disabilities, should benefit from an appropriate support system, ensuring, inter alia, avoidance of unnecessary institutionalization. Both the public and the private sectors should be encouraged, including through incentives, to employ children from different care services, particularly children with special needs.

133. Special efforts should be made to allocate to each child, whenever possible, a specialized person who can facilitate his/her independence when leaving care.

134. Aftercare should be prepared as early as possible in the placement and, in any case, well before the child leaves the care setting.

135. Ongoing educational and vocational training opportunities should be imparted as part of life skills education to young people leaving care in order to help them to become financially independent and generate their own income.

136. Access to social, legal and health services, together with appropriate financial support, should also be provided to young people leaving care and during aftercare.

VIII. Care provision for children outside their country of habitual residence

A. Placement of a child for care abroad

137. The present Guidelines should apply to all public and private entities and all persons involved in arrangements for a child to be sent for care to a country other than his/her country of habitual residence, whether for medical treatment, temporary hosting, respite care or any other reason.

138. States concerned should ensure that a designated body has responsibility for determining specific standards to be met regarding, in particular, the criteria for selecting carers in the host country and the quality of care and follow-up, as well as for supervising and monitoring the operation of such schemes.

139. To ensure appropriate international cooperation and child protection in such situations, States are encouraged to ratify or accede to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996.

B. Provision of care for a child already abroad

140. The present Guidelines, as well as other relevant international provisions, should apply to all public and private entities and all persons involved in arrangements for a child needing care while in a country other than his/her country of habitual residence, for whatever reason.

141. Unaccompanied or separated children already abroad should, in principle, enjoy the same level of protection and care as national children in the country concerned.

142. In determining appropriate care provision, the diversity and disparity of unaccompanied or separated children (such as ethnic and migratory background or cultural and religious diversity) should be taken into consideration on a case-by-case basis.

143. Unaccompanied or separated children, including those who arrive irregularly in a country, should not, in principle, be deprived of their liberty solely for having breached any law governing access to and stay within the territory.

144. Child victims of trafficking should neither be detained in police custody nor subjected to penalties for their involvement under compulsion in unlawful activities.

145. As soon as an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organization responsible for his/her care and well-being to accompany the child throughout the status determination and decision-making process.

146. As soon as an unaccompanied or separated child is taken into care, all reasonable efforts should be made to trace his/her family and re-establish family ties, when this is in the best interests of the child and would not endanger those involved.

147. In order to assist in planning the future of an unaccompanied or separated child in a manner that best protects his/her rights, relevant State and social service authorities should make all reasonable efforts to procure documentation and information in order to conduct an assessment of the child's risk and social and family conditions in his/her country of habitual residence.

148. Unaccompanied or separated children must not be returned to their country of habitual residence:

- (a) If, following the risk and security assessment, there are reasons to believe that the child's safety and security are in danger;
- (b) Unless, prior to the return, a suitable caregiver, such as a parent, other relative, other adult caretaker, a Government agency or an authorized agency or facility in the country of origin, has agreed and is able to take responsibility for the child and provide him or her with appropriate care and protection;
- (c) If, for other reasons, it is not in the best interests of the child, according to the assessment of the competent authorities.

149. With the above aims in mind, cooperation among States, regions, local authorities and civil society associations should be promoted, strengthened and enhanced.

150. The effective involvement of consular services or, failing that, legal representatives of the country of origin should be foreseen, when this is in the best interests of the child and would not endanger the child or his/her family.

151. Those responsible for the welfare of an unaccompanied or separated child should facilitate regular communication between the child and his/her family, except where this is against the child's wishes or is demonstrably not in his/her best interests.

152. Placement with a view to adoption or *kafala* of Islamic law should not be considered a suitable initial option for an unaccompanied or separated child. States are encouraged to consider this option only after efforts to determine the location of his/her parents, extended family or habitual carers have been exhausted.

IX. Care in emergency situations

A. *Application of the Guidelines*

153. The present Guidelines should continue to apply in situations of emergency arising from natural and man-made disasters, including international and non-international armed conflicts, as well as foreign occupation. Individuals and organizations wishing to work on behalf of children without parental care in emergency situations are strongly encouraged to operate in accordance with the Guidelines.

154. In such circumstances, the State or de facto authorities in the region concerned, the international community and all local, national, foreign and international agencies providing or intending to provide child-focused services should pay special attention:

(a) To ensure that all entities and persons involved in responding to unaccompanied or separated children are sufficiently experienced, trained, resourceful and equipped to do so in an appropriate manner;

- (b) To develop, as necessary, temporary and long-term family-based care;
- (c) To use residential care only as a temporary measure until family-based care can be developed;
- (d) To prohibit the establishment of new residential facilities structured to provide simultaneous care to large groups of children on a permanent or long-term basis;
- (e) To prevent the cross-border displacement of children, except under the circumstances described in paragraph 160 below;
- (f) To make cooperation with family tracing and reintegration efforts mandatory.

Preventing separation

155. Organizations and authorities should make every effort to prevent the separation of children from their parents or primary caregivers, unless the best interests of the child so require, and ensure that their actions do not inadvertently encourage family separation by providing services and benefits to children alone rather than to families.

156. Separation initiated by the child's parents or other primary caregivers should be prevented by:

- (a) Ensuring that all households have access to basic food and medical supplies and other services, including education;
- (b) Limiting the development of residential care options and restricting their use to those situations where it is absolutely necessary.

B. Care arrangements

157. Communities should be assisted in playing an active role in monitoring and responding to care and protection issues facing children in their local context.

158. Care within a child's own community, including fostering, should be encouraged, as it provides continuity in socialization and development.

159. As unaccompanied or separated children may be at heightened risk of abuse and exploitation, monitoring and specific support to carers should be foreseen to ensure their protection.

160. Children in emergency situations should not be moved to a country other than that of their habitual residence for alternative care except temporarily for compelling health, medical or safety reasons. In that case, this should be as close as possible to their home, they should be accompanied by a parent or caregiver known to them, and a clear return plan should be established.

161. Should family reintegration prove impossible within an appropriate period or be deemed contrary to the best interests of the child, stable and definitive solutions, such as adoption or *kafala* of Islamic law, should be envisaged; failing this, other long-term options should be considered, such as foster care or appropriate residential care, including group homes and other supervised living arrangements.

C. Tracing and family reintegration

162. Identifying, registering and documenting unaccompanied or separated children are priorities in any emergency and should be carried out as quickly as possible.

163. Registration activities should be conducted by or under the direct supervision of State authorities and explicitly mandated entities with responsibility for and experience in this task.

164. The confidential nature of the information collected should be respected and systems put in place for safe forwarding and storage of information. Information should only be shared among duly mandated agencies for the purpose of tracing, family reintegration and care.

165. All those engaged in tracing family members or primary legal or customary caregivers should operate within a coordinated system, using standardized forms and mutually compatible procedures, wherever possible. They should ensure that the child and others concerned would not be endangered by their actions.

166. The validity of relationships and the confirmation of the willingness of the child and family members to be reunited must be verified for every child. No action should be taken that may hinder eventual family reintegration, such as adoption,

change of name or movement to places far from the family's likely location, until all tracing efforts have been exhausted.

167. Appropriate records of any placement of a child should be made and kept in a safe and secure manner so that reunification can be facilitated in the future.

About the Author

Charlotte Phillips (Amsterdam, 1973) embarked on the ‘international leg’ of her career at a relatively young age; after graduating from high school, she lived for several years in Israel and the UK. She obtained a dual degree in law and criminology from the VU University Amsterdam (1999 – 2002). Admitted to the Dutch Bar in 2002, she joined the Criminal Court of Appeal in Amsterdam in 2006 and a year later the Amsterdam University of Applied Sciences as lecturer in law and graduation coordinator.

In September 2007, she enrolled her PhD research with the Law Faculty of Leiden University in the programme *Securing the Rule of Law in a World of Multilevel Jurisdiction*. Her research focuses on children’s rights, more specifically the protection and well-being of children who are deprived of adequate parental care, with a particular emphasis on child-headed households.

Author of several textbooks on diverse legal subjects, Charlotte has also published articles in Dutch and English journals. She is a member of the Quality of Care working group of the Better Care Network Netherlands and is a frequently-asked guest lecturer to various institutions, including Leiden University.