

**UNDERSTANDING KINSHIP CARE OF CHILDREN IN AFRICA: A FAMILY  
ENVIRONMENT OR AN ALTERNATIVE CARE OPTION?**

BY

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NOVEMBER 2013

## DECLARATION

I certify that the work presented in this thesis: **'Understanding kinship care of children in Africa: A family environment or an alternative care option?'** is, to the best of my knowledge and belief, original, except as acknowledged in the text. I further certify that this work has not been submitted, either in whole or in part, for a degree at any other university or academic institution.

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Date: 25 November 2013



**The law reviewed in this study is stated as at the end of October 2013.**

## DEDICATION

To the LORD God Almighty

*“A father to the fatherless,*

a defender of widows,

is God in his holy dwelling.

*God sets the lonely in families....”*

(Psalm 68: 5-6)



UNIVERSITY *of the*  
WESTERN CAPE

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## KEY WORDS AND PHRASES

1. Kinship care
2. Kin/Extended family
3. Alternative care
4. Foster care
5. Child protection
6. Children's rights
7. Family/Family environment
8. Convention on the Rights of the Child
9. African Children's Charter
10. UN Guidelines on the Alternative care of Children



## ABSTRACT

In Africa generally, orphaned and vulnerable children are traditionally cared for by their relatives or close family friends; this is an abiding practice even in contemporary times. This was historically considered to be a moral obligation binding on different relatives in different ways or at differing levels. In the face of the increasing complexities and changing demographics in African societies, high levels of poverty and socio-economic inequalities as well as the incidence of HIV and AIDS, among others, the traditional family continues to undergo structural changes and experience various challenges which make child rearing responsibilities difficult to cope with especially in the context of loss of parental care. Nonetheless, the extended family system still bears the greatest burden in caring for such children, despite the obligation of governments to provide alternative care for children without parental care. The care of children who have become deprived of parental care by other relatives/family members or family friends is generally described as kinship care.

This study seeks to examine kinship care against the background of international children's rights law as encapsulated in the United Nations Convention on the Rights of the Child, the United Nations Guidelines on the Alternative Care of Children and the African Charter on the Rights and Welfare of the Child, among others. Thus, this research seeks answers to a number of related research questions such as: Does the international children's rights framework recognise or provide for kinship care as a measure of alternative care for children deprived of a family environment? What is the history and practice of kinship care in Africa and what are the challenges confronting kinship care in contemporary African societies? What is the relationship between kinship care and the child protection system? And what forms of support are available for kinship care at both the international and national levels?

Four main themes are considered in separate chapters of the thesis as follows: the contextual and historical background to kinship care in Africa; the international and regional legal framework on the right to alternative care; the conceptualisation of kinship care as alternative care; and the law and practice of kinship care in selected domestic jurisdictions. South Africa and Namibia are the main focus of this study in

the chapter on the status of kinship care at the domestic level. This is mainly because both countries have made some progress in the attempts at (legally) providing for kinship care and addressing some of its attendant challenges, with a particular emphasis on the provision of support for kinship care.



## ACRONYMS/ABBREVIATIONS

<b>Acronym/Abbreviation</b>	<b>Description</b>
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
CA	Children's Act (South Africa)
CCPB	Child Care and Protection Bill (Namibia)
CDG	Care Dependency Grant (South Africa)
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CSG	Child Support Grant (South Africa)
DSD	Department of Social Development (South Africa)
FCG	Foster Care Grant (South Africa)
FPG	Foster Parent Grant (Namibia)
GC	General Comment
Hague Convention	Hague Intercountry Adoption Convention (1993)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ISS/IRC	International Social Service/International Reference Centre for the Rights of Children Deprived of their Family
LAC	Legal Assistance Centre (Namibia)
MGECW	Ministry of Gender Equality and Child Welfare (Namibia)
OVC	Orphans and Vulnerable Children
SALRC	South African Law Reform Commission
SMG	South African Law Reform Commission
The 1924 Declaration	The Geneva Declaration of the Rights of the Child (1924)
The 1959 Declaration	The Declaration of the Rights of the Child (1959)
The 1986 Declaration	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 (1986)

The 1979 Declaration

The Declaration on the Rights and Welfare of the African Child (1979)

UDHR

Universal Declaration of Human Rights

UK

United Kingdom

UNG

United Nations Guidelines on the Alternative Care of Children

UNICEF

United Nations Children's Fund

USA

United States of America



## TABLE OF CONTENTS

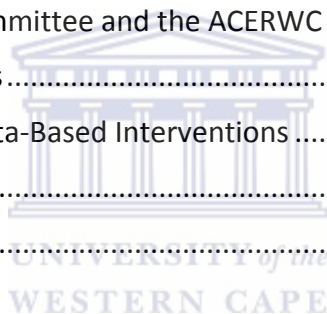
DECLARATION .....	i
DEDICATION .....	ii
ACKNOWLEDGEMENTS .....	iii
KEY WORDS AND PHRASES .....	v
ABSTRACT .....	vi
ACRONYMS/ABBREVIATIONS.....	viii
TABLE OF CONTENTS.....	x
CHAPTER ONE – INTRODUCTION .....	1
1.1 Background .....	1
1.2 Problem Statement .....	3
1.3 Argument and Significance of the Study .....	6
1.4 Research Questions.....	7
1.5 Methodology and Choice of Jurisdictions.....	9
1.6 Limitations and Scope .....	11
1.7 Organisation of Thesis.....	12
1.8 Literature Review .....	13
1.9 Glossary/Definition of Terms .....	16
CHAPTER TWO – KINSHIP CARE OF CHILDREN IN AFRICA: THE UNDERLYING CONTEXT .....	18
2.1 Introduction .....	18
2.2 Kinship Systems and the Extended Family in Africa: Historical Perspectives.....	19
2.2.1 Marriage and Children: The Basis of African Kinship Systems and Family Environment	26
2.2.2 Kinship Responsibilities for the Care of the Child in Traditional African Societies .....	27
2.2.3 Kinship and the Responsibilities of the Child .....	30
2.3 The Family in International Law.....	34
2.3.1 The ‘Right to a Family’: Definitional Issues.....	37
2.3.2 Existing and Changing Family Forms and Functions.....	41
2.3.3 Contemporary Issues Affecting the Family: Focus on Africa .....	44
2.4 Kinship Care and Children’s Familial Rights: The Relationship between Family and State Parties’ Obligations .....	47
2.4.1 The Right to Preservation of Identity: Name, Nationality and Knowledge of and Care by the Child’s Parents .....	49
2.4.2 Parental Direction and Guidance.....	52
2.4.3 Parental Responsibility .....	57
2.4.4 The Rights to Social Security and an Adequate Standard of Living .....	61

2.4.4.1	The Relationship between Children’s Rights to Social Security and an Adequate Standard of Living .....	63
2.4.4.2	Children’s Rights to Social Security and an Adequate Standard of Living under the ACRWC.....	66
2.4.4.3	Social Security and Adequate Standard of Living: States Parties’ Obligations.....	69
2.5	Conclusions .....	71
CHAPTER THREE – THE INTERNATIONAL AND AFRICAN REGIONAL LEGAL FRAMEWORK FOR THE RIGHT TO ALTERNATIVE CARE .....		74
3.1	Introduction.....	74
3.2	Before the Convention on the Rights of the Child and the African Children’s Charter.....	75
3.2.1	The Geneva Declaration of the Rights of the Child (1924).....	76
3.2.2	The Declaration of the Rights of the Child (1959) .....	77
3.2.3	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 (1986) .....	79
3.2.4	The Declaration on the Rights and Welfare of the African Child (1979).....	81
3.3	The Convention on the Rights of the Child .....	82
3.4	The African Charter on the Rights and Welfare of the Child .....	86
3.5	General Principles of the CRC and the African Children’s Charter and the Right to Alternative Care .....	87
3.5.1	Non-discrimination .....	89
3.5.2	The Best Interests of the Child .....	91
3.5.3	Life, Survival and Development.....	98
3.5.4	The Right of the Child to be Heard (Child Participation) .....	100
3.6	The Right to Alternative Care: Analysis of Articles 20 of the CRC and 25 of the ACRWC....	104
3.6.1	Family Environment.....	105
3.6.2	Children Deprived of their Family Environment.....	108
3.6.3	Special Protection and Assistance .....	112
3.6.4	The Best Interests of the Child and Continuity in Upbringing.....	116
3.6.5	Alternative Care .....	117
3.6.5.1	Foster Care.....	120
3.6.5.2	<i>Kafalah</i> of Islamic Law .....	121
3.6.5.3	Adoption .....	122
3.6.5.4	Institutional or Residential Care (Placements).....	127
3.7	Conclusions .....	129
CHAPTER FOUR – THE CONCEPTUALISATION OF KINSHIP CARE .....		133



4.1 Introduction .....	133
4.2 Conceptualising Kinship Care as Alternative Care .....	134
4.2.1 The United Nations Guidelines for the Alternative Care of Children: International Framework for the Recognition of Kinship Care.....	135
4.2.1.1 Residential Care for Children under 3 Years.....	138
4.2.1.2 The Goal of De-institutionalisation.....	139
4.2.1.3 Broadening the Scope of Alternative Care .....	140
4.2.2 Forms of Alternative Care under the UN Guidelines.....	142
4.2.3 The Relationship between Informal Alternative Care and Formal Alternative Care ....	144
4.3 Kinship Care: Definition, Forms, Nature, and Prevalence .....	147
4.3.1 Benefits of Kinship Care.....	150
4.3.2 Challenges or Risks associated with Kinship Care .....	153
4.4 The Relationship between Kinship Care and Foster Care.....	156
4.4.1 The Relationship between Kinship Care and Foster Care: General Background .....	158
4.4.2 The Relationship between Kinship Care and Foster Care: African Context .....	160
4.5 Framework for Delineating Kinship Care Models and their Intersections with Foster Care in the Child Protection System .....	162
4.5.1 Private Kinship Care .....	164
4.5.2 Informal Kinship Care .....	165
4.5.3 Formal Kinship Care .....	166
4.6 Conclusions .....	169
CHAPTER FIVE – THE STATUS OF KINSHIP CARE IN DOMESTIC LEGISLATION AND LINKAGES WITH SOCIAL ASSISTANCE PROVISIONING .....	172
5.1 Introduction .....	172
5.2 The Right to Alternative Care: Constitutional Provisions .....	176
5.2.1 Constitution of the Republic of South Africa (1996) .....	176
5.2.2 Constitution of the Republic of Namibia (1990).....	179
5.3 Child-Specific Legislation: Focus on the Status of Kinship Care in relation to Foster Care .	181
5.3.1 South African Children’s Act (2005).....	181
5.3.2 Namibia’s Draft Child Care and Protection Bill (2012) .....	188
5.4 Kinship Care and Social Assistance .....	193
5.4.1 South Africa .....	194
5.4.1.1 The Child Support Grant (CSG) .....	196
5.4.1.2 The Foster Child Grant (FCG) .....	198
5.4.2 Namibia.....	208

5.4.2.1	The State Maintenance Grant (SMG) .....	210
5.4.2.2	The Foster Parent Grant (FPG) .....	211
5.4.2.3	The Short-term Emergency Grant or Assistance in Kind .....	213
5.5	Conclusions .....	214
CHAPTER SIX – CONCLUSIONS AND RECOMMENDATIONS: TOWARDS EFFECTIVE RECOGNITION AND UTILISATION OF KINSHIP CARE AS ALTERNATIVE CARE .....		218
6.1	Introduction .....	218
6.2	Kinship Care: The Transition from a Traditional Family Environment to Alternative Care ..	218
6.2.1	Kinship Care: Status in International and Regional Law and Policy .....	219
6.2.2	Kinship Care: Conceptualisation as Alternative Care .....	221
6.3	Kinship Care: Status in National Legislation and Policy .....	224
6.3.1	Kinship Care: Comparisons with Foster Care .....	225
6.3.2	Kinship Care: Social Assistance Provisioning .....	226
6.4	Recommendations .....	229
6.4.1	The Roles of the CRC Committee and the ACERWC .....	229
6.4.2	The Role of States Parties .....	230
6.4.3	Further Research and Data-Based Interventions .....	232
6.5	Concluding Remarks.....	234
BIBLIOGRAPHY .....		236



## CHAPTER ONE – INTRODUCTION

### 1.1 Background

In June 1993, during the United Nations World Conference on Human Rights, which among others, called for the universal ratification of the Convention on the Rights of the Child (CRC) by 1995,<sup>1</sup> the Conference proclaimed in the *Vienna Declaration and Programme of Action* that ‘the child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection.’<sup>2</sup> By so doing, the importance of a family environment and the family as a social unit for the overall well-being of children was universally reaffirmed.<sup>3</sup>

However, millions of children around the world have lost either or both parents, or are at the risk of doing so due to the incidence of HIV and AIDS, with a global estimate of 34 million people living with HIV as at the end of 2011.<sup>4</sup> Of the over 145 million children worldwide who have lost one or both parents due to various causes, 15 million of these are due to AIDS.<sup>5</sup> With 69% of all people living with HIV concentrated in sub-Saharan Africa, it is clear that the region is the worst hit by the epidemic resulting in the highest number of AIDS-related deaths occurring in the region.<sup>6</sup> Within sub-Saharan Africa, the impact of HIV and AIDS is most felt in the southern Africa sub-region, with over 30% of people living with HIV worldwide residing in ten countries in the sub-region.<sup>7</sup> In Lesotho, South Africa, Swaziland, and Zimbabwe, for example, ‘more than a quarter of children under 15 years old are living without a parent, and in Namibia the proportion has reached more than one third.’<sup>8</sup>

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<sup>1</sup> Office of the High Commissioner for Human Rights (OHCHR), World Conference on Human Rights, 14-25 June 1993, Vienna, Austria, para 12, at < <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx> > (accessed 31 May 2013).

<sup>2</sup> Vienna Declaration and Programme of Action (1993) Part 1, para 21. Unless otherwise indicated, the use of the pronoun ‘his’ throughout this study refers to children of both sexes.

<sup>3</sup> Hodgson D *Individual duty within a human rights discourse* (2003) 150.

<sup>4</sup> UNAIDS *Report on the Global AIDS Epidemic* (2012a) 8.

<sup>5</sup> Biamba G, Beard J, Brooks B, Bresnahan M, Flynn D & Simon J *The Scale, Scope and Impact of Alternative Care for OVC in Developing Countries: A Review of Literature* (2010) 1.

<sup>6</sup> UNAIDS (2012) 8.

<sup>7</sup> UNAIDS ‘East and Southern Africa’, at < <http://www.unaids.org/en/regionscountries/regions/easternandsouthernafrika/> >; UNICEF Eastern and Southern Africa ‘HIV and AIDS’, at < [http://www.unicef.org/esaro/5482\\_HIV\\_AIDS.html](http://www.unicef.org/esaro/5482_HIV_AIDS.html) > (accessed 31 May 2013).

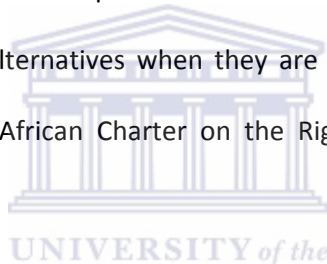
<sup>8</sup> UNICEF *Progress for Children: A Report Card on Child Protection* (2009a) 24.

The incidence of HIV and AIDS and its devastating impact on children in sub-Saharan Africa is further compounded by other factors, such as, abuse and exploitation, armed conflict, natural disasters and poverty, which contribute to the loss of parental care in the region.<sup>9</sup> The impact of HIV and AIDS on children in terms of the loss of parental care has become so widespread that it has resulted in the rise of ‘an entirely new children’s rights language’, such as, the ‘orphan generation’, ‘AIDS orphans’, ‘orphaned and vulnerable children’ (OVC), ‘mother-to-child-transmission’ (of HIV) and ‘child-headed households’, among others.<sup>10</sup> All of these have significantly impacted on family structures and situations in the region.<sup>11</sup>

It has long been established that the absence of parental care has great implications for the lives of children and poses huge challenges for the realisation of their other rights, such as, health care and education.<sup>12</sup>

Moreover, there are often long-term implications which follow children into adulthood due to a lack of the stability and security that a family environment provides.<sup>13</sup> Under international law therefore, children have

a right to be provided with suitable alternatives when they are deprived of parental care. This right is articulated in both the CRC and the African Charter on the Rights and Welfare of the Child (African Children’s Charter/ACRWC).<sup>14</sup>



In Africa, however, orphaned and vulnerable children are traditionally cared for by other family members and even in contemporary times, about 90% of all children deprived of parental care are taken into care by other (extended) family members, especially grandparents (grandmothers).<sup>15</sup> Historically, the care of children in Africa was seen as a moral duty or obligation which was binding on all family members.<sup>16</sup>

However, due to increasing adult mortality as a result of AIDS and other factors, changing demographics, increasing levels of poverty and socio-economic inequalities and challenges, many African families are

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<sup>9</sup> UNICEF *Progress Report for Children Affected by HIV/AIDS* (2009b) 17; UNICEF (2009a) 19.

<sup>10</sup> Sloth-Nielsen J & Mezmur BD ‘HIV/Aids and Children’s Rights in Law and Policy in Africa: Confronting Hydra Head On’ in Sloth-Nielsen J (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) 279.

<sup>11</sup> South African Institute of Race Relations (SAIRR) *First Steps to Healing the South African Family* (2011) 1.

<sup>12</sup> Kwak A ‘Children’s Rights and Adoption’ in Maclean M & Kurczewski J (eds) *Families, Policies and the Law: Perspectives from East and West Europe* (1994) 185.

<sup>13</sup> Parkinson P ‘Child Protection, Permanency Planning and Children’s Right to Family Life’ (2003) 17 *International Journal of Law, Policy and the Family* 154.

<sup>14</sup> Art 20 CRC and Art 25 ACRWC.

<sup>15</sup> Biemba *et al* (2010) 2; Save the Children UK *Kinship Care: Providing positive and safe care for children living away from home* (2007) 2.

<sup>16</sup> Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1999) 6.

being stretched to the limit and are no longer able to cope with child rearing responsibilities.<sup>17</sup> This is generally the case whether or not children have become deprived of parental care. This notwithstanding, despite the obligation of governments to provide alternative care for children deprived of parental care, the extended family system still bears the greatest burden in caring for the affected children.<sup>18</sup> Such alternative care of children who have become deprived of parental care by other relatives/family members or family friends is generally described as kinship care.<sup>19</sup>

## 1.2 Problem Statement

Although kinship care has been practised since time immemorial, particularly in Africa, it is only just beginning to be acknowledged in the child protection framework, within the confines of the provision of alternative care for children deprived of parental care. This is unlike the position in the United Kingdom (UK), the United States of America (USA), and other parts of the 'Western' world where kinship care began to be formally regulated and utilised in child welfare policies and practice over two decades ago.<sup>20</sup> Kinship care in Africa remains largely unregulated by the State, with individuals and families arranging for kinship care privately.<sup>21</sup> Typical kinship carers include aunts, uncles and older siblings, but grandparents (especially grandmothers) are the majority of kinship carers.<sup>22</sup>

Neither the CRC nor the African Children's Charter makes any direct reference to kinship care as a form of alternative care. However, the United Nations General Assembly welcomed a set of guidelines aimed at promoting the practical implementation of the provisions of the CRC in respect of the right to alternative care: United Nations Guidelines for the Alternative Care of Children (2009) (UN Guidelines).<sup>23</sup> The UN Guidelines are significant because they provide for the recognition of kinship care as a form of alternative

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<sup>17</sup> UNICEF (2009a) 24; Roby JL *Children in Informal Alternative Care* (2011) 1; UNICEF (Child Protection Section) Working Paper available at < [www.unicef.org/protection/Informal\\_care\\_discussion\\_paper\\_final.pdf](http://www.unicef.org/protection/Informal_care_discussion_paper_final.pdf) >; Roeland M & Boerma J 'Orphanhood and Childcare Patterns in sub-Saharan Africa: An Analysis of National Surveys from 40 countries' (2004) 18 *AIDS* S55-S65.

<sup>18</sup> UNAIDS, UNICEF & USAID *Children on the Brink: A Joint Report of New Orphan Estimates and a Framework for Action* (2004) 8-12; UNICEF (2009a) 24; Biemba *et al* (2010) 2.

<sup>19</sup> Roby (2011) 41.

<sup>20</sup> Ince L 'Kinship care: An Afrocentric perspective', unpublished PhD thesis, University of Birmingham, 2009, 10.

<sup>21</sup> Save the Children UK (2007) 1.

<sup>22</sup> Save the Children UK (2007) 2.

<sup>23</sup> UN General Assembly, A/RES/64/142, 2010.

care in the general alternative care framework; in fact, the prioritisation of kinship care when parental care is not available was a major impetus for drafting the Guidelines.<sup>24</sup> A companion document to the UN Guidelines has also been prepared to explain the key themes of the Guidelines and outline appropriate policy responses.<sup>25</sup>

These international developments are set against the background of current child law reform initiatives in several African countries, in terms of Article 4 of the CRC (and 1 of the ACRWC) which place an obligation on States to put in place legislative and other measures to appropriately implement all children's rights. Thus, a particular feature of child law reform processes across the continent is the provision of measures to enhance child protection, including the provision of alternative care for children deprived of parental care.

Kinship care is often touted as the best form of family-based alternative care that should be encouraged for the care and protection of children deprived of parental care.<sup>26</sup> However, this universal endorsement of kinship care as a suitable form of alternative care raises several questions, chief of which is how to situate kinship care within the child protection framework as an alternative care option given the large number of children who are placed in kinship care, mostly informally. This is also to be seen against the background of the fact that the traditional understanding and practice of kinship care in Africa is not necessarily the manner in which kinship care operates in contemporary African societies. Roby points this out thus:

While in the past kinship care may have been based more on reciprocity with the purpose of child socialisation, its current swell may be more related to crises in both developing and industrialised countries.<sup>27</sup>

It is therefore necessary to examine the factors giving rise to this change. For a start, kinship caregivers today tend to be poorer and oftentimes older (and less/un-educated) people who may be subject to deteriorating health conditions.<sup>28</sup> Thus, the children in kinship care tend to be invisible to the State such that their situations cannot be properly monitored and their best interests cannot be safeguarded as

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<sup>24</sup> Para 29(b)(i) & (c)(i), UN Guidelines; Save the Children UK (2007) 6.

<sup>25</sup> Cantwell N, Davidson J, Elsley S, Quinn N, & Milligan I *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'* (2012).

<sup>26</sup> Statement of Shay Bilchik, President/CEO, Child Welfare League of America, for the Senate Briefing on Kinship Care and the Re-Introduction of the Kinship Caregivers Support Act, available at < <http://www.cwla.org/newsevents/kinshipcare050118.htm> > (accessed 1 June 2013).

<sup>27</sup> Roby (2011) 41.

<sup>28</sup> Roby (2011) 41.

contemplated under the CRC and the ACRWC.<sup>29</sup> As such, the children in kinship care face the risk of violations of several of their rights, violations which impact negatively on their proper growth and development.<sup>30</sup> Further, with reference to accessing social protection interventions, among others, children and caregivers in kinship care (who form the majority of those in alternative care situations) contend with numerous obstacles and yet receive little or no support from the State.<sup>31</sup> Whatever support some receive usually comes through the interventions of non-governmental and charity or religious organisations. Yet, reliance on kinship care 'entails a responsibility to ensure that carers are supported and children protected within placements.'<sup>32</sup>

In the context of the right to alternative care, kinship care appears to be developing in piecemeal fashion and independently or separately from international and national legal or formal child welfare or child protection systems. Thus, there is no coordinated approach towards conceptualising and incorporating kinship care into the system. The aim of this study, therefore, is to examine children's right to alternative care with a focus on the role and recognition of kinship care as a form of alternative care. This will be done in light of existing international standards for children's rights as enumerated in the CRC, the ACRWC, and the UN Guidelines, among other relevant international, regional and domestic instruments. With regards to domestic instruments, the right to alternative care and the child protection system generally, as domesticated in the legislation of South Africa and Namibia will be the main focus. Examples will also be drawn from several African countries (particularly others in the southern African sub-region). The aim is to investigate whether legislation or policy in support of kinship care exists and, if so, to examine how kinship care is addressed in comparison to, and in relation to, other forms of alternative care particularly foster care. Kinship care is in some cases transformed into foster care (kinship foster care) and not addressed as a distinct form of alternative care separate and/or different from foster care.

If kinship care is properly construed and regulated within the alternative care and child protection framework, it becomes easier to provide adequate support and assistance to children in kinship care and to

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<sup>29</sup> Art 3 CRC; Art 4 ACRWC; Save the Children UK (2007) 4.

<sup>30</sup> Roby (2011) 41.

<sup>31</sup> Save the Children UK (2007) 4.

<sup>32</sup> Save the Children UK (2007) 6.

monitor their best interests since their legal status and visibility would be better enhanced. However, the question is: considering the significant number of children in kinship care and the circumstances by which they enter into kinship care, is it practical, reasonable or cost-effective to address all kinship care situations as alternative care in the child protection context? In other words, should all situations of kinship care be concerns of the formal child protection system?

### **1.3 Argument and Significance of the Study**

Kinship care was traditionally understood and practised as a system of care within the extended family network in Africa, rather than as an actual *alternative* to 'parental care' (except in cases of the death of parents). Today however, kinship care is generally considered to be a self-standing form of alternative care within the care continuum, in the same manner as foster care, adoption or placement in institutions – at least theoretically. Nonetheless, kinship care is the least protected and least supported form of alternative care for children deprived of parental care, yet children in kinship care form the bulk of children in (need of) alternative care. There are also several debates and controversies around kinship care. The major ones include challenges relating to how to provide support for kinship care, whether through direct cash payments or other services 'without interfering unnecessarily in family life, and in a way that is feasible in particularly low-resource settings',<sup>33</sup> as is the case in many African countries.

My contribution to knowledge in this regard is to highlight the fact that the link between the history or traditional practice of kinship care in Africa and its 'new' identity as a family-based form of alternative care has not been well established. This, in my opinion, accounts for some of the controversies and debates around kinship care in contemporary child protection discourse. Establishing the link and highlighting changes and differences along the way will impact on international, regional, and local legal and policy approaches towards the application of kinship care as an alternative care form in a manner similar to other established forms of care, particularly foster care.

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<sup>33</sup> Save the Children UK (2007) 6.



I intend to show that there are different ways of understanding kinship care, each of which has implications for its place (or non-place) within the framework of children's right to alternative care in the child protection context. I intend to propose (particularly for the African context) for kinship care to be addressed in three forms: as (an existing) 'family environment'; as a form of 'supplementary care' (to existing parental care); and as a form of 'alternative care' (in the same manner as foster care and other alternative care options in the care continuum, that is, *in the child protection context*). Each of these should be subject to different standards or models of state support, regulation and monitoring, if necessary. In effect, for example, the obligation of the State to provide adequate protection and support for a kinship care situation which is an existing (original) family environment may be different from the obligation of the State towards a kinship care situation functioning as a child's right to alternative care, in the child protection context.



#### **1.4 Research Questions**

This study will address a number of questions, the primary question(s) being:

Is kinship care envisaged as one of the possible options within the framework of the right to alternative care? If so, what is the relationship between kinship care and the child protection system? If not, to what extent should kinship care as a form of alternative care within the framework of the right to alternative care be included in the child protection context? Finally, to what extent should kinship care be subject to financial incentives or support by the State generally and how is kinship care supported by the selected States in this study and how does support for kinship care compare with other forms of alternative care?

Secondary questions to be examined in this study through the different chapters are as follows:

##### *Chapter 2*

- What were the traditional understandings, practice and historical role of kinship (and kinship care) in Africa, within the context of the extended family system?
- Which factors gave rise to a reliance on kinship care in traditional African societies?

- How are those factors different from those which give rise to the need for and practice of kinship care in contemporary African societies? / What are the challenges confronting the traditional 'African family' today?
- What is a 'family', what are the rights applicable to the family, and what are the obligations of States Parties towards the family?

### *Chapter 3*

- Which instruments regulate the right to alternative care for children deprived of parental care and which obligations do they impose on States?
- What are the elements of the right to alternative care as derived from international and regional instruments governing the subject?
- What are the major forms of alternative care provided for, and where does kinship care fit in the care continuum?
- Given the prevalence of kinship care in Africa, does the African Children's Charter offer any added meaning or standard for the understanding and practice of kinship care?

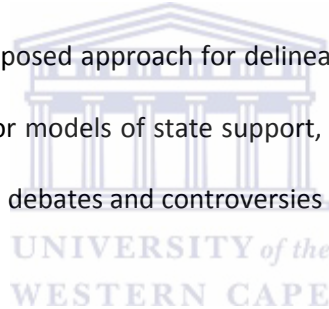


### *Chapter 4*

- How do the UN Guidelines on the Alternative Care of Children address the subject of kinship care?
- What is meant by 'kinship care', and who qualifies as a kinship carer or how is kinship determined?
- What is (or should be) the relationship between kinship care and the child protection system, and how does kinship care compare with other forms of alternative care?
- To qualify as kinship care, should the care provided be on a part-time or full-time basis?
- What are the merits and demerits of kinship care and what are the challenges facing kinship care?

## Chapter 5

- To what extent is the right to alternative care and particularly kinship care provided for in the domestic legislation of the selected countries examined in this study and what is the place of kinship care in their child protection systems?
- How are alternative care measures, and kinship care particularly, supported (financially and otherwise) in law and policy generally and in the domestic legislation of the selected countries examined in this study?
- How are these countries addressing the problems around the provision of financial incentives and other support for kinship care?
- Taking into account the large number of children in kinship care and the challenge of limited resources, can the author's proposed approach for delineating kinship care into distinct categories subject to different standards or models of state support, regulation and monitoring, if necessary, assist in addressing some of the debates and controversies around kinship care?



### 1.5 Methodology and Choice of Jurisdictions

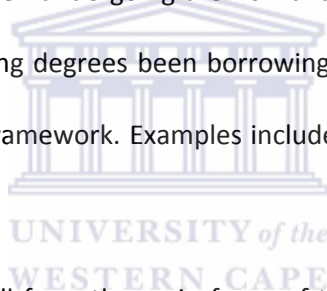
This study is conducted largely by analysis of the international law governing the right to alternative care for children deprived of a family environment, and child protection generally, as contained in a range of literature on the subject, including both primary and secondary sources. With regards to primary sources, the provisions of international, regional and national law (both 'hard' and 'soft' law) on children's rights, and human rights generally, will be analysed. They include Conventions, Charters, Resolutions, Declarations, States Parties reports, Concluding Observations and Recommendations, Constitutions, Acts, Bills, Regulations, Directives, Policies, and case law, among others.

Secondary sources including books, academic articles as well as relevant and reliable materials from the internet are also considerably relied on for the purposes of this study, forming part of a detailed desk (library and digital) research. While field studies were not conducted in order to have actual interactions

with children in alternative care and particularly those in kinship care (in order to observe their exact circumstances), existing qualitative and quantitative studies and reports have been relied upon in parts of the study. This is particularly so with reference to the focus countries in the study.

Further, this study relies to a very limited extent on interviews, observations and personal communication with some of the stakeholders with knowledge and practical experience of different aspects of realising the right to alternative care. Examples include social workers, members of the Hague Conference on Private International Law and established academic experts and legal practitioners dealing with children's rights.

A number of countries, particularly in the southern African sub-region, will serve as reference points in this study. Besides the factor of geographical proximity and some similarity in legal history and tradition, these countries also share the devastating impact of the scourge of HIV and AIDS in common, albeit at varying levels. Further, these countries have been undergoing their child law reform process within the same time period and as such, they have to varying degrees been borrowing from the examples and experiences of one another in developing their legal framework. Examples include Botswana, Lesotho, Malawi, Swaziland and Tanzania.



However, South Africa and Namibia will form the main focus of the study on a comparative basis. Apart from the reasons already cited, Namibia's new legislation on children's rights is in the final stages of becoming law, and the law-making process was quite heavily influenced by the South African process and legislation. Further, compared to all other countries in the sub-region and in Africa generally, both countries have made more progress in the attempts at (legally) providing for kinship care and addressing some of its attendant challenges. They are perhaps the only countries so far on the continent that have attempted to address kinship care in the context of the law, beyond mere policy or in a piecemeal manner.

In the chapter(s) where the situation in both countries shall be examined, the situation in South Africa will be explored first. This is because South Africa has the most comprehensive legislation and regulations which are hailed across the world as models and from which inspiration has been drawn by other countries in the region (other than Namibia) in putting in place their own legislation and policy measures. Further, South African courts have decided on several cases relevant to the subject of alternative care unlike in the

other countries where relevant case law jurisprudence has not developed. Consequently, some theoretical conclusions can be drawn from the jurisprudence provided by South African courts from which others can borrow, deviate from or improve upon.

## **1.6 Limitations and Scope**

As already highlighted, this study was not based on empirical research; it places reliance rather on existing work done on the subject-matter. Apart from information obtained from existing qualitative and other research studies carried out by various researchers and research institutions, the views and opinions of children in kinship care are not included in this study.

With reference to the place of kinship care in traditional African societies, it is not expected that this study will do justice to the diversity of experiences that exists across the entire continent. However, attempts will be made to focus on and distil the main issues that are predominantly similar and generally applicable.

It is important to point out that this study proceeds from the position that the child is generally better off in a family environment, except where it is not in the child's best interests to be in a particular environment.

In relation to kinship care, it is not intended to state that a child deprived of parental care in Africa must be placed with a 'relative', 'kin' or extended family member. The risks of abuse, neglect, exploitation and other challenges associated with kinship care are duly acknowledged.

However, against the background of the fact that the majority of children deprived of parental care in Africa find themselves placed in kinship care (largely informally), it is important to put in place some measures of identification, regulation and protection or assistance (where necessary) not just to the child but to the caregiver(s) as well. Proceeding from there, these children are no longer invisible to the law and as such their concerns can be exposed or identified and appropriately addressed. After all, measures for monitoring child protection are always required in relation to all vulnerable children whether or not in alternative care.

## 1.7 Organisation of Thesis

The thesis will be structured into six chapters as follows:

Chapter 1 provides a general background to the study, spelling out the statement of the problem, the research questions, the aims and significance of the study, the limitations of the study, methodology and choice of jurisdictions, a literature review as well as the organisation of the thesis. This chapter also provides a definitional guide on some of the key terms that will recur throughout the study.

Chapter 2 will attempt to discuss kinship care from an African historical perspective, with a view towards providing information on the variations in the understanding, practice and experiences of kinship care. The chapter will also attempt to highlight how the practice of kinship care in traditional African society differs from what obtains in contemporary African societies. The aim of this chapter is to provide a contextual background for understanding the place of kinship care in traditional African societies and how this impacts on childcare practices today.

Chapter 3 highlights the international and regional legal and policy framework on the right to alternative care for children deprived of a family environment, chiefly in the CRC and the African Children's Charter. This will include relevant historical background to these instruments and how they aid in a proper interpretation and understanding of the right and its attendant obligations. Key elements of the right will be examined, as well as key principles underlying the right, in an attempt to examine the content of the right. The jurisprudence of the CRC Committee and the African Committee on the Rights and Welfare of the Child and other bodies, if any, will be considered here in an attempt to examine the extent and manner of application of the principles underlying the right to alternative care. A discussion on the main forms of alternative care as provided in the relevant instruments will also be presented in this chapter.

Chapter 4 will dwell on kinship care including a discussion on the role of the UN Guidelines in establishing kinship care as alternative care. With regards to international instruments, the UN Guidelines is the only instrument from which guidance can be sought in this regard. The relationship between kinship care and child protection systems will also be discussed, and the benefits and problems of kinship care will also be

highlighted. In this chapter, a proposal will be presented as to the different forms in which kinship care should be understood or addressed with reference to its place in the child protection framework.

Chapter 5 will focus on legal and policy developments on the right to alternative care in the country case studies, focusing on the place of kinship care in the alternative care and child protection framework in comparison to the other established forms of alternative care, particularly foster care. Further, existing measures of state support applicable to alternative care generally, and kinship care particularly, will be discussed, with a view to highlighting the challenges involved.

Chapter 6 will highlight the main conclusions derived from the various themes explored in the study and provide a summary of findings. The chapter will also provide recommendations to a number of stakeholders including African governments, relevant regional and international bodies such as the African Committee of Experts on the Rights and Welfare of the Child and the CRC Committee, as well as the international community at large. The recommendations will be based on the suggested approach as to how kinship care should be understood and addressed in relation to the right to alternative care and child protection generally.



## **1.8 Literature Review**

The author has relied on a vast array of literature in putting together this study. In this section, a review of the frontline literature (incorporating both primary and secondary sources) relied upon in each chapter of the thesis will be presented.

Chapter two provides the underlying historical and contemporary context to the study of kinship care in Africa. The works of Bennett, Chanock, Gordon, Roberts and Snyder feature prominently in this regard. They provide a background to the role of customary law and the impact of colonialism on traditional African practices, such as kinship care. Mutua and Radcliffe-Brown also examine the practice of kinship care in terms of assigned roles and responsibilities for different family members as well as the different ways in which kinship relations are formed. Other scholars whose works feature prominently in this chapter include

Adepoju, Ankumah, Bourdillon, Cobbah, Elmer, Ezewu, Murdock, Ncube, Njungwe, Ojo, Okafor, Quashiga, Rwezaura and Sudarkasa. They together show, among others, that although there is no homogenous description of the 'family' in Africa, the Eurocentric nuclear family structure does not accurately portray how the family is understood in the African context. The chapter also addresses the conceptualisation of the family in international law. To this end, the works of scholars, such as, Goode, Graff, Grosh, Hodgson, Okon, Onyango, Roscoe and van Bueren are critically examined. In this chapter, the author attempts to establish a link between the practice of kinship care in traditional African societies and the role it occupies in contemporary children's rights discourse.

Chapter three proceeds to lay the theoretical framework for the study of children's rights with particular focus on the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. In this regard, the works of Van Bueren, Freeman and Veerman as well as Detrick thoroughly examine the historical background leading up to the drafting of the CRC including the process around the inclusion of the provisions dealing with the right to alternative care generally and kinship care particularly. The works of Cantwell and Holzscheiter, Davel, Delplace, Freeman, LeBlanc, Newell, Tolfree, and Vandenhoe are also examined in this chapter. On the complementary relationship between the CRC and the African Children's Charter, with particular reference to the right to alternative care and the status of kinship care, the works of Chirwa, Gose, Kaime, Kamchedzera, Lloyd, Olowu, Mezmur, Ssenyonjo, Sloth-Nielsen, and Viljoen are also discussed. The gap this chapter seeks to fill is to highlight to what extent (if at all) kinship care was envisaged within the context of the right to alternative care under the CRC and the ACRWC.

Chapter four which dwells on the 'conceptualisation of kinship care' utilises a broad range of literature that are directly relevant to alternative care to highlight the relationship between kinship care and other forms of alternative care, particularly foster care. The chapter examines the transition of kinship care from a family environment to an alternative care option in the light of new developments confronting the African family and society at large. Thus, this chapter relies heavily on an analysis of the United Nations Guidelines for the Alternative Care of Children (2009) and the accompanying Handbook to the Guidelines. In defining



and understanding kinship care as well as in discussing the relationship between kinship care and other forms of alternative care, the works of several scholars are examined. These include Atwool, Barber and Delfabbro, Broad, Cantwell, Doyle, Greeff, Hegar, Isiugo-Abanihe, Kurtz, O'Brien, Oswald, May, Roby, Scannapieco, Sellick, Stack, Takas, Williamson, and a host of others. Chapter four is very significant to the thesis of this study because it seeks to diminish the obscurity to which kinship care is often subjected within the broader subject of the right to alternative care. Thus, it stands as a comprehensive study on the status and practice of kinship care in international law.

In chapter five, the status of kinship care in the domestic legislation of South Africa and Namibia is presented, together with the relationship between kinship care and social assistance provisioning. Consequently the works of established scholars, such as, Ballard, Barberton, Berry, Biersteker, Boezaart, Bray, Budlender, Davel, Dawes, Doek, Dugard, Dinokopila, Duncan, Gallinetti, Goldblatt, Hall, Haarmann, Hosegood, Jamieson, Jordan, Kalula and Strydom, feature prominently throughout the discourse in this chapter. Others include Kangandiela and Mapaure, Kassan, Kaseke, Kruger, Kruuse, Lake, Leatt, Liebenberg, Lund, Matthias and Zaal, Mahery, Mbazira, Meintjes, Monson, Nkosi, Olivier, Pendlebury, Proudlock, Rensburg, Rosa and Dutschke, Ruppel, Seyisi, Skelton, Smit, Smith, Sloth-Nielsen, Triegaardt, van Sloten, Viviers, and Woolard. Against the background of the ongoing child law reform all across Africa, this chapter seeks to unravel the controversies around the practice of kinship care in domestic jurisdictions. It also addresses some of the uncertainties surrounding the inclusion of kinship care within the framework of domestic legal reform on alternative care.

In concluding this study, the author attempts to draw from all of the works mentioned above and more, to address the existing gap(s) in international, regional and domestic law as it concerns the subject of the right to alternative care generally and the law and practice of kinship care particularly. Thus, in chapter six, the author attempts to provide clear answers to all the research questions raised at the beginning of the study as contained in this introductory chapter.

## 1.9 Glossary/Definition of Terms

African Context: This does not refer to a unified or single concept since the aim of this study is not to claim that there is a universal childhood or family experience in Africa. It is rather a general attempt to show the distinctions that exist between the understanding and practices around this concept in Africa and in other parts of the world.

Child Protection: This refers to formal responses or measures of intervention by the State to respond to the abuse of children within the family or a domestic environment in order to protect the child from harm; usually by ensuring the separation of the child from that environment and placing the child in State protective custody. Foster care is the main form of State protective custody that is the focus of this study.

Family/Family Environment: A non-institutional or non-State established structure within which the care and upbringing of the child generally take place.

Foster Care: This generally refers to the placement of a child in the domestic or family environment of a family other than his own (usually with the caregivers being unrelated to the child biologically) for a temporary period ranging from a few months to two years.

Kinship Care: This generally refers to care provided for the child by relatives other than the biological (or legal) parent(s).

Orphan: A child (anyone younger than 18 years) who has lost either or both parents ('single' or 'double' orphan) to death or abandonment among others, and who lives in difficult circumstances, such as, lacking food, support and other services, including the support of any adult.

OVCs: Orphans and other groups of children who are more exposed to risks of deprivation than their peers. It is a broad term which is not a replacement for 'children orphaned by AIDS'; it is rather a reference to various categories of children, including but not limited to children orphaned by AIDS or other factors. Examples of other groups include children from minority groups, children affected by armed conflict, refugee or internally displaced children, and children with disabilities.

Parental Care: Care and protection provided for the child within the confines of a family environment established or regulated by a biological (or legal) parent.

Vulnerability: This includes the physical weakness of children, including weakness in power relations with adults, as well as their lack of certain social and other skills with which to protect themselves from manipulation and other forms of harm and abuse generally.



## CHAPTER TWO – KINSHIP CARE OF CHILDREN IN AFRICA: THE UNDERLYING CONTEXT

### 2.1 Introduction

Kinship care is historically an important source of care and support within the social structure of families in traditional African societies. Such support was largely unremunerated and voluntary but determined by cultural norms and traditional values.<sup>1</sup> Kinship care was, among others, a tool for the socialisation of children and a means of reducing family vulnerabilities. Thus, it was considered a mutually beneficial exercise for all family members.<sup>2</sup> The aim of this chapter is to trace the 'origins' and practice of kinship care in Africa with the goal of showing that it has always been an integral part of child care in Africa, despite the heightened focus and attention kinship care receives today in child care practice and literature. The chapter seeks first, to explain and contextualise kinship care from an African perspective. The reference to an 'African perspective' in this study is important given the erroneous thought by many that kinship care is peculiar to Africa. Kinship care of children (and other family members) is a practice that has been in existence across various cultures and generations the world over.<sup>3</sup>

An understanding of this historical context vis-à-vis the role and practice of kinship care in traditional African societies will contribute towards understanding how kinship care has evolved over time and how it exists and functions in contemporary African societies. Since it continues to have an impact on child care today, an investigation into kinship care in the past will provide insights into the realities, attitudes and practices of recent years. In other words, the chapter will serve to lay a foundation for understanding some of the challenges, problems or difficulties associated with kinship care today, and perhaps provide some guidance on to how to address them.<sup>4</sup> Kinship, as a concept, existed and exists within a cultural milieu

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<sup>1</sup> Kosberg *JI Family care of the elderly: Social and cultural changes* (1992) 265.

<sup>2</sup> The World Bank (Orientations in Development Series) *Reducing vulnerability and increasing opportunity: Social protection in the Middle East and North Africa* (2002) 50.

<sup>3</sup> Ince (2009) 12.

<sup>4</sup> As pointed out in the introductory chapter of this study, some of the challenges concern the role of financial incentives in kinship care as well as poverty and its impact on the health, education and general well-being of children in kinship care.

based on the relationship between the family and community, and plays a significant role in the care and upbringing of children, including those deprived of parental care.<sup>5</sup>

Secondly, this chapter will present a discussion on how the concept of the family has evolved in international law, and on the various shades of understanding of the family as the basic or fundamental unit of any society. In addition to a discussion of the existing and changing forms of the family, a discussion of the challenges confronting the family in contemporary times will be presented, with a focus on Africa. The chapter will also include a discussion of some of the rights applicable to the family as an institution with a focus on how they apply to children, showing their application to care within the kinship context. Although some of these rights are guaranteed in other international law instruments (which will be alluded to), the focus of this chapter will be the provisions of the CRC and the African Children's Charter. This is premised on the fact that children's need for protection and priority care is the rationale behind the adoption of these international instruments dedicated to children's rights.<sup>6</sup> While the provisions of these instruments on the right to alternative care will be discussed in great detail in chapter three, it suffices to note here that the adoption of these international instruments has promoted the visibility of children beyond the scope of the family to that of being subjects of State protection such that childhood is regarded as a separate status in law. However, this does not mean 'that the rights of the child can be best protected when treated in isolation from the rest of the family'<sup>7</sup>; as will be shown in the discussions in the third part of this chapter.

## **2.2 Kinship Systems and the Extended Family in Africa: Historical Perspectives**

A large body of existing knowledge about aspects of African culture is generally situated in Africa's pre-colonial past, an era characterised by the absence of a central state or government as exists today; the cohesion of African societies depended on the kinship system.<sup>8</sup> Since contemporary African societies have

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<sup>5</sup> Ince (2009) 24.

<sup>6</sup> Detrick S (ed) *The United Nations Convention on the Rights of the Child: A guide to the "travaux preparatoires"* (1992) 19; ACRWC preamble, para 5; CRC preamble, para 4.

<sup>7</sup> Van Bueren G *The international law on the rights of the child* (1995) xx.

<sup>8</sup> Bennett TW 'Human rights and the African cultural tradition' (1993) 22 *Transformation* 32.

changed radically from what obtained in the past, several scholars have criticised accounts of the African past as stereotypical and largely utopian, based in many respects on the inventions or imaginations of the authors – with no ‘possibility of empirical verification.’<sup>9</sup> During the 20<sup>th</sup> century however, other scholars criticised the idea of ‘invented accounts’ as racist, perhaps due in part to the need to make the colonial enterprise seem less ‘evil’ than it was considered to be – especially by African scholars.<sup>10</sup> But, ‘whatever the state of the historical record, it is undeniable that differences did, and still do, exist between notional western and African cultures.’<sup>11</sup> And whether ‘relatively true or relatively false, the African stereotype has been critical in shaping a certain consciousness and thereby a secure identity’,<sup>12</sup> which still holds sway in modern African societies.

Although the concept of ‘kinship’ cannot be strictly defined in a manner that cuts across all cultural arrangements and belief systems, it is ‘an important point of reference for analysing the conceptual framework that supports family organisation from an African perspective’.<sup>13</sup> The social institution of kinship greatly underscores the definition and understanding of the concept of family in Africa. This is so in relation to how kinship regulates such matters as patterns of marriage, social positions, rules governing inheritance, and the care of weaker or disadvantaged members of society, among others.<sup>14</sup> Kinship ‘refers to formal systems of relationships with regard to alliances of marriage and lines of descent’<sup>15</sup> or ‘the web of relationships woven by family and marriage’.<sup>16</sup> The term ‘kin’ (or ‘relatives’) generally describes a collective of people with whom one has particular relational connections usually based on blood or marriage ties, across several generations.<sup>17</sup> However:

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<sup>9</sup> See generally Snyder FG ‘Colonialism and legal form: The creation of customary law in Senegal’ (1981) 19 *Journal of Legal Pluralism*; Roberts S ‘Some notes on “African Customary Law”’ (1984) *Journal of African Law*; Chanock M *Law, custom and social order: The colonial experience in Malawi and Zambia* (1985); Gordon R ‘The white man’s burden: Ersatz customary law and internal pacification in South Africa’ (1989) 2 *International Journal of Historical Sociology*; Bennett (1993) 31, 34-35.

<sup>10</sup> Bennett (1993) 35. This paved the way for the elevation and popularity of the idea of cultural relativism within the human rights discourse. See Kaplan D & Manners RA *Culture theory* (1972) 5-8; 38-38.

<sup>11</sup> Bennett (1993) 36.

<sup>12</sup> Bennett (1993) 37.

<sup>13</sup> Ince (2009) 24.

<sup>14</sup> Mataranyika P ‘Zimbabwe: Extended Family System’, 5 May 2011, available at < <http://allafrica.com/stories/201105091071.html> (accessed 2 August 2013).

<sup>15</sup> McCarthy J R & Edwards R *Key Concepts in Family Studies* (2011) 126.

<sup>16</sup> Mataranyika (2011).

<sup>17</sup> McCarthy & Edwards (2011) 127.

Although perceptions of someone as kin or non-kin may have implications for such issues as identity and personhood, property and authority, the distinction may be centred primarily on emotion and the moral quality of relationships, rather than on ideas of biological or 'natural' connections.<sup>18</sup>

In effect, genetic or biological ties may not be definitive for determining kinship relations; rather, 'what is significant is the ways in which different cultures give social meaning to ties that may be understood as biological.'<sup>19</sup> Thus, kinship relations could be deliberately created by affinity, on the basis of common social ties, such as, religion or social status, and for purposes of rendering financial or other assistance to one another whenever the need arises.<sup>20</sup> Thus, kinship relations also encompass the acknowledgment of social relationships which may not necessarily coincide with genetic or physical relationships.<sup>21</sup>

The notion of kinship 'includes a network of responsibilities, privileges, and support in which individuals and families are expected to fill certain roles.'<sup>22</sup> Historically and traditionally, organised kinship networks served as central organising structures in the absence of a formal government,<sup>23</sup> (particularly in pre-colonial Africa). Thus, kinship goes beyond personal relationships to 'having broader social and political significance for the distribution of power and resources.'<sup>24</sup> As a social institution, kinship works based on relationships of descent, with the community placed at the head, the next level being the clan, followed by the family (lineage) and then the individual.<sup>25</sup> In terms of defining relationships, the clan is a larger unit while the lineage is smaller. In a lineage, all members usually know or are able to trace their exact (blood/marriage) relationship to one another while members of a clan are unable to do so although all members are keenly aware of belonging to the group, usually on the basis of sharing a common ancestor.<sup>26</sup>

Kinships are broadly classified into four main types: patrilineal, matrilineal, double and bilateral, all of which exist in different parts of Africa.<sup>27</sup> The clan to which a person belongs is determined by birth and the type of

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<sup>18</sup> McCarthy & Edwards (2011) 128.

<sup>19</sup> McCarthy & Edwards (2011) 128. Ties with unrelated (by blood, marriage or other deliberate acts) individuals may be described as 'fictive kinship' or 'quasi kinship'.

<sup>20</sup> Abebe T & Aase A 'Children, AIDS and the politics of orphan care in Ethiopia: The extended family revisited' (2007) 64 *Social Science & Medicine* 2059.

<sup>21</sup> Radcliffe Brown AR 'Introduction' in Radcliffe Brown AR & Forde D *African systems of kinship and marriage* (1950) 5.

<sup>22</sup> Mataranyika (2011).

<sup>23</sup> McCarthy & Edwards (2011) 127.

<sup>24</sup> McCarthy & Edwards (2011) 127.

<sup>25</sup> N'Sengha MN 'The African Charter on Human and Peoples' Rights: An African contribution to the project of global ethic' (1998) available at < <http://globlethic.org/Center/mutombo1.htm> > (accessed 4 September 2013).

<sup>26</sup> Radcliffe-Brown AR (1950) 39-40; Mataranyika (2011).

<sup>27</sup> Mataranyika (2011).

kinship governing the particular community.<sup>28</sup> Patrilineal kinship focuses on the father's side of the family, that is, relationships are traced through generations from fathers. This system is common in South Africa, Swaziland and Zimbabwe, among others. Matrilineal descent infers tracing lineage through mothers, although matrilineal societies are not necessarily governed by women as political authority usually resides in men. This system exists among certain peoples of Malawi and Zambia. Double descent kinship, which is rare, is one in which every individual belongs to his father's patrilineal group and his mother's matrilineal group, with rights and obligations split between both sides. This exists in parts of West Africa, such as in respect of the Yako of Nigeria, and in parts of southern Africa, such as in respect of the Herero of Namibia. Bilateral descent, which is an even rarer kinship system, is such that an individual is considered equally related to his kin on both the father's and mother's sides.<sup>29</sup>

The hierarchical relationship of descent in a kinship network is aimed at the promotion of complementarity and not subordination. It allows for people to co-exist peacefully and cooperate harmoniously within an orderly social arrangement.<sup>30</sup> It is based on the African tradition of *Ubuntu*<sup>31</sup> which promotes harmony between the individual and the larger group, as the individual finds his true essence through a mutually cooperative relationship with the group ('one for all and all for one').<sup>32</sup> An entirely independent individual is considered an aberration.<sup>33</sup> This is so because 'the African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity.'<sup>34</sup> As described by Bennett:

In Africa individualism would not be valued as it is in the west. Rather, a person would be expected to compromise his or her interests for the good of the larger unit; to stand on one's right would be thought anti-social. It follows that whenever rights were in issue they would be the concern of the family as a group.<sup>35</sup>

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<sup>28</sup> Radcliffe-Brown (1950) 40.

<sup>29</sup> Mataranyika (2011); Radcliffe-Brown AR 'Introduction' in Radcliffe-Brown AR & Forde D *African systems of kinship and marriage* (1950) 3, 13-15.

<sup>30</sup> Radcliffe-Brown (1950) 5-6.

<sup>31</sup> This tradition is fully expressed in the Xhosa (South African) proverb *Umuntu ngumuntu ngabantu* which means 'I am, because we are'. See also Mbiti J *African Religion and Philosophy* (1970) 141.

<sup>32</sup> Gildenhuis JSH *Ethics and Professionalism: The battle against public corruption* (2004) 107.

<sup>33</sup> Benedek W 'Peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights' in Kunig P, Benedek W & Mahalu C (eds) *Regional Protection of Human Rights by International Law: The Emerging African System – Documents and three introductory essays* (1985) 63.

<sup>34</sup> Mutua M 'The Banjul Charter and the African Cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 359.

<sup>35</sup> Bennett (1993) 33.



Similarly therefore, no individual family is viewed in isolation but as part and parcel of the kinship-communal system, mutually supportive of one another.<sup>36</sup> The larger unit or community is defined as a 'network or networks of informal relationships between people connected with each other by kinship, common interests, geographical proximity, friendship, occupation or the giving and receiving of services or various combinations of these.'<sup>37</sup> Thus, the kinship system is founded on a balanced combination of entitlements and obligations such that the African notion of rights could not be conceived independently of duties. Consequently, 'the right of one kinship member is the duty of the other and the duty of the other kinship member is the right of another.'<sup>38</sup>

The practice of *Ubuntu*, which traditionally forms the bedrock of African societies, can be distilled into seven elements which together characterise family life and social interactions and impact on all aspects of life within the kinship system and larger African societies: respect, responsibility, restraint, reciprocity, reverence, reason and reconciliation.<sup>39</sup> Respect must be directed to others especially parents, relatives, elders and leaders in the community while responsibility means being accountable for self and for the less fortunate in one's extended family and community. Similarly, reciprocity envisages giving back to the community on the basis of mutual assistance while restraint means that due consideration must be given to the family and community when making decisions. Reverence is an attribute to be directed towards God and the ancestors and other things in nature while reason and reconciliation are applicable to the manner in which disputes are settled and peace is maintained within the family and community.<sup>40</sup> These are cherished values in traditional African communities.<sup>41</sup> Based on this view of the interconnectedness of the individual with the kinship community at large, it has been argued that in modern African states, 'the duty upon States to protect families cannot be dissociated from its protection of the community at large.'<sup>42</sup>

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<sup>36</sup> Ankumah E *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 163.

<sup>37</sup> Barclay P *Social Workers: Their role and tasks (the Barclay Report)* (1982) 199 – cited in Kosberg (1992) 130.

<sup>38</sup> Cobbah J 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 321.

<sup>39</sup> Sudarkasa N *The strength of our mothers: African & African American women & families - Essays and Speeches* (1996) 218; Mutua (1995) 362.

<sup>40</sup> Aranda-Narajo B & Davis R 'Psychosocial and cultural considerations' in Anderson J (ed) *A guide to the clinical care of women with HIV* (2000) 276-277.

<sup>41</sup> Ojo V 'Culture, Identity and the Self: Africanisms in the Americas', 2005, 11 – available at <http://theafrican.com/Magazine/Africanisms.html>

<sup>42</sup> Njungwe E The international protection of children's rights: an analysis of African attributes in the African Charter on the rights and welfare of the child (2009)3 *Cameroon Journal on Democracy and Human Rights* 18.

The 'nuclear family' is often associated with the idea of being the 'traditional', 'ideal' or 'proper' family or family form.<sup>43</sup> As such, it is assumed to be the benchmark from which all other family forms differ or deviate.<sup>44</sup> This view usually fails to take into consideration particular eras and social contexts in which the nuclear family form existed or exists. This family form which usually refers to a married heterosexual couple together with their biological children 'may [however] be an assumption that is relevant primarily to white middle-class European and New World societies at a particular point in history.'<sup>45</sup> In Africa however, the perception of family extends beyond this narrow confines to include other relatives, such as, uncles, aunts, cousins, nephews and grandparents. Thus, the 'typical' African was extended both vertically and horizontally. Vertical extension refers to the incorporation of 'ascending and descending generations into lineages and clans' while horizontal extension refers to the incorporation of members by marriage or polygamous unions.<sup>46</sup> In essence, the 'nuclear' or 'elementary' family unit, arranged in terms of husband-wife, parent-child and siblings, may only be understood to be the first level of a network of relations that serves as the foundation for the larger kinship system.<sup>47</sup> Thus, based on how households were generally structured, the extended family in most of Africa was considered to be the core family, and no individual would ordinarily conceive of his family without the inclusion of individuals other than his parents and siblings.<sup>48</sup>

Thus a household would contain a man, his wives and their children, his unmarried brothers and sisters, possibly his parents, and any kinfolk or other people who chose to attach themselves to him. This unit provided for all the individual's material, social and emotional needs. Such kin-based societies are characterised by the overriding emphasis placed on loyalty to the family and the stress placed on duties rather than rights.<sup>49</sup>

While there is no homogenous family form that can be referred to as 'the African family',<sup>50</sup> the typical nuclear family structure does not accurately depict what was historically understood to be a family in

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<sup>43</sup> 'Family forms' refer to 'the variety of patterned, or structured, ways in which people live and relate together as family members, sometimes raising the technical issues of how to describe individuals' relationships to each other.' See McCarthy & Edwards (2011) 70.

<sup>44</sup> McCarthy & Edwards (2011) 71.

<sup>45</sup> McCarthy & Edwards (2011) 72.

<sup>46</sup> Bennett (1993) 32.

<sup>47</sup> Bourdillon MFC *The Shona peoples: An ethnography of the contemporary Shona, with special reference to their religion* (1976) 44; Radcliffe-Brown (1950) 6.

<sup>48</sup> Njungwe (2009)17; Mataranyika (2011).

<sup>49</sup> Bennett (1993) 33.

<sup>50</sup> Adepoju A 'Introduction' in Adepoju A (ed) *Family, population and development in Africa* (1997) 8.

Africa.<sup>51</sup> The traditional African extended family refers to 'a family form in which intergenerational, and other wider family relationships, are an important feature of residence, contact, and/or various forms of support and control [including norms, values and beliefs].'<sup>52</sup> Within this composition are understood roles and functions, the practice of which maintains the family cohesion within the larger social kinship collective.<sup>53</sup>

Ezewu provides an elaborate and comprehensive explanation of the extended family which incorporates both a historical and contemporary understanding of how the extended family is viewed in Africa generally:

...the following characteristics can be observed: 1. the extended family system is a combination of several nuclear, polygamous, or polyandrous types of family, and the relationships between the members are biological and social. 2. The members through biological relationships usually trace their origin to a common ancestor, lineage and a common genealogical line. 3. The members usually occupy a specific geographical location in a village or city as a home place for all members, *even if they live in other parts of the world*,<sup>54</sup> returning to it from time to time. 4. The members have a common identity and group feelings, looking up to one another for help at times of disaster or misfortune and sharing one another's happiness.<sup>55</sup>

From the above, the African family is defined or established by the following factors: marriage; a common biological ancestry; sharing a common geographical location or place of origin; and sharing a common identity coupled with a common sense of responsibility for one another's well-being. With reference to family members living in different parts of the world, Ezewu alludes to the disruptions that have changed the traditional or historical structure of the family in Africa since the eras of colonisation and decolonisation. However:

Maintenance of kinship ties may also be valued regardless of geographical movements; indeed, for people moving across the world, networks of wider kin may be a crucial part of life in both their place of origin and their destination.<sup>56</sup>

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<sup>51</sup> South African Institute of Race Relations (SAIRR) *First Steps to Healing the South African Family* (2011) 1.

<sup>52</sup> McCarthy & Edwards (2011) 72; Adepoju (1997) 4.

<sup>53</sup> Ince (2009) 24.

<sup>54</sup> Emphasis added.

<sup>55</sup> Ezewu E 'The relative contribution of the extended family system to schooling in Nigeria' (1986) 55 *The Journal of Negro Education* 222.

<sup>56</sup> McCarthy & Edwards (2011) 73.

### 2.2.1 Marriage and Children: The Basis of African Kinship Systems and Family Environment

In traditional African societies, clear lineages were extremely crucial for the organisation of family structures because those kinship ties were necessary for the establishment of rules providing for the care of children, including those who become orphaned or otherwise deprived of parental care.<sup>57</sup> For example, orphans automatically became the responsibility of their paternal or maternal uncles, depending on the tradition by which the kinship line of descent is traced.<sup>58</sup> Marriage was therefore considered to be the resource for founding and growing kinship and kinship relations. In fact, most villages in pre-colonial Africa comprised of people related either by blood or by marriage.<sup>59</sup> As such, a marriage was understood to be an alliance between 'two families or bodies of kin' and not simply a union between a man and a woman.<sup>60</sup> Consequently, the birth of children not only unites the husband and wife, but also unites two families or bodies of kin by producing for them common descendants to further cement the kinship bond.<sup>61</sup>

Thus, procreation was considered to be the fundamental goal of marriage such that being childless was considered a tragedy, affecting not only the (married) couple but the extended family at large.<sup>62</sup> As the 'value' of a married woman was measured in her ability to produce children, barrenness in certain cases led to a refund of the bride price or the provision of another woman who could bear children.<sup>63</sup> Having children conferred a higher social status to the child bearer in comparison to the childless individual, couple or family.<sup>64</sup> Thus, children were also viewed as a both a form and a source of wealth,<sup>65</sup> with particular reference to their role as labourers or producers for the family and community by assisting their parents in production activities, such as, farming, hunting, fishing and trading, among others.<sup>66</sup> It must however be stressed that the value of children to the family was not measured merely in economic terms; rather

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<sup>57</sup> Ince (2009) 24.

<sup>58</sup> Ince (2009) 24.

<sup>59</sup> Cobbah J 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 362.

<sup>60</sup> Radcliffe-Brown (1950) 51.

<sup>61</sup> Radcliffe-Brown (1950) 48.

<sup>62</sup> Fortes M 'Kinship and marriage among the Ashanti' in Radcliffe-Brown A & Forde CD *African systems of kinship and marriage* (1950) 262; Asirifi B 'The value of children in Africa' in Sai FT (ed) *Family welfare and development in Africa*. (Proceedings of the IPPF Regional Conference, Ibadan, Nigeria, August 29-September 3, 1976) (1977) 114-118.

<sup>63</sup> Radcliffe-Brown (1950) 51.

<sup>64</sup> Harkness S & Super C 'Shared child care in East Africa: Socio-cultural origins and developmental consequences' in Lamb ME, Sternberg KJ, Hwang CP & Broberg AG (eds) *Child care in context: Cross-cultural perspectives* (1992) 445.

<sup>65</sup> Harkness & Super (1992) 444.

<sup>66</sup> Belembaogo A 'The best interests of the child: The case of Burkina Faso' (1994) 8 *International Journal of Law, Policy and the Family* 212.

children's real value was also socially, emotionally, culturally and spiritually construed.<sup>67</sup> On the whole therefore, 'children were cherished and valued, as semi-productive contributors of the future for the kinship unit.'<sup>68</sup>

Childhood in traditional African societies was largely a social construct not necessarily determined by the child's biological age. 'Rather, it was a time-limited period of consummate dependency, followed by a gradual and inexorable progression into adult life: this progression commenced almost immediately a child could function independently.'<sup>69</sup> Thus, childhood and the process of transition into adulthood were determined by conformity to established rules and patterns of authority. The transition period was fluid, characterised by several changes in status, roles and responsibilities over time - each assigned role or responsibility having been successfully and satisfactorily executed.<sup>70</sup>

### **2.2.2 Kinship Responsibilities for the Care of the Child in Traditional African Societies**

In traditional African societies, the care of children was understood to be the responsibility not only of the parents but of the extended family and larger community; it was an obligation to be discharged with a great sense of responsibility.<sup>71</sup> This collective sense of responsibility for the proper upbringing of children is the background to the African saying that 'it takes a village to raise a child', with the 'village' referring to the extended family and kinship community at large.<sup>72</sup>

Culturally, children were not considered to belong exclusively to their parents but to the larger community which was in turn responsible for the care and socialisation of the child.<sup>73</sup> Thus, the concept of 'parent' and by implication parental responsibilities was wide in scope to include individuals other than the biological

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<sup>67</sup> Rwezaura B 'Competing "images" of childhood in the socio-legal systems of contemporary Sub Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* 253.

<sup>68</sup> Sloth-Nielsen J 'Modern African childhoods: Does law matter?' in Freeman M (ed) *Law and childhood studies* (2012) 119.

<sup>69</sup> Sloth-Nielsen (2012) 118.

<sup>70</sup> Sloth-Nielsen (2012) 118.

<sup>71</sup> Fall-Sow D 'The rights of children in the African judicial system' in Verhellen E (ed) *Understanding children's rights* (1996) 493; Benedek (1985) 63.

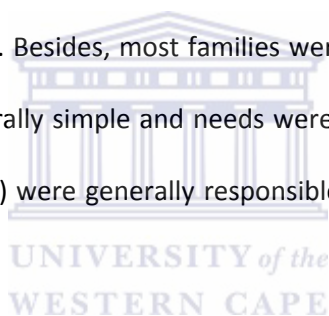
<sup>72</sup> Ojo (2005).

<sup>73</sup> Ocholla-Ayayo ABC 'The African Family: Between Tradition and Modernity' in Adepoju (1997) 60.

parents.<sup>74</sup> These individuals were, together with the biological parents, responsible for exercising a variety of functions in relation to the child.<sup>75</sup> This enabled the extended family to operate as a 'reproductive, economic and socialization unit.'<sup>76</sup> Thus, the care of the child was never construed in terms of rights, it was simply a natural process regulated by custom. The default position was that a child would be collectively cared for even if he was an orphan or had parents who were unable or unwilling to care for him.<sup>77</sup> The main focus was on what the birth and existence of the child meant for the family and kinship group as a whole:

In the African tradition, children's rights were not a social issue; a child was a welcome addition to any household, where it would be assured of food, shelter and support. There were no formal mechanisms to protect children, but then none would have been necessary. Abundant land, a subsistence economy, and the highly developed sense of generosity due to all family members, underwrote the support obligation. African law had no concern with a *child's* rights to a proper upbringing; its interest was in a *family's* right to claim the child as one of its members.<sup>78</sup>

Thus, it was taken for granted that all family members, including children, would be sufficiently cared for in terms of food, shelter and other needs. Besides, most families were sufficiently capable of catering to the needs of their members, life was generally simple and needs were much fewer.<sup>79</sup> Parents and relatives of the same generation (uncles and aunts) were generally responsible for the care, control and education of children.<sup>80</sup>



The relationship between children and adults at this level was generally based on the 'exercise of authority on the one side and respect and obedience on the other'.<sup>81</sup> With grandparents however, the relationship was much less formal and much more interactive; a relationship based on 'friendly familiarity and almost of social equality'.<sup>82</sup> This was because grandparents had the duty to protect children's interests and safeguard them from harsh treatment. They also served as the medium through which the voices of children were heard.<sup>83</sup> Thus, while children showed a lot of restraint in their behaviour towards their parents and other

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<sup>74</sup> Ankut P 'Balancing parental responsibility and state obligation in fulfilling the socio-economic rights of children under the African Charter on the Rights and Welfare of the Child', unpublished LLM thesis, University of the Western Cape 2003, 26.

<sup>75</sup> Armstrong A & Barzelatto J 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African Perspective (1995) *Women and Law in Southern Africa working paper No 11*, 10.

<sup>76</sup> Cobbah (1987) 320.

<sup>77</sup> Armstrong & Barzelatto (1995) 11.

<sup>78</sup> Bennett (1993) 33.

<sup>79</sup> Ankut (2003) 27.

<sup>80</sup> Cobbah (1987) 320; Radcliffe-Brown (1950) 27.

<sup>81</sup> Radcliffe-Brown (1950) 28.

<sup>82</sup> Radcliffe-Brown (1950) 28.

<sup>83</sup> Sloth-Nielsen (2012) 118-119.

family members of their generation, they were much less restrained with their grandparents.<sup>84</sup> It is submitted that this cultural practice counterbalanced the cultural invisibility of children reflected in the notion that in Africa, a child is only to be seen and not heard,<sup>85</sup> thereby maintaining the equilibrium within the larger social kinship system. In effect, children's voices were heard but just not directly and not in the manner developed by the notion of *rights*. It is further submitted that the practice is not removed from the notion of child participation as it exists today in that children are generally heard through representatives except if they are of sufficient maturity and reasoning to speak for themselves.<sup>86</sup> Further, because childhood in Africa was not a time-bound period determined by biological or physical age, the allowance for the child to be heard would also depend on sufficient maturity as determined by the successful execution of certain cultural practices.<sup>87</sup>

All of these do not however mean that children were never exposed to incidents of maltreatment, neglect or other forms of abuse in traditional African societies.<sup>88</sup> Further, with the changing nature of modern society characterised by factors, such as, deteriorating socio-economic conditions, the geographical separation of family members or kin, the individualisation of rights and limited social interactions among kinship groups, the role of biological parents for the care of the child has increased and become the standard while the active role of extended family members (as a collective) has decreased and become almost non-existent. As such, the imposition of 'real legal duties of a socio-economic nature on people who care only *de facto* for a child' raises difficulties if not being entirely impossible.<sup>89</sup>

Radical changes are clearly evident in domestic relationships. Christianity, capitalism, industrialisation and urbanisation have all had a corrosive effect on ties of kinship. The exigencies of labour migration and urban accommodation alone have succeeded in fragmenting the extended household.<sup>90</sup>

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<sup>84</sup> Radcliffe-Brown (1950) 28. This practice has been used to explain why grandparents are generally 'more indulgent towards their grandchildren than are parents to their children.'

<sup>85</sup> Stephen AN 'The United Nations Convention on the Rights of the Child and its influence on the legislations of African states' (2009) <http://stannescatholic.wordpress.com> (accessed 5 September 2013).

<sup>86</sup> Children's right to express their views and have such views considered will be discussed in the following chapter.

<sup>87</sup> See Ampim M 'The Five Major African Initiation Rites', *Africana Studies*, September 2003, available at < <http://www.manuampim.com/AfricanInitiationRites.htm> > (accessed 10 September 2013). See also Hipple A 'Coming of age rituals in Africa: Tradition and change' (2008) IV *Prudence International Magazine Journal*, available at < <http://www.annikahipple.com/writing.samples> > (accessed 28 June 2010).

<sup>88</sup> Sloth-Nielsen (2012) 119.

<sup>89</sup> Ankut (2003) 27.

<sup>90</sup> McCarthy & Edwards (2011) 129.



All these factors and more resulted in the rise of phenomena such as city-dwelling single parents, female-headed households,<sup>91</sup> and many rural households containing only women, children and the elderly, among others.<sup>92</sup> As the weakest and/or most vulnerable members of any group, children have had to bear the brunt of these radical changes:

such units obviously cannot provide reliable support networks for the indigent. The cost of educating and raising children, for example, a burden exacerbated by growing poverty, means that a child without parents is no longer automatically welcomed into a family. It might be rejected as a financial burden. And the former guardians of morals – paternalistic chiefs and vigilant ancestral shades – are no longer there to insist on performance of family obligations.<sup>93</sup>

The changes described above notwithstanding, kinship care of children traditionally played two key roles. First, it was a cultural requirement integral to the African conception of family and community, requiring the direct involvement of almost every member. Secondly, it was ‘a way of maintaining the child’s links with his/her biological family.’<sup>94</sup>



### **2.2.3 Kinship and the Responsibilities of the Child**

Childhood in traditional African societies was not understood as a period of total dependence; children were expected to assume responsibilities towards the household from an early age.<sup>95</sup> Children were viewed not in terms of rights but in terms of their need for care and protection as well as in terms of their duties towards parents, other relatives and the community at large.<sup>96</sup> Thus, children were expected to take part in productive activities for the sustenance of the family by which they acquired the capacity to grow in status and be able to assume greater responsibilities in the larger society.<sup>97</sup> Such duties were considered as important, if not more important than the right of children to be cared for.<sup>98</sup> In other words, that children

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<sup>91</sup> Ojo argues that the existence of female-headed households is not new as it had its place in traditional African societies based on certain cultures where women had central roles to play in the family. It is therefore not an aberration in the manner in which it is addressed in literature today. See Ojo (2005).

<sup>92</sup> Bennett (1993) 34.

<sup>93</sup> Bennett (1993) 34-35.

<sup>94</sup> Ince (2009) 12.

<sup>95</sup> Ncube W (ed) *Law, Culture and Children’s Rights in Eastern and Southern Africa* (1998) 21; Sloth-Nielsen (2012) 118.

<sup>96</sup> Cobbah (1987) 311, 321.

<sup>97</sup> Ankut (2003) 28.

<sup>98</sup> Badamasuy J *Obligations and rights of the parents under the Child’s Rights Act: A Shariah perspective* (2009) 1; Rajabi-Ardeshiri M ‘The rights of the child in the Islamic context: The challenges of the local and the global’ (2009) 17 *The International Journal of Children’s Rights* 479.



would take responsibility for aspects of family and communal life was taken for granted in the same manner that the care of children was taken for granted. Examples of duties expected of children in traditional African societies include respect for adults, and actively taking responsibility for the care of younger siblings. Others include farming, the rearing of livestock, and trading in family-produced goods, etc.<sup>99</sup>

Despite the universal (legal) acceptance of the age of 18 as marking the end of childhood, there exists the 'cultural view that children still have responsibilities towards their families and duties to contribute to the maintenance of the family's means of production.'<sup>100</sup> In fact, apart from the mantra of a lack of adequate resources, that the majority of African states do not (legally) contemplate or execute welfare programmes for the care of the aged and needy, finds its root in the culture of children owing their parents and families a 'duty of respect and maintenance.'<sup>101</sup>

The idea that rights come with corresponding duties is one which is ingrained in each kinship member from birth.<sup>102</sup> This African worldview greatly influenced the language of the African Charter on Human and Peoples' Rights (ACHPR)<sup>103</sup> and the Children's Charter. With regards to the latter instrument, the inclusion of Article 31 on the duties or responsibilities of the child has been criticised as being incompatible with the best interests of the child.<sup>104</sup> This is however an imbalanced approach which places excessive focus on rights while almost totally ignoring the corresponding duties, the interrelationship between rights and duties being a settled principle of law.<sup>105</sup> Further, such criticism or reservation betrays a lack of

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<sup>99</sup> Cobbah (1987) 309; Sloth-Nielsen (2012) 118.

<sup>100</sup> Sloth-Nielsen (2012) 126.

<sup>101</sup> Mutua (1995) 369.

<sup>102</sup> Mutua (1995) 361.

<sup>103</sup> It was adopted in 1981 and entered into force in 1986. See also the American Declaration on the Rights and Duties of Man, 1948.

<sup>104</sup> See generally Gose M *The African Charter on the Rights and Welfare of the Child* (2002); Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) *The International Journal of Children's Rights* 127; Chirwa DM 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157; Lloyd A 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *The International Journal of Children's Rights* 180.

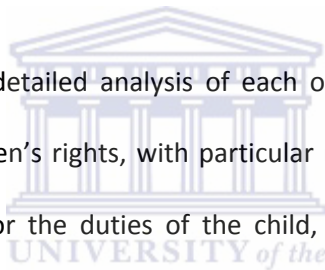
<sup>105</sup> Chapman AR 'Reintegrating rights and responsibilities: Towards a new human rights paradigm' in Hunter KW & Mack TC (eds) *International Rights and responsibility for the Future* (1996) 9; Cooray M *The Australian Achievement: from Bondage to Freedom*, available at < <http://www.ourcivilisation.com/cooray/btof/chap226.htm> > (accessed 22 May 2013). It should be noted that the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) also make provisions for the duties or responsibilities of individuals to others and the community at large. See for example, articles 29(1) UDHR and paragraph 5 of both preambles to the ICCPR and the

understanding of the concept of rights and responsibilities within the African context and a lack of appreciation of the valuable contribution such a provision makes to children's rights globally.<sup>106</sup> Article 31 of the Charter provides:

Every child shall have responsibility 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*,<sup>107</sup> 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;<sup>108</sup>
- b) to serve his national community by placing his physical and intellectual abilities at its service;<sup>109</sup>
- c) 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;<sup>110</sup>
- d) to preserve and strengthen the independence and the integrity of his country;<sup>111</sup>
- e) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.<sup>112</sup>

Sloth-Nielsen and Mezmur provide a detailed analysis of each of the duties listed above, painstakingly showing their compatibility with children's rights, with particular reference to the African context.<sup>113</sup> It is important to note that in providing for the duties of the child, the ACRWC drew inspiration from the ACHPR, wherein the terminology of 'duties' and 'peoples' was adopted based on the African conception of



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ICESCR. See also Alfredsson G & Eide A 'Introduction' in Alfredsson G & Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) xxix.

<sup>106</sup> In an era of increasing globalisation with the world becoming more of a 'global village', a sense of responsibility and duties towards all individuals from all races, is key to harmony and peaceful co-existence all across the globe. Article 31 is also 'has the great potential to advance the participation rights of children.' See Sloth-Nielsen J & Mezmur BD 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 187. Children's participation rights in all matters affecting them cannot be interpreted as referring only to rights as responsibility issues also affect children.

<sup>107</sup> Emphasis added.

<sup>108</sup> Speaking about the place of 'respect' in Africa, Cobbah (1987) 321 notes as follows:

'Although African society is communal, it is hierarchical. Respect governs the behaviour of family members toward the elders in the family. It has been said that the African child learns to respect his elders even before he learns to speak. ... This respect is manifested in greetings, bows, curtsies, and other gestures that signal recognition of seniority. As one grows up in the society, therefore, one acquires seniority rights and moves up in the hierarchy of the community. Seniority rights bear no relation to one's other attributes. These rights are strictly guaranteed. Ideally every member of the family with the exception of the very young enjoys some seniority rights.'

<sup>109</sup> A classic example of this which is generally accepted all across the world is the role of young sports men and women who make their services available in international sporting events such as football.

<sup>110</sup> This refers to selflessness; an attitude disposed towards giving back to society and not just seeking to receive or exploit others. See Sloth-Nielsen & Mezmur (2008) 183.

<sup>111</sup> An example of this is the leeway provided by article 38(2)(3) of the CRC which allows children younger than 18 but not less than 15 years to be conscripted into their nations' defence forces, and this duty is viewed with pride as an act of patriotism.

<sup>112</sup> The political situation and historical background at the time is a justification for this provision, and remains justified today in light of the objectives of the Constitutive Act establishing the African Union. Sloth-Nielsen & Mezmur (2008) 186-187.

<sup>113</sup> Sloth-Nielsen & Mezmur (2008) 187.

human rights as going beyond the individual to encompasses all members of a community.<sup>114</sup> The placing of the responsibilities of the child as the last substantive provision in the ACRWC 'underlines the point that responsibilities are complementary to rights, rather than undermining them ... duties [are] the balancing elements to reinforce rights.'<sup>115</sup>

It should however be noted that the CRC is not necessarily incompatible with the African view of the relationship between children's rights and responsibilities, despite the lack of any express provision imposing duties on the child under the CRC.<sup>116</sup> This is especially so when viewed from the perspective of the complementary role the ACRWC plays to the CRC.<sup>117</sup> It has been argued that the concept of the duties of the child under the ACRWC can be related to Article 5 of the CRC, which deals with the evolving capacity of the child.<sup>118</sup> The effect of this is that while the duties of the child are not incompatible with the rights of the child, such duties must be based on the capacity of each child depending on the age, maturity and other personal attributes of the child.<sup>119</sup> This in itself is consonant with the reality that childhood is based on a variety of cultural traditions, as earlier mentioned.<sup>120</sup> In effect, in both pre-modern and modern African societies, duties are not imposed on the child without regard to the age and maturity of the child, as defined either by custom or by law. Thus, the child's evolving capacities cannot be divorced from the duties of the child as contemplated under the Charter.

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<sup>114</sup> Sloth-Nielsen & Mezmur (2008) 164. See also Cobbah (1987) 321; Udombana NJ 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 111; Quashigah EK & Okafor OC 'An Introduction' in Quashigah EK & Okafor OC (eds) *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (1999) 7; Heyns C 'Where Is The Voice Of Africa In Our Constitution?', Occasional Paper No. 8, Centre for Human Rights, University of Pretoria (1996), available at < <http://www1.chr.up.ac.za/index.php/occasional-papers.html> > (accessed 22 May 2013).

<sup>115</sup> Sloth-Nielsen & Mezmur (2008) 187.

<sup>116</sup> Sloth-Nielsen & Mezmur (2008) 162, 170: 'Throughout the CRC, duty bearers seem to be parents and the state.'

<sup>117</sup> Mezmur BD 'The African Children's Charter v UN Convention on the Rights of the Child: A Zero-Sum Game?' (2008) 23 *South Africa Public Law* 1.

<sup>118</sup> This will be discussed further in the following chapter.

<sup>119</sup> Sloth-Nielsen & Mezmur (2008) 170. See also Assim UM '20 years down the line: Assessing the impact of the United Nations Convention on the Rights of the Child' unpublished LLM research paper on Children's Rights and the Law, UWC (2009) 9.

<sup>120</sup> Van Bueren (1995) xxi.

## 2.3 The Family in International Law

The United Nations General Assembly in 1994 proclaimed that year as 'The International Year of the Family' (IYF), with the theme 'Family: resources and responsibilities in a changing world', thereby placing the family at a higher level on the international agenda.<sup>121</sup> This recognition was in acknowledgement of the various 'destabilizing trends' confronting the family institution, the world over:

Due to economic and social changes and the drive towards development, however, the family has been undergoing considerable transformation. Families are experiencing increasing stress in having to cope with unemployment, poverty, domestic violence, drug and alcohol addiction, child abuse and neglect, disease and sickness, and displacement due to armed conflicts, environmental degradation and famine. Rising rates of divorce and births out of wedlock and the emergence of single parenting of children have had the effect of transferring traditional family duties and responsibilities from the private to the state sector.<sup>122</sup>

The objectives of the 1994 proclamation therefore included, among others, the need 'to increase awareness of the importance of the family and family issues among governments and the private sector, to enhance understanding of the functions and problems of families.'<sup>123</sup> In keeping with the need to maintain flexibility with regard to defining the family, the United Nations did not focus on definitional issues since:

Families assume diverse forms and functions from one country to another, and within each national society. These express the diversity of individual preferences and societal conditions. Consequently, the International Year of the Family encompasses and addresses the needs of *all families*.<sup>124</sup>

With the passage of time and constant changes in societies, traditional or hitherto accepted family forms are being altered resulting in new family forms. In most African societies for example, the family typically comprised of a patriarchal husband and/or father with his wife and/or wives and their children organised under a traditional kinship structure.<sup>125</sup> With industrialisation and globalisation, however, have come

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<sup>121</sup> Resolution 44/82 of 9 December 1989; Hodgson (2003) 150.

<sup>122</sup> Hodgson (2003) 150. Challenges confronting the family still abound even as the 20th anniversary of the IYF comes up in 2014. See United Nations, Department of Economic and Social Affairs (DESA), Economic and Social Council (ECOSOC), 'Twentieth Anniversary of the International year of the Family, 2014' available at < <http://social.un.org/index/Family/InternationalObservances/TwentiethAnniversaryofIYF2014.aspx> > (accessed 06 May 2013): Owing to rapid socio-economic and demographic transformations, families find it more and more difficult to fulfil their numerous responsibilities. Many struggle to overcome poverty and adequately provide for the younger and older family members. It is also more and more difficult for them to reconcile work and family responsibilities and maintain the intergenerational bonds that sustained them in the past.

<sup>123</sup> Hodgson (2003) 150. Another critical objective is the need 'to focus on the rights and responsibilities of all family members.'

<sup>124</sup> United Nations, Department of Economic and Social Affairs (DESA), Economic and Social Council (ECOSOC), 'The International year of the Family (IYF) 1994' available at < <http://social.un.org/index/Family/InternationalObservances/InternationalYearoftheFamily.aspx> > (accessed 06 May 2013). My emphasis in italics.

<sup>125</sup> Pretorius E 'Family life in South Africa' in Roopnarine JL & Gielen UP (eds) *Families in global perspective* (2005) 368; Okon E 'Towards defining the 'right to a family' for the African child" (2012) 12 *African Human Rights Law Journal* 379.

changes in the 'traditional structure of families in most cultures, resulting in a preference for the nuclear family form.'<sup>126</sup> This has however not eradicated the role of the extended family or kinship network system as 'post-modern families feature extended family members coming to the rescue of stressed nuclear family members.'<sup>127</sup> In fact, this is the context in which many children in need of alternative care in contemporary times enter into the kinship care system. This is different from what obtained in pre-modern times where extended family members were expected to take part in raising the children of their relatives based on culturally assigned roles and responsibilities.<sup>128</sup> Thus, the kinship or extended family system has only undergone a structural change in that it is no longer necessarily residential in nature or strictly composed of kin and does not necessarily function as a self-sufficient economic unit.<sup>129</sup> This structural change has however not affected familial obligations among family members however spread apart they may have become.<sup>130</sup>

Generally, the African family, through the existence of strong kinship networks, serves as a safety net and source of economic and social security benefits to its members whether or not some of the members are gainfully employed.<sup>131</sup> In the past where almost every family had a common economic resource, such as a farm, the profitability of such a resource depended on the active involvement of each member in the utilisation of the resource or in the production process.<sup>132</sup> Writing from a sociological perspective, Goode asserts that in a family, 'people are actually producing goods and services for one another...They are engaged in ... a wide array of services that would have to be paid for in money if some member of the family does not do them.'<sup>133</sup> Even today with the shift from defined forms of economic resource like farmlands to other forms of capital, the earnings or income of any of its members is generally considered to

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<sup>126</sup> Okon (2012) 380.

<sup>127</sup> Okon (2012) 380.

<sup>128</sup> Sloth-Nielsen (2012) 118; Sloth-Nielsen J 'Children's rights in Africa' in Sessononyo M (ed) *The African Regional Human Rights System: 30 years after the ACHPR and beyond* (2012) 155; According to Cobbah: "These roles are essentially rights which each kinship member customarily possesses, and duties which each kinship member has toward his kin." Cobbah (1987) 320-321.

<sup>129</sup> Adepaju (1997) 8.

<sup>130</sup> Adepaju (1997) 9; Opong (1997); Foster (2002) 346. Other structural changes include the proliferation of female-headed households and new forms of polygamy which are bi-residential rather than co-residential in nature, as well as the rise of child-headed households.

<sup>131</sup> Grosh M 'Weaving the Social Safety Nets', Paper presented at the HDNSP course, Protecting the Vulnerable: The Design and Implementation of Effective Safety Nets, December 2-13, 2002, World Bank, Washington DC (slide 41).

<sup>132</sup> Graff EJ *What is Marriage For? The Strange Social History of Our Most Intimate Institution* (1999) 16.

<sup>133</sup> Goode WJ *The family* (1982) 1.

be part and parcel of family resources to be utilised whenever necessary.<sup>134</sup> The family thus functions not only as the basic unit of society but also as the basic unit of production, besides reproduction and consumption.<sup>135</sup> This situation still continues today against the background of the fact that, unlike in industrialised nations where the government bears the burden of social security, this responsibility falls almost solely on the family in Africa.<sup>136</sup> Adult men were traditionally the custodians of wealth in both the family and community. But today, there is a growing number of female-headed families with no males or fathers and where present, they have been undermined, economically and in many other ways. Thus:

The myth of the desirability of male economic dominance still holds very strong currency for many working-class families, but unemployment and low wages are a feature of the lives of many men.<sup>137</sup>

Consequently, nowhere is the widespread poverty in Africa felt as much as in the family, and the analysis shows that the majority of the world's poorest populations live in Africa.<sup>138</sup> While the population continues to grow exponentially, the current situation in the majority of the countries in the region is 'characterised by lack of resources, absence of social security, inequality, and aid dependency.'<sup>139</sup> The majority of African countries have weak, if any, public social security mechanisms to assist individuals and families in coping with increasing financial and other burdens.<sup>140</sup> Thus financial burdens are collectively borne by the pooling of resources within the family, clan and tribe for any financial obligations concerning any individual member of the family.<sup>141</sup> Such obligations include getting married, discharging a debt or paying a fine, conducting funeral rites and more importantly, meeting the day-to-day basic needs of food, clothing and even shelter.<sup>142</sup> Lack of sufficient resources and infrastructure, among other factors, makes it difficult if not impossible for most African governments to establish and implement welfare programmes for those who

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<sup>134</sup> Adepaju (1997) 7.

<sup>135</sup> Gakuru ON, Kariuku P & Bikuri K 'Children in debt: The experience of street children in Nairobi' in Lugalla JLP & Kibassa CG (eds) *Poverty, AIDS, and street children in East Africa* (2002) 27; Adepaju (1997) 2.

<sup>136</sup> Zimmer Z & Dayton J 'Older adults in sub-Saharan Africa living with children and grandchildren' (2005) 59/3 *Population Studies* 296; Adepaju (1997) 7.

<sup>137</sup> Campbell C 'Learning to kill? Masculinity, the family and violence in Natal' (1992) 18 *Journal of Southern African Studies* 618.

<sup>138</sup> Sala-i-Martin X 'THE WORLD DISTRIBUTION OF INCOME: FALLING POVERTY AND... CONVERGENCE, PERIOD (\*)' 22, October 9, 2005, available at < [http://www.columbia.edu/~xs23/papers/pdfs/World\\_Income\\_Distribution\\_QJE.pdf](http://www.columbia.edu/~xs23/papers/pdfs/World_Income_Distribution_QJE.pdf) > (accessed 11 May, 2013). See also United Nations Development Programme (UNDP) Africa Human Development Report 2012: Towards a Food Secure Future 22; The World Bank's Annual Report 2012 and THE WORLD BANK ANNUAL REPORT 2008: YEAR IN REVIEW (2008) 2, 30.

<sup>139</sup> Mezmur (2009) 80.

<sup>140</sup> Ghai D 'Social security priorities and patterns: a global perspective', Education and outreach programme Discussion paper DP/141/2002, International Institute for Labour Studies, 13, available at < <http://www.ilo.org/public/english/bureau/inst/download/dp14102.pdf> >

<sup>141</sup> Kayongo-Male D & Onyango P *The sociology of the African family* (1984) 81.

<sup>142</sup> Roscoe J *The Baganda: An account of their native customs and beliefs* (1965) 12.



are financially vulnerable due to one or other form of disability or inability.<sup>143</sup> The situation becomes even worse for children who are usually left on the periphery of such interventions, unless concerted efforts have been made and proactive steps taken to reverse the situation. Thus social services targeted at children are largely absent with a few exceptions, as in Ethiopia, Kenya, Malawi, Mauritius, Namibia, and South Africa.<sup>144</sup>

From the foregoing, what emerges is that globally, the modern conception of the family goes beyond the traditional understanding of a man, woman and children. It includes, among others, single parent families and other cohabiting individuals, whether married or not and whether of the same or opposite sex.<sup>145</sup> The emphasis is on the existence of a 'primary living unit in which the care and upbringing of children take place'.<sup>146</sup> Thus, the family should be understood in the context of its functions and not necessarily based on its structure or form.<sup>147</sup>



### 2.3.1 The 'Right to a Family': Definitional Issues

Most international instruments describe the family as the basic unit of society.<sup>148</sup> The family is also the unit upon which the primary responsibility for the upbringing and protection of children rests.<sup>149</sup> Although some international and non-governmental organisations have asserted that 'all children have a right to a

<sup>143</sup> Mezmur (2009) 75; Lim (2010) 56.

<sup>144</sup> Sloth-Nielsen J 'A developing dialogue-children's rights, children's law and economics: Surveying experiences from Southern and Eastern African law reform processes' (2008)12 *European Journal of Comparative Law* 1. The Child Support and Foster Care grants in South Africa, as part of a comprehensive social security programme, are particularly worthy of note, being the first of their kind on the continent. See Kaseke E 'The role of social security in South Africa' (2010) 53 *International Social Work* 160. These initiatives will be further examined in a later chapter of this study.

<sup>145</sup> South Africa Law Commission 'Report on the Review of the Child Care Act' (2002) 58 <<http://www.doj.gov.za/salrc/reports/2002dec.pdf>> (accessed 3/10/2011).

<sup>146</sup> Terpstra E 'Children on the move: A perspective from the Netherlands' in Doek J, van Loon H & Vlaardingbroek P *Children on the move: How to implement their right to family life* (1996) 22.

<sup>147</sup> Elmer MC *The sociology of the family* (1945) 17.

<sup>148</sup> See among others, arts 12 & 16(1) UDHR; Preamble & art 23, ICCPR; Art 10, ICESCR; art 18, ACHPR; art 16, European Social Charter & art vi, American Declaration of the Rights and Duties of Man, 1948. According to Cobbah, social contract theorists opine that the individual is the basic unit of society, but philosophers such as Aristotle (as well as African philosophers) consider the family (including the extended family in the African context) to be the basic unit of society as the individual is a function of his social relationships, the first of which is the family. This position is what holds sway globally and found its way into international law. See Cobbah (1987) 319.

<sup>149</sup> UN General Assembly, Special Session on Children (SSC), Declaration and Plan of Action on A World Fit for Children (WFFC), Resolution S-27/2, 10 May 2002.

family, and families have a right to care for their children',<sup>150</sup> the 'right to a family' is not expressly provided for in international law.<sup>151</sup> This notwithstanding, Okon argues 'for the recognition of the right of the child to a family as a canopy for other familial rights enjoyable by the child.'<sup>152</sup> Such other related 'familial' rights, include the 'right to respect for family life'<sup>153</sup> the 'right to found a family'<sup>154</sup> and the right not to be arbitrarily separated from the family.<sup>155</sup> She notes further that the 'right to a family' does not exist because 'family' has not been defined.<sup>156</sup> It is however my view that the lack of a definition for 'family' (which may be unnecessary as further discussions will reveal) does not in any way detract from the recognition and protection of the family as an established institution at international, regional and national levels. According to Hodgson:

Repeated reference to the family by these various instruments reflects the continuing concern and respect of states for this institution. In light of this wide recognition, it is at least arguable that state and societal protection of the family has crystallised into a rule of customary law.<sup>157</sup>

Neither the CRC nor the ACRWC defines 'family' although the approach of the CRC Committee as to what constitutes the family is flexible taking into account the diverse family forms in different parts of the world.<sup>158</sup> This was a deliberate approach on the part of the CRC drafters as the discussion in chapter three will show, in order to leave the definitional issue (if at all) to States' Parties discretion while focusing on the role and functions of the family for the proper growth and development of the child.<sup>159</sup> Other international

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<sup>150</sup> International Committee of the Red Cross (ICRC), International Rescue Committee (IRC), Save the Children UK, UNICEF, UNHCR & World Vision International (WVI) *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (2004) 16. This assertion is rooted in the 'principle of family unity' or 'integrity of the family' under international humanitarian law in the context of armed conflict.

<sup>151</sup> See Sloth-Nielsen J, Mezmur BD & van Heerden B 'Inter-country Adoption from a Southern and Eastern African perspective' (2010) *International Family Law* 86-96.

<sup>152</sup> Okon (2012) 375.

<sup>153</sup> Art 8(1) European Convention on Human Rights.

<sup>154</sup> Art 9 Charter of Fundamental Rights of the European Union.

<sup>155</sup> Art 9 CRC & arts 19 & 25 ACRWC.

<sup>156</sup> Okon (2013) 391. Citing the case of *Re: Certification of the Constitution of the Republic of South Africa* (1996 10 BCLR 1253 (CC)), she correctly points out that the court noted that the existence of various family forms or the changing constitutions of families makes it inappropriate to define the concept of family in constitutional terms.

<sup>157</sup> Hodgson (2003) 150. See for example, arts 12, 16 & 25 UDHR; 23 ICCPR & 18 ACHPR: 'But state and societal protection alone is no guarantor of its success. Such protection is a necessary, but not sufficient, precondition for its maintenance and development.'

<sup>158</sup> Hodgkin R & Newell P *Implementation handbook for the Convention on the Rights of the Child* (2007) 76. See also CRC Committee General Comment (GC) No 7 'Implementing child rights in early childhood' (2005) para 15.

<sup>159</sup> Okon (2012) 387; Mezmur BD 'Intercountry adoption in an African context: A legal perspective', unpublished LLD thesis, University of the Western Cape (2009) 156. During the 2005 Day of General Discussion on 'Children without Parental Care', the CRC Committee included the 're-constructed family' and 'joint family' to the list of family forms listed in the 1994 Day of General Discussion. See also GC 7 (2005) para 15 which states that family 'refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests.'



instruments and their monitoring bodies have also followed the same approach: an acknowledgement of the existence of various family forms and a focus on the functions and responsibilities of the family.<sup>160</sup>

This approach which is mindful of the African understanding of family has played a role in influencing legislation on children's rights in several African states. 'Family' in some of the legislation is defined in a manner broad enough to encompass the care of children by persons other than their parents. This is in recognition of the role of extended family members in the care and upbringing of children within the African context. For instance, the Nigerian Child's Rights Act (2003) defines 'family' to include 'a person who has parental responsibility for a child and a person with whom the child is living or has been living.'<sup>161</sup> The South African Children's Act 38 of 2005 is even more explicit; in Section 1 it defines a child's 'family member' as including:<sup>162</sup>

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

Identifying persons who form family in relation to a child is therefore based on 'key characteristics', such as, 'parenthood (natural or adoptive) and blood relationship; acquisition of parental responsibility in respect of the child; and significant relationship, akin to a family relationship, resulting from psychological and emotional attachment.'<sup>163</sup> Sub-section (d) above provides for 'flexibility in understanding the family, away from traditional consanguineous relations.'<sup>164</sup>

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<sup>160</sup> See for example the UN General Assembly Resolution on A World Fit For Children, A/S-27/19/Rev, (2002) Art 44(19); Aguirre S & Wolfgram A 'United Nations policy and the family: Redefining the ties that bind: A study of history, forces and trends' (2002) 16 *BYU Journal of Public Law* 113. See also Art 4 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) which defines 'members of the family' as:

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

<sup>161</sup> Sec 277, Nigerian Child's Rights Act, 2003.

<sup>162</sup> Sec 1, South African Children's Act 38 of 2005. Emphasis added in italics.

<sup>163</sup> Okon (2012) 389.

<sup>164</sup> Okon (2012) 389: 'This definition appears to extend family membership to persons (excluding blood relatives to the second degree) who may have cared for a child for a period of time, and thereby became psychologically and emotionally attached to the child without necessarily acquiring legal rights and responsibilities in respect of the child.'

'The word 'family' is derived from the Latin word 'familia' which means household.'<sup>165</sup> Citing Cicero, Hodgson points out that the family is considered to be the 'seed-plot of the whole commonwealth',<sup>166</sup> a metaphor suggesting that 'successful family nurture is vital to the well-being of the civic order.'<sup>167</sup> This means that only a family (also in the alternative care context) with adequate resources and support can ensure the proper growth and development of the child, and in turn produce well-rounded and responsible citizens for the larger society.

Over the years however, several writers have defined the concept in diverse ways based on their different educational, cultural and other backgrounds, as well as the time period in which they wrote. In 1949 Murdock, an Anthropologist, defined the family as:

[A] social group characterised by common residence, economic co-operation and reproduction. It includes both sexes, at least two of whom maintain a socially-approved sexual relationship, and one or more children, own or adopted, of sexually-cohabiting adults.<sup>168</sup>

Murdock's definition leaves out categories, such as, same-sex couples or partners and even families or couples without children, his definition being underscored by or in conformity with what is termed 'socially-approved sexual relationships.' Perceptions of what amounts to 'socially approved sexual relationships' continue to shift and change over time in different societies such that heterosexual adult relationships are not the only foundational basis for a family, albeit the most common.<sup>169</sup> Silverstein & Auerbach define the family as 'two or more people who are in a relationship created by birth, marriage or choice.'<sup>170</sup> Based on the inclusion of 'choice', this definition is inclusive of families involved in adoption, foster care or kinship care, which is also covered by 'birth'. A more open definition states that the family is 'one or more adults related by blood, marriage or affiliation who co-operate economically, who may share a common dwelling

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<sup>165</sup> Hodgson (2003) 147. This already suggests that an exact definition for 'family' is futile since the structure and composition of households vary from culture to culture.

<sup>166</sup> Cicero Offices, *Essays and Letters translated by T Cockman* (1690), London (1909) I, xvii cited in Hodgson (2003) 147.

<sup>167</sup> Hodgson (2003) 147.

<sup>168</sup> Murdock GP *Social Structure* (1949) 1.

<sup>169</sup> Popenoe D 'American family decline 1960-1990: A review and appraisal' (1993) 55 *Journal of Marriage and Family* 529-535. See also Gittins D *The family in question: Changing household and familiar ideologies* (1995) 15; Gubrium JF & Holstein JA *What is family?* (1990) 1.

<sup>170</sup> Silverstein LB & Auerbach CF '(Post-) modern families' in Roopnarine JL & Gielen UP (eds) *Families in a global perspective* (2005) 33.

place, and who may rear children.<sup>171</sup> Central to the understanding of what family means is attachment to or self-identification with the group and the role of support, nurturing and socialisation that the family plays as the 'haven of primary fulfilment and meaningful experience.'<sup>172</sup>

To support the argument for a definition of family, Okon suggests no definition but gives pointers to ingredients which such a definition, in relation to children, should be composed of. They are: responsible adult(s); blood relationship; parental rights and responsibilities; 'a unit or persons to whom a child is emotionally and psychologically attached and from whom the child enjoys material and physical security'; permanence or intended permanence (*excluding most foster families*).<sup>173</sup> She concludes that the focus should not be on 'its structure or form, but rather in the functions of family members, one to another, and the intention to establish permanence in the execution of such functions.'<sup>174</sup> Further, she proposes that whatever definition is developed 'should be revisited regularly and adapted to changing times and needs.'<sup>175</sup> It is submitted that these conclusions further serve to justify my position that arriving at a fixed definition of family is unnecessary and may be counter-productive. As shown in the discussion above, the ingredients Okon suggests are already present in existing definitions, and the understanding of the family globally is dynamic; subject to change as time progresses. In the context of the right to alternative care however, Okon's exclusion of foster families from the definition of family is problematic and quite impractical because foster families have in reality become an established form of alternative family care for many children.

### 2.3.2 Existing and Changing Family Forms and Functions

Despite the established recognition and protection of the family as an institution, the 'family' as a concept is not static but is constantly in 'transitional development' because the understanding and practice of

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<sup>171</sup> Strong B, DeVault C & Sayad BW *The marriage and family experience: Intimate relationships in a changing society* (1998) 14. See also Benokraitis NV *Marriage and families – Changes, choices and constraints* (2005) 3.

<sup>172</sup> Zinn B & Eitzen S *Diversity in families* (1990) 14. See also Benokraitis (2005) 3; Winch RF 'Toward a model of familial organisation' in Burr WR, Hill R, Nye FI & Reiss I (eds) *Contemporary theories about the family* (1979) 162; Hodgson (2003) 151.

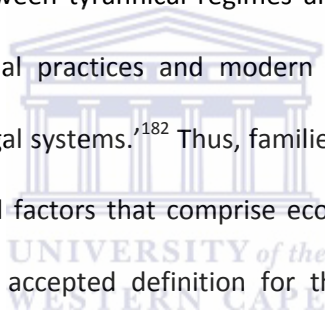
<sup>173</sup> Okon (2012) 386-387.

<sup>174</sup> Okon (2012) 393.

<sup>175</sup> Okon (2012) 393.

family varies from place to place, and each variation has profound implications for children and their upbringing.<sup>176</sup> Contemporary society therefore requires an increasing reliance on a multi-disciplinary or interdisciplinary approach for properly capturing the essence of what is termed 'family'.<sup>177</sup> As noted by Graff, 'marriage and the family have been in violent flux throughout history, the rules constantly shifting to fit each culture and class, each era and economy.'<sup>178</sup> However, the central assumption underlying the concept is the 'long-term stability of the family as a close physical, economic and emotional unit within which children are planned, born and reared.'<sup>179</sup> Consequently, the family is distinguished from other social groups by 'the kind and degree of emotional, socio-cultural and legal relationships between the various members.'<sup>180</sup>

The family, with particular reference to Africa, was about two decades ago described as being 'sandwiched between tradition and modernity, between tyrannical regimes and democratic reforms.'<sup>181</sup> This position remains the same today as 'traditional practices and modern structures are strongly combined and intertwined in the African social and legal systems.'<sup>182</sup> Thus, families continue to be defined and re-defined by several contemporary and historical factors that comprise economic, social and cultural processes.<sup>183</sup> Consequently, there is no universally accepted definition for the ancient concept of 'family' as it is practically impossible to arrive at a definition 'that is capable of including families from different cultures and historical periods.'<sup>184</sup> In fact, most of the definitions that existed in literature for a long period of time



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<sup>176</sup> Van Bueren (1995) 68; CRC Committee GC 7 (2005) para 19.

<sup>177</sup> Muncie J, Wetherall M, Langan M, Dallos R & Cochrane S (eds) *Understanding the family* (1997) 1; Ogletree CJ 'Parentage issues challenging California's judicial system: What is a family?' (2005) 6 *Journal of the Center for Families, Children and the Courts* 99. See also Okon (2012) 376: 'modern day understanding of family relationships has been fuelled by scholarship in diverse disciplines, including sociology, anthropology, psychology, history, family studies, child development studies, family therapy, education, medicine, economics, demography, social work and law.'

<sup>178</sup> Graff (1999) x.

<sup>179</sup> Adegboyega O, Ntizi JPM & Ssekamatte-Ssebuliba JB 'The African family: data, concepts and methodology' in Adepoju *et al* (1997) 28.

<sup>180</sup> Adegboyega, Ntizi & Ssekamatte-Ssebuliba (1997) 29.

<sup>181</sup> Adepoju (1997) 8.

<sup>182</sup> Mezmur (2009) 37.

<sup>183</sup> Montgomery CM, Hosegood V, Busza J & Timaeus IM 'Men's involvement in the South African family: Engendering change in the AIDS era' (2006) 62 *Social Science & Medicine* 2412. See also Ocholla-Ayayo ABC 'The African family between tradition and modernity' and Oppong C 'African family systems and socio-economic crisis' in Adepoju (1997) 60 & 158; Foster G, Makufa C, Drew R & Kralovec E 'Factors leading to the establishment of child-headed households: the case of Zimbabwe' (1997) 7 *Health Transition Review*, Supplement 2 to Volume 7 155-168.

<sup>184</sup> Okon (2012) 376-377: 'The role and functions of family also vary immensely from era to era, region to region, state to state, and culture to culture. This diversity hinges on the variety in culture, religion, sociological order (including individual lifestyle preferences) and legal perspectives that exist around the globe.'

were generally based on the nuclear or monogamous family system leaving out the extended family network and polygamous families, common in most of Africa and other parts of the world.<sup>185</sup>

In terms of classification, the United Nations understands the diverse family forms as currently existing under three broad types: nuclear families (comprising of biological, social, single-parent, adoptive and in vitro families); extended families (comprising of at least three generations, kinship/tribal groups and polygamous families); and reorganized families (comprising same-sex couples, divorced and remarried couples and community living families, among others).<sup>186</sup> These classifications and sub-classifications allow for family unions of various kinds not based solely on biological ties.<sup>187</sup> The extended family form which incorporates kinship relations is particularly significant in the context of alternative care because of the huge role it plays in child care in Africa.<sup>188</sup> Despite having grown smaller in scope and size, the extended family remains a major support structure for children deprived of their family environment through the death or incapability of their biological parents.<sup>189</sup>

In recognition of the existence of various family forms, the UN General Assembly notes that Article 5 of the CRC provides the broadest statement of principle in the Convention about the relationship between child, family, and state.<sup>190</sup> The broadness of Article 5 is in recognition of the fact that the typical western family structure and family environment is not necessarily the norm in other parts of the world, particularly in Africa. Article 5 of the CRC provides:

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<sup>185</sup> Okon (2012) 377. It is acknowledged however that there are various theories in family studies that inform the definition of the family based on anthropology, culture, ecology, history and religion, among others. See for example: Boss PG, Doherty WJ, LaRossa R, Schumm WR & Steinmetz SK (eds) *Sourcebook of family theories and methods: A contextual approach* (1993); Ingoldsby BB & Smith S (eds) *Families in multicultural perspective* (1995) 8; Broderick CB *Understanding family process* (1993).

<sup>186</sup> Aguirre & Wolfgram (2002) 36-41. See also CRC Committee, GC 7 (2005) para 19.

<sup>187</sup> Mezmur (2009) 157.

<sup>188</sup> See Foster G 'Supporting community efforts to assist orphans in Africa' (2002) 346 *New England Journal of Medicine* 1907; Foster G 'Understanding community responses to the situation of children affected by AIDS - Lessons for external agencies' in Sisask A & SIDA (eds) *One Step Further – Responses to HIV/AIDS* (2002) 91-115; Drew R, Foster G & Chitima J 'Cultural practices of orphaned families in the North Nyanga District of Zimbabwe' (1996) 11 *Journal of Social Development in Africa* 79; Ntozi JPM, Ahimbisibwe FE, Odwee JO, Ayiga N & Okurut FN 'Orphan care: The role of the extended family in northern Uganda' (1999) *Health Transition Review: The Continuing African HIV/AIDS Epidemic* 225.

<sup>189</sup> Bessler J 'In the spirit of Ubuntu: Enforcing the rights of orphans and vulnerable children affected by HIV/AIDS in South Africa' (2008) 31 *Hastings International and Comparative Law Review* 80, citing Davel C & Mungar U 'AIDS orphans and children's rights' (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 77; Roeland M and Boerma J 'Orphanhood and childcare patterns in sub-Saharan Africa: An analysis of national surveys from 40 countries' (2004) 18 *AIDS* S55-S65 Alternative care in this context may also take the form of 'customary adoption' in Africa, which is different from domestic adoption in terms of law. See Mezmur (2009) 46.

<sup>190</sup> United Nations General Assembly (November 1989) Adoption of a convention on the rights of the child (U.N. Doc. A/Res./44/25) New York: UNGA cited in Melton (1996) 1236.

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.

The very fact that there exists a rich diversity in the understanding and practice of family across the globe is what makes arriving at a fixed definition of family a difficult task (if at all necessary).<sup>191</sup> However, '[t]he family is a universal phenomenon and one of the most basic social institutions. Indeed, the family is our earliest experience of community [which lays the foundation for our social interactions in and with society at large.]'<sup>192</sup>

### 2.3.3 Contemporary Issues Affecting the Family: Focus on Africa

Although the loss of parents and parental care, giving rise to the need for alternative care, has always been a feature of every society, the incidence of HIV and AIDS has in recent years led to an increase in the rate of loss of parental care, particularly in sub-Saharan Africa.<sup>193</sup> Although the global rate of HIV and AIDS orphaning is on the decrease, sub-Saharan Africa, and particularly southern Africa, is the most affected area.<sup>194</sup> As such, the impact of the pandemic will continue to be most felt in the region particularly due to the length of time between infection and death.<sup>195</sup> Other than the implications HIV and AIDS have for the health of parents, children and entire households, there are also economic impacts. These take their toll in different phases spanning from direct costs for medical expenses and the additional burden of caring for

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<sup>191</sup> Freeman J 'Defining family in *Mossop v DSS: The challenge of anti-essentialism and interactive discrimination for human rights litigation*' (1994) 41 *University of Toronto Law Journal* 57.

<sup>192</sup> Hodgson D 'The international legal recognition and protection of the family' (1994) 8 *Australian Journal of Family Law* 219, cited in Hodgson (2003) 147.

<sup>193</sup> In its fifth stocktaking report, UNAIDS noted that over 9 million children had been orphaned as at 2009, with another estimated 47 million children having lost one parent mostly due to HIV and AIDS. See UNAIDS *Children and AIDS: Fifth Stocktaking Report* (2010) 48.

<sup>194</sup> In its 2013 report, UNAIDS reports that new HIV infections among adolescents and adults dropped by over 50% in 26 countries between 2001 and 2012. And since 2005 (the peak of the crisis), AIDS-related deaths have fallen by 30%. The report however shows that South Africa's HIV prevalence rate among people aged 15 to 49 increased to almost 18% of the total population from 17.3% in 2011; the number of people living with HIV and Aids is estimated to have increased by a million (6.1 million) over the past decade. See UNAIDS 'Report on the global AIDS epidemic 2013'; <<http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2013/september/20130923prunga/>>.

<sup>195</sup> Innocenti Insight Caring for children affected by HIV/AIDS (2006) 5. Survival rates however continue to be boosted due to the increasing availability of antiretroviral therapy. See UNAIDS *Report on the Global AIDS Epidemic* (2010) 96. The risk of decline however remains due to economic conditions in the global north due to the (2009) economic meltdown and other factors.

sick members to funeral expenses and post-funeral expenses, usually at a time when the family is already drained financially.<sup>196</sup>

With the rapid increase in the number of children orphaned by HIV and AIDS in the 1990s, it was becoming more obvious that the extended family and kinship system could not cope with caring for the affected children. During this period, local and international non-governmental organisations (NGOs) became more involved in the process while the role of the African governments was generally minimal – only six out of 40 countries in sub-Saharan Africa had in place a policy for orphans and other vulnerable children.<sup>197</sup> Although many more countries have in recent years documented national policies for OVCs, interventions for alleviating their situation remain largely inadequate.<sup>198</sup>

Besides the scourge of HIV and AIDS, other contributory factors to the instability of the family, with particular reference to child care, include natural disasters, high and increasing levels of poverty, child labour, poor governance and insecurity due to armed conflicts, and trafficking in children, among others. These highlight and increase the vulnerability of children resulting in the loss of parental care or lack of an adequate family environment.<sup>199</sup> These are some of the factors that led to the coining of the phrase ‘orphans and vulnerable children’ (OVCs)<sup>200</sup> and the preparation of various action plans in different

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<sup>196</sup> Foster G *Under the radar: Community safety nets for children affected by HIV/AIDS in poor households in sub-Saharan Africa* (2005) 13-14; UNICEF *Africa's orphaned and vulnerable generations: Children affected by AIDS* (2006) 10.

<sup>197</sup> UNICEF *Africa's orphaned generations* (2003) 36.

<sup>198</sup> UNAIDS *Children and AIDS: Fourth Stocktaking Report* (2009) 32; Richter L, Foster G & Sherr L *Where the heart is: Meeting the psychosocial needs of young children in the context of HIV/AIDS* (2006) 19-20.

<sup>199</sup> Sloth-Nielsen (2012) 129; Chirwa DM ‘Combating Child Poverty: The Role of Economic, Social and Cultural Rights’; Kassan D ‘The Protection of Children from All Forms of Violence’; Kaime T ‘The Protection of Refugee Children Under the African Human Rights System: Finding Durable Solutions in International Law’; Mezmur BD ‘Children at Both Ends of the Gun: Child Soldiers in Africa’; Gallinetti J & Kassan D ‘Trafficking of Children in Africa: An Overview of research, International Obligations and Existing Legal provision’; Sloth-Nielsen J & Mezmur BD ‘HIV/Aids and Children’s Rights in Law and Policy in Africa: Confronting Hydra Head On’; Combrinck H ‘The Hidden Ones: Children with Disabilities in Africa and the Right to Education’; Gallinetti J ‘Worst Forms of Child Labour: A View from Out of Africa’ all in Sloth-Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 91, 165, 183, 199, 239, 279, 299, 323.

<sup>200</sup> Examples of related expressions include ‘most vulnerable children’ (MVC), the ‘orphan generation’, ‘AIDS orphans’, etc. See Sloth-Nielsen & Mezmur (2008) 279.



countries for 'orphans and vulnerable children', among others.<sup>201</sup> 'The concept generally refers to orphans and other groups of children who are more exposed to risks than their peers.'<sup>202</sup>

Although there is no fixed definition of 'vulnerability', and neither the CRC nor the Children's Charter provides a definition, its interpretation and application vary from country to country, and are subject to contextual differences in the circumstances of children (and their family environments, if any).<sup>203</sup>

Vulnerability usually refers to involuntary circumstances that expose a child to a high risk of deprivation in varying degrees and forms.<sup>204</sup> It 'means to face a significant probability of incurring an identifiable harm while substantially lacking ability and/or means to protect oneself.'<sup>205</sup> With particular reference to children's vulnerability vis-à-vis their family environments, Skinner *et al* explain that childhood vulnerability is determined by reference to three core areas of life: material, emotional and social. Material problems include 'insufficient access to money, food, clothing, shelter, healthcare and education'; emotional problems include the absence of care, 'love, support, space to grieve and containment of emotions' while social problems include 'lack of a supportive peer group, of role models to follow, stigma or lack of guidance in difficult situations, and risks in the immediate environment.'<sup>206</sup>

Consequently, vulnerable children require external or additional support due to the fact that 'their immediate support system of families and caregivers can no longer cope thereby exposing them to deprivation or harm.'<sup>207</sup> It is important to point out that the socio-economic condition of poverty is itself an

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<sup>201</sup> Examples include the Kenya National Plan of Action on Orphans and Vulnerable Children 2007 – 2010, the Malawi National Plan of Action for Orphans and Vulnerable Children 2005 and the Lesotho National Policy on Orphans and Vulnerable Children (2005). These are initiatives set up to 'ameliorate the situation of children that lack parental care.' See Chirwa D & Kaime T 'Where are the missing pieces? Constructing a mosaic of the CRC and the African Children's Charter in Malawi's law and policy' (2008) 2(1) *Malawi Law Journal* 102.

<sup>202</sup> World Bank 'OVC Core Definitions', available at < <http://info.worldbank.org/etools/docs/library/164047/howknow/definitions.htm> > (accessed 29 May 2013).

<sup>203</sup> Herring J 'Vulnerability, Children, and the Law' in Freeman M (ed) *Law and Childhood Studies: Current Legal Issues 2011* (2012) 245; Sloth-Nielsen J, Gallinetti J, Wakefield L & Murungi N 'Good practice examples in law reform for children from selected Eastern and Southern African countries.' UNICEF Draft Research paper (2010 - copy on file) 29; Dunn M, Clare I & Holland A 'To Empower or to Protect? Constructing the "Vulnerable Adult" in English Law and Public Policy' (2008) 28 *Legal Studies* 234.

<sup>204</sup> SADC Secretariat *Strategic Framework and Program of Action 2008 – 2015: Comprehensive care and support for orphans, vulnerable children and youth (OVCY) in the Southern African Development Community* (2008) 5.

<sup>205</sup> Schroeder D & Gefenas E 'Vulnerability Too Vague and Too Broad' (2009) 18 *Cambridge Quarterly of Healthcare Ethics* 113.

<sup>206</sup> See Tsheko GN (ed) *Qualitative research report on orphans and vulnerable children in Palapye, Botswana* (2007) 2. See also Skinner D, Tsheko N, Mtero Munyatsi SM, Chibatamoto P, Mfecane S, Chindiwana B, Nkomo N, Tlou S & Chitiyo G *Defining orphaned and vulnerable children* (2004) 1.

<sup>207</sup> Sloth-Nielsen *et al* (2010) 28.



impetus for inadequate parental care and family environment in many areas. In relation to the root causes of widespread poverty, Ankut notes that:

Some of the most notable changes in the functions of the African family are those influenced by the shift from traditional modes of economic production and economic relations to modern economic relations based on the cash economy which most African families still grapple to adjust to. On the other hand African states have not been able, due to their weak economies to, provide alternative social security to avert the serious economic risks faced by families. It is against this background that international human rights law provides a basis for imposing obligations on the state to assist families in fulfilling their child rearing functions.<sup>208</sup>

The family is generally recognised as the first baseline of support for children. Thus, once that structure is no longer available to children, they inevitably become vulnerable and as such require support to safeguard them from the risks of vulnerability. What follows therefore is an examination of some of the family-based children's rights for assisting the family in being a proper medium of support for children in its child rearing functions.



## **2.4 Kinship Care and Children's Familial Rights: The Relationship between Family and State Parties' Obligations**

The importance of a family environment for the proper growth and development of the child is premised on the understanding that children's rights are best protected within that environment. As the basic unit of society, the family serves as the first layer of protection for the rights of children, by which the State can be assured of productive citizens for the advancement of the society. This is generally the rationale behind the role of the State in ensuring the preservation of the family as its most fundamental unit.<sup>209</sup>

While the next chapter of this study will specifically examine the right to alternative care, this section will discuss in greater detail some rights which are applicable to the protection of the family, especially in relation to its role in the care and protection of children. Thus, although there is no 'right to a family' as earlier discussed, these are rights which are applicable to the family or rights that ideally should be exercised or realised within the confines of a family environment. As such, these rights are equally

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<sup>208</sup> Ankut (2003) 32.

<sup>209</sup> Puras D 'Institutional care as a violation of rights of children under three years of age: Document for discussion' Sub-Regional Workshop on the rights of vulnerable children under three years of age Prague, Czech Republic 22 November 2011.

applicable to existing/original family environments (founded on parental care) and alternative family environments, such as, foster and adoptive families and situations of kinship care.

The realisation of most of these rights often requires achieving a balance between parental responsibility and State obligation, and most of them should be read together or in conjunction with certain other rights. In recognition of this need, the CRC Committee indicated in its guidelines for State reporting that a number of these related rights should be reported on under the cluster heading of 'Family Environment and Alternative Care'.<sup>210</sup> Related to these familial rights are those categorised under the heading 'Basic health and welfare'.<sup>211</sup> As rightly noted by Kamchedzera, 'the common tenet in all these Articles is not so much their reference to 'family' or 'parents' or 'parent', it is rather the 'need to nurture the child for her or his survival, development, participation, and protection.'<sup>212</sup>

It is therefore important to examine the content of these rights and to understand how the balance between family responsibility and State obligation is being achieved or ought to be achieved, given that they are mostly of a socio-economic nature in character. This is regardless of the fact that in no area of the human rights spectrum is the universality, indivisibility, interdependence and interrelation of human rights more visible and established than in the children's rights sphere.<sup>213</sup> Neither the CRC nor the ACRWC followed the old/traditional approach of classifying human rights into the so-called 'three generations'.<sup>214</sup>

Article 4 of the CRC provides:

States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural right, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

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<sup>210</sup> CRC Committee, *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, paragraph 1(a) of the Convention* ('Initial Report Guidelines') (1991) paras 16-18 and *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, paragraph 1(b) of the Convention* (Periodic Report Guidelines) (2005) paras 27-29.

<sup>211</sup> As above, paras 19-20 & 30-32 respectively.

<sup>212</sup> Kamchedzera G 'Article 5: The child's right to appropriate direction and guidance' in Alen A, Vande J, Lanotte JV, Verhellen E, Ang F, Berghmans E & Verheyde M (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2012) 5-6.

<sup>213</sup> UNICEF *Protecting the world's children: Impact of the Convention on the Rights of the Child in diverse legal systems* (2007) 2; CRC Committee, General Comment No. 5 'General Measures of Implementation of the Convention on the Rights of the Child' (2003) para 6.

<sup>214</sup> Abagkwa SC 'Reclaiming humanity: economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 180.

The ACRWC similarly obliges the State to adopt all measures necessary 'to give full effect to the provisions of this Charter.'<sup>215</sup> On the face of it, the Children's Charter seems to contain no limitation clause with respect to the realisation of all children's rights, including rights that are socio-economic in nature. It has therefore been argued that, under the Charter, children's rights are immediately realisable or enforceable without the constraint provided by the principle of the progressive realisation of socio-economic rights.<sup>216</sup> The special status and vulnerability of children notwithstanding, this is an incorrect interpretation because the relevant provision of the Charter cannot be read in isolation from others which make it expressly clear that in terms of rights of a socio-economic nature, States Parties obligations are 'in accordance with their means and national conditions.'<sup>217</sup> Thus, resource availability and the principle of progressive realisation cannot be divorced from the protection of children's rights under the Charter. In effect, there is no practical difference between the CRC and the ACRWC in terms of the interpretation and realisation of socio-economic rights.<sup>218</sup> The South African Constitutional Court in *Government of Republic of South Africa & Others V Grootboom and Others* addressed the nature of children's socio-economic rights and came to the conclusion that children's (socio-economic) rights are subject to the availability of resources and progressive realisation.<sup>219</sup>



#### **2.4.1 The Right to Preservation of Identity: Name, Nationality and Knowledge of and Care by the Child's Parents**

Although classified as civil and political rights and thus not 'directly' linked to the socio-economic familial rights as explained above,<sup>220</sup> it is important to discuss the elements of a child's identity because of its relationship to the child's family background or 'family environment'. Article 8 of the CRC provides that the elements of a child's identity include his or her name, nationality and family relations.<sup>221</sup> Article 8 is read together with Article 7 which provides for the child's right to birth registration, including the acquisition of

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<sup>215</sup> Art 1(1) ACRWC.

<sup>216</sup> Olowu (2002) 130.

<sup>217</sup> Art 20(2)(a) ACRWC.

<sup>218</sup> Ankut (2003) 39.

<sup>219</sup> (CCT38/00) [2000] ZACC 14.

<sup>220</sup> CRC Committee Periodic report Guidelines (2005) paras 15 & 24-26 respectively.

<sup>221</sup> Art 8(1) CRC.

a name and nationality as well as ‘the right to know and be cared for by his or her parents’, which relates to ‘family relations’ in Article 8. While Article 8 of the CRC has no counterpart in the ACRWC (or in any other international treaty for that matter),<sup>222</sup> Article 6 of the ACRWC similarly provides for the child’s right to birth registration including the acquisition of a name and nationality.<sup>223</sup> The Article also presumes against the separation of a child from his parents, which is further developed in Article 19.

The ICCPR was the first instrument to address birth registration (by name) as a human right that is linked to the establishment of a person’s identity in society, and in respect of the State.<sup>224</sup> It is the basis for, and the first means by which the State can perform its duty to promote, protect and fulfil the rights of children, by affirming their status and ensuring their visibility. In other words, birth registration is the ‘State’s first official acknowledgement of the child’s existence.’<sup>225</sup>

The crucial element in the registration of a child’s birth is the name (followed by the birth date and information on the parents, etc.).<sup>226</sup> Names are not only important to the State for children’s rights, they are equally (or more important) to families and societies because they generally reflect a person’s cultural, religious or other roots or heritage. A child’s name (particularly the surname) is particularly important in the context of kinship care in Africa because names served the purpose of distinguishing between kinship groups in traditional African societies. Descendants of a common ancestor usually could identify themselves on the basis of family names. Regardless of how ‘scattered’ extended family members may have become in Africa today, this still holds true. Ceremonies associated with the naming of children were therefore considered as sacred.

Closely linked to a child’s right to a name (and the registration of the name and other related details) is the right to know and be cared for by one’s parents.<sup>227</sup> The participation of Islamic countries in the drafting of the CRC played a significant role in the inclusion of this right in the CRC. It was argued that knowing one’s

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<sup>222</sup> Doek J ‘Article 8, The right to preservation of identity; Article 9, The right not to be separated from his or her parents’ in Alen *et al* (2006) 5.

<sup>223</sup> Art 6(1)-(4) ACRWC.

<sup>224</sup> Art 24(1) ICCPR. See also Van Bueren (1995) 118.

<sup>225</sup> Hodgkin & Newell (2007) 98. See also Nowak M *UN Covenant on Civil and Political Rights* (1993) 432.

<sup>226</sup> The acquisition of a name, *as a right*, first appeared in Article 24(2) of the ICCPR. As a desirable principle, it was first provided for in the 1959 Declaration on the Rights of the Child, which will be discussed further in the next chapter of this study. See Newell & Hodgkin (2007) 101 for details on what should be registered.

<sup>227</sup> Art 7 CRC.

parents or family background plays an important role in the psychological well-being of the individual resulting in a well-developed sense of self-esteem.<sup>228</sup> The uniqueness of this right in the CRC (and by indirect implication the ACRWC) is that it is a right that can be exercised by children, during their childhood years. In the past, the right was generally exercised by adults who were adopted during childhood in a bid to trace their origins.<sup>229</sup> Thus, unlike other rights, such as those attached to parental responsibility for the child, this right is focused on the child (while still a child, not as an adult) as the right holder.<sup>230</sup> It is in the best interests of the child to know their parents or at least, their identity, especially in the context of the right to alternative care generally. Such knowledge determines what form of alternative care is considered for a particular child. In other words, it plays an important role in the making of placement decisions.<sup>231</sup> This is so because the rules concerning identity and family origins are different for each form of alternative care, for example, adoption, foster care and *kafalah* of Islamic law.<sup>232</sup>

It has however been rightly noted that the 'right to know' one's parents is not the same thing as the 'right to be with' one's parents; the emphasis is on knowledge of one's biological and/or kinship ties and not on social relations or ties underscored by physical co-habitation.<sup>233</sup> The distinction can also be linked to the understanding that there is no 'right to a family' as already discussed, although there are rights applicable to the family to ensure its preservation and development as the basic and fundamental unit of society. This also serves to explain why the right is qualified by the phrase, '*as far as possible*.'<sup>234</sup> The qualification is justifiable since it is not always possible to identify parents and even where they are identified or identifiable, there are situations where 'it may not be in the child's best interests'<sup>235</sup> to be cared for by

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<sup>228</sup> Blauwhoff R (2009) 'Foundational facts: relative truths: A comparative law study on children's right to know their genetic origins' (2009) 50. As further discussions in chapter three of this study will reveal, the participation of Islamic countries was particularly significant in the drafting of the provisions governing the right to alternative care for children deprived of a family environment.

<sup>229</sup> Mezmur (2009) 192.

<sup>230</sup> Hodgkin & Newell (2007) 108.

<sup>231</sup> Arts 20(3) CRC & 25(3) ACRWC. See also Ziemele I 'Article 7: The right to birth registration, name and nationality, and the right to know and be cared for by parents' in Alen *et al* (2007) 31; Mezmur (2009) 190-198.

<sup>232</sup> These alternative care options will be discussed in greater detail in chapter three.

<sup>233</sup> Besson S 'Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy and the Family* 145-146.

<sup>234</sup> Art 7 CRC.

<sup>235</sup> The concept of a child's best interests is an indeterminate one which is nowhere defined and as such is often difficult to understand or grapple with; in practice, it is usually determined by contextual circumstances. The concept will be discussed further in the following chapter.

them.<sup>236</sup> Examples include cases of abandoned children, children born out of wedlock (especially where the mother refuses to identify the father), children born of incestuous relationships or rape, etc.<sup>237</sup>

#### 2.4.2 Parental Direction and Guidance

Article 5 of the CRC is unique in international law in linking the child's evolving capacities with appropriate direction and guidance.<sup>238</sup> The drafting history of the Article reveals that it was clearly intended to be revolutionary by, among others, making a clear distinction between parental authority or responsibility over the child and the child's right to enjoy or exercise his rights, that is, to firmly establish that the child is a rights holder in international law.<sup>239</sup> Consequently, the right is not particularly focused on the family as a unit, but on the role of particular adults (usually parents) in the child's development trajectory as well as on the participation of the child in following that trajectory.<sup>240</sup> To this end, Article 5 is said to have 'a two-pronged purpose.'<sup>241</sup> It provides:

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.

Although guidance and direction are semantically related, the latter 'entails a way and the existence of purpose' while the former 'entails supervision, assistance and instructions in the process of proceeding in a direction.'<sup>242</sup> Taken together therefore, 'the point is that a child's life must be purposeful.'<sup>243</sup> The first observable thing about Article 5 is that it makes a clear distinction between the role of parents and extended family or (kinship) community (as determined by custom), on the one hand, and 'legal guardians or other persons legally responsible for the child', on the other. In effect, the CRC recognises that there are

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<sup>236</sup> Hodgkin & Newell (2007) 97, 105-109. It should however be noted that the phrase was discussed and adopted against the background of discussions on adoption in order to make room for varying national legislation on matters such as anonymous births, secret adoptions, artificial fertilization and other forms of genetic parenting, etc.

<sup>237</sup> Hodgkin & Newell (2007) 106.

<sup>238</sup> Kamchedzera (2012) 6.

<sup>239</sup> As above, 13.

<sup>240</sup> As above, 20.

<sup>241</sup> As above, 33.

<sup>242</sup> As above, 22.

<sup>243</sup> As above, 22.

societies and nations where the duty to provide guidance and direction to children is not strictly that of parents but also culturally involves other members of the extended family and community at large.<sup>244</sup> This accords with the notions of the family and parental responsibility in (traditional) African societies as discussed earlier in this chapter.<sup>245</sup> The thrust of Article 5, however, is the notion that adults, particularly parents or caregivers in the child's environment, are *participants in* and not *determiners of* the child's life.<sup>246</sup>

A similar provision is found in Article 9 of the ACRWC as follows:

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. 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.<sup>247</sup>

The ACRWC provision appears both surprising and confusing in certain respects. First, unlike the CRC, the Charter only makes reference to the role of 'legal guardians' after parents, with no mention of the extended family or community, thereby seeming to revert 'to a more Western concept of the family'<sup>248</sup> which 'fails to recognise the multiplicity of ways in which care can be provided.'<sup>249</sup> It has been rightly noted that this 'is an anomalous position for a continent still characterized by extended family ties, albeit attenuated by the cash economy and increased mobility.'<sup>250</sup>

Secondly, Article 9 of the ACRWC is captioned 'Freedom of Thought, Conscience and Religion'. Thus the first sub-section, Article 9(1), which leads to the provision on 'guidance and direction' above, provides that 'every child shall have the right to freedom of thought conscience and religion.' It therefore appears that the duty to provide direction and guidance to the child is applicable to the right to 'freedom of thought conscience and religion.'<sup>251</sup> A general difference between the CRC and the ACRWC has been pointed out to be the fact that, for ease of reference, rights and obligations in the ACRWC 'are classified and marked with

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<sup>244</sup> Kamchedzera (2012) 24.

<sup>245</sup> See section 2.2.2.

<sup>246</sup> Kamchedzera (2012) 14.

<sup>247</sup> Article 9(2)-(3) ACRWC.

<sup>248</sup> Gose (2002) 97.

<sup>249</sup> Lansdown G *The evolving capacities of the child* (2005) 18.

<sup>250</sup> Kamchedzera (2012) 10.

<sup>251</sup> Article 9(1) ACRWC.

captions that make it easy for reference and to understand at a glance what article deals with which right.<sup>252</sup> While this is generally the method that runs through the Charter, it is however my thinking that the inference that may initially be drawn from the framing of Article 9 as a whole is not what the drafters intended, since the provision on guidance and direction cannot be applicable to the right to religious freedom alone. This is so because (sub) Articles 9(2) & (3) make reference to the 'exercise of *these rights*',<sup>253</sup> which can be interpreted to refer to all rights provided for in the Charter generally. To argue otherwise would mean that the ACRWC dissects the general right to religious freedom into *three distinct rights*: thought; conscience; and religion. Such an argument cannot be justified given that Article 9(1) provides that every child shall have 'the right to' and not 'the rights to'. Also, the 'and' placed between 'conscience' and 'religion' is used conjunctively and not disjunctively. It should also be noted that there is a separate provision in the CRC, Article 14, which is more specific to the right to religious freedom and is framed in a manner similar to Article 9 of the ACRWC.<sup>254</sup> It provides as follows.<sup>255</sup>

1. State 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*<sup>256</sup> in a manner consistent with the evolving capacities of the child.

The CRC is thus much clearer on the fact that the provision of direction to the child in Article 14 above is specific to the child's right to religious freedom. The writer is not ignorant of the fact that a thorough analysis of the right to religious freedom necessarily requires an in-depth discussion of what is meant by the individual components of 'thought', 'conscience' and 'religion'. However, this does not translate to each component standing alone as an individual right in international law, and the ACRWC, being an instrument complementary to the CRC, cannot contradict the latter in such a fundamental manner.<sup>257</sup>

In relation to the complementary relationship between the two instruments, Kamchedzera points out that the absence of a corresponding provision like Article 5 of the CRC in the ACRWC points to an African bias

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<sup>252</sup> See Mezmur (2008) 8.

<sup>253</sup> Emphasis added.

<sup>254</sup> Art 14 CRC.

<sup>255</sup> Art 14(1)-(2) CRC. See also 14(3) for limitations on the right to religious freedom.

<sup>256</sup> Emphasis added to show that the exercise of the child's right in this context is linked specifically to the right to religious freedom in (1).

<sup>257</sup> See for example Arts 18 UDHR and 18(1) ICCPR. In chapter three, there will be further discussions on the complementary relationship between the CRC and the ACRWC.



against the rights of the child as an independent bearer of rights and a preference for a 'welfares' approach to children's rights founded on a preference for family autonomy, inclusive of the duties of the child.<sup>258</sup> While conceding the fact that the ACRWC generally places greater emphasis on family relations as closely connected to the rights of the child, it is my opinion that this is not necessary based on bias, neither can it be described as a weakness in the Children's Charter. It is rather a reflection of the African collectivist notion of human rights (including children's rights) as earlier discussed in this chapter.<sup>259</sup> The emphasis on family relations does not in any way detract from an African acceptance of the notion of children's rights as established by the CRC, hence the complementary nature of the ACRWC to the former. Besides, the explanation offered above on the relationship between Articles 9 of the ACRWC and 14 of the CRC is sufficient to show that the provision of Article 5 (on parental direction and guidance) of the CRC is perfectly acceptable in the African context.

The notion of the 'evolving capacities of the child' is intricately linked to the child's right to be heard or to participate in matters affecting him.<sup>260</sup> Providing direction and guidance in accordance with the evolving capacities of the child refers to a recognition and acknowledgement of the fact that children's capacity to exercise personal autonomy in decisions affecting them increases as they gain more competencies and maturity in the course of growing and developing.<sup>261</sup> For instance, the nature of guiding and directing a very young child may almost take the form of commands, while in directing and guiding an older child (for example, a teenager), parents and others must make room for some measure of independent thought and action by the child. This means that what the child decides to do may not be exactly what the adult directed or may not be done in the particular manner in which the adult directed or suggested. The CRC Committee has therefore noted that children are aware of their own uniqueness and have a sense of identity. Even when very young, children 'make choices and communicate their feelings, ideas and wishes in numerous

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<sup>258</sup> Kamchedzera (2012) 6-8. He however notes that a proper construction of article 31 on the duties of the child implies the requirement of parental guidance and direction in terms of supervision. As such, parents and others are responsible for accounting for those duties until children become adults, 10.

<sup>259</sup> See section 2.2.

<sup>260</sup> Arts 12 CRC & ACRWC. The principle of child participation will be discussed in greater detail in chapter three of this study.

<sup>261</sup> Mezmur (2009) 151.

ways, long before they are able to communicate through the conventions of spoken or written language.<sup>262</sup>

The Committee exhaustively explains the notion thus:

Article 5 draws on the concept of “evolving capacities” to refer to processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized. Respecting young children’s evolving capacities is crucial for the realization of their rights, and especially significant during early childhood, because of the rapid transformations in children’s physical, cognitive, social and emotional functioning, from earliest infancy to the beginnings of schooling. Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child’s interests and wishes as well as the child’s capacities for autonomous decision-making and comprehension of his or her best interests. While a young child generally requires more guidance than an older child, it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations. Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children’s autonomy and self-expression and which have traditionally been justified by pointing to children’s relative immaturity and their need for socialization. Parents (and others) should be encouraged to offer “direction and guidance” in a child-centred way, through dialogue and example, in ways that enhance young children’s capacities to exercise their rights, including their right to participation (art. 12) and their right to freedom of thought, conscience and religion (art. 14).<sup>263</sup>

As the principal duty bearer of children’s rights, the State has the obligations to respect, protect, promote, and fulfil the enjoyment of children’s right to appropriate direction and guidance. Respect implies non-interference with parents and other key caregivers in the exercise of their role in this regard, except where the best interests of the child are at stake.<sup>264</sup> The State must also respect, without interference, the right of the child to receive appropriate direction and guidance as provided by the parent(s) or others.<sup>265</sup> Non-interference does not equate to ‘blanket autonomy’ for parents in exercising their part of this right. Thus, protection refers to the State taking proactive measures to prevent and respond to violations of this right as it applies to children and parents or caregivers.<sup>266</sup> While protective measures for the benefit of the child may be directed at parents, protective measures for the benefit of the parents or caregivers may be directed at other persons or groups putting the proper exercise of the right at risk.

The promotion of the right to parental direction and guidance underscored by the evolving capacities of the child generally ‘entails raising awareness and understanding regarding the nature, scope, and implications

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<sup>262</sup> CRC Committee, GC 7 (2005) para 14.

<sup>263</sup> CRC Committee, GC 7 (2005) para 17.

<sup>264</sup> Kamchedzera (2012) 26-27.

<sup>265</sup> Kamchedzera (2012) 26-27.

<sup>266</sup> Kamchedzera (2012) 27-28.

of the right'.<sup>267</sup> The duty to fulfil encompasses the provision of measures for facilitating the enjoyment of the right, such as providing practical support and education to both parents and children towards properly exercising the right.<sup>268</sup> It is however important to stress that the State is not the only duty bearer, parents and others responsible for the child bear the responsibility while the State has a role to play in facilitating the process as the principal organ to which the realisation of human rights is directed.

### 2.4.3 Parental Responsibility

Closely related to the above is the principle of parental responsibilities towards children, which serves as the flip side of the coin to children's right to appropriate guidance and direction in accordance with their evolving capacities. In other words, while the right to parental guidance and direction is focused on the child, the focus of parental responsibility is the parent(s) and/or other key caregivers. A major way in which the CRC revolutionised the child-parent relationship in the context of the family environment is evidenced by the shift from the doctrine of *parens patriae* (which basically entrusted parents with rights over children) to the doctrine of parental responsibilities for children. In an attempt to balance this 'new' relationship between the rights of parents over their children and the rights of children as autonomous individuals in accordance with their evolving capacities, the CRC Committee notes that:

Children's rights will gain autonomy, but they will be especially meaningful in the context of the rights of parents and other members of the family – to be recognized, to be respected, to be promoted. And this will be the only way to promote the status of, and the respect for, the family itself.<sup>269</sup>

Neither the CRC nor the ACRWC provides a definition of (parental) 'responsibility', but it has been defined as follows:

Parental responsibilities are a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property.<sup>270</sup>

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<sup>267</sup> Kamchedzera (2012) 28. See generally also Arts 4 & 42 CRC and CRC Committee, GC No. 5.

<sup>268</sup> Kamchedzera (2012) 29.

<sup>269</sup> CRC Committee General Day of Discussion 'Role of the Family in the promotion of the Rights of the Child' (1994) para 198.

<sup>270</sup> Council of Europe, Committee of Ministers, Recommendation No. R(84)4 of the Committee of Ministers to Member States on Parental Responsibilities (1984) Principle 1(a).

The concept of parental duties/responsibilities towards children has its roots in English common law as described below:

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation not only by nature itself, but by their own proper act, in bringing them to this world ... By begetting them ... they have entered into a voluntary obligation to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.<sup>271</sup>

'Parental duty, however, goes well beyond preserving the life of the child through protective oversight measures and the provision of basic material necessities such as food, clothing and shelter.'<sup>272</sup> These measures fall into the category of an additional component of parental responsibilities described in modern legal terms as 'maintenance'.<sup>273</sup> Historically described as 'parental authority' or 'parental power', the concept of parental responsibilities includes the transmission and preservation of intangible elements, such as, identity, cultural, religious and other values, which together help to mould the character of the child and prepare him for responsible adulthood.<sup>274</sup> These are some of the elements children deprived of a family environment miss out on, and which alternative care is expected to make up for to ensure that the affected children develop into well-rounded adults and responsible citizens.

Under common law, parental responsibilities and rights comprised of guardianship, custody and access, which today translate to 'acting as the child's guardian', 'caring for the child', and 'maintaining contact with the child'.<sup>275</sup> 'Custody' (or care) refers to 'a person's capacity physically to have the child with him or her and to control and supervise the child's daily life [with reference to] ... health, education, safety and

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<sup>271</sup> Sir William Blackstone *Commentaries on the Laws of England Vol. 1* (1829) p. 446 – cited in Hodgson (2003) 151. The modern 1989 Children Act of England defines it as: 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. See Chapter 41, Art 3(1) of the Act. On the flip side, under traditional common law conceptions, parents and especially fathers were in absolute control of their families and children. Thus, all goings-on within the family were considered entirely private and outside of any possible intervention by the State. This policy meant that children were vulnerable to various forms of violence and abuse within the family and had no recourse to the law or State for reprieve. All of these have changed due to the recognition of the rights of children as individuals subject to the protection of the State in at least the same manner as adults. See Bilsky L 'Child-Parent-State: The Absence of Community in the Courts Approach to Education' in Douglas G & Sebba L (eds) *Children's Rights and Traditional Values* 134; Van Bueren (1995) 73; Robinson JA 'An introduction to international law on the rights of the child relating to the Parent-Child relationship' (2002) 13 (2) *Stellenbosch Law Review* 309; UNICEF Regional Office of South Asia and Save the Children Sweden *Children's Rights: Turning principles into practice* (2000) 79.

<sup>272</sup> Hodgson (2003) 151.

<sup>273</sup> Cronje DSP & Heaton J *South African Family Law* 2 ed (2004) 272.

<sup>274</sup> Hodgson (2003) 151.

<sup>275</sup> Heaton J 'Parental responsibilities and rights' in Davel C & Skelton A *Commentary on the Children's Act* (2007) 3-3 – 3-4. This is an established interpretation in South Africa and may differ elsewhere.

welfare’, among others.<sup>276</sup> ‘Access’ refers to regularly communicating with the child based on the maintenance of a personal relationship with the child.<sup>277</sup> ‘Guardianship’ is broad enough to incorporate elements of care of care but is narrowly understood to refer to the duty to

administer and safeguard the child’s property and property interests, assist or represent the child in administrative, contractual and other legal matters, and give or refuse any consent that is legally required in respect of the child.<sup>278</sup>

According to Article 18 of the CRC, ‘parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.’<sup>279</sup> In the ACRWC, reference is made to ‘other persons’ in place of ‘legal guardians’, which caters for the numerous informal forms of child care (including kinship care) in Africa.<sup>280</sup> States have a duty to appropriately assist ‘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.’<sup>281</sup>

The position of the ACRWC is quite different with regards to State assistance.<sup>282</sup> First, the duty of the State to assist is qualified by resource availability and prevailing circumstances.<sup>283</sup> This qualification is itself underscored by an acknowledgement that the exercise of parental responsibilities towards children can only be secured within the ‘abilities and financial capacities’ of those responsible for the child.<sup>284</sup> This provision highlights States’ recognition of the inadequate socio-economic conditions of many African families and individuals. Thus, ‘the drafters were mindful that socio-economic rights of children cannot be applied with uniformity across all households [due to conditions of poverty and inadequate financial

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<sup>276</sup> Heaton (2007) 3-4.

<sup>277</sup> Heaton (2007) 3-5.

<sup>278</sup> Heaton (2007) 3-3 – 3-5. It should be noted that by law, parental responsibilities are automatically conferred on married parents of a child (if married at the time of conception, at birth or anytime in between) or a mother of a child born out of wedlock. In South Africa, certain criteria are provided for the acquisition of parental responsibilities by unmarried fathers and other people who may be or wish to be responsible for the child’s upbringing. Other countries have other rules and standards for the conferment of parental responsibilities on unmarried fathers.

<sup>279</sup> Art 18(1) CRC.

<sup>280</sup> Art 20(1) ACRWC.

<sup>281</sup> Art 18(2) CRC.

<sup>282</sup> Art 20(2) ACRWC.

<sup>283</sup> ‘States Parties to the present Charter shall *in accordance with their means and national conditions* take all appropriate measures...’(emphasis added). Art 18(2) CRC above does not contain a similar qualifier to the obligation on the state to assist with parental responsibility.

<sup>284</sup> Art 20(1)(b) ACRWC. Art 27(2) CRC however provides similarly.

security].<sup>285</sup> In cases where parents are thus unable to discharge their parental responsibilities, they are not likely to be held to be in violation of the rights of the child.<sup>286</sup>

Secondly, State assistance under the ACRWC goes beyond the scope of the CRC. While the CRC appears to narrow assistance to the provision of child care ‘institutions, facilities and services’ for the benefit of working parents,<sup>287</sup> assistance under the ACRWC goes further to encompass the provision of material assistance for the survival of the child. Examples include ‘nutrition, health, education, clothing and housing.’<sup>288</sup> Consequently, where States fail to assist by providing ‘material support and support programmes’, they are in violation of the right of the child to conditions of living necessary for the child’s development.<sup>289</sup> The provision of measures of support forms the core of the family’s right to ‘enjoy the protection and support of the State for its establishment and development’ under the ACRWC.<sup>290</sup> In effect, States have a responsibility towards children even while they are in family or parental care especially when their socio-economic needs cannot be adequately guaranteed in that environment.<sup>291</sup> This is by no means a licence for States to remove children from poor parents or families as poverty cannot be a justification for separation. Rather, it is a call for States to discharge their obligations to support poor families in their child-rearing responsibilities.<sup>292</sup> Such socio-economic living conditions necessary for the child’s development would include, among others, adequate education, shelter, food, clothing, and medical aid for the child.<sup>293</sup>

It is important to highlight that in the context of alternative care, where new caregivers assume responsibility for the upbringing of the child, the provisions on parental responsibilities are also

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<sup>285</sup> Ankut (2003) 31.

<sup>286</sup> Ankut (2003) 31-32:

<sup>287</sup> Art 18(2)-(3) CRC. Art 20(2)(b)-(c) of the ACRWC contain similar provisions, making it clear that assistance under the latter is broader in scope.

<sup>288</sup> Art 2(a) ACRWC.

<sup>289</sup> CRC Committee, General Comment No 1 ‘Aims of Education’ (2001) para 9. It is important to stress that African states cannot perpetually rely on having ‘weak economies’ or ‘inadequate resources’ as a justification for not fulfilling their obligation to assist. This is because the socio-economic rights principle of progressive realisation of rights requires that there must at least be a minimum level, based on the ‘available resources’, at which a State is operating with clear policies and plans to increase the levels of intervention.

<sup>290</sup> Art 18(1) ACRWC. The family is entitled to the protection and support of the State as the ‘natural unit and basis of society.’

<sup>291</sup> Ankut (2003) 44.

<sup>292</sup> States Parties obligations in this regard are also provided in Art 10(1) ICESCR that ‘the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.’ Similarly, Art 24(1) of the ICCPR guarantees the child’s right to protection by the family, society and the State. See also Art 18(1)-(2) ACHPR. The European Social Charter also provides similarly in its Article 16 for the right of the family to social, legal and economic protection ‘by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.’

<sup>293</sup> Ankut (2003) 30.

applicable.<sup>294</sup> This is in line with earlier discussions on the 'family', with particular reference to Article 5 of the CRC which recognises persons other than biological parents. It must again be stressed that the expression 'parental responsibilities' does not strictly apply to biological parents alone but also to any other adult who has direct responsibility over the child or children under his or her care. This understanding is of particular importance to kinship care as the main subject matter of this study.

#### **2.4.4 The Rights to Social Security and an Adequate Standard of Living**

The provision of social security has become a major area of interest for various stakeholders concerned with matters affecting children and other vulnerable groups including persons with disabilities and the elderly.<sup>295</sup> In relation to children, social workers, development practitioners, policy makers, children's rights advocates and organisations, among other stakeholders, are increasingly becoming aware of the importance of social security measures for the realisation of children's rights.<sup>296</sup> This is particularly so in developing countries where poverty levels are high. The promotion of human well-being and social justice requires the development of appropriate social security systems.<sup>297</sup> The role of social security in compensating beneficiaries' loss of or lack of income due to exposure to some contingency functions as both a poverty reduction and prevention mechanism; poverty being the biggest threat to human security in Africa.<sup>298</sup> It also plays a role in redistributive justice through the redistribution of income, thereby preventing social exclusion and promoting social inclusion.<sup>299</sup> In other words, social security is 'designed for the purposes of poverty prevention, poverty alleviation, social compensation and income distribution.'<sup>300</sup>

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<sup>294</sup> UNICEF 'CHILD PROTECTION INFORMATION SHEET: Children without Parental Care', May 2006, 1. However, this does not preclude the original parent(s) or caregivers from maintaining relations with the child, unless it is not in the child's best interests or where such original parent(s) or caregivers are no longer available. Examples include a case of separation from parents 'where the parents are living separately and a decision must be made as to the child's place of residence (Art 9(3) CRC).' Where a child is separated from his or her parent(s) at the initiative of a State Party due to death or other factors involving the parent(s), alternative care is to be provided for the child and parental responsibilities are then conferred on the new caregivers. See art 9(4) CRC read together with art 20 CRC. See also art 19(1) ACRWC read together with art 25 ACRWC.

<sup>295</sup> Kaseke E 'The role of social security in South Africa', (2010) 53 *International Social Work* 160.

<sup>296</sup> Kaseke (2010) 160.

<sup>297</sup> Kaseke (2010) 160.

<sup>298</sup> Kaseke (2010) 162.

<sup>299</sup> United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) 'General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)', E/C.12/GC/19 (2008) paragraph 3.

<sup>300</sup> Nkosi G 'An analysis of the South African social assistance system as it applies to children in rural communities: A perspective from the Grootboom case' (2011) 26 *Southern African Public Law* 83.



This is said to be particularly important in societies with high levels of inequality such as South Africa, for example.<sup>301</sup>

Although not a fixed concept, social security is generally understood to be an umbrella concept encompassing social assistance and social insurance.<sup>302</sup> While social insurance is more applicable in the labour context for the protection of employees or workers, social assistance, which is the focus of this study, generally relates to strategies contemplated as State interventions to provide support for categories of citizens in need and who lack the means to support themselves.<sup>303</sup> Thus, social assistance has been defined as ‘a range of benefits and services available to guarantee [a] minimum (however defined) level of subsistence to people in need, based on the test of resources.’<sup>304</sup> In other words, it is an income ‘safety net’ paid to ‘bring incomes up to some minimum level’,<sup>305</sup> and it rests on two pillars: the provision of various kinds of social services and the payment of social grants (whether in cash or in kind).<sup>306</sup> As a State intervention measure, social assistance is usually regulated by legislation, financed through taxes and is the exclusive responsibility of the State through specialised government agencies such as the South African Social Security Agency (SASSA).<sup>307</sup>



Social assistance is generally sub-categorised into two strands: means-tested social assistance and national or universal social assistance.<sup>308</sup> Means-tested social assistance is applicable or available only to those who qualify on the basis of a means test; the test being based on an evaluation of the applicant’s income and assets to determine if they are below a stipulated minimum.<sup>309</sup> The aim of the means-tested social assistance is to guard against severe deprivation by ensuring the maintenance of a basic subsistence

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<sup>301</sup> Kaseke (2010) 164.

<sup>302</sup> Jordaan B, Kalula E & Strydom E (eds) *Understanding social security law* (2009) 1; Olivier MP ‘The concept of social security’ in Olivier MP, Smit N & Kalula ER (eds) *Social security: A legal analysis* (2003) 24. It should be noted that there is no consistency in the definition of any of these concepts and they are often used interchangeably along with other descriptions such as social welfare and social protection.

<sup>303</sup> Triegaardt J & Patel L ‘Social security’ in Patel L (ed) *Social Welfare & Social Development in South Africa* (2005) 124; Nkosi G ‘An analysis of the South African social assistance system as it applies to children in rural communities: A perspective from the Grootboom case’ (2011) 26 *Southern African Public Law* 82; Kaseke (2010) 163. Social assistance is theoretically meant to at least, raise the floor for those living below the poverty line.

<sup>304</sup> Eardley T, Bradshaw J, Ditch J, Gough I & Whiteford P ‘Social assistance in OECD countries’ (1997) 7 *Journal of European Social Policy* 4.

<sup>305</sup> Nkosi (2011) 84.

<sup>306</sup> Olivier & Kulula ‘Scope and coverage’ in Olivier, Smit & Kalula (2003) 143.

<sup>307</sup> Strydom EML (ed) *Essential Social Security Law* (2001) 7. Visit DSD at < <http://www.dsd.gov.za/> >

<sup>308</sup> Nielsen K ‘Counteracting material deprivation: The role of social assistance in Europe’ (2012) 22 *Journal of European Social Policy* 148; Gough I ‘Social Assistance Regimes: A Cluster Analysis’ (2001) 11 *Journal of European Social Policy* 165; Strydom (2001) 8.

<sup>309</sup> Nielsen (2012) 149; Strydom (2001) 8.



level.<sup>310</sup> The National or Universal social assistance, on the other hand, differs from the means-tested category only in one main respect: it is 'premised on the notion that the state should aim to provide a minimum standard of living for all', irrespective of 'means' or 'qualification'.<sup>311</sup> The means test element of social assistance is what has given rise to various programmes known as cash transfer schemes, whether social cash transfers (SCT), conditional cash transfers (CCT), or unconditional cash transfers (UCT), among others. All these form 'part of a bigger strategy of social assistance in poverty reduction and assisting the most destitute in society.'<sup>312</sup>

#### **2.4.4.1 The Relationship between Children's Rights to Social Security and an Adequate Standard of Living**

The rights to social security and an adequate standard of living are guaranteed in several international and regional human rights instruments.<sup>313</sup> However, the International Labour Organization (ILO) is the specialised UN agency for standard setting on and implementation of the right to social security on a global scale; the ILO played a significant role in the inclusion of these rights in the CRC.<sup>314</sup> Consequently, understanding children's rights to social security and an adequate standard of living cannot be isolated from the instruments already mentioned and the work of the ILO. This is more so because:

The CRC Committee has so far not comprehensively clarified its understanding of Article 26 of the CRC, e.g. by way of a general comment. Nor has systematic attention been paid to the right to benefit from social security in the concluding observations on reports of States Parties. Moreover, it is usually adults who have direct claim to social security benefits, including children's benefits which are supposed to be administered on the children's behalf.<sup>315</sup>

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<sup>310</sup> Nielsen (2012) 150; Strydom (2001) 8.

<sup>311</sup> Nielsen (2012) 150; Strydom (2001) 8.

<sup>312</sup> Govender M 'Conditional cash transfers as a means of addressing poverty in South Africa', unpublished PhD thesis, University of South Africa (2011) 144.

<sup>313</sup> See: Arts 25(1) UDHR; 11(1)(e) & 14(2)(c) CEDAW; 9 & 11 ICESCR & 27(1) ICRMW.

<sup>314</sup> Scheinin M 'The Right to Social Security' in Eide A, Krause C & Rosas A (eds) *Economic, Social and Cultural Rights* (2001) 214. See also Commission on Human Rights, Summary Record of the Two Hundred and Twentieth Meeting (UN Doc. E/CN.4/SR.220) 13 – cited in Vandenhole W 'Article 26: The Right to Benefit from Social Security' in Alen *et al A commentary on the United Nations Convention on the Rights of the Child* (2007) 4.

<sup>315</sup> Vandenhole (2007)15.

'The right to benefit from social security is also today an important right, both in itself and for the realisation of other rights in the CRC',<sup>316</sup> including the right to alternative care. Article 26 of the CRC provides:

1. States Parties shall recognize for every child the right to benefit from social security, 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 26 does not guarantee the *right to social security* but the *right to benefit from social security*. From the *Travaux Préparatoires* of the CRC, the rationale for this formulation is that the right to receive social security benefits is granted to the parent or caregiver of the child who is responsible for maintaining the child.<sup>317</sup> Sometimes, parents and (in the context of alternative care) other caregivers are unable to properly provide for their own well-being and consequently lack sufficient resources to cater for the needs of the children in their care.<sup>318</sup> Vandenhoele rightly points out, however, that the reasoning behind this formulation appears contradictory to the meaning of Article 26(2) which 'makes clear that the CRC does not exclude that a child itself is entitled to social security benefits, and is even the applicant.'<sup>319</sup> In fact, it was the express intention of the drafters that children could apply directly for benefits.<sup>320</sup> Thus, the 2005 reporting guidelines of the CRC Committee required States to indicate 'the circumstances under which children themselves are allowed to apply for social security measures, either directly or through a representative.'<sup>321</sup>

During the drafting of the CRC, it was thought that there might be no added value in including the right to social security in the CRC.<sup>322</sup> This was due to the provisions of Articles 18 (parental responsibilities) and 27 (adequate standard of living) of the CRC, both of which were considered to already cover the concerns in

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<sup>316</sup> Vandenhoele (2007) 1.

<sup>317</sup> Detrick (1992) 364-365.

<sup>318</sup> Govender (2011) 27.

<sup>319</sup> The wording of Art. 26(2) refers to 'application for benefits by or on behalf of the child' (emphasis added): Vandenhoele (2007) 15.

<sup>320</sup> UNICEF (2007) 379.

<sup>321</sup> CRC Committee, Periodic Report Guidelines (UN Doc.CRC/C/58/Rev.1, 2005) para. 100. See also para 35 of the updated 2010 CRC Committee periodic report guidelines. It has also been pointed out that in making a reservation to Article 26 implying children's independent entitlement to social security, the Netherlands seems to confirm the Committee's interpretation. See Vandenhoele (2007) 16.

<sup>322</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) Legislative history of the Convention on the Rights of the Child (2007) 614.

the draft Article 26 on social security. Article 27(1) of the CRC provides that '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.' Additionally,

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,<sup>323</sup> particularly with regard to nutrition, clothing and housing.<sup>324</sup>

Despite these provisions, the ILO successfully argued in favour of a separate provision on social security based on the fact that Articles 18 and 27 'only dealt with specific aspects [of social security] and did not expressly mention social security.'<sup>325</sup> It is however clear that the issues covered in both Articles 18 and 27 of the CRC form part and parcel of the issues contemplated under the umbrella right to social security (Article 26), and specifically social assistance. In other words, children's right to social security cannot be isolated from other rights in the CRC, particularly children's right to an adequate standard of living, because the right to social security is generally instrumental to securing an adequate standard of living.

This link is further evidenced by the fact that the CRC Committee usually makes no clear distinctions between both rights when making recommendations on States Parties' reports in its concluding observations.<sup>326</sup> Detrick has noted that the close relationship between both rights justifies such an approach.<sup>327</sup> The interdependence and inter-relatedness of these two rights, along with other rights of the child, such as, the right to life, survival and development, to basic health and welfare, and all other socio-economic rights particularly, is further highlighted in the reporting guidelines of the CRC Committee as well as in its General Comments. The Committee has noted for example that:

Growing up in relative poverty undermines children's well-being, social inclusion and self-esteem and reduces opportunities for learning and development. Growing up in conditions of absolute poverty has even more serious consequences, threatening children's survival and their health, as well as undermining the basic

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<sup>323</sup> See also the discussions above in section 2.4.3.

<sup>324</sup> Art. 27(3) CRC. Art. 27(2) of the CRC again re-states the principle that parents have the primary responsibility to secure the child's right to an adequate standard of living. Hence, Art. 27(3) again comes into effect where or when parents are unable to discharge their responsibility towards the child.

<sup>325</sup> Detrick (1992) 368-369; OHCHR (2007) 614.

<sup>326</sup> Vandenhoele (2007) 11. See for example CRC Committee Concluding Observations: Gabon (UN Doc. CRC/C/15/Add.171, 2002) para 52(c); Georgia (UN Doc. CRC/C/15/Add.222, 2003) para 53; Antigua and Barbuda (UN Doc. CRC/C/15/Add. 247, 2004) para 55; Latvia (UN Doc. CRC/C/LVA/CO/2, 2006); Nepal (UN Doc. CRC/C/15/Add.261, 2005) para 72; Nigeria (UN Doc. CRC/C/15/Add.257, 2005) para 59.

<sup>327</sup> Detrick *S A commentary on the United Nations Convention on the Rights of the Child* (1999) 446.

quality of life. States Parties are urged to implement systematic strategies to reduce poverty in early childhood as well as combat its negative effects on children's well-being. All possible means should be employed, including "material assistance and support programmes" for children and families (art. 27.3), in order to assure young children a basic standard of living consistent with rights. Implementing children's right to benefit from social security, including social insurance, is an important element of any strategy (art. 26).<sup>328</sup>

Thus, the CRC Committee interprets children's right to benefit from social security in an instrumental way, that is, 'to the extent that it is beneficial for the realisation of the general principles or other rights in the CRC, such as the right to survival and development and the right to health, or for the reduction of poverty.'<sup>329</sup> It is instructive to note that this multi-faceted approach to the right to social security (social assistance) is what underlies the social security interventions made in favour of children deprived of their family environment and in need of alternative care, as discussions in subsequent chapters will show.

#### **2.4.4.2 Children's Rights to Social Security and an Adequate Standard of Living under the ACRWC**

With regards to the ACRWC, it has been noted that, like the ACHPR, the African Children's Charter contains no provision on social security (with specific reference to social assistance) as an autonomous right.<sup>330</sup> Several factors have been presented as possible reasons for the absence of the right to social security in the ACHPR. First, it has been argued that the omission is due in part to the different political ideologies prevalent at the time of drafting the ACHPR, and in part to the 'African worldview' that considers taking care of those in need as the responsibility of the family and community rather than the State.<sup>331</sup> This is a major reason for the criticisms levelled against the conception of duties in both the ACHPR and the Children's Charter, since it appears to relieve the State of its responsibility to secure the welfare and protection of its citizens.<sup>332</sup>

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<sup>328</sup> CRC Committee GC 7 (2005) para 26; emphasis added.

<sup>329</sup> Vandenhoe (2007) 12. See for example: CRC Committee, General Comment No. 3: HIV/AIDS and the Rights of the Child (2003) para 6. Vandenhoe has however also noted that 'Article 26 of the CRC, if read in light of other human rights and ILO treaties, could be given a more technical reading, thus imposing more specific obligations on the State than Article 27 does.' Thus, the distinction between both rights is not merely artificial. On the indivisible nature of the rights in the CRC, with particular reference to the right to social security and an adequate standard of living, see: Eide A 'Article 27: The Right to an Adequate Standard of Living' in Alen *et al* (2006) 13.

<sup>330</sup> Ankut (2003) 15; Chirwa (2008) 91.

<sup>331</sup> Vandenhoe (2007) 11; Ouguergouz F *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (2003) 42.

<sup>332</sup> Art. 29(1) ACHPR provides that the individual shall have the duty to among others, maintain his parents 'in case of need.'

Secondly, there is the argument about the 'socio-economic circumstances prevailing in most African States.'<sup>333</sup> As was pointed out earlier however, this is not a sustainable argument, especially in the long term, based on the socio-economic rights principle of the progressive realisation of rights.<sup>334</sup> In effect, States cannot continually avoid their responsibility by claiming to have inadequate resources; rather they have a responsibility to act, in accordance with what is available and with international cooperation,<sup>335</sup> which has continuously been on the increase in Africa in recent years. In furtherance of this, Odinkalu has argued that a combined reading of several provisions in the ACHPR reveals that the right to social security and other socio-economic rights are contemplated in the instrument.<sup>336</sup> This position was accepted and adopted by the African Commission on Human and Peoples' Rights (the ACHPR enforcement body)<sup>337</sup> in the case of *Social and Economic Rights Action Centre and Another v Nigeria* (SERAC case),<sup>338</sup> among others, showing that social security and other socio-economic rights are in no way outside the interpretative scope of the African human rights system.<sup>339</sup>

With specific reference to children's social security rights, it has been argued that the absence of a specific provision on social security in the ACRWC, as is the case under the CRC, is rather unfortunate and 'extremely disturbing.'<sup>340</sup> This is because the right 'would have been of utmost importance in the context of Africa where most families are grappling with basic survival needs and require, to a large extent, state support.'<sup>341</sup> It is however my submission that the ACRWC does provide for children's rights to social security and an adequate standard of living. The ACRWC's provision on 'parental responsibilities' which obliges States Parties to provide material assistance and support programmes to needy parents to ensure child survival represents the Children's Charter's equivalent of the CRC's provisions on the rights to social security and an adequate standard of living for children. Thus, the relevant portion of Article 20 of the

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<sup>333</sup> Gose (2003) 120.

<sup>334</sup> See the discussion in section 2.4.

<sup>335</sup> Arts 4 CRC & 1(1) ACRWC.

<sup>336</sup> Odinkalu CA 'Implementing economic, social and cultural rights' in Evans M & Murray C (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2000) 192; Examples include Arts 5, 15-17 ACHPR.

<sup>337</sup> Art 30 ACHPR.

<sup>338</sup> Communication 155/96 (ACHPR 2001) (2001) AHRLR 60.

<sup>339</sup> Oloka-Onyago J 'Reinforcing Marginalised Rights in the Age of Globalisation: International Mechanisms, Non-State Actors and the Struggle for Peoples' Rights in Africa' (2003) *American University International Law Review* 852-911.

<sup>340</sup> Gose (2002) 120.

<sup>341</sup> Ankut (2003) 19.

ACRWC must be understood and interpreted as equivalent to the CRC's provision in Article 27 on an adequate standard of living. According to the ACRWC, 'States Parties ... shall in accordance with their means and national conditions [take] all appropriate measures'

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.<sup>342</sup>

A comparison between Article 27(3) of the CRC and Article 20(2)(a) of the ACRWC clearly shows that the latter was largely a repetition of the former.<sup>343</sup> The main difference lies in the fact of the headings provided for each section of the ACRWC; Article 20 of the ACRWC is titled 'Parental Responsibilities' while Article 27 of the CRC is known as the CRC's provision for the right to an adequate standard of living. Engaging with the contents however reveals that the contents are substantially the same. In relation to Article 20 of the ACRWC, Mezmur notes:

In addition, article 20(2)(a) of the ACRWC, which finds no corresponding provision in the CRC, provides that State Parties shall assist parents and guardians, in case of need, to provide material assistance and support programmes especially with regard to health, education, clothing and housing. Taking into account the continental scourge of HIV/AIDS and the attendant problem of orphans and child-headed households, this duty may prove to be an invaluable addition where parents or de facto care-givers are no longer able to provide or are no longer present, a positive duty is imposed on the state.<sup>344</sup>

While the quotation above is correct to the extent that it shows the importance of States Parties obligations in Africa, in the context of social security and an adequate standard of living, it is however wrong to the extent that it asserts that 'article 20(2)(a) of the ACRWC finds no corresponding provision in the CRC'; as already shown above. Based on this analysis, it will therefore be incorrect to claim or assert that the ACRWC makes no provisions for children's rights to social security and an adequate standard of living. Further, it must be stressed that it is extremely important that the ACRWC be at all times read as an instrument that is complementary to the CRC, which is the original intention. To do otherwise is to hold that rights that are not expressly contained in the ACRWC but in the CRC are not applicable to African States Parties. This is not the case particularly given that the ACRWC provides very importantly as follows:

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<sup>342</sup> Art 20(2)(a).

<sup>343</sup> Art 20 of the ACRWC however includes health and education, both of which are absent in the CRC's Article 27.

<sup>344</sup> Mezmur (2008) 25.

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 Party.<sup>345</sup>

All African States (except Somalia)<sup>346</sup> have ratified the CRC (and 46 of 54 countries have ratified the ACRWC),<sup>347</sup> and thus none can be absolved of its obligations under the CRC based on any difference, real or perceived, contained in the ACRWC.

#### **2.4.4.3 Social Security and Adequate Standard of Living: States Parties' Obligations**

States Parties' obligations to provide social assistance to children should take into account the resources and circumstances of the child, including of those responsible for the child's maintenance.<sup>348</sup> When reporting before the CRC Committee, States Parties need to show:

The legal provisions relevant to the implementation of this right, the circumstances under which children themselves are allowed to apply for social security measures, either directly or through a representative, the criteria taken into account to grant the benefits, as well as any relevant disaggregated information concerning the coverage and financial implications of such measures, its incidence by age, gender, number of children per family, civil status of the parents, the situation of single parents, and the relationship of social security to unemployment.<sup>349</sup>

Like all other socio-economic rights, the right to benefit from social security is subject to the principle of 'progressive realisation' as expressed in Articles 4 of the CRC and 20(2) of the ACRWC, among others.<sup>350</sup> The interrelated elements of availability, accessibility and quality are relied upon to define and/or measure the realisation of socio-economic rights generally.<sup>351</sup> Thus the first component of the right to benefit from social security is the establishment of a system of social security (availability).<sup>352</sup> While expressing concern at the absence of such systems in a number of countries, the CRC Committee has emphasised that 'the

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<sup>345</sup> Art 1(2) ACRWC.

<sup>346</sup> The newly independent South Sudan is currently in the process of finalising the ratification process.

<sup>347</sup> See 'LIST OF COUNTRIES WHICH HAVE, SIGNED, RATIFIED/ACCEDED TO THE AFRICAN UNION CONVENTION ON AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD', available at < <http://acerwc.org/wp-content/uploads/2011/03/French-and-English-ACERWC-Updated-Status-of-the-ACRWC.pdf> > (accessed 20 September 2013).

<sup>348</sup> CRC Committee, Periodic Report Guidelines (2010) para 35. See also the 2005 periodic report guidelines.

<sup>349</sup> As above, para. 100.

<sup>350</sup> Art 4 CRC provides: States Parties shall take all appropriate...measures...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.'

<sup>351</sup> The ICESCR Committee has a long history in the development of the elements of availability, accessibility and quality which have sometimes been adopted by other monitoring bodies including the CRC Committee. See for example, CRC Committee General Comment No. 4 'Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (2003) para 41.

<sup>352</sup> Vandenhoe (2007) 22.



general lack of financial resources cannot be used as a justification for neglecting to establish social security programmes and social safety nets to protect the most vulnerable groups of children.<sup>353</sup>

Accessibility contemplates a wide coverage of social security programmes, without discrimination, which should particularly target those most in need of the interventions. Consequently, States are obligated to take measures through which a significantly larger number of children and their families may benefit from a minimum of social security protection, with an emphasis on children from poorer families, communities or backgrounds, children of unemployed or self-employed parents, and children with disabilities, among others.<sup>354</sup>

With regard to the quality of social security measures, the adequacy of the benefits is an indicator which the CRC Committee has often emphasised although what is considered adequate is not always clear.<sup>355</sup>

Concerns have however been raised about the low level of social security benefits and lack of promptness in making payments and services available to the recipients.<sup>356</sup> Adequacy can also refer to a system which provides a minimum level of social security for the child and the family, and is measured by whether the child is able to enjoy an adequate standard of living based on the minimum.<sup>357</sup>

With reference to social assistance benefits applicable to children, the CRC Committee has mainly paid attention to child allowances and benefits with a focus on vulnerable families and families living in

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<sup>353</sup> CRC Committee Concluding Observation: Nigeria (UN Doc. CRC/C/15/Add.61, 1996) para 33. See also Nepal (UN Doc. CRC/C/15/Add.261, 2005) para 73. See further Weissbrodt DS & de la Vega C *International human rights law: An introduction* (2007) 133; UNICEF (2007) 382.

<sup>354</sup> This has been re-stated by the CRC Committee in several concluding observations over the years. See for example, CRC Committee Concluding Observations: United Kingdom (Isle of Man) (UN Doc. CRC/C/15/Add.134, 2000) paras 32-33; Congo (UN Doc. CRC/C/15/Add.153, 2001) paras 58-59; Portugal (UN Doc. CRC/C/15/Add.153, 2001) para 28; Mozambique (UN Doc. CRC/C/15/Add. 172, 2002) para 55; United Kingdom (UN Doc. CRC/C/15/Add.188, 2002) para 46; Georgia (UN Doc. CRC/C/15/Add.222, 2003) para 53; Pakistan (UN Doc. CRC/C/15/Add.217, 2003), para 59; Australia (UN Doc. CRC/C/15/Add.268, 2005) para 64; Yemen (UN Doc. CRC/C/15/Add. 267, 2005) para 62; Mexico (UN Doc. CRC/C/MEX/CO/3, 2006) para 54; Trinidad and Tobago (UN Doc. CRC/C/TTO/CO/2, 2006) paras 57-58. See also UNICEF (2007) 380; US Social Security Administration 'A Profile of Social Security Child Beneficiaries and their Families: Sociodemographic and Economic Characteristics', available at < <http://www.ssa.gov/policy/docs/ssb/v71n1/v71n1p1.html> > (accessed 31 October 2013).

<sup>355</sup> Vandenhole (2007) 39.

<sup>356</sup> UNICEF (2007) 388. See CRC Committee, Concluding Observations: Russian Federation (UN Doc. CRC/C/15/Add.110, 1999) para 13; Moldova (UN Doc. CRC/C/15/Add.192, 2002) para 39; Georgia (UN Doc. CRC/C/15/Add.222, 2003) para 54.

<sup>357</sup> UNICEF (2007) 382; Gordon D, Nandy S, Pantazis C, Pemberton S & Townsend P *The distribution of child poverty in the developing world* (2003) 23; ILO Report VI 'Social security: Issues, challenges and prospects', 89<sup>th</sup> session, Geneva, June 2001; Viet-Wilson J *Setting adequacy standards: How governments define minimum incomes* (1998) 11. See also CRC Committee, Concluding Observations: Solomon Islands (UN Doc. CRC/C/15/Add.208, 2003) para 45; Czech Republic (UN Doc. CRC/C/15/Add.201, 2003) para 43; Hungary (UN Doc. CRC/C/HUN/CO/2, 2006) para 46.



poverty.<sup>358</sup> Assistance through child and family benefits is seen as central to the fight against poverty based on the means-testing system or a universal scheme; such assistance is deemed to protect more families from economic deprivation unlike fiscal reforms which generally benefit only middle- and high-income families.<sup>359</sup>

## 2.5 Conclusions

This chapter presented discussions on a number of key issues necessary for laying a foundation for understanding the right to alternative care for children deprived of a family environment, with particular reference to kinship care in Africa. Purposefully, the chapter began historically by dwelling on the understanding and practice of kinship care in traditional African societies. It was shown that kinship care is part and parcel of what a family environment means in the African context; the kinship system is an intricate foundation upon which the very essence of family is built and defined. Several issues have impacted on the role of kinship systems in maintaining the cohesion of the family, ranging from changes in economic systems to HIV and AIDS. However, kinship bonds continue to exist and play a critical role in several aspects of life especially with regards to child care experiences and practices. As noted by McCarthy and Edwards:

Kinship connections are often a source of fascination to people in their everyday lives ... Indeed, kinship may be a key way in which people's ideas about their families are linked to the past and future, constituting family projects rooted in historical time. Kinship also continues to be an important part of people's everyday lives, despite the often repeated - but probably misleading - belief that kin relationships are declining in importance or that friends may be seen to be equivalent to kin. Grandparents often continue to play significant roles in family lives, and siblings and wider kinship ties also continue to be important throughout adult lives. Generally, kinship may be the basis for expectations and negotiations of obligations and support, and for (moral) identity.<sup>360</sup>

With reference to child care, a major finding which will be explored in subsequent chapters is that unlike in the past when kinship care was a communal practice based on shared responsibilities among several members of the same kinship group or extended family, kinship care today is in the main the entire responsibility of the particular kinship carer with whom the child is placed.

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<sup>358</sup> Vandenhoe (2007)41.

<sup>359</sup> Vandenhoe (2007) 42-43.

<sup>360</sup> McCarthy & Edwards (2011) 130.

Secondly, the chapter presented a discussion on the concept of the 'family' in international law, showing that while there is no right to a family, the duty to uphold and protect the family as society's most fundamental unit has become established as a rule of customary international law. Discussion of the various attempts to define what is meant by 'family' showed that the family, both as a concept and an institution, continues to evolve in nature and practice as the years go by. The main point therefore is that regardless of what form it takes, the family remains the basis and fundamental unit of society subject to the protection and support of the State.

Following from the above, the discussions progressed to show that although there is no right to a family, there are rights of or rights applicable to or within the context of the family, with particular significance for the proper growth and development of the child. These include the rights to knowledge of one's origins, parental direction and guidance and an adequate standard of living, among others. The importance of the discussion in that section is in the fact that those rights are significant for the survival of children regardless of what form the family takes. This is even more so in the context of kinship care because, as has been highlighted in the previous chapter, kinship care is the most prevalent family form for many children in Africa, within the framework of alternative care for children deprived of parental care.

The chapter also discussed the importance of the rights to social security and an adequate standard of living as they apply to children and their families. It was clearly pointed out that the right to an adequate standard of living cannot be separated from the right to social security; the latter generally serves as the means through which the former is realised. These rights are important in the context of any discussion on the right to alternative care because as highlighted in the chapter (and as will be further explored in subsequent chapters), the socio-economic condition of poverty is a major trigger for loss of parental care and the need for alternative care in many African countries. Increasingly therefore, States' obligation to provide the right to alternative care for children deprived of their family environment or parental care cannot be separated from States' obligations to guarantee children's rights to social security and an adequate standard of living.

In the following chapter, the right to alternative care as a whole will be the focus of the discussion. It will be argued that while kinship care is a child care reality for many children in Africa, the right to alternative care as construed in international law did not contemplate kinship care as alternative care within the framework of the relevant instruments. Kinship care was clearly understood to be a family environment and this understanding has an impact on the provision of adequate measures of support and protection for kinship care circumstances. This will serve as a background for understanding the focus on kinship care in recent years as a viable alternative care option, within the alternative care framework, for children without parental care.



## CHAPTER THREE – THE INTERNATIONAL AND AFRICAN REGIONAL LEGAL FRAMEWORK FOR THE RIGHT TO ALTERNATIVE CARE

### 3.1 Introduction

In Chapter 2, it was argued that kinship care has always been part and parcel of child care practices in Africa; kinship care in today's African societies is however different from its practice in the past due to changes in legal, political and socio-economic conditions. A second discussion dealt with understanding the concept of 'family' in international law and how it is understood in the African context, especially in relation to child care obligations. Challenges facing the family in contemporary times were also addressed as well as the evolving nature of the family across the globe. This led on to a discussion on the rights applicable to the family as the fundamental unit of society, and the family's right to State protection and support when necessary, with a particular emphasis on the implications of this right for children.

This chapter seeks to define and describe broadly, the right to alternative care with the aim of showing whether or not and to what extent, if at all, kinship care is contemplated within the context of the right to alternative care as encapsulated in the relevant international instruments. The CRC and the Children's Charter both place a high premium on the need for children to grow up in a family environment; it is a necessary precondition for the full and harmonious development of a child's personality.<sup>1</sup> The protection of the rights of children today is an investment into securing a sustainable future for them as adults tomorrow,<sup>2</sup> and to that extent the family is the ideal first environment for securing the protection of these rights. It is against this background that the CRC and the Children's Charter give an additional level of assistance and protection to children deprived of their natural family environment.<sup>3</sup> This is justifiable in light of the fact that children who lack the security of a family are more vulnerable to the violation of all other rights that they are entitled to, as children and rights-bearing individuals in society. Childhood and adolescence in the life of an individual are stages that impact significantly on the formation of character

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<sup>1</sup> ACRWC preamble, para 4; CRC preamble, para 6.

<sup>2</sup> Viljoen F *International human rights in Africa* (2012) 391.

<sup>3</sup> Arts 20 CRC & 25 ACRWC. Both articles make it clear that such children are entitled to 'special protection and assistance.'

and personality. They are important periods for laying the foundation for an emotionally balanced and secure adulthood.<sup>4</sup>

The aim of this chapter is to present and analyse the legal and policy frameworks that are relevant to the care and protection of children deprived of a family environment, within the context of the right to alternative care. To do this, the chapter is structured into seven parts: law and policy prior to the CRC and the ACRWC; general overview of the CRC; general overview of the ACRWC; analysis of the general principles of the CRC and the ACRWC; analysis of the principles underlying the right to alternative care under both the CRC (together with relevant general comments of the CRC Committee) and the ACRWC, including the forms of alternative care provided therein; and general conclusions derived from the discussions.

### **3.2 Before the Convention on the Rights of the Child and the African Children's Charter**

Prior to the CRC and the ACRWC, there are some other international instruments which, although non-binding, serve as reference materials for States in the interpretation and implementation of children's right to alternative care. More importantly, some of these instruments actually gave inspiration to the drafting of, or formed the basis of, the CRC's and Children's Charter's provisions on alternative care. Additionally, they provide insight into the historical development of children's rights generally, and the right to alternative care particularly. They are: the 1924 Geneva Declaration on the Rights of the Child (1924 Geneva Declaration), the 1959 Declaration on the Rights of the Child (1959 Declaration); the 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration); and the 1979 Declaration of Rights and Welfare of the African Child (1979 African Declaration).

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<sup>4</sup> Delplace M 'Participation in Adoption' in Ang F, Berghmans E & Catrijsse L *et al Participation rights of children* (2006) 179.

### 3.2.1 The Geneva Declaration of the Rights of the Child (1924)

In 1924 the League of Nations, the first intergovernmental organisation for the maintenance of world peace (subsequently replaced by the United Nations Organisation), adopted the Geneva Declaration on the Rights of the Child.<sup>5</sup> Though formulated as moral duties of 'mankind' towards children, rather than as rights, it was the first international instrument on matters affecting children.<sup>6</sup> It provides a concise list of five obligations targeted at the well-being of children generally;<sup>7</sup> they are:

1. The child must be given the means requisite for its normal development, both materially and spiritually;
2. 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 succoured;*<sup>8</sup>
3. The child must be the first to receive relief in times of distress;
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;
5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.<sup>9</sup>

While the second duty on the list is of particular relevance to alternative care for children deprived of a family environment, it is instructive to note that the Geneva Declaration hinted at rights which are today considered the general principles of the CRC;<sup>10</sup> the principles will be discussed subsequently in this chapter. It is also significant to note that obligation 5 of the Geneva Declaration bears a resemblance to Article 31 of the Children's Charter on the responsibilities of the child.<sup>11</sup> It can therefore be concluded that although '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',<sup>12</sup> it offered a formidable start to the advanced jurisprudence on children's rights as it exists globally today.

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<sup>5</sup> The League of Nations existed from 1919 to 1946 and the "Geneva Declaration" was drafted against the background of the impact of the first world war on children.

<sup>6</sup> Phillips C *Child-headed households: A feasible way forward, or an infringement of children's right to alternative care?* (2011) 34.

<sup>7</sup> Freeman M A *Commentary on the United Nations Convention on the Rights of the Child, Article 3: The best interests of the child* (2007) 11.

<sup>8</sup> Emphasis added.

<sup>9</sup> 'Geneva Declaration of the Rights of the Child' < <http://www.unicef.org/vietnam/01 - Declaration of Geneva 1924.PDF> > (accessed on 30/09/2011).

<sup>10</sup> They are: non-discrimination ('above all considerations of race, nationality or creed'); best interests of the child ('the best that it has to give'); life, survival and development ('means requisite for its normal development'); and child participation ('position to earn a livelihood' and 'be brought up in the consciousness...').

<sup>11</sup> See the discussions in chapter 2, section 2.3.4.

<sup>12</sup> Phillips (2011) 35.

### 3.2.2 The Declaration of the Rights of the Child (1959)

The 1959 Declaration was adopted by the UN General Assembly as a follow-up to the Geneva Declaration,<sup>13</sup> but the principles this time were formulated as 'rights' and not as moral obligations of adults towards children.<sup>14</sup> In addition to being a follow-up to the 1924 Geneva Declaration, the 1959 Declaration also attempted to build on the provisions of the Universal Declaration of Human Rights (UDHR) as it applies to children.<sup>15</sup>

The 1959 Declaration contains 10 Principles which, though expressed as rights, are referred to as 'Principles' rather than as 'Articles', highlighting their non-binding nature.<sup>16</sup> It also provides for the rights considered to be the general principles of children's rights.<sup>17</sup> However, although it covers a wider scope than the 1924 Declaration, it remained limited in impact due to being a mere 'statement of intent' rather than a legally binding instrument.<sup>18</sup>

Of particular relevance to the right to alternative care is Principle 6 which provides:

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.*<sup>19</sup> Payment of State and other assistance towards the maintenance of children of large families is desirable.

This Principle legally established the generally accepted fact that the family environment is important for the 'full and harmonious development' of the child as recognised in more recent and legally binding instruments on children's rights.<sup>20</sup> Therefore, where a child is deprived of his family environment, 'particular care' for such a child would include the provision of suitable alternative care.

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<sup>13</sup> Preamble to the 1959 Declaration, para 4.

<sup>14</sup> Art 1 of the 1959 Declaration provides: 'The child shall enjoy all the *rights* set forth in this declaration' (emphasis mine). See also Detrick (1992) 14.

<sup>15</sup> See the preamble to the 1959 Declaration, para 2. Art 25(2) of the UDHR provides that "Motherhood and Childhood are entitled to special care and assistance". For more on how the 1959 Declaration amplifies the child-related provisions of the UDHR, see the note to the 1959 Declaration by the Circumcision Reference Library (CIRP) < <http://www.cirp.org/library/ethics/UN-declaration/> > (accessed on 30/09/2011).

<sup>16</sup> Veerman PE *The rights of the child and the changing image of childhood* (1992) 168.

<sup>17</sup> See Principles 1&10 (non-discrimination); 2&& (best interests of the child); 2&4 (life, survival and development); and 10 (child participation).

<sup>18</sup> Phillips (2011) 37.

<sup>19</sup> Emphasis added.

<sup>20</sup> These include among others, the CRC and the African Children's Charter.

The drafting of Article 20 of the CRC on the right to alternative care was greatly influenced by Principle 6 of the 1959 Declaration.<sup>21</sup> However, some of the elements of Principle 6 did not make it into Article 20 of the CRC for a number of reasons. Of significance is the exclusion of the portion about not separating a child of 'tender' years from his mother.

The first reason for this exclusion is that such an approach is biased against the interests of the father, in cases of divorce or separation. Since the law today is generally to the effect that both parents are entitled to custody of their child/children in cases of dispute, the court should be left to decide mainly on the basis of the best interests of the child.<sup>22</sup> Secondly, the phrase does not take into account current realities of working mothers in that it ignores the practice of placing 'children of tender years' in day care or other such facilities where the children can get better care and attention than they would from their working mothers, fathers or both. According to the drafters of the CRC at the time, such practices had not been shown to be detrimental to children's best interests.<sup>23</sup>

It was also felt that, while the state has a responsibility to ensure an adequate standard of living for its citizens, parents should not be encouraged to birth large families especially if they are unable to cope with meeting all the needs of a large family.<sup>24</sup> Thus, the sentence 'payment of State and other assistance towards the maintenance of children of large families is desirable' was removed and does not feature in Article 20. To do the contrary would further nullify 'efforts to decrease population in the world.'<sup>25</sup> These progressive changes in the law go to show how the development of children's rights has evolved over the years, shaped by the social and other realities of the time.

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<sup>21</sup> Office of the United Nations High Commissioner Human Rights (UNHCHR) *Legislative History of the Convention on the Rights of the Child (1978-1989): Article 20 Children deprived of a family environment* (2007) 5.

<sup>22</sup> UNHCHR (2007) 8.

<sup>23</sup> As above.

<sup>24</sup> UNHCHR (2007) 5.

<sup>25</sup> UNHCHR (2007) 10.



### **3.2.3 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 (1986)**

Adopted in 1986 by the UN General Assembly, 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 (1986 Declaration) begins by affirming Principle 6 of the 1959 Declaration, on the importance of children being raised by their parents and in a stable family environment.<sup>26</sup> By stating that ‘child welfare depends upon good family welfare’,<sup>27</sup> the 1986 Declaration further highlights the double vulnerability of children deprived of a family environment, underscoring the importance of the right to alternative care. More specific to kinship care, the Declaration provides:

When care by the child’s own parents is unavailable or inappropriate, care by relatives of the child’s parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered.<sup>28</sup>

Although another non-binding instrument, as a precursor to the CRC on alternative care, the 1986 Declaration is valuable for expounding on the right to alternative care. First, article 4 of the Declaration makes the first direct reference to kinship care as one of the alternative care options for children deprived of a family environment.<sup>29</sup> In effect, a ‘stable family’ in the context of this Declaration is synonymous with parental care or care by one’s parents, and the role of relatives in the care and upbringing of children was not envisaged to be a core part of the child’s family. As such, only when parents are ‘unavailable or inappropriate’ should relatives be considered as the first alternative choice for care of the child. It will be recalled from discussions in the previous chapter that this understanding while popular and acceptable in the ‘Western’ context is not (traditionally) applicable in the African context. Proof of this, it will be argued, is found in the fact that this approach was not adopted in the CRC although the UN Guidelines on the Alternative Care of Children, which will be examined in the next chapter, attempted to re-introduce it.

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<sup>26</sup> Preamble to the 1986 Declaration, para 3 & art 3.

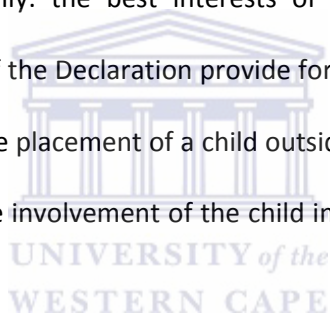
<sup>27</sup> Art 2, 1986 Declaration.

<sup>28</sup> Art 4, 1986 Declaration.

<sup>29</sup> Art 4 of the 1986 Declaration makes reference to ‘care by relatives of the child’s parents.’

Secondly, the approach of the Declaration to the right to alternative care pioneered the hierarchical manner in which alternative care options should be sought and provided. That is, it points to a hierarchy (or descending scale of preference) among the alternative care options: (beginning with) kinship care; foster care; adoption; and institutional placement (as a last resort).<sup>30</sup> Thus, the ideal situation is that the first measure of alternative care to be considered should resemble, as far as possible, a 'typical' family environment and only when such is unavailable should other less desirable ones be considered. This would explain why the Declaration, solely focused on foster care and adoption, provided first for kinship care as the first or highest level of alternative care in the absence of parents.

The 1986 Declaration also recognises the importance of some general principles which were subsequently adopted in the CRC, as being important not only to the realisation of the right to alternative care but to the realisation of children's rights generally: the best interests of the child and child participation. The Preamble (paragraph 5) and Article 5 of the Declaration provide for the 'paramountcy' of the best interests of the child 'in all matters relating to the placement of a child outside the care of the child's own parents',<sup>31</sup> while Articles 12 and 15 provide for the involvement of the child in reaching decisions to place the child in foster care or adoption.



Article 21 of the CRC on intercountry adoption and the provisions of the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Intercountry Adoption Convention) are also traceable to Articles 17 to 24 of the 1986 Declaration.<sup>32</sup> Of the 24 Articles of the Declaration, adoption is dealt with under Articles 13 to 24; but while four of these 12 Articles focus on adoption generally, eight are devoted to the subject of intercountry adoption. In terms of the Declaration, the 'primary aim of adoption is to provide a child who cannot be cared for by his own parents with a

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<sup>30</sup> This suggests a preference for family-based forms of alternative care, that is, priority should be given to such alternatives before considering other options such as institutional placement. And among the family-based options, a preference for the least disruptive form of care in terms of the child's cultural, social and other background is also suggested. The dynamics of this will be discussed further in the chapter; see section 3.3.2.5.

<sup>31</sup> It should be noted that the best interests of the child is only made *a* primary consideration in all matters affecting the child, and not *the* primary or paramount consideration. The effect of this is that under the CRC, other considerations may trump the best interests of the child principle, depending on the circumstances of the case. Under the ACRWC however, all other considerations will take secondary positions to the best interests of the child principle. Only in relation to article 21 of the CRC on intercountry adoption is the best interest of the child made the paramount or primary consideration. The implications of this will be discussed later in this chapter; see section 3.3.1.2.

<sup>32</sup> See the Preamble to the Hague Intercountry Adoption Convention, para 5.

permanent family.<sup>33</sup> In relation to intercountry adoption, the various safeguards provided in the CRC and the Hague Intercountry Adoption Convention were developed with reference to the provisions of the 1986 Declaration. These include the establishment of competent supervisory mechanisms,<sup>34</sup> the prohibition of improper financial gain,<sup>35</sup> and measures to guard against child abduction and trafficking.<sup>36</sup>

### 3.2.4 The Declaration on the Rights and Welfare of the African Child (1979)

The year 1979, being the International Year of the Child, marked the submission of a proposal by Poland for the enactment of a treaty specifically dedicated to the rights and concerns of children.<sup>37</sup> The proposal set in motion the process for the drafting of the CRC a decade later. 1979 is also significant in the context of children's rights in Africa because it was also the year in which the Organisation of African Unity (OAU – now known as the African Union) passed the Declaration on the Rights and Welfare of the African Child.<sup>38</sup>

The 1979 African Declaration is significant in a number of ways. First, it followed in the direction earlier provided by the 1959 Declaration by formulating its principles in terms of 'a rights-based language in the context of children's rights.'<sup>39</sup> It however went further than the 1959 Declaration by insisting on the need for States to embark on law reform 'relating to the rights of children.'<sup>40</sup> This provision was 'remarkably prescient'<sup>41</sup> as it formed the basis for the rights-based approach which is a dominant feature of child law reform today, not only in Africa but the world at large.<sup>42</sup>

Secondly, the African Declaration expressly states the obligations of States towards children unlike the 1959 Declaration which merely states what children are entitled to without being categorical about the duty-bearer of children's rights.<sup>43</sup> Thirdly, the African Declaration was very progressive on several issues:

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<sup>33</sup> Art 13, 1986 Declaration.

<sup>34</sup> Art 18, 1986 Declaration.

<sup>35</sup> Art 20, 1986 Declaration.

<sup>36</sup> Art 19, 1986 Declaration.

<sup>37</sup> UN GA RES. 31/169 of 21 Dec. 1976

<sup>38</sup> Kamchedzera GS 'The complementarity of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' in Verhellen E (ed) *Understanding children's rights* (1998) 550.

<sup>39</sup> Sloth-Nielsen J 'Children's rights in Africa' in Ssenyonjo M (ed) *The African Regional Human Rights System* (2012) 162.

<sup>40</sup> Principle 2, 1979 African Declaration.

<sup>41</sup> Sloth-Nielsen (2012) 162.

<sup>42</sup> Sloth-Nielsen J 'Domestication of children's rights in national legal systems in African context: Progress and prospects' in Sloth-Nielsen (ed) (2008) 53; Sloth-Nielsen J, Chirwa D, Mbazira C, Mezmur B & Kamidi R *Child friendly laws in Africa* (2009) 1.

<sup>43</sup> Sloth-Nielsen (2012) 163. The African Declaration however places great emphasis on the role of non-governmental and inter-governmental organisations in assisting states with fulfilling their obligations towards children. See for example, Principles 4 & 5.

The contents of the Declaration are, with hindsight, relatively forward looking towards some of the principal areas of concern in contemporary child rights jurisprudence: topics such as refugee and displaced children (Principle 12), provision of day care centres and early childhood development (Principle 6(c)), participation of beneficiaries to assure the fulfilment of children's rights (Principle 11), and priority for the rights of children with disabilities (Principle 6(b)), are, coincidentally, all subjects on which the CRC Committee has issued a General Comment, albeit that the Committee commenced engagement with these themes some 25 odd years later!<sup>44</sup>

In addition to all the above, the African Declaration was first to identify and address several issues of particular concern to children in Africa, such as, harmful cultural/traditional practices and the need to address the unequal status of the girl-child.<sup>45</sup> The Declaration also concerned itself with the need to ensure the transmission of the values of African cultural heritage to African children to guarantee their preservation into the future.<sup>46</sup> States were enjoined to achieve this objective through the development and preservation of African arts, languages and cultures, and the stimulation in children of interest in and appreciation of them.<sup>47</sup>

In the context of the importance of a family environment and the right to alternative care, the African Declaration emphasised the existence of a strong link between the welfare of the child and that of his parents and larger family, especially the mother.<sup>48</sup> In the African context, this shows the value that is placed on the family unit especially with regards to the care and upbringing of the child.<sup>49</sup>

The African Declaration therefore laid the foundation for the eventual enactment of the African Children's Charter as a regional instrument supplementary to the CRC. These two instruments are discussed in further detail below, followed by an analysis of their contents with regard to the right to alternative care.

### **3.3 The Convention on the Rights of the Child**

The CRC was adopted on 20 November 1989 and has been ratified by all countries of the world except Somalia and the USA (and the recently independent South Sudan), making it a near-universal legal

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<sup>44</sup> Sloth-Nielsen (2012) 163.

<sup>45</sup> Principles 2 & 3, 1979 African Declaration.

<sup>46</sup> Preamble to the 1979 African Declaration, para 6.

<sup>47</sup> Principle 10, 1979 African Declaration.

<sup>48</sup> Preamble to the 1979 African Declaration, para 7.

<sup>49</sup> Njungwe (2009) 9.

instrument.<sup>50</sup> Being exclusively devoted to children, it serves as an important tool for advancing children's rights and preventing matters concerning children from being taken for granted or accorded less importance. This tends to be the case with other general human rights treaties which are equally applicable to children, although not drafted with a consciousness of children in mind.<sup>51</sup> Thus, although the pre-existing major international instruments – the UDHR, the ICCPR, and the ICESCR – are generally applicable to children as human beings, and had particular Articles devoted to children,<sup>52</sup> the need for a children-specific international instrument was influenced largely by the 'recognition of children as rights-holders and the adoption of a rights-based approach to matters relating to child development, welfare and protection.'<sup>53</sup> The universal acceptance of the CRC represents a global consensus on matters concerning children in that it provides the 'world with shared norms and values in relation to childhood'.<sup>54</sup> The significance of this lies in the promotion of positive international uniformity as opposed to the subjectivity of cultural relativism.<sup>55</sup>

From the Preamble to the CRC, it is clear that it is built on the Declarations drafted before it, as references are made to the 1924 Geneva Declaration, and the 1959 Declaration, as well as the UDHR, ICCPR and the ICESCR. The CRC is therefore a conglomeration of all international human rights for children;<sup>56</sup> its uniqueness lies in the fact that it encompasses all rights, whether civil and political or economic, social and

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<sup>50</sup> Ratification in Somalia has been hampered by the absence of an effective government since 1991 while the USA has only signed the CRC. South Sudan gained its independence from the larger Sudan on 9 July 2011, and is in the process of ratifying the CRC.

<sup>51</sup> Miljeteig-Olssen P 'Advocacy of children's rights-The Convention as more than a legal document' (1990) 12 *Human Rights Quarterly* 148; Cantwell N 'The origins, development and significance of the United Nations Convention on the Rights of the Child' in Detrick (1992) 27. Some of the advancements made on the rights of the child as a direct consequence of the CRC include the adoption of the first and second optional protocols: 'Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography' (2000) and 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (2002). More recently is the approval of a third optional protocol to the CRC on a Communications Procedure, which will allow individual children (or their representatives) to submit complaints regarding specific violations of their rights under the CRC and the first two optional protocols. Adopted by the UN General Assembly in December 2011, the third protocol was opened for signature on 28 February 2012 and will enter into force upon ratification by 10 UN Member States.

<sup>52</sup> For example, art 25(2) of the UDHR provides for special care and assistance to childhood; art 24 of the ICCPR provides for children's right to a name, nationality and non-discrimination; and art 10(3) of the ICESCR provides for the protection of children from economic and social exploitation.

<sup>53</sup> Lim H 'Legally recognising child-headed households through a rights-based approach: The case of South Africa' unpublished LLD thesis, University of Pretoria (2010) 98.

<sup>54</sup> Tomas, C 'Childhood and Rights: Reflections on the UN Convention on the Rights of the Child' (2008) 2 *Childhoods Today* 6 (An online journal for childhood studies available at < [www.childhoodstoday.org/article.php?id=19](http://www.childhoodstoday.org/article.php?id=19) > accessed on 06/11/2011).

<sup>55</sup> A major challenge facing the advancement of human rights generally is the issue of cultural relativism. While elements of this exist within the realm of children's rights, the CRC largely represents basic norms that resonate universally.

<sup>56</sup> Phillips (2011) 45. The proposal that culminated in the drafting of the CRC was put forward by Poland and in fact, the original proposal was that the 1959 Declaration be converted into a legally binding instrument. This was rejected but it paved the way for the eventual drafting of the CRC, based on the 1959 and other Declarations.

cultural, all of which should be regarded as justiciable.<sup>57</sup> This is considered to be a progressive advance in the development of international human rights.<sup>58</sup> As the climax to earlier Declarations on children's rights, the Convention is very extensive and deals with a wide range of issues affecting children.<sup>59</sup> However, the differences in the legal, social, political, cultural and economic backgrounds and systems of the different nations of the world demanded that the Convention be drafted in a broad and general manner that gives wide discretion to States in the manner of implementation of the Convention's provisions.<sup>60</sup> This probably explains the almost universal acceptance of the CRC as 'a set of guidelines and directives for action and as a tool for promoting knowledge and understanding of children's issues' by making children a subject of global focus.<sup>61</sup>

However, the greatest value of the CRC lies not in its being exclusively devoted to children, but more in the fact that it is a legally binding instrument, unlike those previously discussed. By being a legally binding document, the CRC has had, and continues to have, a significant impact on the evolution of law and practice affecting children in various domestic jurisdictions. Consequently, there has been a wave of domestic law reforms, amendments and the adoption of other practical measures over the last two decades (and much more recently in many African countries) in compliance with the CRC.<sup>62</sup> More importantly, States can be held accountable for their treatment of children and for the violation of children's rights.<sup>63</sup> Such accountability is promoted by the CRC Committee on the Rights of the Child in terms of States Parties' Reports, Concluding Observations and General Comments, among others.

Additionally, in December 2011, a Third Optional Protocol to the CRC was adopted by the United Nations General Assembly and opened for ratification in February 2012. The Protocol allows individual children (or their representatives) to submit complaints to the CRC Committee regarding specific violations of their

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<sup>57</sup> Sloth-Nielsen J *Realising the rights of children growing up in child-headed households: A guide to laws, policies and social advocacy* (2004) 4; CRC Committee GC 5 (2003) paras 24 & 25.

<sup>58</sup> Kaime T, "'Vernacularising' the Convention on the Rights of the Child: Rights and Culture as Analytic Tools" (2010) 18 *The International Journal of Children's Rights* 642.

<sup>59</sup> The CRC contains a comprehensive preamble and 54 articles ranging from the age definition of a child to the workings of the monitoring body of the Convention, the CRC Committee.

<sup>60</sup> Phillips (2011) 45.

<sup>61</sup> Detrick (1992) 29

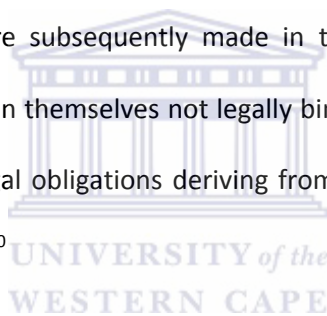
<sup>62</sup> Sloth-Nielsen (2008) 53; Phillips (2011) 45. Article 2 of the CRC obliges States Parties to ensure compliance with the CRC while article 4 requires states parties to take necessary measures (legislative, administrative and otherwise) to accomplish this.

<sup>63</sup> Newell P 'The CRC and the promotion of human rights' in Bruning M & Ruitenber G (eds) *Rechten van het kind in (inter)nationale perspectief* (2005) 36.

rights under the CRC and its first two Optional Protocols on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict. According to Save the Children:

It will be the only complaint mechanism covering the full range of rights guaranteed under the CRC and should significantly contribute to empower victims whose rights have been violated under the CRC in seeking remedies. By ratifying the new Protocol, states will provide a crucial contribution to complement measures for respecting and protecting the rights of the child worldwide.<sup>64</sup>

The CRC Committee is a body of independent experts established in terms of Article 43 of the Convention, for the purpose of monitoring the implementation of the CRC (and its two Optional Protocols) by States Parties.<sup>65</sup> The Committee was established in 1991 and is currently composed of 18 members who are experts on children's rights.<sup>66</sup> The monitoring and evaluation of States Parties' progress or otherwise is done mainly via the examination of periodic reports submitted by States Parties to the Committee, and additional information obtained from NGOs, INGOs and other agencies.<sup>67</sup> The Committee's concerns and recommendations to States Parties are subsequently made in the form of Concluding Observations.<sup>68</sup> Although Concluding Observations are in themselves not legally binding, 'they have an authoritative status in that they reflect on violations of legal obligations deriving from treaties';<sup>69</sup> they serve to interpret the nature and scope of treaty obligations.<sup>70</sup>



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<sup>64</sup> Save the Children 'Third Optional Protocol to the Convention on the Rights of the Child opens for signature 28 February 2012', available at < <http://resourcecentre.savethechildren.se/content/news/third-optional-protocol-convention-rights-child-opens-signature-28-february-2012> > (accessed 11 April 2013).

<sup>65</sup> See art. 43, CRC for the establishment, composition, workings and operations of the Committee.

<sup>66</sup> Phillips (2011) 49. Note that art 43 provides for the election of ten members into the Committee, but this number has been increased to 18 at the moment.

<sup>67</sup> See art. 44 CRC for the general procedure for state reporting to the CRC Committee, and art 45 for the involvement of NGOs, INGOs and other agencies.

<sup>68</sup> For more information on the nature and contents of concluding observations see: African Child Policy Forum (ACPF) *In the best interests of the child: Harmonising Laws in Eastern and Southern Africa* (2007) 104; Boerefijn I 'Establishing State Responsibility for breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties' (2001) 56 *Netherlands International Law Review* 182; LeBlanc LJ *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (1995) 270.

<sup>69</sup> Phillips (2011) 50.

<sup>70</sup> As above.



### 3.4 The African Charter on the Rights and Welfare of the Child

Although a vast number of States participated in the drafting process of the CRC, many developing countries, particularly from sub-Saharan Africa, could not participate in the process.<sup>71</sup> In fact, the few African countries that participated in the process towards the end were Islamic States from the northern African region.<sup>72</sup> Thus, the Children's Charter was drafted partly in response to the under-representation of African States in the drafting process of the CRC,<sup>73</sup> and the need to address particular issues that are peculiar to children's rights based on the economic and socio-cultural context in Africa generally.<sup>74</sup>

However, the ACRWC draws inspiration from the CRC as evidenced by the fact that the provisions of the former are framed in similar manner to the latter. The ACRWC makes direct reference to the CRC in its Preamble and the ACRWC is equally premised upon the same fundamental principles of children's rights established by the CRC.<sup>75</sup> The Charter which was adopted in 1990 and entered into force in 1999 is considered to be the most comprehensive and important regional instrument on children's rights,<sup>76</sup> and like the CRC, it encompasses all rights whether socio-economic or civil and political.<sup>77</sup> Nevertheless, by being region-specific in a number of areas, the complementary role that the ACRWC plays to the CRC in children's rights is quite established.<sup>78</sup> The ACRWC offers a higher level of protection to children in certain areas, such as, the legal definition of the age of the child,<sup>79</sup> as well as the protection of children from armed conflict,<sup>80</sup> and establishes the supremacy of children's rights over any inconsistent 'custom, tradition, cultural or

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<sup>71</sup> LeBlanc (1995) 33. For more on the contributions and reservations of Islamic states in the drafting process of the CRC, see also LeBlanc LJ 'Reservations to the Convention on the Rights of the Child: A macroscopic view of state practice' (1996) 4 *International Journal of children's Rights* 357.

<sup>72</sup> LeBlanc (1995) 33.

<sup>73</sup> Viljoen F 'The African Charter on the Rights and Welfare of the Child' in Davel CJ (ed) *Introduction to child law in South Africa* (2000) 218; Cantwell N & Holzscheiter A 'Article 20: children deprived of their family environment' in Alen *et al* (2008) 22; LeBlanc (1995) 30.

<sup>74</sup> For a discussion of these factors, see: Zeleza PT 'The struggle for human rights in Africa' in Heyns, C & Stefiszyn, K (eds) *Human rights, peace and justice in Africa: A reader* (2006) 42; Chirwa (2002) 157; Lloyd (2002) 180; Olowu (2002) 127.

<sup>75</sup> Gose (2002) 17.

<sup>76</sup> Lloyd A 'The African regional system for the protection of children's rights' in Sloth-Nielsen (ed) (2008) 33. See also, Lloyd A 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *The International Journal of Rights* (2002) 180.

<sup>77</sup> African Child Policy Forum *In the best interests of the child: Harmonising laws in Eastern and Southern Africa* (2007) 12.

<sup>78</sup> Sloth-Nielsen (2011) 163; Sloth-Nielsen (2012) 124; Chirwa (2002) 157; Viljoen F

'Africa's contribution to the development of international human rights and humanitarian law: the African Charter on the Rights and Welfare of the Child' (2001) 1 *African Human Rights Law Journal* 1; Olowu (2002) 127; Mezmur (2008) 1.

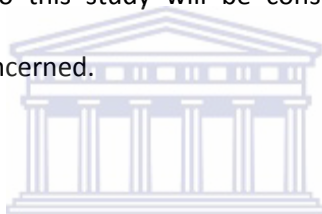
<sup>79</sup> Art 2 ACRWC clearly defines a child as 'every person below the age of eighteen years' without variation, while art 1 CRC gives states the leeway of setting a lower age of majority.

<sup>80</sup> Art 22 ACRWC obliges state parties to refrain from recruiting children for armed conflict, effectively protecting children between 15 and 18 years from recruitment while art 38 CRC only obliges states from recruiting children who are below 15 years.



religious practice.<sup>81</sup> This signifies an African acceptance of the global paradigm shift to the recognition of children as full and visible members of society, entitled to human rights in the here and now.<sup>82</sup> The complementary nature of the ACRWC to the CRC reveals the distinct contributions that the ACRWC makes to children's rights generally and the CRC particularly.<sup>83</sup> The ACRWC adds positive values that resonate with the realities of children in Africa, and buttresses the fact that regional treaties are important for the resolution of regional human rights situations, while 'upholding cultural traditions and history unique to the region'.<sup>84</sup>

Against the background of the fact that the provisions of the CRC and the ACRWC are similarly expressed, all subsequent discussions in this chapter will incorporate the method of discussing the relevant provisions of both the CRC and the ACRWC, making comparisons and distinctions where relevant and necessary. The provisions of both treaties relevant to this study will be consecutively discussed since both treaties reinforce each other on the subjects concerned.



### **3.5 General Principles of the CRC and the African Children's Charter and the Right to Alternative Care**

In order to fully articulate the rights of the child, the CRC contains certain provisions considered to be the 'pillars' or 'cardinal principles' of children's rights which together inform the interpretation of the Convention.<sup>85</sup> The realisation of all children's rights, as expressed within the CRC, is hinged on these general principles on the basis of all children's rights (as with all human rights) being interrelated and

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<sup>81</sup> Art 1(3) ACRWC; the CRC has no explicit provision on that.

<sup>82</sup> Arts 1(3), 7 ACRWC & 12 CRC; Freeman M 'The moral status of children', Van Bueren G 'International children's rights: A stop-go history', Kolosov Y 'The juridical significance of the Convention on the Rights of the Child' and, Lanotte JV & Goedertier G 'The procedure before the Committee on the Rights of the Child' all in Verhellen E (ed) *Understanding children's rights* (1996) 28, 316, 369 & 471.

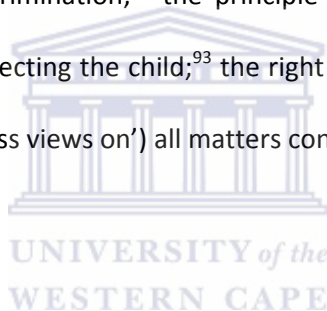
<sup>83</sup> See generally Bekker G 'The African Committee of Experts on the rights and Welfare of the Child' in Ssenyonjo (2011) 249-252.

<sup>84</sup> Lloyd (2002) 183; LL Senghor 'Address delivered to the opening meeting of the African Experts in preparation of the African Charter on Human and Peoples' Rights' reprinted in C Heyns & K Stefiszyn *Human rights, peace and justice in Africa: A reader* (2006) 49. For a schematic comparison of the ACRWC and the CRC, see: Mezmur (2008)1.

<sup>85</sup> Sloth-Nielsen J 'Of newborns and nubile: Some critical challenges to children's rights in Africa in the era of HIV/Aids' (2005) 13 *The International Journal of Children's Rights* 73; Hodgkin R & Newell P *Implementation Handbook for the Convention on the Rights of the Child* (2002) 42. See also the 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child' by the UN Committee on the Rights of the Child, CRC/C/58/Rev.2, 2010, para 23.

interconnected.<sup>86</sup> In fact, the need for the wholesome development of children makes the indivisibility and interdependence of rights more firmly applicable to the rights of children.<sup>87</sup> This is the background against which all rights contained in the CRC and the African Children's Charter, whether civil and political or economic, social, and cultural, are grouped together with no particular hierarchy.<sup>88</sup> Flowing from this holistic approach, the CRC is said to have four aims (also known as 'the four P's'): Protection, Prevention, Provision and Participation.<sup>89</sup>

A proper interpretation and implementation of the right to alternative care cannot be divorced from these principles which are fundamental to the implementation of the Convention in its entirety.<sup>90</sup> In other words, these principles, which represent the very essence of the Convention, serve as guides in understanding the application of the right to alternative care and all other rights in the CRC.<sup>91</sup> The principles of the CRC and the ACRWC are: the right to non-discrimination;<sup>92</sup> the principle of the best interests of the child as a primary consideration in all matters affecting the child;<sup>93</sup> the right to life, survival and development;<sup>94</sup> and the child's right to participate in ('express views on') all matters concerning the child.<sup>95</sup>



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<sup>86</sup> CRC Committee, General Comment No 1 'The aims of education' (2001) paras 6 & 7.

<sup>87</sup> CRC Committee, General Comment No 4 'Adolescent Health' (2003) para 5; Lopatka A 'The Convention on the Rights of the Child: Universal Dilemmas' (1999) 21 *Whittier Law Review* 86; Freeman M 'Why it remains important to take children's rights seriously' (2007) 15 *The International Journal of Children's Rights* 7.

<sup>88</sup> See Rios-Kohn R 'The impact of the United Nations Convention on the Rights of the Child' (1996) 6 *Transnational Law and Contemporary Problems* 300. This approach is without prejudice to the fact that the principle of 'progressive realisation' of rights remains applicable to the socio-economic rights contained in the CRC (for example, article 4 of the CRC). However, the particular needs and vulnerabilities of children require that this principle cannot be used as an excuse not to priorities the rights and welfare needs of children.

<sup>89</sup> Sloth-Niesen J (2004) 4. Similarly, the aims of the rights contained in the CRC are also known by another classification as the "3 P's": Provision, Protection, and Participation. See Quennerstedt A 'Children, but not really humans? Critical reflections on the hampering effects of the "3 P's"' (2010) 18 *The International Journal of Children's Rights* 21.

<sup>90</sup> CRC Committee, General Guidelines for Periodic Reports, 2005, para 21; Rios-Kohn R 'Intercountry Adoption: An international perspective on the practice and standards' (1998) 1 *Adoption Quarterly* 146.

<sup>91</sup> Rios-Kohn (1998) 143, 146.

<sup>92</sup> Arts 2, CRC & 3, ACRWC.

<sup>93</sup> Arts 3, CRC & 4, ACRWC.

<sup>94</sup> Arts 6, CRC & 5, ACRWC.

<sup>95</sup> Arts 12, CRC & 7, ACRWC.

### 3.5.1 Non-discrimination

The principle of non-discrimination, also positively described as the principle of equality,<sup>96</sup> is considered key to the understanding and proper application of all the rights contained in the CRC.<sup>97</sup> The principle is however not unique to the CRC as it is derived from almost all other pre-existing declarations and treaties on human rights,<sup>98</sup> which establish the principle as a cornerstone for the realisation of global human rights.<sup>99</sup> According to the Human Rights Committee, discrimination refers to:

...any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>100</sup>

By this definition, the principle of non-discrimination prohibits four discriminatory elements: the differentiation of similar situations; the absence of legitimate ends; the lack of proportionality of means to ends; and the use of suspect classifications.<sup>101</sup>

However, the provisions of the CRC and the ACRWC on non-discrimination are unique in that they prohibit discrimination, not only against the child, but against the parents, guardians or relatives as well.<sup>102</sup> In other words, a child may not be directly discriminated against and may also not be indirectly discriminated against on the basis of any status or opinion attributable to the child's parent(s), guardians or relatives. This is a logical and comprehensive approach to the principle in relation to children's rights because children tend to suffer discrimination flowing from existing discrimination against their parents or guardians.

Article 2 of the CRC provides as follows:

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<sup>96</sup> Cohen C 'The United Nations Convention on the Rights of the Child: A feminist landmark' (1997) 3 *William & Mary Journal of Women and the Law* 21.

<sup>97</sup> CRC Committee, General Comment No 1 (2001) para 6; General Comment No 3 'HIV/AIDS and the rights of the child' (2003) para 5; General Comment No 5 'General measures of implementation for the Convention on the Rights of the Child' (2003) paras 4 & 12; Hodgkin & Newell (2002) 19.

<sup>98</sup> See among others: the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

<sup>99</sup> Nowak M *UN Covenant on civil and political rights: CCPR Commentary* (2005) 458.

<sup>100</sup> Human Rights Committee, General Comment No 18 on the principle of non-discrimination (1989), para 6.

<sup>101</sup> Besson S 'The principle of non-discrimination in the Convention on the Rights of the Child' (2005) 13 *The International Journal of Children's Rights* 435; as cited in Mezmur (2009) 135.

<sup>102</sup> Cohen (1997) 34. The provisions cover both *de jure* and *de facto* discrimination.

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.

In the same vein, Article 3 of the African Children's Charter provides:

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.

In a bid to widen the scope of the principle of non-discrimination and to target discriminatory practices that affect children in Africa, the ACRWC in its Article 3 goes further than the CRC by extending the obligation concerning non-discrimination to non-State actors also. This is achieved by the absence of any reference to the 'State' or 'State Parties'; some customary law practices may fall within the category of discriminatory actions against children by non-state parties or private individuals and groups.<sup>103</sup>

In the context of the right to alternative care, the principle of non-discrimination is important for a number of reasons. First, it addresses some of the causes of the loss of a family environment, such as being born out of wedlock. It also addresses discriminatory tendencies that occur in the placement process, that is, factors which make it difficult, if not impossible, for many children to be placed in alternative care. The principle also serves the purpose of ensuring that children who are placed in alternative care are not discriminated against in favour of children who live in their natural family environment.<sup>104</sup> Some of the discriminatory practices which may exist in relation to alternative care include, among others, the preference for certain categories of children for adoption, the prohibition of homosexual couples from being adoptive parents or foster carers and discrimination against children with HIV, children with disabilities or children belonging to minority groups.<sup>105</sup>

The non-discrimination principle is also applicable in relation to the different alternative care placement options available to children deprived of their family environment. The implication of this is that children in

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<sup>103</sup> Chirwa (2002) 159; Lloyd (2008) 38.

<sup>104</sup> Mezmur (2009) 138.

<sup>105</sup> As above.

one form of alternative care (especially those in institutional care) may not be discriminated against in the enjoyment of all their other rights, in favour of children in other forms of alternative care placement options.<sup>106</sup> Thus, children's rights to education, health care and religion, among others, must be guaranteed even within institutional care facilities in the same manner as obtains in other alternative care options.<sup>107</sup>

### 3.5.2 The Best Interests of the Child

Although the concept of the best interests of the child first appeared in international law in the 1959 Declaration of the Rights of the Child,<sup>108</sup> the concept came into existence in the early 19<sup>th</sup> century, when parents began to be regarded not as 'owners' of children but as 'nurturers' of children.<sup>109</sup> This development was itself a consequence of the shift in the role of Western families from being 'work/discipline units' to being 'nests for malleable hearts and minds.'<sup>110</sup> Thus children began to be viewed differently: no longer as economic materials for productive labour but as personalities in need of love and nurturing.<sup>111</sup>

Over the years, the principle has come to be accepted as a child-focused standard in dealing with all matters affecting children. Thus, it has been established in the CRC, the African Children's Charter and other international law instruments applicable to children.<sup>112</sup> According to Pais, the inclusion of the principle in the CRC is ground-breaking in that it has 'helped crystallize the perception of the child as a real

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<sup>106</sup> Cantwell & Holzscheiter (2008) 53.

<sup>107</sup> It should however be noted that the right to non-discrimination does not amount to equal treatment in that the CRC and the ACRWC among others, recognise the need for special treatment for vulnerable or disadvantaged groups based on the principle of affirmative or positive action. Positive or affirmative action is generally aimed at "redressing structural disadvantages and counterbalancing the underlying power inequalities in society". For more on this see, Mezmur (2009) 143; CRC Committee, General Comment No 5 (2003) para 12; preamble to the CRC, para 9; art 26 of the ACRWC; Van Bueren G 'Of floors and ceilings: Minimum core obligations and children' in Brand D & Russell S (eds) *Exploring the core contents of socio-economic rights: South African and international perspectives* (2002) 188.

<sup>108</sup> Principle 2 of the 1959 Declaration of the Rights of the Child provides: 'The child shall enjoy special protection...In the enactment of laws for this purpose, the best interests of the child shall be the primary consideration'. The principle is also featured in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), arts 5(b) & 16(1)(d).

<sup>109</sup> Graff (1999) 109.

<sup>110</sup> Graff (1999) 111.

<sup>111</sup> Graff (1999) 109.

<sup>112</sup> See art. 3, CRC; art. 4, ACRWC, para 4 preamble to, & art. 21, Hague Intercountry Adoption Convention, among others.

person in his or her own right, someone who must be considered autonomously.<sup>113</sup> Article 3(1) of the CRC provides:

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.

However, more than any other principle in the CRC, the best interests of the child principle has been the subject of the most academic analyses and debates due to its controversially indeterminate and subjective nature.<sup>114</sup> The principle often connotes different and sometimes contradictory meanings, depending on who is analysing it and what the circumstances are.<sup>115</sup> In determining what amounts to the best interests of the child in different situations, *Save the Children* suggests that objective answers to the following questions should be sought: 'How and by whom has this vision (of best interests) been defined? What are the assumptions underlying it? What have girls and boys contributed to the development of this vision?'<sup>116</sup> According to Alston, the principle serves the role of clarifying, justifying or supporting particular applications of all rights under the CRC, and also serves as a tool for mediation in the resolution of conflicts between rights contained in the CRC.<sup>117</sup> The principle may also be used to fill any existing gap within the framework of the CRC.<sup>118</sup> According to the CRC Committee however, the aim of the principle is to ensure 'the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.'<sup>119</sup>

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<sup>113</sup> Pais MS (ed) *A Human Rights Conceptual Framework for UNICEF* (1999) 11 quoted in Tun AA, Cave G, Trotter D & Bell B 'The domestic fulfilment of children's rights: Save the children's experience in the use of rights-based approaches' in Alen A et al *The UN Children's Rights Convention: Theory meets practice. Proceedings of the International Interdisciplinary Conference on Children's Rights, 18-19 May 2006, Ghent, Belgium* (2007) 42.

<sup>114</sup> Vite S & Boechar H *A Commentary on the United Nations Convention on the Rights of the Child: Article 21 Adoption* (2008) 23; Hodgkin & Newell (2002) 41.

<sup>115</sup> Tun et al (2007) 43; Graff (1999) 109. However, there are some extreme situations such as hunger and poverty which are never considered to be in the child's best interests. See Freeman (2007) 27.

<sup>116</sup> International Save the Children Alliance (2002) 37 quoted in Tun et al in Alen et al (2007) 43. See also Elster's approach: 'For a determinate answer to the question of what would be in the child's best interests, (a) all options must be known, (b) all the possible outcomes of each option must be known, (c) the probabilities of each outcome occurring must be known, and (d) the value attached to each outcome must be known.' See Elster J 'Solomonic judgments: Against the best interests of the child' (1987) 54 *University of Chicago Law Review* 12.

<sup>117</sup> Alston P 'The best interest principle: Towards a reconciliation of culture and human rights' (1994) 8 *The International Journal of Law, Policy and the Family* 15.

<sup>118</sup> Freeman (2007) 26.

<sup>119</sup> CRC Committee, General Comment No 14 (2013) 'The right of the child to have his or her best interests taken as a primary consideration', para 4. Prior to 2013, the CRC Committee has through other general comments, sought to shed light on the understanding of the concept of the best interests of the child. However, this has been done only with reference to specific contexts and particular themes. See for example: General Comment No 3 (2003) 'HIV/AIDS and the rights of the child' para 10, 'the child should be placed at the centre of the response to the pandemic, and strategies should be adapted to children's rights and

Nevertheless, what the best interests principle loses by being indeterminate and elusive,<sup>120</sup> is made up for by the flexible nature of its application which makes it adaptable to specific circumstances,<sup>121</sup> as 'what is best for a specific child or for children in general cannot be determined by any degree of certainty.'<sup>122</sup> Consequently, the best interests principle is itself based on the principle of individualised treatment; that is, 'best interests' does not mean the same thing for every child but refers to what Thomas and O'Kane describe as a 'highly individualised choice between alternatives.'<sup>123</sup> However, Alston and Gilmour-Walsh note that this indeterminacy may give room for non-compliance with some of the provisions of the CRC, in deference to the concept of cultural relativism.<sup>124</sup> The CRC Committee however addresses this concern in its 2013 General Comment on the concept of the child's best interests.<sup>125</sup> According to the Committee, since all rights in the CRC are in the child's best interests, none can be 'compromised by a negative interpretation of the child's best interests.'<sup>126</sup> Additionally, 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention.'<sup>127</sup>

While reinforcing the fact that the 'child's best interests' is a 'dynamic concept that requires an assessment appropriate to the specific context',<sup>128</sup> the Committee, in an attempt to clarify some of the uncertainties around the 'child's best interests concept', notes that the principle of the 'child's best interests' or 'the best interests of the child' covers three dimensions.<sup>129</sup> This means that the principle is a 'three-fold concept': a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.<sup>130</sup> As a substantive right, the principle 'creates an intrinsic obligation for States' which is 'directly applicable (self-executing)

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needs'; General Comment No 6 'Treatment of unaccompanied and separated children outside their country of origin' (2005) paras 20 and 21; General Comment No 9 (2006) 'The rights of children with disabilities' para 30; General Comment No 12 (2009) 'The right of the child to be heard', paras 2, 16, 51, 53, 56, 61, 68, 70-74, 113, 116, 124 & 126.

<sup>120</sup> Archard D & Skivenes M 'Balancing a child's best interest and a child's view' (2009) 17 *International Journal of Children's Rights* 1; Thomas N & O'Kane C 'When children's wishes and feelings clash with their best interests' (1998) 6 *International Journal of Children's Rights* 138.

<sup>121</sup> Arts K *Coming of age in a world of diversity? An assessment of the UN Convention on the Rights of the Child* (2010) 14; Thomas & O'Kane (1998) 138.

<sup>122</sup> Elster (1987) 12.

<sup>123</sup> Thomas & O'Kane (1998) 138. See also arts 6, 58-70 & 78-98 of the UN Guidelines on Alternative Care.

<sup>124</sup> Alston P & Gilmour-Walsh B *The best interests of the child: Towards a synthesis of children's rights and cultural values* (1996) 2.

<sup>125</sup> CRC Committee, GC 14 (2013).

<sup>126</sup> CRC Committee, GC 14, para 4.

<sup>127</sup> CRC Committee, General Comment No 13 (2011) 'The right to protection from all forms of violence', para 61 – restated in CRC Committee, GC 14, para 4.

<sup>128</sup> CRC Committee, GC 14, para 1.

<sup>129</sup> CRC Committee, GC 14, para 7.

<sup>130</sup> CRC Committee, GC 14, para 6.



and can be invoked before a court.<sup>131</sup> As a fundamental, interpretative legal principle, '[i]f a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests [based on the CRC and its Optional Protocols] should be chosen.'<sup>132</sup> Mezmur provides a guide to understanding this by positing that a practical approach is to ensure that the application of the principle respects the other three general principles of the CRC. Hence, any interpretation or application of the principle that goes against any of the other cardinal principles of the CRC (either as it affects the child concerned or other children) may not pass the test of correctness as being in the best interests of the child.<sup>133</sup> It is submitted that this is a progressive approach because all four general principles of the CRC, as already stated, re-enforce one another in the realisation of all rights contained in the CRC and none can be said to be superior to any other.

As a rule of procedure, the concept requires that:

Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.<sup>134</sup>

Closely related to the above is Freeman's elaboration on Article 3 of the CRC that the best interests principle is also applicable in situations of inaction i.e. failure to take an action which promotes the child's best interests.<sup>135</sup> This explanation is useful since Article 3 refers to 'all actions concerning children', and '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.'<sup>136</sup>

Although the scope of the General Comment is limited to Article 3(1) of the CRC,<sup>137</sup> the provision of Article 3 as a whole has implications for the right to alternative care. First, it is significant that the principle of the best interests of the child is restated in Article 20 of the CRC which is specific to the right to alternative

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<sup>131</sup> CRC Committee, GC 14, para 6(a). Thus, in the face of several interests, when a child is involved, his or her best interests must be assessed and given a primary consideration before any decision is reached.

<sup>132</sup> CRC Committee, GC 14, para 6(b).

<sup>133</sup> Mezmur (2009) 119.

<sup>134</sup> CRC Committee, GC 14, para 6(c).

<sup>135</sup> Freeman (2007) 45.

<sup>136</sup> Phillips (2011) 55.

<sup>137</sup> CRC Committee, GC 14, para 8. It leaves out 3(2) & 3(3) which deal with child well-being and States parties obligations respectively.



care, thereby underscoring the importance of the principle to children deprived of a family environment.<sup>138</sup> Given the general consensus that a family environment serves the best interests of every child, it becomes imperative to focus on how to secure the best interests of children who lack such an environment.<sup>139</sup> However, securing the best interests of the child would mean that the most appropriate form of alternative care for each affected child will depend on the general needs of the child but more importantly, on the specific needs as well, as there can be no 'one solution fits all' approach.<sup>140</sup> Some elements of a child's best interests in such circumstances include the need for affection, security and care.<sup>141</sup> The importance of the principle in the context of alternative care is further highlighted by Article 3(3) of the CRC (Article 3 being the umbrella provision on the best interests of the child principle), which has a direct relevance to institutional placement of children deprived of a family environment. Article 3(3) of the CRC provides:

States Parties shall ensure that the institutions, services and facilities responsible for the care and 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.

Still within the context of alternative care, it is noteworthy that the CRC makes the best interests of the child principle 'the paramount consideration',<sup>142</sup> when adoption as an alternative care option is contemplated. The introductory part of Article 21 of the CRC on adoption (both domestic and Intercountry adoption) provides that: '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* (emphasis mine)...' There is no such emphasis with regards to the other forms of alternative care in Article 20. This is perhaps due to the permanent and generally irrevocable nature of an adoption.

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<sup>138</sup> See also CRC Committee GC 14, para 3.

<sup>139</sup> CRC Committee Day of General Discussion 'Children without Parental Care' (2005).

<sup>140</sup> As above. For example, the best interests of a victim of physical or sexual abuse would require that the alternative care option chosen provides for emotional and psychological treatment by a trained professional in the field.

<sup>141</sup> Art 5, 1986 Declaration.

<sup>142</sup> Art 21, CRC.

A proper understanding of the concept is important for a proper application of the best interests of the child principle. According to Lord McDermott's dictum in the case of *J v C*,<sup>143</sup> the difference between the terms 'a primary consideration' (Article 20) and 'the paramount consideration' (Article 21) is as follows:

[‘Paramountcy’ means] more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question [which is what ‘a primary consideration’ means]... They connote a process whereby when all the relevant facts, relationships, claims and wishes of the parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare. That is ... the paramount consideration, because it rules upon or determines the course to be followed.<sup>144</sup>

In other words, when the best interests of the child is a ‘primary consideration’, it is not an absolute because it competes with other factors and other rights for consideration,<sup>145</sup> but when it is ‘the paramount consideration’, all other issues must be hinged on it. Thus, in the former case, the best interests principle requires ‘due’ but not ‘absolute’ consideration.<sup>146</sup> While this distinction may be valuable for understanding the principle, its application still depends on a case-by-case analysis of all relevant factors as already discussed.

Writing against the background of Zimbabwe’s fragile economy and widespread poverty, Armstrong (writing about custody, education and alternative care) notes that the best interests of the child concept is relative to the availability of opportunities and resources to the child.<sup>147</sup> This is due to the fact that the socio-economic circumstances and economic interests of the child’s family cannot be separated from whatever is understood as being in the child’s best interests.<sup>148</sup> Similarly in Taiwan, it has been shown that judges’ interpretation of the best interests of the child in custody cases is often a reflection of cultural ideas as well as the ‘socio-economic climate of Taiwan.’<sup>149</sup> These further highlight the fact that what are the best

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<sup>143</sup> *J v C* [1970] AC 668 at 710, cited in Goonesekere S ‘The best interests of the child: A South Asian perspective’ (1994) 8 *International Journal of Law and the Family* 117.

<sup>144</sup> Goonesekere (1994) 118.

<sup>145</sup> Detrick S *Commentary on the United Nations Convention on the Rights of the Child* (1999) 91.

<sup>146</sup> Alston & Gilmour-Walsh (1996) 11.

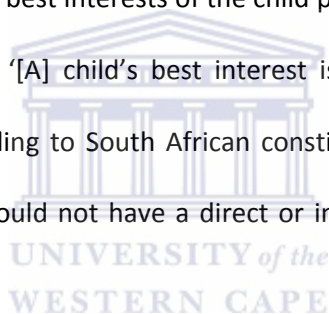
<sup>147</sup> Armstrong A ‘Schools and Sadza†: Custody and the best interests of the child in Zimbabwe’ (1994) 8 *International Journal of Law and the Family* 1.

<sup>148</sup> Armstrong (1994) 184, 185.

<sup>149</sup> Liu H ‘Mother or Father: Who received custody? The best interests of the child standard and judges’ custody decisions in Taiwan’ (2001) 15 *International Journal of Law, Policy and the Family* 185. Liu’s study reveals that since 1996 when the best interests of the child standard replaced the presumption of paternal custody, there has been a dramatic increase in the award of custody to mothers. Many reasons such as gender equality movements are responsible for this, but a significant cause as revealed by Liu’s study is judges’ willingness to combine social customs and traditional ideas with an explanation of what would be in the child’s best interests after an examination of all relevant facts.

interests of the child will differ from case to case depending on several often connected factors. Armstrong summarises it thus: 'The best interests of the child might be different in a perfect world than they are in a world of limited possibilities.'<sup>150</sup>

Unlike Article 3 of the CRC, Article 4 of the ACRWC makes the best interests of the child *the* primary consideration and not *a* primary consideration in all matters concerning the child and as such some scholars have argued that this places a weightier obligation on Member States.<sup>151</sup> Article 4(1) of the ACRWC provides that: 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be *the* [emphasis mine] primary consideration.' The import of this is that the best interests principle will trump any other consideration in matters concerning the child while the position under the CRC is to the effect that there may be situations in which other considerations may trump the best interests principle.<sup>152</sup> The emphatic nature of the best interests of the child principle in the ACRWC is re-stated in the South African Constitution as follows: '[A] child's best interest is of *paramount importance*<sup>153</sup> in every matter concerning the child.'<sup>154</sup> According to South African constitutional jurisprudence, the emphasis is important 'since very few measures would not have a direct or indirect impact on children, and thereby concern them.'<sup>155</sup>



That Article 4 of the ACRWC on the best interests principle targets any 'person or authority' is another reason why the ACRWC provision is considered broader than that of the CRC.<sup>156</sup> This approach of the ACRWC is considered relevant to the African context because 'a majority of facilities and institutions providing services to children are not state initiated but are initiated by NGOs or individuals.'<sup>157</sup> However, that Article 3 of the CRC makes reference to all actions carried out by 'public or private' institutions makes

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<sup>150</sup> Armstrong (1999) 189.

<sup>151</sup> Lim (2010) 141.

<sup>152</sup> See Considerations 1989 Working Group, Commission on Human Rights, 45<sup>th</sup> Session UN Doc E/CN.4/1989/48 (1989), reprinted in Detrick (1992), para 125.

<sup>153</sup> My emphasis.

<sup>154</sup> Art. 28(2) The Constitution of the Republic of South Africa, 1996.

<sup>155</sup> See the case of *M v S (Centre for Child Law, Amicus curiae)* 2007 (12) BCLR 1312 (CC).

<sup>156</sup> Freeman (2007) 21.

<sup>157</sup> Lim (2010) 141. Although the manner in which the principle is to be enforced in relation to private/non-state actors is unclear, Mezmur convincingly argues that the state has an obligation to ensure that private/non-state actors uphold the principle in all matters concerning children whom they have to deal with; see Mezmur (2009) 117.

the principle applicable to every context where actions concerning children are concerned.<sup>158</sup> It should be noted that although the ACRWC recognises the best interests of the child principle as ‘the’ primary consideration in all matters relevant to children,<sup>159</sup> few countries in Africa have this principle guaranteed in their constitutions, whether as *a* or *the* primary consideration.<sup>160</sup>

### 3.5.3 Life, Survival and Development

Article 6 of the CRC provides for the recognition of every child’s ‘inherent right to life’,<sup>161</sup> and obliges States to ‘ensure to the maximum extent possible the survival and development of the child.’<sup>162</sup> Ultimately, all the rights in the CRC are aimed at achieving this right (life, survival, and development), as its interpretation cannot be divorced from all the other rights in the Convention.<sup>163</sup> The connection between the right to life and development is a comprehensive and holistic approach for the full and harmonious development of children.<sup>164</sup>

During the discussions surrounding the drafting of the right, there were debates as to the absence of a legal definition for the concept of ‘survival’ and so some States’ representatives felt that making a link between survival and development could jeopardise the concept of the right to development as it was understood.<sup>165</sup> But, relying on the explanations given by UNICEF, it was understood that ‘life and survival were complementary and were not mutually exclusive’,<sup>166</sup> given that mere survival is possible even in poor conditions. Thus the proper understanding is that ‘the right to survival should be supplemented by the

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<sup>158</sup> Hodgkin & Newell (2002) 42.

<sup>159</sup> Art. 4, ACRWC provides: ‘In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration’.

<sup>160</sup> Sloth-Nielsen J ‘Strengthening the promotion, protection and fulfilment of children’s rights in the African context’ in Alen *et al* (2007) 98. Ethiopia, Kenya, South Africa and Zimbabwe are examples of countries which have the best interests of the child principle constitutionally guaranteed: art 36(2), Ethiopian Constitution and art 28(2), South African Constitution.

<sup>161</sup> Art. 6(1) CRC.

<sup>162</sup> Art. 6(2) CRC.

<sup>163</sup> Lim (2010) 145; Vandenhoele W ‘The Convention on the Rights of the Child’ in de Feyter K & Isa FG International human rights law in a global context (2009) 451; Nowak M A *Commentary on the United Nations Convention on the Rights of the Child, Article 6: The right to life, survival and development* (2005) 2. Some of the other rights in the CRC that show the overarching nature of article 6 include: arts 24 & 25 (the right to health); arts 26 & 27 (social security and adequate standard of living); arts 28 & 29 (the right to education); and art 31 (rest, leisure and play).

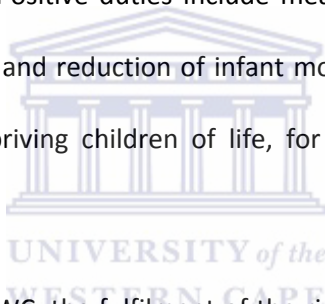
<sup>164</sup> Verhellen E *Historical perspective: Educational consequences and reflections in the CRC* (forthcoming-copy on file with author; paper presented at the Human Rights for Development (HR4DEV) Training Programme, with a focus on Children’s Rights, 30 July to 24 August 2012, Antwerp, Belgium) 8; Tun *et al* (2007) 42.

<sup>165</sup> Detrick (1992) 120.

<sup>166</sup> Detrick (1992) 120.

notion of healthy development.<sup>167</sup> It should be noted that the initial draft of the eventual Article 6 of the CRC did not make express reference to the 'right to life' but to 'the survival and healthy development of the child.'<sup>168</sup> It was due to the recognition of the fact that the right to life as already expressed in existing international law instruments<sup>169</sup> is more or less *jus cogens*, that there was an insistence on the inclusion of the specific right to life.<sup>170</sup>

While the right to life is generally understood as connoting a negative duty of not doing anything to deliberately take a person's life, the right to survival is understood to carry a more positive connotation that requires 'positive steps taken to prolong the life of the child.'<sup>171</sup> Consequently, the corresponding Article 5 of the ACRWC additionally provides: 'Death sentence shall not be pronounced for crimes committed by children.'<sup>172</sup> Thus, the right to life, survival and development impose both positive and negative duties on the States Parties. Positive duties include measures taken to ensure the provision of nutrition, shelter, adequate healthcare and reduction of infant mortality, among others,<sup>173</sup> while negative duties imply any acts targeted at depriving children of life, for example, the imposition of the death penalty.<sup>174</sup>



However, in both the CRC and the ACRWC, the fulfilment of the right is limited by availability of resources to States Parties.<sup>175</sup> From the explanations above and the framing of both the provisions of the CRC and the ACRWC,<sup>176</sup> it can therefore be concluded that the element of 'availability of resources' is applicable only to

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<sup>167</sup> Detrick (1992) 120.

<sup>168</sup> The initial proposal was submitted by India (E/CN.4/1988/WG.1/WP.13). See Detrick (1992) 120.

<sup>169</sup> See art 3, Universal Declaration of Human Rights; and art 6 of the International Covenant on Civil and Political Rights, among others.

<sup>170</sup> Detrick (1992) 121. It was however agreed that the inclusion of the right to life in article 6 of the CRC was not to be used to reopen the discussion concerning the moment at which life begins.

<sup>171</sup> Detrick (1992) 121.

<sup>172</sup> Art 5(3) ACRWC.

<sup>173</sup> Sloth-Nielsen J & Mezmur B '2+2=5? Exploring the domestication of the CRC in the South African courts (2002-2006)' (2008) 16 *The International Journal of Children's Rights* 5. See also CRC Committee, General Comment No. 7 (2005) para 10.

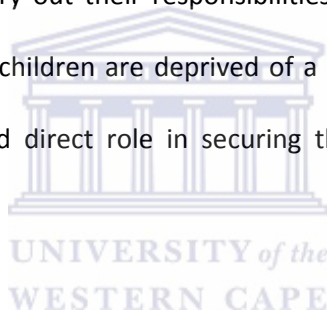
<sup>174</sup> Pais MS 'Convention on the Rights of the Child' in *Manual on human rights reporting under six major international human rights instruments* (1997) 425. See also CRC Committee, General Comment No 3 (2003), paragraph 11 of which states: 'Children have the right not to have their lives arbitrarily taken, as well as to benefit from economic and social policies which will allow them to survive into adulthood and develop in the broadest sense of the word...'

<sup>175</sup> Art 6(2) CRC & Art 5(2) ACRWC.

<sup>176</sup> Art 6, CRC provides: 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. Art 5 of the ACRWC (which titles the right, 'survival and development') provides: 1. Every child has an inherent right to life. This right shall be protected by law. 2. States Parties...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.

the survival and development aspects of the right while it is in no way applicable to the 'right to life'; that is, going by the historical divide between civil and political rights, on the one hand, and socio-economic rights on the other. Additionally, development in relation to children goes beyond mere survival and encompasses all dimensions of growth and development: physical, mental, social, psychological, moral and spiritual, etc.<sup>177</sup>

In the alternative care context, the importance of this right is based on the vulnerability that the lack of a family environment exposes children to, given that the family is the first base of support for life and development, ideally. Thus, the provision of an appropriate alternative for affected children is key to securing their right to life, survival and development. According to Nowak, the State has a responsibility to create an environment conducive to the realisation of this right, first, by ensuring appropriate assistance to families who require it in order to carry out their responsibilities towards their children.<sup>178</sup> But in more difficult circumstances, such as where children are deprived of a family environment, the State becomes responsible to take a more active and direct role in securing the children's right to life, survival and development.<sup>179</sup>



### **3.5.4 The Right of the Child to be Heard (Child Participation)**

The last general principle of the CRC is that which is commonly referred to as 'child participation',<sup>180</sup> although the concept of participation is itself a general rule of international human rights law.<sup>181</sup> It should be noted that the word 'participation' does not appear in Article 12 of the CRC (and Article 7 of the ACRWC) dealing with this right but that:

This term has evolved and is now widely used to describe on-going processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.<sup>182</sup>

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<sup>177</sup> CRC Committee, GC 3 (2003) para 11; Nowak (2005) 2.

<sup>178</sup> Nowak (2005) 38. See also the discussion in section 2.4 of the previous chapter.


<sup>179</sup> Nowak (2005) 38.

<sup>180</sup> CRC Committee, General Comment No 12 'The right of the child to be heard' (2009) para 2.

<sup>181</sup> Tun *et al* (2007) 43.

<sup>182</sup> CRC Committee GC 12 (2009) para 3.

This principle, according to Van Bueren, 'provides an opportunity for international human rights law to operate as a catalyst to change the value which society places upon children's contributions.'<sup>183</sup> Consequently, it has been argued that participation rights of children have more to do with the status of children in society than with the current emphasis on children's influences on, or involvement in, programmes.<sup>184</sup> According to the CRC Committee, the right to child participation is a unique provision as 'it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights.'<sup>185</sup> The Committee states further that '[t]his right reinforces the status of the young child as an active participant in the promotion, protection and monitoring of their rights.'<sup>186</sup> Children should therefore be respected as active participants in the family and society at large rather than have their views ignored or rejected merely on grounds of age and immaturity, as the significance of a child's views cannot be determined only on the basis of the age of the child.<sup>187</sup> Thus, according to Lansdown:



Participation is a fundamental human right in itself. It is also a means through which to realise other rights. It recognises children as citizens entitled and – (...) – able to contribute towards decisions affecting them...<sup>188</sup>

It has also been argued that the principle of child participation is about 'empowering young people to confront established (adult) authority, challenge embedded (adult) assumptions about their interests and competences, and assert their views on issues that directly concern them',<sup>189</sup> rather than seeking to get the perspectives of children on issues based on the views and opinions of adults. Consequently, the CRC sets no minimum age for the exercise of a child's right to express his or her views, and thus the CRC Committee discourages States from introducing age limits either in law or in practice that would restrict the child's right to be heard.<sup>190</sup> The starting point is for States to presume the child's capacity to form and express his

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<sup>183</sup> Van Bueren (1995) 145.

<sup>184</sup> Tun *et al* (2007) 44.

<sup>185</sup> CRC Committee General Comment No 12 (2009) para 1.

<sup>186</sup> CRC Committee General Comment No 7 'Implementing Child Rights in Early Childhood' (2005) para 14.

<sup>187</sup> As above. See also CRC Committee General Comment No 12 (2009) para 29.

<sup>188</sup> Lansdown G 'The realisation of children's participation rights' in Percy-Smith B & Thomas N (eds) *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (2010) 13, as quoted in Stalford H & Schuurman M 'Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda' (2011) 19 *International Journal of Children's Rights* 390.

<sup>189</sup> Woodland M Foreword to *A Handbook of Children and Young People's Participation* (2010) cited in Stalford & Schuurman (2011) 390.

<sup>190</sup> CRC Committee, GC 12 (2009) para 21.



own views as there is no onus on the child to prove his capacity.<sup>191</sup> Full implementation of Article 12 therefore requires recognition of and respect for, a combination of communication tools both verbal and non-verbal, the latter including forms, such as, play, body language, facial expressions, drawings and paintings, among others, through which much younger children demonstrate understanding, choice and preferences.<sup>192</sup> Although the weight to be given the child's preference depends on the age and maturity of the child, in line with the evolving capacities of the child, the CRC places no limit(s) on the contexts within which children can express their views; they are to be heard in 'all' matters affecting them.<sup>193</sup>

Article 12 of the CRC states:

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.

This right implies that children must be allowed to take an active role in the decision-making process about everything that affects them, in any setting whatsoever. It has however been argued that the right to participate does not translate into an automatic endorsement of children's views. Rather, due consideration should be given to such views and those views must have the ability to genuinely influence whatever outcome or decision is arrived at.<sup>194</sup> While Article 12 of the CRC (and Article 7 of the ACRWC) is the umbrella provision on children's right to participate, it is said to encompass several other rights which are also individually covered under the CRC.<sup>195</sup> These include the rights to freedom of expression,<sup>196</sup>

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<sup>191</sup> Article 12 UNCRC. Thus, even young children should be heard: CRC Committee, GC 7 (2005) para 14.

<sup>192</sup> Howard A Davidson *The child's Right to be heard and represented in judicial proceedings* (1991) 18 *Pepperdine Law Review* 2.

<sup>193</sup> Art 12 CRC.

<sup>194</sup> Pais (1997) 428. The approach of many NGOs and governments to children's participation rights are criticized for being merely tokenistic rather than being based on a concrete recognition of children having a separate and individual status in law.

<sup>195</sup> Mezmur (2009) 151.

<sup>196</sup> Arts 12 CRC & 7 ACRWC.



freedom of thought, conscience and religion,<sup>197</sup> freedom of association and peaceful assembly,<sup>198</sup> and the evolving capacity of the child.<sup>199</sup>

States' obligations under the right of the child to participate involve the creation of an atmosphere that is conducive for meaningful engagement with the child in any decision-making process; this is said to be a step above merely providing an opportunity for the expression of views.<sup>200</sup> This requires making available to the child all appropriate and relevant information, as well as 'unbiased guidance on possible options and the foreseeable consequences arising therefrom'.<sup>201</sup>

The right of the child to participate is particularly linked to the best interests of the child principle because the right to participate is not always directly exercised by the child, but is often exercised by a representative acting on behalf of the child. Thus, it is expected that those who represent children in the exercise of the right should express opinions that are presumably in the best interests of the child.<sup>202</sup> The connection between a child's participation rights and the best interests of the child principle is further linked to 'the evolving capacities of the child.'<sup>203</sup> This principle, though not in the category of the four general principles of the CRC, is an equally important principle because its application affects every right in the CRC and the ACRWC.<sup>204</sup> The link between these three principles (child participation, best interests of the child and the evolving capacities of the child) is clearly highlighted by one of the measures that the CRC Committee directs States Parties to take in the implementation of the right to child participation:

The Committee encourages States parties to take all appropriate measures to ensure that the concept of the child as rights holder with *freedom to express views and the right to be consulted in matters that affect him or*

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<sup>197</sup> Arts 14 CRC & 9(1) ACRWC.

<sup>198</sup> Arts 15 CRC & 8 ACRWC.

<sup>199</sup> Arts 5 CRC & 9(2) ACRWC. The principle of the evolving capacity of the child in the CRC and the ACRWC has to do with the provision of direction and guidance by parents or guardians to children in the exercise of all rights contained in the CRC.

<sup>200</sup> Lim (2010) 146.

<sup>201</sup> Lim (2010) 146.

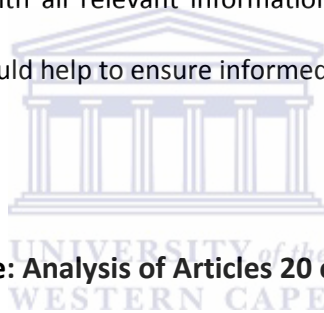
<sup>202</sup> Mezmur (2009) 150. An example is the appointment of a *curator ad litem* to act on the child's behalf in court proceedings. Speaking within the context of early childhood, the CRC Committee noted that: 'By virtue of their relative immaturity, young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities.' See CRC Committee, GC 7 (2005) para 13.

<sup>203</sup> Arts 5 CRC & 9(2) ACRWC. See also CRC Committee, GC 12 (2009) para 1.

<sup>204</sup> See section 2.4.2 of the previous chapter.

*her* is implemented from the earliest stage in ways appropriate to the *child's capacities, best interests, and rights to protection from harmful experiences.*<sup>205</sup> (Emphasis added)

The right to participation is thus applicable to all children's rights. It is particularly important within the context of the right to alternative care since alternative care generally involves the placement of a child in an environment different from his original family environment. The child's participation right is important in every stage of the process: from the determination of the most appropriate form of alternative care to actual placement and to post-placement monitoring and evaluation.<sup>206</sup> In fact, the CRC Committee states clearly that in determining the most appropriate form of alternative care, 'the "best interests" of the child cannot be defined without consideration of the child's views.'<sup>207</sup> States Parties therefore have an obligation to ensure 'that the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.'<sup>208</sup> This includes providing the children with all relevant information about the effect of whatever form of alternative care is agreed upon; this would help to ensure informed consent on the part of the child.<sup>209</sup>



### **3.6 The Right to Alternative Care: Analysis of Articles 20 of the CRC and 25 of the ACRWC**

Article 20 of the CRC is the principal provision on the right to alternative care for children deprived of parental care, while Article 25 of the ACRWC is more or less the regional equivalent to Article 20 of the CRC on the right to alternative care, and both provisions are largely similar. Article 20 of the CRC provides:

1. A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state.
2. State Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care shall 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

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<sup>205</sup> See CRC Committee, GC 7 (2005) para 14. Although this general comment is on early childhood, the Committee emphasized 'that article 12 applies both to younger and to older children'.

<sup>206</sup> Lim (2010) 147; See generally CRC Committee, GC (2009) paras 53-56.

<sup>207</sup> CRC Committee, GC (2009) para 56

<sup>208</sup> CRC Committee, GC 12 (2009) para 54.

<sup>209</sup> CRC Committee, GC 12 (2009) para 56.

paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

According to Phillips, although Article 20 covers the four P's of children's rights – protection, prevention, provision and participation – 'the aims of protection and provision are the most significant.'<sup>210</sup> This is arguably due to the fact that the prevention aim has to do with the State obligation to address factors that give rise to children being deprived of their family environment in the first place. However, the participation aim is also discernible from Article 20 since it is a significant element in arriving at a decision on alternative care for the affected children, as already discussed.<sup>211</sup> The same can be said of Article 25 of the ACRWC which provides:

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 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 conflict 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.

What follows is an analysis of key concepts that flow from Articles 20 of the CRC and 25 of the ACRWC, which provide the basis for a greater understanding and appreciation of the right to alternative care for children deprived of a family environment.

### **3.6.1 Family Environment**

As previously discussed in Chapter 2, there are no rigid definitions for the term 'family'; the same goes for 'family life' and 'family environment'. However, the term 'family environment' is a new concept uniquely

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<sup>210</sup> Phillips (2011) 57.

<sup>211</sup> See section 3.5.4 above.

introduced by the CRC, and adopted by the African Children's Charter; it has been suggested that these terms are overlapping concepts that are generally used interchangeably.<sup>212</sup> During the drafting of Article 20, there was preference for 'family environment' rather than 'parental care'; the latter was considered too narrow, as it did not take into consideration kinship relations applicable in many cultures.<sup>213</sup> This means that there was an understanding that a child's actual family could, from the very beginning, be composed of people other than the parents. To that extent, it is quite clear that kinship care was not considered to be *alternative care* because it was recognised as forming part of the child's family environment – which is exactly how the family environment is generally understood in the Africa context. It can therefore be argued that, strictly speaking, the right to alternative care does not immediately apply upon the loss of parental care; it becomes applicable where there are no suitable, willing or available relatives that have assumed responsibility for the care of the child upon the loss of parental care.

However, the implications of the term 'family environment' rather than 'family' are far-reaching. First, it avoids disputes about the nature or structure of a family by focusing on function rather than form; that is, the emphasis is on the quality and setting of care provided to children rather than the personalities of the care providers themselves.<sup>214</sup> Secondly, 'family environment' rather than 'family' gives rise to a legally enforceable right since a government cannot guarantee the right to a family but can facilitate the creation of 'an environment that is protective and facilitative of the relationships most important to a child.'<sup>215</sup> Consequently, 'any non-institutional living arrangement in which the education [and other nurturing and training activities] of children takes place under the responsibility of one or more adults'<sup>216</sup> would amount to a family environment. This is so because the family as an institution is not established by State initiative and is ordinarily not subject to State supervision or intervention.<sup>217</sup> However, the family environment as an object of State protection encompasses more than the family itself.<sup>218</sup>

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<sup>212</sup> Van Bueren (1995) 69.

<sup>213</sup> Cantwell & Holzscheiter (2008) 59; Detrick (1992) 300.

<sup>214</sup> Melton GB 'The Child's Right to a Family Environment: Why Children's Rights and Family Values are Compatible' (1996) 51 *American Psychologist* 1236. See also the discussions in chapter 2.3.

<sup>215</sup> Melton (1996) 1236.

<sup>216</sup> Moolhuysen-Fase CMI 'Opening speech' in Doek *et al* (1996) 3.

<sup>217</sup> As above.

<sup>218</sup> Melton (1996) 1236.

In recognition of the different forms of family environments in existence, the CRC and the African Children's Charter refer to a child deprived of 'his or her' family environment and not of 'a' or 'the' family environment.<sup>219</sup> This again underscores the point that there is no 'standard' or universally acknowledged definition or form of family. Thus, Article 20 of the CRC makes reference to 'family' and not merely 'parents', again a distinction in recognition of a broad understanding of the concept of a family environment as going beyond the mere existence of parents.<sup>220</sup> Thus, according to the CRC Committee:

...When considering the family environment the Convention reflects different family structures arising from the various cultural patterns and emerging familial relationships. In this regard the Convention refers to the extended family and the community and applies to situations of nuclear families, separated parents, single parent family, common law family and adoptive family.<sup>221</sup>

The importance of a family environment is therefore not premised on the mere existence of a physical structure but on the psychological elements it represents. Ideally, the family environment is both a place of intimate relations and a social institution upon which society is based.<sup>222</sup> It gives stability, definition and affirmation to an individual's personality and as far as children are concerned, the existence of a suitable family environment is fundamental to the realisation of the rights contained in the CRC.<sup>223</sup> It is submitted, however, that within the context of the right to alternative care, a family environment may also refer to the immediate home/house environment (physical structure), in terms of the setting, safety, security, and other practical benefits or functions that the structure provides. This is particularly important in relation to placement in institutional facilities, and sometimes in foster care. The reason for this is not far-fetched as institutions are usually perceived as cold and formal establishments which provide no room for or tolerance of spontaneous or informal and sometimes frivolous interactions as may be typical within a family.<sup>224</sup> Consequently, State supervision of such establishments usually places a premium on the physical and functional aspects of a family environment.<sup>225</sup>

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<sup>219</sup> Cantwell & Holzscheiter (2008) 32; Arts 20 CRC & 25 ACRWC.

<sup>220</sup> Art 20(1) CRC; Hodgkin & Newell (2007) 278.

<sup>221</sup> CRC Committee Day of General Discussion on the 'Role of the family in the promotion of the rights of the child' (1994) para 2. See also the discussions in section 2.3 of the previous chapter.

<sup>222</sup> Garbarino *J Children and families in the social environment* (1992) 71.

<sup>223</sup> Melton (1996) 1237.

<sup>224</sup> Gudbrandsson *B Rights of children at risk and in care* (2006) 35.

<sup>225</sup> Gudbrandsson (2006) 36.

The role of a family environment is related to a child's right to life, survival and development.<sup>226</sup> The significance of this right<sup>227</sup> goes beyond the inherent right to life to an all-embracing approach determined by the quality of life available to the child, physically, psychologically, socially and otherwise.<sup>228</sup> As a result, States Parties' obligations to children go beyond the formal preservation of family relationships to the provision of substantive 'entitlements that support an environment conducive to family life.'<sup>229</sup>

### 3.6.2 Children Deprived of a Family Environment

The scope of Article 20 of the CRC covers children deprived of a family environment either on a temporary or permanent basis and refers to categories of children who have either 'lost' or become 'separated' from their families for several reasons. Causes of loss or separation include the death of parents, children's abandonment or relinquishment by parents, armed conflict, internal displacement, temporary or permanent incapacity of parents (due to imprisonment, illness or disability) and children removed from parental care, in their best interests, by an administrative or judicial decision.<sup>230</sup> 'Children deprived of a family environment' is thus a generic term covering a wide range of children including orphans due to HIV/AIDS and other causes of death.<sup>231</sup> There are also those classified as 'destitute children' (victims of a wide range of family circumstances, such as poverty) and sometimes, children of single parents (especially mothers) who need to work but do not have access to child care facilities are also considered as destitute and deprived of a family environment.<sup>232</sup>

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<sup>226</sup> Art 6 CRC.

<sup>227</sup> As discussed in section 3.5.3 above.

<sup>228</sup> Fottrell D (ed) *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* (2000) 5; CRC Committee General Comment No 5 (2005) para 12.

<sup>229</sup> Melton (1996) 1237; Gose (2002) 96. In effect, governments are expected to assist parents/families in creating and maintaining family environments that are protective of children and conducive to the realisation of all their rights without interfering with or usurping the role of parents in the family environment. Examples of government interventions where necessary include the provision of social assistance initiatives. See also Chapter 2.4.

<sup>230</sup> Arts 3 & 9 CRC; South Africa Law Commission (2002) 167.

<sup>231</sup> See CRC Committee General Comment No 6 'Treatment of unaccompanied and separated children outside their country of origin' (2005) paras 7, 8 & 39. However, children within the juvenile justice system, though deprived of their family environment are not considered in this context because they are separately provided for. See the 1990 UN Standard Minimum Rules on the Administration of Juvenile Justice and 1985 Rules for Protection of Juveniles Deprived of Their Liberty. Children who are voluntarily outside of their family environment for recreational or other purposes are also excluded.

<sup>232</sup> Tolfree D *Roofs and roots: The care of separated children in the developing world* (1995) 38.

State obligations towards children deprived of their family environment take effect not only when it is impossible for a child to be cared for by his parents but also when 'it is deemed that the child would be in danger if left in their care.'<sup>233</sup> Thus, Article 20 covers any child within a state's jurisdiction who, 'for whatever reason, is unable to benefit, or has been removed, from the care of his or her parent and is not being looked after informally within the extended family.'<sup>234</sup> Cantwell & Holzscheiter supply proof to show that kinship care was not originally contemplated as alternative care in the context of Article 20 of the CRC because care within the extended family context was understood to be care within a family environment. As such, no other alternative would be required. What is required is the fulfilment of State obligations towards the family environment as discussed in Chapter 2 in order to secure the care and protection of such children within the context of their existing family environment. This discussion will be pursued further in Chapter 4 in support of my proposition relating to the extent to which kinship care should be accommodated in the child protection system.

The wording of Article 25 of the ACRWC suggests protection for a wider range of children by requiring that alternative care be made available to children who are deprived of their family environment 'for any reason.'<sup>235</sup> The emphasis in Article 25 is arguably a deliberate inclusion in light of the unique provisions of the ACRWC on the prohibition of the use of children as soldiers,<sup>236</sup> special protection for internally displaced children (in the same manner as refugee children),<sup>237</sup> special measures for the right to education of the girl-child,<sup>238</sup> and the prohibition of harmful traditional practices like child marriages and female genital cutting.<sup>239</sup> In effect, Article 25 is wide enough to apply to situations where children leave the family environment in order to avoid being forcefully married or subjected to other harmful practices. The resultant consequence is that such children could end up equally being deprived of their family

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<sup>233</sup> Cantwell & Holzscheiter (2008) 9, 63.

<sup>234</sup> As above; emphasis added.

<sup>235</sup> Art 25(1) (2)(a) ACRWC; Art 20(1) CRC.

<sup>236</sup> Art 22(2) ACRWC.

<sup>237</sup> Art 23(4) & 25(2)(b) ACRWC.

<sup>238</sup> Art 11(3)(e) ACRWC.

<sup>239</sup> Art 21 ACRWC.

environment and thus become in need of alternative care. These are some of the reasons for which children could be deprived of a family environment in the African context.<sup>240</sup>

While the list of affected children that may be derived from both articles 20 of the CRC and 25 of the ACRWC is non-exhaustive, the position of street children and child-headed households has been said to be unclear under international law.<sup>241</sup> However, the recognition and protection afforded child-headed households by the UN Guidelines for the Alternative Care of Children has changed this view.<sup>242</sup> Further, the works of Phillips and Lim on child-headed households in South Africa and other African countries are significant in clarifying their position, based on the recent legal recognition granted to child-headed households in a few countries.<sup>243</sup> It is however important to distinguish between the recognition of child-headed households as a new family form, on the one hand, and it being a form of alternative care on the other. The effect of this distinction is that a child-headed household is *not* an alternative care placement; rather it is a protective measure for children found *already living* in this type of family unit.<sup>244</sup> It is important to emphasise this distinction due to the controversial nature of expecting or permitting a child to undertake adult responsibilities in a household consisting only of the child together with other children.<sup>245</sup>

Generally, the recognition of child-headed households has the advantage of keeping siblings together and reducing the number of children for whom alternative care would have to be provided.<sup>246</sup> The State has an obligation to support and monitor such households, the recognition of which is not automatic but is dependent on the maturity and capacity of the child heading the household; this is in accordance with Article 5 CRC on the evolving capacities of the child.<sup>247</sup> It is submitted that this approach also lends

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<sup>240</sup> See generally the report of the Special Representative of the (UN) Secretary on Violence against Children 'Protecting children from harmful practices in plural legal systems with a special emphasis on Africa' (2012) 29-38; available at < [http://srsrg.violenceagainstchildren.org/sites/default/files/publications\\_final/SRSG\\_Plan\\_harmful\\_practices\\_report\\_final.pdf](http://srsrg.violenceagainstchildren.org/sites/default/files/publications_final/SRSG_Plan_harmful_practices_report_final.pdf) > .

<sup>241</sup> Cantwell & Holzscheiter (2008) 38; CRC Committee, GC 3 'HIV/AIDS and the rights of the child' (2003) also raises concerns about the increasing number of child-headed households due to HIV/AIDS, but makes no reference to their status or position. Authors such as Sloth-Nielsen and Phillips have however argued for the legal regulation of child-headed households and this has begun to find its way into some national legislation such as the South African Children's Act, among others.

<sup>242</sup> Para 37, UN Guidelines. The guidelines will be discussed further in Chapter 4.

<sup>243</sup> Phillips (2011) & Lim (2010).

<sup>244</sup> Couzens, M & Zaal F N, 'Legal recognition for child-headed households: an evaluation of emerging South African Framework' (2009) 17 *International Journal of Children's Rights* 310.

<sup>245</sup> Hence, the protective requirements put in place by international and domestic legislation. With reference to South Africa, see Matthias C & Zaal N, 'The Child in Need of Care and Protection' in Boezaart T (ed) *Child Law in South Africa* (2009) 177.

<sup>246</sup> South Africa Law Commission (2002) 172.

<sup>247</sup> Sloth-Nielsen J & Mezmur B 'HIV/AIDS and children's rights in law and policy in Africa' in Sloth-Nielsen J (ed) (2008) 284; South Africa Law Commission (2002) 196. The acceptable minimum age in the South African Children's Act is 16 years. See



credence to Article 31 of the ACRWC on the duties of the child because, historically, childhood in Africa was 'generally marked by constant changes in status, roles and responsibilities, rather than having a single entry point at a defined age.'<sup>248</sup> In addition, recognising child-headed households further buttresses the fact that the loss of parents or parental care does not necessarily mean the loss of a family environment. With particular reference to Africa, the care of younger siblings by older children, among others, is considered a duty that forms part of the African kinship care system.<sup>249</sup> To the extent that the older children are relatives of the younger ones, a child-headed household can be said to be part of kinship care, but to the extent that State intervention for the protection of such children and households is being defined and legislated upon, child-headed households clearly fall within the child protection system.

While the term 'deprivation' usually indicates a deliberate act by a third party, within the context of the CRC, it denotes any reason, (justified and lawful or not), for a situation in which a child is lacking in parental and family care.<sup>250</sup> Thus, deprivation is context-based in the sense that the focus is on the attachment or relationship lost, and not just on the physical loss of parents. This is especially important within the African and other non-western cultures where attachments are formed with a wide variety of people who play distinct but complementary roles in caring for children.<sup>251</sup> It is important to note that deprivation in the context of the right to alternative care is sometimes different from deprivation which results from the direct intervention or initiative of the State. Examples of the latter would include situations of the detention, imprisonment, exile or deportation of the child's parents as provided in Articles 9 of the CRC and 19 of the ACRWC. In both contexts (the right to alternative care and the right not to be separated from parents), while alternative care will generally be required, the child protection system must of necessity be invoked in the case of separation from parents but this is not necessarily the case in the context of Articles 20 CRC and 25 ACRWC.<sup>252</sup>

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also Sloth-Nielsen (2012) 118.

<sup>248</sup> Sloth-Nielsen (2012) 118.

<sup>249</sup> Cobbah (1987) 320.

<sup>250</sup> Cantwell & Holzscheiter (2008) 38; CRC Committee GC 3 (2003) paras 27-32.

<sup>251</sup> Tolfree (1995) 24.

<sup>252</sup> This discussion will be pursued in Chapter 4.

The use of the term 'deprived' also draws attention to the components of a family environment (in an ideal situation), the absence of which places a child in a disadvantaged position. A major component of a family environment is stability or continuity in a 'non-exploitative caring' relationship among the members of the family.<sup>253</sup> Other components of a family environment include a warm relationship of acceptance and closeness between the child and the caregiver, bond formation over a period of time with members of the family and stimulation of the child from infancy for normal development of language, intelligence and other developmental traits.<sup>254</sup> In specialised studies, the concept of 'deprivation' is also used to describe the consequences of living in institutions resulting in the absence of affection, personal care, and deep emotional relationships, presumably present in a family environment.<sup>255</sup>

### 3.6.3 Special Protection and Assistance

Article 20 of the CRC provides that children deprived of a family environment are 'entitled to special protection and assistance provided by the State.'<sup>256</sup> All children are entitled to protection and priority care due to the particular vulnerability associated with childhood. The recognition of this is the rationale behind the adoption of international instruments dedicated to children's rights,<sup>257</sup> but the importance of growing up in a family environment justifies the additional level of assistance and protection that States are expected to provide for children deprived of a family environment.<sup>258</sup> They are doubly vulnerable to the violations of all the rights they are entitled to in the absence of the security ideally provided by a family environment.<sup>259</sup> However, the CRC does not specify what form the 'special protection and assistance' should take.<sup>260</sup> This has raised the question whether the provision of alternative care is one form of special protection and assistance or whether it is the mechanism through which special protection and assistance

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<sup>253</sup> Goonesekere S 'Human rights as a foundation for family law reform' (2000) 8 *The International Journal of Children's Rights* 84.

<sup>254</sup> Tolfree (1995) 19.

<sup>255</sup> See the presentation by Gruppo di Lavoro per la CRC, Italy during the CRC Committee Day of General Discussion on 'Children without Parental Care' (2005) <<http://www.crin.org/NGOGroup/CRC/DayofGeneralDiscussion/2005>>

<sup>256</sup> Art 20(1) CRC.

<sup>257</sup> Detrick (1992) 19.

<sup>258</sup> Cantwell & Holzscheiter (2008) 5.

<sup>259</sup> This is without prejudice to the fact that there are many children who are subjected to various forms of abuse and violations of their rights within the confines of their family environment. Nevertheless, this does not negate the general protective role of the family in shielding children from harm and risks to which they would be exposed in the absence of a family environment.

<sup>260</sup> Detrick (1999) 235.

is realised. In other words, is alternative care synonymous with special protection and assistance or are they two separate obligations?<sup>261</sup>

In analysing Article 20 of the CRC, Lim argues that the relevant right gives rise to two separate requirements for children deprived of a family environment: the right to special protection and assistance, on the one hand, and the right to alternative care on the other hand. She supports this position by reference to the general guidelines for periodic reports under the CRC reporting guidelines for States Parties to the CRC.<sup>262</sup> The guidelines, in the section dealing with children deprived of their family environment, require States to report on measures adopted to ensure:

- Special protection and assistance to the child who is temporarily or permanently deprived of his or her family environment or in whose own best interests cannot be allowed to remain in that environment;
- Alternative care for such a child, specifying the available forms of such care (*inter alia* foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of the child);
- That the placement of such a child in suitable institutions will only be used if really necessary;
- Monitoring of the situation of children placed in alternative care;
- Respect for the general principles of the Convention, namely non-discrimination, the best interests of the child, respect for the views of the child and the right to life, survival and development to the maximum extent.<sup>263</sup>

Thus she concludes that State obligation to provide 'special protection and assistance' is different from the obligation to provide 'alternative care' and as such, the former 'should be interpreted more broadly and separately from' the latter.<sup>264</sup> In addressing the same question, Phillips is of the opinion that 'the entitlement to alternative care could be seen as (one of the forms of) protection and assistance to be provided by the State.'<sup>265</sup> She further states that, although the form of special protection and assistance is not specified in the CRC, it can be 'derived from relevant articles on health, an adequate standard of living

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<sup>261</sup> Lim (2010) 131.

<sup>262</sup> Art 44 CRC; CRC Committee 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (CRC/C/58/Rev.2 2010). See also the older guidelines: CRC Committee, Periodic report guidelines (UN Doc.CRC/C/58/Rev.1, 2005) and CRC Committee, Periodic report guidelines (CRC/C/58 1996).

<sup>263</sup> CRC Committee, General Guidelines for periodic reports (1996) Part V (G), paras 80-82. See also the current CRC Committee, Periodic report guidelines (2010) paras 31-32.

<sup>264</sup> Lim (2010) 132.

<sup>265</sup> Phillips (2011) 57.

and education’, as stipulated in the Convention.<sup>266</sup> Further, it can also be inferred from the deliberations of the Working Group on Article 20 that the first paragraph of the article was adopted generally as an introductory paragraph to the right to alternative care for children deprived of their family environment, in recognition of their unique vulnerability.<sup>267</sup>

It is submitted that although neither the *travaux préparatoires* nor commentaries on the CRC’s Article 20 provide guidance on the issue, it is arguable that the understanding of ‘special protection and assistance’ is context-based. This is evidenced by the frequent usage of the term in several human rights documents and national constitutions.<sup>268</sup> As pointed out by Lim, apart from Article 20 of the CRC, ‘special care and assistance’ is used in some other articles of the CRC; for example, Article 23, in relation to children with disabilities (see also Article 13 of the ACRWC).<sup>269</sup> In effect, special protection, assistance or care is defined according to the peculiar circumstances of whomever or whatever group of persons it applies to. The aim of the usage is generally to highlight the particular vulnerabilities of those concerned, in a bid to ensure that such vulnerabilities do not deprive them of the full range of rights to which they are entitled.<sup>270</sup> Consequently, there may be no added value in trying to distinguish between the obligation to provide special protection and assistance and the obligation to provide alternative care, within the context of the rights of children deprived of a family environment. This is owing to the fact that even where it is accepted that the provision of alternative care is considered to be one of the measures of special protection and assistance, the responsibility to ensure that children deprived of a family environment get special protection and assistance within whatever form of alternative care is decided upon, remains.

In the context of Article 20, ‘special protection and assistance’ can therefore mean that children deprived of a family environment require particular efforts by States to secure their protection through appropriate

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<sup>266</sup> As above. This position also gets support from evidence during the drafting process of the article. One of the earlier versions of the eventual article 20 had the provision of ‘appropriate educational environment’ and ‘measures to facilitate adoption’ and foster care as elements of protection and assistance. See UNHCHR (2007) 13.

<sup>267</sup> UNHCHR (2007) 16.

<sup>268</sup> As noted by Lim, the use of the terms ‘special protection’, ‘special assistance’, ‘special care’ can be found in the UDHR (art. 25 in relation to motherhood and childhood); art. 10 ICESCR (special protection for mothers before and after birth); art 73(2) of the Constitution of Cape Verde (special protection to ill, orphan and deprived children); art 73(2) Constitution of Sao Tome and Principe (special protection for young workers). See also art 21, Hague Intercountry Adoption Convention on the provision of alternative care for children whose adoption process has not been completed. The article is introduced by reference to the need for the ‘protection’ of children in such circumstances.

<sup>269</sup> Lim (2010) 133.

<sup>270</sup> Lim (2010) 134.

means.<sup>271</sup> In order for special protection and assistance to be meaningful, the measures undertaken must reflect the lived realities of those children. Consequently, special protection and assistance is fulfilled only if the children concerned actually experience 'the feeling of being cared for by a care giver.'<sup>272</sup> This obligation bears a moral connotation because it goes to the root of the duty of society to children. Thus, where children lack parents or families to meet their essential needs, the onus falls on the larger society to care for them. It therefore becomes a State obligation within organised and civilized societies.<sup>273</sup> Flowing from this, it has been argued that there is a fiduciary relationship between the State and children deprived of a family environment, within the framework of the right to alternative care. A fiduciary relationship in this context places a positive obligation on the State to act in the best interests of the affected children.<sup>274</sup> As the ultimate guardian of all children within its jurisdiction, the State has an obligation to provide alternative care for children without a family environment, in accordance with domestic law, based on the best interests of the child principle.<sup>275</sup> This duty is more critical in relation to early childhood, the stage for the formation of strong emotional attachments, upon which the survival of young children depends.<sup>276</sup> State obligation towards children without a family environment therefore requires the development and programmatic implementation of alternative care policies and plans, in cooperation with civil society, in consideration of factors that are peculiar to each society.<sup>277</sup> In practice therefore, a multidisciplinary approach is required for the fulfilment of state obligations in the provision of alternative care for children deprived of a family environment. In addition, state obligations in this regard are not discharged by the mere provision of an alternative care option alone, as there is need for continuous monitoring and regular periodic review.<sup>278</sup>

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<sup>271</sup> Cantwell & Holzscheiter (2008) 11.

<sup>272</sup> Stevens I 'The impact of the national care standards in Scotland: Putting article 20 into practice?' (2008)16 *The International Journal of Children's Rights* 265.

<sup>273</sup> Hodgkin & Newell (2007) 279.

<sup>274</sup> Grover S 'Nowhere to turn: The Supreme Court of Canada's denial of a constitutionally-based governmental fiduciary duty to children in foster care' (2004) 12 *The International Journal of Children's Rights* 105.

<sup>275</sup> Art 20(2) CRC.

<sup>276</sup> CRC Committee General Comment No 7 (2005) para 4.

<sup>277</sup> Cantwell & Holzscheiter (2008) 51.

<sup>278</sup> Hodgkin & Newell (2007) 281; CRC Committee General Comment No 5 (2003) para 1.

### 3.6.4 The Best Interests of the Child and Continuity in Upbringing

As discussed earlier, while Article 3 of the CRC establishes the best interests of the child principle in relation to all children's rights, the principle is restated in Article 20 thereby underscoring its importance in the context of the right to alternative care.<sup>279</sup> It has been argued that serving the best interests of the child when considering alternative care placement requires that the process should not be prejudiced by ideological, political or religious factors.<sup>280</sup> However, in providing alternative care, the CRC provides that consideration must be given to the need to maintain continuity in a child's 'ethnic, religious, cultural and linguistic background'.<sup>281</sup> The concept of 'continuity in upbringing', as used in the CRC, represents a new norm in international law, in the context of childcare. However, the concept does not insist on the conformity of the alternative care provided to the recent background of the affected children, but on the need for 'continuity in childhood care' for children deprived of their family environment with *due regard* (emphasis added) to the elements of their background, up to the point of becoming deprived of that environment.<sup>282</sup> Like the CRC, the ACRWC also reaffirms the best interests of the child principle and the concept of continuity in upbringing, subject to the same considerations already discussed above.<sup>283</sup>

In effect, *due regard* in this context would mean that in considering alternative care, a child's background becomes relevant only to the extent to which maintaining it would serve his best interests. Indeed this position comes out clearly from the discussions of the Working Group when it was agreed that the initial phrase 'particular regard' be replaced by 'due regard'. The rationale given for the substitution is that while 'factors of continuity in the child's upbringing and background [should be considered], the best interests of the child should always be the primary concern.'<sup>284</sup> Thus, the focus is on ensuring that the alternative care provided does not impact negatively on the child's growth, and development rather than sticking rigidly to continuity. Like the best interests of the child principle, there is no 'one solution for all' approach in

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<sup>279</sup> See section 3.3.1.2. The emphasis on this principle in relation to children deprived of a family environment is further evidenced by its inclusion in related provisions to art 20. Such related articles include arts 9 (on separation from parents) & 21 (adoption).

<sup>280</sup> Gudbrandsson B 'Rights of children at risk and in care' Conference Paper at the Conference of European Ministers responsible for Family Affairs, "Changes in Parenting: Children today, parents tomorrow" (16-17 May 2006) Lisbon, Portugal 22.

<sup>281</sup> Arts 20(3) CRC.

<sup>282</sup> Cantwell & Holzscheiter (2008) 60.

<sup>283</sup> Art 25(2)(a) and (3) ACRWC. Compare art 20(1) CRC.

<sup>284</sup> UNHCHR (2007) 20.

implementing continuity. In practice, a case-by-case analysis is required, since a strict application of continuity may not always serve the best interests of all children deprived of their family environment. A rigid interpretation would be incompatible with the flexible nature of the concept, making a determination of 'best interests' in each case impossible.<sup>285</sup>

Continuity in upbringing also refers to the need to secure children deprived of their family environment in a stable and constant alternative care setting, with love and understanding for harmonious development so as to avoid the negative effects of drifting from place to place. This rightly goes beyond mere continuity in a socio-cultural environment.<sup>286</sup> In addition, the concept of continuity is relevant within the context of some other related provisions of the CRC. These include the right of a child to know and be cared for by his parents<sup>287</sup>, the right to preservation of identity,<sup>288</sup> the cultural and identity rights of children of minority or indigenous background,<sup>289</sup> and the rights to freedom of religion, expression and association.<sup>290</sup>



### 3.6.5 Alternative Care

Neither the CRC nor the ACRWC define 'alternative care'. It is however clear that the child's right to alternative care comes into effect upon the loss of or deprivation of not just parental care but more broadly, a family environment.<sup>291</sup>

At the most basic level, 'care' in this context refers to the 'function of watching, guarding, or overseeing'<sup>292</sup> someone or something and 'the process of caring for somebody/something and providing what they need for their health or protection'.<sup>293</sup> In the child care context or in relation to caring for children, care refers to the 'provision in the household and the community of time, attention and support to meet the physical,

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<sup>285</sup> Hodgkin & Newell (2007) 289; Cantwell & Holzscheiter (2008) 61.

<sup>286</sup> Hodgkin & Newell (2007) 289; Cantwell & Holzscheiter (2008) 62.

<sup>287</sup> Art 7 CRC.

<sup>288</sup> Art 8 CRC.

<sup>289</sup> Art 30 CRC.

<sup>290</sup> Arts 13, 14 & 15; Reddy R 'Regional practice: The Asian Pacific situation' in Doek *et al* (1996) 134; Hodgkin & Newell (2007) 288.

<sup>291</sup> Roby (2011) 9: UNICEF (Child Protection Section) Working Paper. As already discussed in the previous chapter and above (3.6.1), "family environment" is defined by cultural and social norms while "parental care" is more clearly established, although in some cultures who is a "parent" can be questioned as well.'

<sup>292</sup> Available at < <http://www.thefreedictionary.com/care> > (accessed on 06/08/ 2011).

<sup>293</sup> Available at < <http://www.oxfordadvancedlearnersdictionary.com/dictionary/care> > (accessed on 06/08/2011).

mental and social needs of the growing child and other household members.<sup>294</sup> In a more technical and broader sense, Engle and Lhotska define care as, the 'behaviours and practices of caregivers (mothers, siblings, fathers, and child-care providers) to provide the food, health care, stimulation, and emotional support necessary for children's healthy growth and development.'<sup>295</sup> In addition, the manners in which these actions are performed (with affection and responsiveness) so as to encompass the physical, emotional and psycho-social needs of children are key components of the definition by Engle and Lhotska.<sup>296</sup>

The elements of care as defined above are those generally accepted as being available to children within the context of parental care and a family environment.<sup>297</sup> Alternative care therefore indicates the provision of care other than parental care to children deprived of their family environment, temporarily or permanently, but with such alternatives possessing the elements of care.<sup>298</sup> In other words, alternative care refers to the 'physical, material, emotional, social, educational and spiritual care for a child, not provided by the biological or adoptive parents.'<sup>299</sup>

It is significant that Article 25 of the ACRWC makes reference to '*alternative family care*'<sup>300</sup> thereby suggesting the priority of a 'family-based' or 'family-like' alternative for children without parental care over a non-family form of alternative such as placements in institutions generally.<sup>301</sup> Thus, *alternative family care* is not necessarily synonymous with *alternative care* as is used in the CRC.<sup>302</sup> The specific reference to 'alternative family care' under the ACRWC may be interpreted to mean that under the ACRWC, the concept of 'continuity in upbringing' becomes more relevant in terms of taking into consideration the child's original family environment or background, for example through the involvement of the extended family network.

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<sup>294</sup> Jallow I, 'Ensuring effective caring practice within the family and community', Association for the Development of Education in Africa (Libreville Gabon, March 27-31, 2006) cited in Lim (2010) 23.

<sup>295</sup> Engle PL & Lhotska L 'The role of programmatic actions for nutrition: Designing programmes involving care' (1999) 20/1 *Food & Nutrition Bulletin* 122.

<sup>296</sup> As above.

<sup>297</sup> Melton (1996) 1237.

<sup>298</sup> Art. 20(1), CRC.

<sup>299</sup> Phillips (2011) 118. Adoption, though a form of alternative care (to an extent) is included in the above definition because once an adoption is complete, rights and responsibilities attach and operate as with the case of biological parents.

<sup>300</sup> My emphasis, see art 2(a) ACRWC.

<sup>301</sup> Cantwell & Holzscheiter (2008) 23. This is without prejudice to the fact that 'placement in suitable institutions' is one of the forms of alternative care listed under art 25.

<sup>302</sup> Mezmur (2009) 167; Lim (2010) 137. See art 20(2) CRC and compare art 25(2)(a) & (3) ACRWC. It should be recalled however that the UN Guidelines as well as the order of placement of the alternative care options in art 20 CRC, also establish the priority of a family-based form of alternative care over others.



Again, this will depend on the extent of the 'continuity' principle's consistency with the best interests of the child principle, and Article 1(3) ACRWC on the supremacy of the universality of children's rights over any cultural, religious, customary or traditional practice.<sup>303</sup>

However, in providing for alternative care options, both Article 20 of the CRC and Article 25 of the ACRWC give priority to family-based options like foster care and adoption while making institutional care a subsidiary option, 'if necessary', thereby making it a secondary form of alternative care in the hierarchy of options.<sup>304</sup> This is aimed at reaffirming the 'superiority of the family environment, be it the 'natural' family environment or an alternative family placement (foster care, adoption) over other types of alternative care'.<sup>305</sup> The implication of this is that between the time when a child 'loses' his natural family and the time of placement in institutional care, other alternatives should be explored unless it is necessary to place the child in such care in the first place, especially if for a temporary period of time. Further, although the list of alternative care options provided in Article 20 of the CRC is non-exhaustive, it is not expressly stated that there is a hierarchy to be followed in the consideration of alternative care options for children deprived of a family environment. However, the options listed (prior to institutional placement) appear to be ranked in order of permanence, that is, from the least permanent form of alternative care to the most permanent.<sup>306</sup>

The use of 'inter alia' in Article 20(3) (and 'among others' in Article 25 of the ACRWC) indicates the non-exhaustive nature of the options listed in the article, leaving States the discretion of making available other options 'in accordance with their national laws'.<sup>307</sup> The manner in which other models of alternative care have been developed will be considered in the following chapter. For now, what follows is a general overview of the forms of alternative care listed in the CRC and the ACRWC. These widely recognised forms

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<sup>303</sup> The idea of 'continuity in upbringing' under the ACRWC immediately follows the consideration of 'alternative family care' (art 25(3)). Under the CRC, 'continuity in upbringing' follows the general (but non-exhaustive) list of forms of alternative care (art 20(3)).

<sup>304</sup> Arts 20(3) CRC & 25(2)(a) ACRWC; Cantwell & Holzscheiter (2008) 16. The use of the phrase 'if necessary' before listing or permitting institutional placement is indicative of this.

<sup>305</sup> Cantwell & Holzscheiter (2008) 19.

<sup>306</sup> The order provided in art 20(3) CRC reads as follows: 'foster care', 'kafalah' and 'adoption'. During the drafting of the article, the Venezuelan representative stated that it was logical to begin with measures that are relevant for temporary family deprivation and end with measures for deprivation of a permanent nature. In this light, it was also suggested that some form of institutional placement should come first; this was however not adopted since it was generally agreed that institutional placement should be considered only if necessary. See UNHCHR (2007) 25.

<sup>307</sup> Art 20(2)(3) CRC.

of alternative care are adoption, foster care, *kafalah* of Islamic law, and placement in institutions.<sup>308</sup> Kinship care, and its relationship with some of these forms of alternative care will form part of the discussions in Chapter four.<sup>309</sup>

### 3.6.5.1 Foster Care

The term 'foster care' is open to several interpretations despite the definition given by the UN Guidelines, which will be discussed in chapter four of this study. However, foster care is traditionally defined as the legal placement of children in the care of individuals to whom they are unrelated, biologically.<sup>310</sup> Historically, such placement was temporary, pending reunification with the family,<sup>311</sup> but has now evolved into an alternative care option that may not be temporary but quite permanent or transformed into adoption or quasi-adoption.<sup>312</sup>

Although fostering covers a wide range of child-care arrangements ranging from emergency care to short and medium term care,<sup>313</sup> the unique characteristic of foster care is that it does not confer full parental responsibilities upon the foster parents; overall parental authority is usually retained by the biological parents (or the state).<sup>314</sup> In effect, the residual parental responsibilities for children in foster care are shared between the state and the foster parents. Consequently, it is essentially a form of social parenting that is subject to legal controls by the state.<sup>315</sup> In more developed countries, foster care as a form of alternative care (in its various forms) is a legal/formal and specialised State-financed service.<sup>316</sup> However, formal foster

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<sup>308</sup> Art 20(3) CRC.

<sup>309</sup> While 'kinship care' or more broadly, 'informal care' is not listed in the instruments, it can be read in based on the non-exhaustive nature of article 20 by the use of *inter alia*.

<sup>310</sup> Williamson J *A family is for a lifetime* (2004) 12.

<sup>311</sup> Cantwell (2005) 8.

<sup>312</sup> Waysdorf SL 'Families in the AIDS crisis: Access, equality, empowerment and the role of kinship caregivers' (1994) 3 *Texas Journal of Women and Law* 145.

<sup>313</sup> Nott V & Brisbane C *Alternatives to institutional care for orphaned and vulnerable children: A model for transitional care* (2008) 11.

<sup>314</sup> Tolfree D *Facing the crisis: Supporting children through positive care options* (2005) iv.

<sup>315</sup> Bainham A *Children: The modern law* (1998) 191. 'Parental responsibility refers to the collection of tasks, activities and choices which are part and parcel of looking after and bringing up a child' and is conferred by virtue of becoming a parent (usually, a 'natural' parent). See Hoggett B *Parents and children* (1993) 11.

<sup>316</sup> Lee-Jones L 'Foster care and social work from the perspective of the foster child' unpublished master's thesis, University of Cape Town (2003) 11.

care is not commonly practised in Africa,<sup>317</sup> and there are lots of grey areas in its practice and understanding as well as several linkages between foster care and kinship care. South Africa has gone further to develop other models of foster care; chiefly, cluster foster care, and this is being replicated in other climes (mainly Namibia which shares a common legal history with South Africa, and outside of Africa, Israel).<sup>318</sup>

While foster care generally provides a child with substitute parents, similar to the typical family environment, its non-permanent nature can have a negative impact on a child's psychological well-being and mental development.<sup>319</sup> This is more so in cases of 'foster drift' where children experience placement in several foster families without securing permanence.<sup>320</sup> In terms of continuity in upbringing and maintenance of family ties, foster care may also not be appropriate for siblings deprived of parental care since they may be separated.<sup>321</sup>



### 3.6.5.2 *Kafalah* of Islamic Law

The term '*kafalah*' derives from the Arabic word '*kaff*' which means 'to take care of'.<sup>322</sup> Under this Islamic practice of alternative care, a family is permitted to take in, care for and raise (as one of theirs), a child deprived of parental care on a permanent basis.<sup>323</sup> However, unlike in an adoption, such a child is neither entitled to take up the family name nor entitled to an automatic right of inheritance from his new family.<sup>324</sup>

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<sup>317</sup> UNICEF (Innocenti Research Centre) (2006) 20. South Africa is one of the few countries in Africa where foster care is legalised and practised in terms of the law.

<sup>318</sup> See among others, Gallinetti J & Sloth-Nielsen J 'Cluster foster care: a panacea for the care of children in the era of HIV/ Aids or a MCQ?' (2010) *Social work/Maatskaplikewerk* 1. In Israel, up to twenty families living in a single neighbourhood take up to twelve children each under the Israeli cluster foster care scheme. See Colton M & Williams M *The World of Foster Care: An international sourcebook on foster family care systems* (1997) 46 - cited in Harber M 'Social policy implications for the care and welfare of children affected by HIV/AIDS in KwaZulu-Natal', School of Development Studies, University of KwaZulu-Natal, Research Report No 17 (undated), available at < <http://sds.ukzn.ac.za/files/rr17.pdf> > (accessed 18 October 2012).

<sup>319</sup> Strijker J & Zandberg TJ 'Breakdown in foster care' (2005) 9/1&2 *International Journal of Child and Family Welfare* 76; Sallanas M et al 'Breakdown of teenage placements in Swedish foster and residential care' (2004) 9/2 *Child and Family Social Work* 141.

<sup>320</sup> Cushing G & Greenblatt SB 'Vulnerability to foster care drift after the termination of parental rights' (2009) 19/6 *Research on Social Work Practice* 694.

<sup>321</sup> Lim (2010) 156.

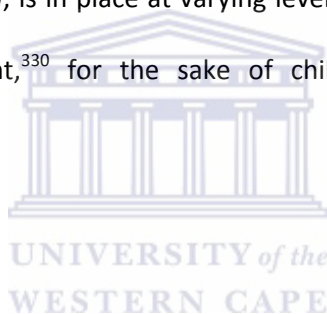
<sup>322</sup> Phillips (2011) 39.

<sup>323</sup> Van Bueren (1995) xxi;

<sup>324</sup> As above.

The Islamic *kafalah* form of child care was recognised internationally as an alternative care option for the first time in the 1986 Declaration.<sup>325</sup> Although focusing on foster care and adoption, the Declaration recognised the existence of various alternative care institutions and particularly ‘the *Kafala* of Islamic Law’.<sup>326</sup> Subsequently, it was included in the CRC as one of the options when considering alternative care for children without a family environment.<sup>327</sup>

*Kafalah* as an alternative care form is more predominantly practised in countries where the Islamic Shariah law constitutes a part of or serves wholly as State law, for example Bangladesh, Lebanon, Iran, Pakistan and Syria.<sup>328</sup> It is also practiced in states that make up the Northern part of the African continent, such as Egypt and Libya, and on a more limited basis in other countries in sub-Saharan Africa with large Muslim populations, for example Mali, Nigeria and Sudan.<sup>329</sup> Given the significant number of countries in Africa where the Islamic legal system, *Shariah*, is in place at varying levels, the recognition and understanding of *kafalah* is a progressive development,<sup>330</sup> for the sake of children without parental care in those jurisdictions.



### 3.6.5.3 Adoption

Adoption is ‘a type of family placement in which the rights and responsibilities of one or more parents are fully and irrevocably transferred to one or more adoptive parents.’<sup>331</sup> The arrangement is meant to ‘provide a form of family care as close as possible to care within the child’s biological family.’<sup>332</sup> In other words, permanence in a new family environment is secured for the child by severing the ties with his family of

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<sup>325</sup> Preamble to the 1986 Declaration, para 6.

<sup>326</sup> As above; para 6 of the Preamble provides: ‘Recognizing that under the principal legal systems of the world, various valuable alternative institutions exist, such as the *Kafala* of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents.’ For more on what *kafala* refers to and how it is practised, see Assim UM ‘In the best interests of children deprived of a family environment: A focus on Islamic *kafalah* as an alternative care option’, unpublished LLM Dissertation, University of Pretoria, 2009.

<sup>327</sup> UNHCHR (2007) 25.

<sup>328</sup> Hashemi K ‘Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation’ (2007) 29 *Human Rights Quarterly* 220; Sonbol AA ‘Adoption in Islamic Society: A historical survey’ in Fernea EW *Childhood in the Muslim Middle East* (1995) 39.

<sup>329</sup> Olowu D ‘Children’s rights, international human rights and the promise of Islamic legal theory’ (2008) 12 *Law, Democracy and Development* 73; Vite and Boechat (2008) 21; Hodgkin & Newell (2007) 294; Hashemi (2007) 221.

<sup>330</sup> Mezmur (2009) 87.

<sup>331</sup> Tolfree (1995) 165.

<sup>332</sup> Bainham (1998) 205.

birth.<sup>333</sup> Adoption generally represents the most permanent form of alternative care for children without parental care. Unlike other forms of alternative care however, once an adoption process is completed, it is no longer subject to periodic review or state supervision since it confers full parental responsibilities on the adoptive parent(s).<sup>334</sup>

Historically, adoption served the interests of adults and not children.<sup>335</sup> This is because it was recognised and practiced for purposes of meeting the needs of childless couples. Such needs include the desire for children, the need for an heir or continuity of a family's lineage or for religious purposes.<sup>336</sup> Today, the focus has changed and adoption is now more child-centred by providing a home or family environment for a child rather than providing a family with a child.<sup>337</sup> Adoption is further considered to be a social tool to improve the lives of vulnerable children through the provision of a substitute family to children whose parents are unable or unwilling to care for them.<sup>338</sup>

Generally, the legal effects of adoption include: the irrevocable termination of the legal relationship with birth parents and the acquisition of a new status as the child of the adopters; the extinguishing of former parental responsibility, to the exclusion of any future role for the biological parents in the upbringing of the adopted child and the discharge of any existing care order by a court or any other relevant body; and the termination of inheritance rights with regard to the birth family.<sup>339</sup> Notwithstanding the general features of adoption, there are different types of adoption and the legal effects vary depending on what type is engaged in.

Broadly, adoptions may be full or simple, on the one hand, or open or closed on the other hand.<sup>340</sup> An adoption may also be domestic or international/intercountry, that is it may take place in the same country

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<sup>333</sup> Welbourne P 'Adoption and the rights of children in the UK' (2002) 10 *The International Journal of Children's Rights* 269; Bartholet (1999) 24.

<sup>334</sup> Cantwell & Holzscheiter (2008) 52; Quinton D *et al* *Joining new families: A study of adoption and fostering in middle childhood* (1998) 6.

<sup>335</sup> Graff (1999) 110.

<sup>336</sup> O'Halloran K *The politics of adoption: International perspectives on law, policy and practice* (2009) 1; Tolfree (1995) 170.

<sup>337</sup> Delplace (2006) 163; Bainham (1998) 207.

<sup>338</sup> Krause HD *Family law in a nutshell* (1991) 163; South Africa Law Commission (2002) 233.

<sup>339</sup> Welbourne (2002) 276; Bainham (1998) 229.

<sup>340</sup> Vite & Boechat (2008) 16; Duncan W 'Children's rights, cultural diversity and private international law' in Douglas G & Sebba L (eds) *Children's rights and traditional values* (1998) 17; Duncan W 'Intercountry adoption: some issues in implementing the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption' in Doek *et al* (1996) 84.

as the one in which the child was born, or involve bringing children from one country to live in the country of their adopted parents.<sup>341</sup> Most intercountry adoptions are 'trans-cultural' and 'trans-racial', except those involving new family members such as stepparents. The former involves 'the placement of a child with a family in a cultural environment different from that of her birth family' while the latter involves 'the placement of a child with a family of a different racial origin'.<sup>342</sup>

Intercountry country adoption, though a sub-set of adoption,<sup>343</sup> has become a subject of significant interest in recent years as a result of the vast increase in the number of such adoptions in the last half-century.<sup>344</sup> Consequently, a separate legal framework for the regulation of intercountry adoption was adopted by the Hague Conference on Private International Law.<sup>345</sup> the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Adoption Convention). It is a supplementary instrument to the CRC and the 1986 Declaration building on the provisions of Article 21 of the CRC on Intercountry adoption; it brings into practical effect (i.e. it is an 'implementation instrument' of) the general provisions on adoption contained in article 21 of the CRC (and Article 24 of the ACRWC).<sup>346</sup>

Article 21 CRC provides for intercountry adoption for States that 'permit' or 'recognise' adoption. The same language is employed in article 24 of the ACRWC. However, Article 21 of the CRC is to be read together with Article 20, the umbrella provision on alternative care. (In the same vein, Article 24 of the ACRWC on adoption is to be read together with its Article 25 on alternative care). Article 21 of the CRC begins with a focus on adoption generally, before proceeding in 21(b) and the subsequent sub-paragraphs to focus on intercountry adoption. However, under the CRC and the ACRWC, intercountry adoption is to be undertaken as a measure of last resort after attempts have been made at securing alternative care for children

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<sup>341</sup> Van Bueren (1995) 96.

<sup>342</sup> Tolfree (1995) 207.

<sup>343</sup> Art 21, CRC & art 24, ACRWC.

<sup>344</sup> Bartholet E 'International Adoption' in Askeland L (ed) *Children and youth in adoption, orphanages and foster care* (2005) 108; Wallace SR 'Intercountry adoption: The most logical solution to the disparity between the numbers of orphans and abandoned children in some countries and families and individuals wishing to adopt in others?' (2003) 20 *Arizona Journal of International and Comparative Law* 692.

<sup>345</sup> The Hague Conference on Private International Law is a global intergovernmental organisation with the main aim of unifying the rules of private international law among member states. See < <http://www.hcch.net> >

<sup>346</sup> Hague Conference on Private International Law *Hague Intercountry Adoption Convention - Outline* (2008); Vite & Boechat (2008) 5; Parra-Aranguren G *Explanatory Report on the 1993 Hague Intercountry Adoption Convention* (1994) 3.

deprived of a family environment within their home country.<sup>347</sup> The Hague Adoption Convention, on the other hand, prescribes intercountry adoption as a form of alternative care if a suitable family cannot be found for a child domestically, thereby prioritising intercountry adoption over non-family-based alternative forms of care such as residential or institutional placement within the child's country of origin, effectively making institutional care the measure of last resort.<sup>348</sup> This approach is based on the Hague Adoption Convention's emphasis on the importance of children growing up in a family environment, whether at home or abroad.<sup>349</sup>

Therefore, there appears to be some conflict between the CRC and the ACRWC on the one hand, and the Hague Adoption Convention on the other hand, with regards to the ranking of intercountry adoption on the alternative care scale.<sup>350</sup> The former appear to give preference to institutional placement within a child's state of origin above intercountry adoption while the latter places intercountry adoption above institutional placement, even if within the child's state of origin.<sup>351</sup> It has however been convincingly argued that this approach negates a proper interpretation of Articles 20 and 21 of the CRC. While Article 20 of the CRC (and Article 25 of the ACRWC) provides for the various forms of alternative care in order of permanence (with intercountry adoption forming part of adoption), Article 21 of the CRC (and Article 24 of the ACRWC) provides a hierarchy only between domestic adoption and intercountry adoption, and not between institutional care and intercountry adoption.<sup>352</sup>

In giving effect to the CRC provisions on intercountry adoption, the Hague Adoption Convention's primary objectives include the regulation of intercountry adoption in order to avoid or deal with abuses in the system, which result in the violation of children's rights. This is to ensure the best interests of the child in the intercountry adoption process.<sup>353</sup> However, all over the world, controversies surround intercountry

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<sup>347</sup> O'Halloran (2009) 129; Hodgkin & Newell (2007) 297.

<sup>348</sup> Vite & Boechat (2008) 45;

<sup>349</sup> See the Preamble to the Hague Adoption Convention. See also Parra-Aranguren G 'History, philosophy and general structure of the Hague adoption convention' in Doek *et al* (1996) 65

<sup>350</sup> Stark B 'Lost boys and forgotten girls: Intercountry adoption, human rights and African children' (2003) 22 *Saint Louis University Public Law Review* 288.

<sup>351</sup> Davel T 'Intercountry adoption from an African perspective' in Sloth-Nielsen (ed) (2008) 263.

<sup>352</sup> Mezmur (2009) 167, 301.

<sup>353</sup> Phillips (2011) 91.



adoption due to various political, socio-cultural and economic reasons.<sup>354</sup> It is a subject that generates very strong reactions, both for and against it.<sup>355</sup> In reaction to this, African states have taken differing, and sometimes, opposing positions on the subject. Up to 2008, only as few as five African countries had ratified the Hague Adoption Convention. But since 2009, in response to the increase in the rate of intercountry adoptions from Africa despite many states not being properly equipped to deal with the complexities involved, more African states have begun to ratify the Convention.<sup>356</sup> To date, about 15 African countries are party to the Hague Adoption Convention with other states involved in plans and processes leading up to its ratification.<sup>357</sup> However, apart from non-recognition of intercountry adoption by some African countries, factors such as obsolete legislation and weak legal institutions (to combat illegal adoptions and child trafficking) as well economic challenges militate against the adoption of the Convention.<sup>358</sup> However, the CRC Committee in several concluding observations on reports from African States, and UNICEF have urged states' governments to ratify the Hague Adoption Convention in order to ensure greater international cooperation in ensuring the protection of children within the context of intercountry adoption.<sup>359</sup>



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<sup>354</sup> Shapiro LM 'Inferring a right to permanent family care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and selected scientific literature' (2008) 15 *Washington and Lee Journal of Civil Rights and Social Justice* 196; Stark (2003) 289.

<sup>355</sup> Tolfree (1995) 207.

<sup>356</sup> African Child Policy Forum (ACPF) *Africa: The new frontier for intercountry adoption* (2012) v-vii.

<sup>357</sup> The African countries that have ratified the Hague Adoption Convention are: Burkina Faso, Burundi, Cape Verde, Guinea, Kenya, Lesotho, Madagascar, Mali, Mauritius, Rwanda, Senegal, Seychelles, South Africa, Swaziland and Togo. Ethiopia and Malawi, among others, have signed the Convention and are some of the states working towards its ratification. See < [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) >. For an appraisal of the African situation on intercountry adoption prior to 2009, see Sloth-Nielsen J 'Children's Rights and the Law in African Context: An Introduction' in Sloth-Nielsen (ed) (2008) 8.

<sup>358</sup> Doek J 'General Report – Children on the Move' in Doek *et al* (eds) (1996) 226; Phillips (2011) 92. Other works focused on intercountry adoption in Africa include: ACPF (2012); Davel (2008); Mezmur BD 'Madonna, Mercy, Malawi, and international children's rights law in adoption' (2012) 20 *International Journal of Children's Rights* 24; Mezmur (2009). See also Mezmur BD 'From Angelina (to Madonna) to Zoe's Ark: What are the "A-Z" lessons for intercountry adoption in Africa?' (2009) *International Journal of Law, Policy and the Family* 145.

<sup>359</sup> UNICEF (Press Centre) 'African Governments urged to adopt Hague Conventions on children', 23 February, 2010 < [http://www.unicef.org/media/media\\_52823.html](http://www.unicef.org/media/media_52823.html) > (accessed on 09/10/2011).



### 3.6.5.4 Institutional or Residential Care (Placements)

Institutional care refers to ‘a group living arrangement for children in which care is provided by remunerated adults who would not be regarded as traditional carers within the wider society.’<sup>360</sup> As previously highlighted, the provision of alternative care through placement in institutional facilities is the only non-family based form of alternative care listed in the relevant instruments.<sup>361</sup> However, the subsidiary position of institutional care is reflective of the negative connotations attached to institutional or residential care facilities.<sup>362</sup> Historically, and all over the world, many traditional institutional establishments for the alternative care of children are often large, overcrowded, poorly resourced, understaffed, and neglectful and in some cases, they accommodate the abuse of children, in various forms – which often goes undetected and unreported.<sup>363</sup> It has also been shown that children who spend the early developmental phase of their lives in residential facilities exhibit lower rates of cognitive, emotional, social, and linguistic development compared to those raised in the family or community; these further increase their vulnerability to the violation of their rights.<sup>364</sup> In some cases, sustainable attachments cannot be formed between the children in care and their caregivers because the caregivers are untrained personnel who render their services on a voluntary basis. This is particularly the case with faith-based residential facilities.<sup>365</sup> The same risks also exist however in facilities funded and operated by private individuals, NGOs or governments.<sup>366</sup>

All the above notwithstanding, a blanket condemnation of all forms of residential care is inappropriate, particularly in the light of modern developments in the field of institutional care. There are different facilities which come under the broad categorisation of institutional or residential care and many of them are further classified or specialised based on the categories of children that they cater for (example, ‘orphanages’ for orphans). Examples include ‘residential units’ like ‘group homes’, ‘family homes’, ‘family-

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<sup>360</sup> Peterson-Badali M, Ruck M & Bone J ‘Rights conception of maltreated children living in state care’ (2008) 16 *The International Journal of Children’s Rights* 6.

<sup>361</sup> Cantwell & Holzscheiter (2008) 53.

<sup>362</sup> As above; Csaky C *Keeping children out of harmful institutions: Why we should be investing in family-based care* (2009) 1; Tolfree (2005) 4.

<sup>363</sup> Csaky (2009) 7; Peterson-Badali *et al* (2008) 100; Pinhero (2006) 175; Tolfree (1995) 60.

<sup>364</sup> Gudbrandsson (2006) 9; UNICEF (Innocenti Research Centre) (2006) 36; Williamson (2004) 21. Some of the rights that children in institutional care risk having violated are listed in Phillips (2011) 136.

<sup>365</sup> Delap E *Every child deserves a family: EveryChild’s approach to children without parental care* (2009) 22; Williamson (2004) 21.

<sup>366</sup> Csaky (2009) 3.

type orphanages' and 'family-like boarding schools', 'community-based care' centres, 'temporary stay solutions' and, 'placement for day or night' among others.<sup>367</sup> The emphasis should be on making such facilities as family-based as possible in order to encourage intimate relationships and interactions, which is vital to proper child development.<sup>368</sup> Thus, the crucial factor is the quality of the environment into which the child is placed and the nature of care provided rather than the fact of institutionalisation itself. Significantly, institutional establishments have evolved from the traditional mode into several models more suitable for the needs of childcare; these will be explored in greater detail in the succeeding chapter, which will discuss the UN Guidelines provisions on institutional placements, among others.<sup>369</sup>

Knowledge of, and reliance on, placements of children without parental care in institutional care facilities is quite a recent phenomenon in Africa; coming to the fore in just over the last decade. This is due to the traditional role of the extended family in absorbing children deprived of a family environment.<sup>370</sup> The phenomena of HIV/AIDS, armed conflict, natural disasters, and chiefly poverty,<sup>371</sup> among others, resulting in an increase in the number of children without parental care, have given rise to the proliferation of institutional care facilities on the continent.<sup>372</sup> Most of these facilities are unregistered and as such, the actual figures of how many there are and more importantly, how many children are in institutional care is unknown, or at the least, inaccurate.<sup>373</sup>

Despite the many disadvantages often associated with institutional care, institutions are useful in certain respects and form 'an essential part of the child and youth care system', under the supervision of trained professionals.<sup>374</sup> Institutional care is sometimes a necessary part of the process of securing a more permanent form of alternative care; they serve as a time-limited interim stage towards securing permanent

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<sup>367</sup> Phillips divides them generally into dormitory-style institutions and household-style set-ups; (2011) 134.

<sup>368</sup> Baladon LG 'A child's journey across international frontiers: the Asian experience' in Doek *et al* (1996) 124; Tolfree (1995) 64; Cantwell & Holzscheiter (2008) 53; Council of Europe 'Children in Institutions: Prevention and alternative care' (2005) presentation at the CRC Committee Day of General Discussion (2005).

<sup>369</sup> Examples include models developed by organisations such as the SOS Children's Villages among others.

<sup>370</sup> Phillips (2011) 134.

<sup>371</sup> As a result of poverty, there are many children in residential care facilities who still have either or both of their parents alive. A major reason for this is that the material needs of children are often better met in these facilities than in their immediate family environment. See Csaky (2009) 1.

<sup>372</sup> Pinhero (2006) 184; Williamson (2004) 13.

<sup>373</sup> UNICEF *Progress Report for Children Affected by HIV/AIDS* (2009) 19; Dunn A, Jareg E & Webb D *A last resort: The growing concern about children in residential care* (2003) 16.

<sup>374</sup> Peterson-Badali *et al* (2008) 106, 116; South Africa Law Commission (2002) 281.

alternative care placement for children deprived of a family environment, and who cannot be reunited with their birth families. Thus, the period spent in institutional care facilities should be used for 'devising for every child in care a permanent, and preferably family, protective solution, including intercountry adoption when no adoptive family can be found in the country of origin'.<sup>375</sup> The aim of an interim approach to institutional care is ultimately the 'de-institutionalisation' of children who find themselves placed therein; it therefore remains a measure of last resort for children deprived of their family environment. The UN Guidelines on the Alternative Care of Children which will be discussed in the next chapter is quite emphatic about this position.<sup>376</sup>

Against the background of the fact that all forms of alternative care are expected to serve the best interests of the child, the principles of 'necessity' and 'suitability' when considering alternative care placement are applicable to all other forms of alternative care and not to placement in institutions alone.<sup>377</sup> While institutional care facilities may not be the best environment within which children should grow up, the circumstances of each case would help to determine the best interests of the child.



### 3.7 Conclusions

This chapter presented a broad overview of the relevant international and regional legal and theoretical framework fundamental for a thorough understanding and proper application of the right to alternative care for children deprived of their family environment. With particular reference to children deprived of their family environment, it has been shown that the additional level of assistance and protection which

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<sup>375</sup> Yacoob A *Report on professional foster care: A pilot project of the Inter-Ministerial Committee on Young People at Risk* (1998) 11 (Kimberley, Northern Cape Province, South Africa); Vite & Boechat (2008) 25; Cantwell & Holzscheiter (2008) 24; GC 3 (2003) 35. The risk of illegal intercountry adoption of children in institutional care has however been noted even though there are low percentages of intercountry adoption from such facilities. This is due in part to the fact that children in institutions tend to be viewed as 'problem children': 'many children living in institutions are older than five and may be traumatised sick or disabled, potential adoptive parents [especially from other countries] wish to adopt healthy babies without any 'baggage' and those are usually not to be found in residential care.' See Phillips (2011) 138.

<sup>376</sup> Phillips (2011) 137; UNICEF *Africa's Orphaned and Vulnerable Generations: Children affected by AIDS* (2006) 20. Para 23 of the UN Guidelines provides for the progressive elimination of institutional care for children deprived of a family environment. However, institutional care is also useful for keeping siblings together where there are no foster or adoptive parents willing to take them all in; for absorbing street children who are unable or unwilling to go home; and for providing a neutral environment for the treatment of children who have been traumatised by abuse within their family environment.

<sup>377</sup> Cantwell N 'Towards UN Guidelines on alternative care for children: from concerns to consensus' (2008). PPT Presentation available at < <http://www.bettercarenetwork.nl> > (accessed 18 May 2013).

the existing legal framework accords them is justified in light of the double vulnerability of such children to violations of all other rights to which they are entitled.

Overall, four main issues have been discussed so far. First, beginning with a historical overview of the international instruments relevant for children's rights and the right to alternative care alternative care in particular which were in place prior to the CRC and ACRWC, the chapter clearly shows that the right to alternative care as conceptualised today can be traced to key provisions in those earlier instruments on children's rights: the Geneva Declaration of the Rights of the Child (1924); the Declaration of the Rights of the Child (1959); 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 (1986); and the Declaration on the Rights and Welfare of the African Child (1979).

Secondly, the adoption of the almost-universal CRC remains significant for establishing a rights-based approach to matters concerning children by being the first internationally binding instrument on children's rights. Related to the CRC, it was argued that the African Children's Charter, drawing inspiration from the CRC, plays a complementary role to the CRC despite being region-specific in a number of areas including the subject of alternative care. On the relationship between the CRC and the ACRWC, what stands out clearly is the fact that the two instruments cannot be understood, interpreted or implemented in isolation from the other, with regard to all children's rights generally and the right to alternative care particularly, at least within Africa.

Thirdly, the four fundamental principles of children's rights (non-discrimination, best interests of the child, child participation, and the right to life, survival and development) in both the CRC and the ACRWC were presented in a manner which highlights the particular ways in which these principles are relevant to and important for the realisation of the right to alternative care. The emphasis on some unique aspects of the principles and rights as formulated in the ACRWC is of particular importance given the geographical context and relevance of this thesis.

Fourthly, the main thrust of the chapter was a presentation of a theoretical basis for the right to alternative care through an analysis of key concepts and principles emanating from the right to alternative care. These concepts such as 'family environment', 'deprivation', 'continuity in upbringing', among others, are key concepts which provide the fundamental requirements (a human or children's rights-based approach) relevant for consideration when taking measures to ensure a proper realisation of the right to alternative care. A highlight of the chapter is the argument that kinship care was not originally envisaged as part of the options considered under the right to alternative care because it was understood to form part and parcel of what is meant by family environment. The changes that have taken place in international and local law and policy on the place of kinship care will be considered in the next chapter.

In addition to the key principles of alternative care, an overview of the major forms of alternative care as provided in the CRC and ACRWC was also presented serving as a background to the consideration of kinship care in comparison with the others that will be discussed subsequently. Of significant note is the fact that the universal acceptance of the importance of a family environment to the proper growth and development of the child has resulted in a shift towards the prioritisation of family-based alternative care options for children deprived of their family environment. The development of family-based models of alternative care has become fundamental to the understanding and proper implementation of the right to alternative care. Some of this will be examined further in chapter four.

It will be argued further that international and domestic measures on the right to alternative care are largely uncertain about the status and position of kinship care, and particularly its relationship with the child protection system. This will lay a proper foundation for the proposition on how kinship care should be placed in relation to the right to alternative care and the child protection system.



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## CHAPTER FOUR – THE CONCEPTUALISATION OF KINSHIP CARE

### 4.1 Introduction

In this chapter, the status of kinship care (relative to foster care and other forms of alternative care) will be considered, in light of current developments in international law and policy around the right to alternative care. In Chapter 3, it was argued that kinship care was not originally envisaged as or intended to fall within the framework of the right to alternative care as provided in the international children's rights framework. This was done through an analysis of the drafting history of the CRC, particularly the eventual Article 20, and its counterpart, Article 25 of the African Children's Charter. This chapter seeks to highlight how kinship care transitioned from being a family environment or the result of a particular family situation to becoming an alternative care measure within the framework of the right to alternative care.

In the first part of the chapter, the role of the United Nations Guidelines on the Alternative Care of Children in recognising kinship care and locating it within the framework of the right to alternative care is explored. Some of the other significant ways in which the Guidelines have contributed to or impacted on the development of the right to alternative care are also presented. The next section presents a discussion on the broad forms of alternative care as provided by the UN Guidelines. This is followed by a discussion on kinship care, focusing on the definition, forms, nature, prevalence, benefits and challenges of kinship care generally and in Africa.

An analysis of the relationship between kinship care and traditional foster is also presented followed by the presentation of a framework for understanding and distinguishing the different forms of kinship care and how they interact (or should interact) with the child protection system generally, and with foster care more specifically. The chapter concludes with a number of observations about kinship care within the framework of the right to alternative care and its interactions with the child protection system.

## 4.2 Conceptualising Kinship Care as Alternative Care

A highlight of the discussion in Chapter three is the argument that kinship care was not originally envisaged as part of the options considered under the right to alternative care because it was understood to form part of what is meant by a family environment. As outlined in Chapter two, historically, 'kinship care has been an ever-present family resource, frequently providing varying levels of support to family members in need.'<sup>1</sup> In Africa particularly, children's kin traditionally played various roles in the care and upbringing of children; a cultural requirement which can be likened to the provision of occasional, short term or other temporary care in contemporary understanding.<sup>2</sup>

In more recent years however, an increasing number of extended family members especially grandmothers are moving away from their more traditional roles within the family, and into roles typically assumed by their grandchildren's parents. Some of the factors responsible for this include changes in family structure and socio-economic conditions, also discussed previously.<sup>3</sup> Consequently, relatives such as uncles, aunts, older siblings, cousins and especially grandparents now routinely provide full-time care for children of their relatives, effectively taking up the full-time parenting role of such relatives – largely on an informal basis.<sup>4</sup> In the past, the role of kin in the care and upbringing of children was supplementary to the role of parents,<sup>5</sup> but today, their role is largely primary, against the background of deprivation and the need to provide alternative care.<sup>6</sup> In effect, kinship care today refers to the 'full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, step-parents, or any adult who has a kinship bond with a child.'<sup>7</sup>

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<sup>1</sup> O'Brien V 'The benefits and challenges of kinship care' (2012a) 18(2) *Child Care in Practice* 127.

<sup>2</sup> Kosberg (1992) 265.

<sup>3</sup> See Chapter 2, section 2.3.3. See also Backhouse J 'Grandparents raising their grandchildren: impact of the transition from a traditional grandparent role to a grandparent-as-parent role', unpublished PhD thesis, Southern Cross University, Lismore, NSW, 2009, 1-2.

<sup>4</sup> See generally Cox CB 'Why grandchildren are going to and staying at grandmother's house and what happens when they get there' in Cox CB (ed) *To Grandmother's House We Go and Stay: Perspectives on Custodial Grandparents* (2000); Richards A *Second Time Around: A Survey of Grandparents Raising their Grandchildren* (2001); Council on the Ageing National Seniors (Melbourne Australia: Department of Families, Community Services and Indigenous Affairs) *Grandparents Raising Grandchildren* (2003).

<sup>5</sup> Their role may also be described as 'complementary' based on the African world view of 'ubuntu'. See also Chapter 2, section 2.2.

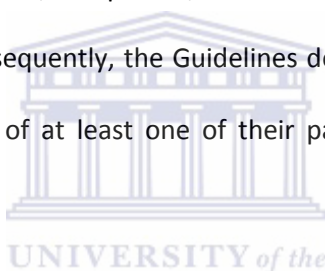
<sup>6</sup> In chapter five of this study, some cases decided in domestic courts will be discussed, showing the different ways in which courts have interpreted the responsibilities of relatives in caring for children.

<sup>7</sup> UNICEF & ISS 'Improving protection for children without parental care, Kinship care: An issue for international standards' (2004) 2; Children's Rights, New York 'Overview of institutional care in the United States' (2005) 1.



#### 4.2.1 The United Nations Guidelines for the Alternative Care of Children: International Framework for the Recognition of Kinship Care

Like the CRC and the ACRWC, the 2009 UN Guidelines for the Alternative Care of Children (UN Guidelines) do not define alternative care, but the standard for activating the right to alternative care under the CRC and the ACRWC differs from that under the Guidelines. The CRC and ACRWC make it clear that the right to alternative care comes into effect not just upon the loss of biological parents but also upon the loss of other relatives or persons broadly considered as forming part of the child's family environment.<sup>8</sup> In a departure from this approach, the UN Guidelines defines the child's family as primarily comprising the child's parent(s), thereby implying that 'a child's right to alternative care springs into effect when he or she is deprived of "parental care"'.<sup>9</sup> Thus, while the phrase 'children deprived of their family environment' can be inferred from the CRC and the ACRWC, the phrase, 'children deprived of parental care' is that which runs through the UN Guidelines.<sup>10</sup> Consequently, the Guidelines define 'children without parental care' as 'all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances.'<sup>11</sup>



Despite this conceptual difference, the more complex and diversified nature of the 'African society' as described above and in the previous chapter, justifies the narrow focus of the UN Guidelines in its definition of the family. Further, regardless of how kinship care is conceptualised, the children involved find themselves somewhere between parental/family care and State care, with particular concerns that need to be addressed.<sup>12</sup>

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<sup>8</sup> This is defined according to the customs, culture and social norms of individual societies. See Art 5 CRC.

<sup>9</sup> Roby (2011) 9; Para 3, UN Guidelines: '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.' See also para 4 which provides that children with 'inadequate or no parental care' are at the risk of being denied 'a supportive, protective and caring environment that promotes [their] full potential.'

<sup>10</sup> See among others, paras 4, 7, 14, 15, 1, 18, 53, 69 & 70 of the UN Guidelines. Para 1 of the UN Guidelines sets out the purpose of the guidelines as follows: '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.'

<sup>11</sup> Para 29(a) UN Guidelines. This includes children without parental care who are outside their country of habitual residence or who are victims of emergency situations.

<sup>12</sup> Roby (2011) 9.

While the CRC (together with the ACRWC) provides the international legal framework for the care and protection of children deprived of a family environment, it does not provide detailed guidelines as to the practical application of its provisions on alternative care. In other words, Article 20 of the CRC (and Article 25 of the ACRWC) provides a broad framework for the protection of children deprived of a family environment, but establishes no rules for the implementation of the provisions contained therein. Until 2009, there was no other international instrument from which guidance could be sought on the subject.<sup>13</sup> At the time of drafting the CRC, the rapid increase in the number of children without parental care (especially in Africa due to HIV/AIDS and armed conflicts, among others)<sup>14</sup> was not foreseen and as such, the provisions of the CRC dealing with such children were not particularly elaborate or detailed.<sup>15</sup> By the 2000s, the problem of children deprived of a family environment had resulted in a crisis that could no longer be ignored or left unattended leading the CRC Committee to note in 2004

the frequency with which its Concluding Observations provided to States Parties following periodic consideration of their reports address serious difficulties regarding care provision for children in informal or formal fostering, including kinship care and adoption, or residential facilities, often recommending the strengthening and regular monitoring of alternative care measures.<sup>16</sup>

Consequently, the CRC Committee in 2005 devoted its Day of General Discussion to the theme of 'Children without Parental Care'. This began the process of what eventually led to the development of the United Nations Guidelines for the Alternative Care of Children, 2009.<sup>17</sup> The combination of the CRC, ACRWC, and

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<sup>13</sup> International Social Service (ISS) 'A global policy for the protection of children deprived of parental care' (2005) available at < <http://www.crin.org/docs/A%20Global%20Policy%20for%20the%20Protection.pdf> >; UNICEF 'Children without Parental Care' (2005) available at < [http://www.unicef.org/chinese/protection/files/Parental\\_Care.pdf](http://www.unicef.org/chinese/protection/files/Parental_Care.pdf) >.

<sup>14</sup> CRC Committee, Recommendation on 'Children without parental care', (10/2004) preamble, available at < <http://www2.ohchr.org/english/bodies/crc/decisions.htm#7> > (accessed 18 October 2012).

<sup>15</sup> Sloth-Nielsen (2004) 6.

<sup>16</sup> CRC Committee Recommendation 10/2004, preamble. The Committee, in paragraph 1 of the Decision, also commended the 'efforts made by regional and inter-agency bodies to define principles and standards of care for children without parental care, notably the Recommendation of the Council of Europe's Committee of Ministers to Member States on Children's Rights in Residential Institutions, and the Inter-Agency Guiding Principles on Unaccompanied and Separated Children'.

<sup>17</sup> The UN Guidelines were approved and welcomed by the UN General Assembly on 20 November 2009, on the occasion of the 20<sup>th</sup> anniversary of the CRC. The guidelines were developed by a consortium of international non-governmental organisations, 15 States Parties, young persons with care experience and the CRC Committee. The INGOs include Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), Save the Children UK, SOS Children's Villages International and World Vision International. The States Parties known as the 'Group of Friends' comprised Argentina, Brazil, Egypt, Finland, Ghana, Georgia, Italy, Japan, Morocco, Philippines, Portugal, Sudan, Sweden, Ukraine, and Uruguay. For more information on the history and development of the UN Guidelines, see the following: UNICEF/International Social Service 'Improving protection for children without parental care: A call for international standards – A joint working paper (2004); UNICEF/International Social Service 'Improving protection for children without parental care. Kinship care: An issue for international standards' (2004); Cantwell N 'Not just "the same difference": A comparative overview of the Quality4Children Standards and the draft UN Guidelines in the field of alternative care for children' (2008); International Social Service (ISS) 'The Draft United Nations Guidelines on the Alternative Care of Children: An Ethical Framework on the Path to Adoption as Permanent Protection Measure', being a presentation by Christina Baglietto at the 2nd International Conference on Adoption, New Delhi, 8-10 October 2007, available at <



including: the relationship between parental care and alternative care; state obligations with regard to informal care or kinship care; the application of the best interests of the child principle; the goals of alternative care; the recognition of child-headed households; alternative care for children of imprisoned mothers;<sup>22</sup> residential care for children under three years; the hierarchy of care options; the concepts of ‘necessity’ and ‘suitability’ as they affect alternative care placements; and importantly, the goal of de-institutionalisation.<sup>23</sup> Some of these have been discussed in previous chapters<sup>24</sup> while the subject of kinship care will be the focus of subsequent parts of this chapter. However, a few others will be addressed briefly below, in a bid to shed some more light on the contributions of the UN Guidelines to the development of children’s right to alternative care generally.

#### 4.2.1.1 Residential Care for Children under 3 Years

It is important to point out that although ‘residential care’ and ‘institutional care’ are often used interchangeably, they are not synonymous; institutions are simply one form of residential care in line with the approach of the UN Guidelines.<sup>25</sup> However, institutions as a category of residential care are historically equated with ‘large residential care facilities.’<sup>26</sup> Factors generally used to distinguish institutions from other categories of residential care include: the size of the facility; the number of carers; and the length of placement.<sup>27</sup> However, ‘in the heterogeneous and “hybrid” alternative care environment, no definitional method can be fool proof.’<sup>28</sup> Thus, definitions are determined by contextual realities at national level.<sup>29</sup> This

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<sup>22</sup> A subject, which though missing from the CRC, is addressed in Article 30 of the ACRWC.

<sup>23</sup> Cantwell N ‘Improving Protection for Children without Parental Care: Developing Internationally-accepted Standards’ Paper presented at the European Congress in Gmunden, June 2005, at < <http://www.crin.org/bcn/details.asp?id=11692&themeID=1001&topicID=1007> > (accessed 28 August 2013)

<sup>24</sup> See Chapter 2, section 2.4 on aspects of the relationship between parental care and alternative care; Chapter 3, section 3.5.2 on the best interests of the child principle generally; section 3.6.2 on child-headed households; section 3.6.5 on the goals of alternative care; and Chapter 4, section 4.2.1, para 3 above briefly on the principles of necessity and suitability.

<sup>25</sup> Tolfree (1995) 6. Other forms of residential care include places of safety and transit centres: Para 29(c)(iv), UN Guidelines. The implementation handbook of the guidelines also recognises that residential care ‘encompasses a very wide range of settings, from emergency shelters and small group homes to the biggest residential facilities.’ See Cantwell *et al* (2012) 33. See also Meintjes *et al* (2007) and Bilson A & Harwin J ‘Gatekeeping Services for Vulnerable Children and Families: A toolkit’ in UNICEF and the World Bank Group *Gatekeeping Services for Children and Vulnerable Families: Changing Minds, Policies and Lives Toolkit* (2003) iv; at < <http://www.unicef-irc.org/publications/pdf/gatekeeping.pdf> > (accessed 18 October 2012).

<sup>26</sup> See Chapter 3, section 3.6.5.

<sup>27</sup> Cantwell (2010) 12; Cantwell *et al* (2012) 34.

<sup>28</sup> Cantwell (2010) 13.

<sup>29</sup> UNICEF *Children in Formal Care – Indicator Consultation*, 18 November 2003 (unpublished document) cited in Cantwell (2010) 13.

is consistent with State Parties' obligations towards alternative care.<sup>30</sup> The emphasis should be placed more on the reason for a child's presence in a particular alternative care setting than on the designation of the setting itself.<sup>31</sup> In effect, the use of residential care facilities should be limited to cases where it is appropriate, necessary and constructive.<sup>32</sup>

However, where children under the age of three years are involved, residential care facilities must be family-based.<sup>33</sup> In fact, the adoption of the UN Guidelines is considered to be a major landmark 'in terms of reaching international agreement on the decision that for children under three years of age, institutional care should not be an option and that family-type alternatives should be promoted and supported.'<sup>34</sup> In other words, institutional placements for very young children (at least three years and below) is totally unacceptable.<sup>35</sup>

#### 4.2.1.2 The Goal of De-institutionalisation

While the UN Guidelines do not call for an outright ban on institutions, institutions described above are expected to be the target of a 'de-institutionalisation strategy'.<sup>36</sup> More generally, the UN Guidelines call on 'each State to draw up its own strategy for progressively deinstitutionalising its alternative care system.'<sup>37</sup> Thus, reliance on institutional residential care facilities must be anchored on an overall deinstitutionalisation strategy targeted at the eventual elimination of such facilities.<sup>38</sup> This also requires that any initiative to set up a new institution should be critically examined in the light of the goal of deinstitutionalisation because:

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<sup>30</sup> Art 20(2)(3) CRC and Art 25(2) ACRWC.

<sup>31</sup> Cantwell (2010) 13; Cantwell *et al* (2012) 33-34.

<sup>32</sup> Cantwell *et al* (2012) 22.

<sup>33</sup> Paras 21 & 22, UN Guidelines.

<sup>34</sup> OHCHR 'Institutional care as a violation of rights of children under three years of age', Document for discussion at the sub-regional workshop on the rights of vulnerable children under three years of age, Prague, Czech Republic, 22 November 2011, 15.

<sup>35</sup> 'Although UN Guidelines specifically cover the first three years of age [para 21], it could be suggested for further consideration of major international and national stakeholders that all children under 5 or under 8 years of age should be raised in families, without exceptions.' See OHCHR (2011) 15.

<sup>36</sup> Para 23, UN Guidelines; Cantwell *et al* (2012) 34. See also Meintjies *et al* (2007) 1.

<sup>37</sup> Para 23, UN Guidelines; Cantwell *et al* (2012) 33-34.

<sup>38</sup> Para 23, UN Guidelines.

Experience has clearly demonstrated that deinstitutionalisation— if it is to be successful and protect children’s rights – is a highly complex and multi-faceted process. It requires careful planning. Furthermore, because not everyone supports change, it is important that all concerned individuals and agencies agree on the reasons behind a de-institutionalisation policy and understand its implications.<sup>39</sup>

This discussion highlights the fact that a clear distinction has been made between what amounts to ‘suitable’ residential care on the one hand and the traditional understanding of institutional placement on the other hand.<sup>40</sup> While institutional placement should rightly be the focus of de-institutionalisation strategies, it is my opinion that the development of more family-based residential facilities (see the discussion in the following section on ‘forms of alternative care’) for promoting the proper development of the child in itself represents a measure of deinstitutionalisation or an aspect of an overall deinstitutionalisation strategy or policy.

#### **4.2.1.3 Broadening the Scope of Alternative Care**

The UN Guidelines broaden the scope of the application of the right to alternative care by providing for continued care and support for young persons who require support when making the transition from care placements to independent living upon attaining majority (18 years).<sup>41</sup> All children who are outside their states of origin or habitual residence who are without parental care are also entitled to alternative care, including children who are victims of emergency situations.<sup>42</sup> Such children are described as either ‘unaccompanied’ or ‘separated’ children.<sup>43</sup> They are unaccompanied ‘if they are not cared for by another relative or an adult who by law or custom is responsible for doing so’, and separated ‘if they are separated from a previous legal or customary primary caregiver, but who may nevertheless be accompanied by another relative.’<sup>44</sup>

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<sup>39</sup> Cantwell *et al* (2012) 33-34, 43.

<sup>40</sup> See Chapter 3, section 3.6.5.4.

<sup>41</sup> Paras 27 & 28, UN Guidelines; Cantwell *et al* (2012) 31.

<sup>42</sup> Paras 29 (a) & 153, UN Guidelines.

<sup>43</sup> Unaccompanied or separated children include refugees and asylum-seekers, irregular migrants, and victims of trafficking, abduction and other forms of forced migration.

<sup>44</sup> Para 29(a)(i)-(ii), UN Guidelines. See also CRC Committee General Comment No 6 ‘Treatment of unaccompanied and separated children outside their country of origin’ (2005) paras 7 & 8; CRC Committee Report of the 2012 Day of General Discussion ‘The Rights of All Children in the Context of International Migration’ (2012) para 39.

In effect, the Guidelines highlight the importance of alternative care in exceptional circumstances for children in situations which are already the subjects of other international laws and standards.<sup>45</sup> The inclusion of these exceptional circumstances is due to the fact that the subject of alternative care has (like almost all other spheres of life) 'had to confront challenges resulting from a rapid expansion of cross-border issues in recent decades.'<sup>46</sup> As noted by Cantwell *et al*,

Various alternative care arrangements – including informal kinship care – are made for children abroad. One of the main reasons for taking up this question in the Guidelines, however, was to address concerns over international short-term 'hosting' and 'respite care' initiatives. Programmes of this kind, involving a stay of several weeks with a volunteer family abroad, are very frequently organised with few safeguards and no oversight, particularly in terms of ensuring the suitability of the host families. This is the first time that an attempt has been made to tackle this issue in an international standard-setting text.<sup>47</sup>

The wide scope of the Guidelines to include separated and unaccompanied children, and victims of emergency situations such as natural or man-made disasters (including international or internal armed conflicts and foreign occupation),<sup>48</sup> resonates with the wider scope of the categories of children requiring alternative care as contemplated by Article 25 of the ACRWC, unlike the narrower scope of the CRC.<sup>49</sup> In these exceptional circumstances, the Guidelines oblige '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' to pay special attention to, among others, developing 'necessary, temporary and long-term family-based care'; using residential care as a temporary measure; mandatory efforts towards family tracing and reintegration.<sup>50</sup> These provisions are important as there are severe, frequent and widespread risks of 'highly inappropriate responses to the situation of children identified as being without parental care in such circumstances.'<sup>51</sup> Justifying the wider scope of the Guidelines to include children in emergency situations, and with particular reference to institutional placements, it has been noted that:

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<sup>45</sup> Examples include The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the protection of Children (1996) and the United Nations High Commissioner for Refugees (UNHCR) *Guidelines on the Determination of the Best Interests of the Child* (2008). See further and generally, paras 137-141, UN Guidelines.

<sup>46</sup> Cantwell *et al* (2012) 114.

<sup>47</sup> Cantwell *et al* (2012) 115.

<sup>48</sup> Para 153, UN Guidelines.

<sup>49</sup> See chapter three, section 3.6.2.

<sup>50</sup> Para 154(a)-(f), UN Guidelines.

<sup>51</sup> Cantwell *et al* (2012) 117.



In the emergency context, the Guidelines take a far stronger line on the use of residential care than their consideration at a general level (notably s 21 – 23). Thus, in this special case, there is an outright prohibition on setting up new long-term facilities. This hard line approach is grounded largely in experience of foreign non-State actors arriving in a disaster zone with the intention and resources to establish a residential facility, regardless of existing policies. In the worst instances, they may subsequently decline to cooperate in, or even actively obstruct, family reunification efforts on behalf of children in their care.<sup>52</sup>

#### 4.2.2 Forms of Alternative Care under the UN Guidelines

The UN Guidelines provide broadly for two forms of alternative care: informal and formal. Alternative care is formal if the placement was ordered by a competent administrative body or judicial authority, including placements in residential facilities.<sup>53</sup> Informal alternative care refers to placements based on private arrangements initiated by the child, his parents (or relatives) or other person(s) without the involvement of any administrative body or judicial authority.<sup>54</sup> Sub-categories of formal care generally include: legally/judicially ordered foster care; group home care; and residential care (whether public or private).<sup>55</sup> Informal care comprises: kinship care; community-based care; and other family-based care arrangements.<sup>56</sup> It is important to note that the UN Guidelines, upon re-stating the importance of a family environment to the child's proper development,<sup>57</sup> progressively build on the non-exhaustive list of alternative care options provided in the CRC and the ACRWC, 'with priority to family- and community-based solutions.'<sup>58</sup> This is achieved by the development of formal options other than traditional foster care, such as: other family-based settings; family-like settings; residential care (with institutions as a sub-category); and supervised independent living arrangements.<sup>59</sup> The goal is to ensure that priority is given to the placement of a child in

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<sup>52</sup> Cantwell *et al* (2012) 117.

<sup>53</sup> Para 29(b)(ii), UN Guidelines.

<sup>54</sup> Para 29(b)(i), UN Guidelines; Cantwell *et al* (2012) 32.

<sup>55</sup> Roby (2011) 10.

<sup>56</sup> Roby (2011) 10.

<sup>57</sup> Para 3, UN Guidelines.

<sup>58</sup> Arts 20(3) CRC & 25(2) ACRWC; para 53, UN Guidelines; Cantwell *et al* (2012) 22 & 79; Cantwell (2010) 3.

<sup>59</sup> Para 29(c)(i)-(v), UN Guidelines. While *kafalah* is a type of 'other family-based care setting', the 'essential difference between "family-based" and "family-like" is that the former involves care within an existing family's domestic setting whereas the latter involves a group care arrangement, organised in a manner akin to that of an autonomous family, in which specific carers play a parental role but in a setting outside their domestic environment.' See Cantwell (2010) 8; Cantwell *et al* (2012) 33. Supervised independent living arrangements are 'designed for children and young people transitioning from a formal care setting to an independent life in the community.' They are based on provisions of the Guidelines concerning an after care policy for children transitioning from care placements. See generally paras 131-136, UN Guidelines; Cantwell *et al* (2012) 34, 98.



a setting that closely resembles a family environment, as much as is possible.<sup>60</sup> This is the rationale behind ensuring that institutional facilities for the alternative care of children are modelled after a ‘typical’ family setting.<sup>61</sup>

With reference to care settings generally, the CRC Committee in 2011, and relying on provisions of the UN Guidelines, defined care settings broadly as follows:

Care settings are places where children spend time under the supervision of their “permanent” primary caregiver (such as a parent or guardian) or a proxy or “temporary” caregiver (such as a teacher or youth group leader) for periods of time which are short-term, long-term, repeated or once only. Children will often pass between caregiving settings with great frequency and flexibility but their safety in transit between these settings is still the responsibility of the primary caregiver – either directly, or via coordination and cooperation with a proxy caregiver (for example to and from school or when fetching water, fuel, food or fodder for animals). Children are also considered to be “in the care of” a primary or proxy caregiver while they are physically unsupervised within a care setting, for example while playing out of sight or surfing the Internet unsupervised. Usual care settings include family homes, schools and other educational institutions, early childhood care settings, after-school care centres, leisure, sports, cultural and recreational facilities, religious institutions and places of worship. In medical, rehabilitative and care facilities, at the workplace and in justice settings children are in the custody of professionals or State actors, who must observe the best interests of the child and ensure his or her rights to protection, well-being and development. A third type of setting in which children’s protection, well-being and development also must be secured, are neighbourhoods, communities and camps or settlements for refugees and people displaced by conflict and/or natural disasters.<sup>62</sup>

The provision of alternative care therefore refers to the availability of a ‘family situation’ or ‘family environment’ for the child under the charge of an alternative ‘permanent primary caregiver.’ With reference to informal care, although there are clear distinctions between kinship care, community-based care and others,<sup>63</sup> the terms are often used interchangeably in literature, policy and practice concerning alternative care generally.<sup>64</sup> This study however refers strictly to kinship care without interchanging it with community-based care or others forms of informal care. However, kinship care and informal care will often be used interchangeably.

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<sup>60</sup> See Chapter 3, sections 3.2.3 (para 3) & 3.6.5 (para 4).

<sup>61</sup> Examples include: ‘small family groupings of children within a larger institution; households of children within a compound of such houses (set apart from the surrounding community) under the care of an adult and living as a family unit within a community; and children placed in small family-sized units with an adult caretaker in households scattered throughout the community.’ See Williamson J *A Family is for a Lifetime: Synergy Project* (2004) 12, Available at < <http://www.womenchildrenhiv.org/pdf/p09-of/of-30-00.pdf> > (accessed 19 October 2012).

<sup>62</sup> CRC Committee, General Comment No. 13: ‘The right of the child to freedom from all forms of violence’ (2011), para 34.

<sup>63</sup> Roby (2011) 21-26.

<sup>64</sup> Roby (2011) 11-13.

### 4.2.3 The Relationship between Informal Alternative Care and Formal Alternative Care

The aim of this section is to point out that the UN Guidelines do not demand that kinship care or informal care generally should interact with the formal child protection system in the same manner as formal alternative care models. In other words, although the Guidelines recognise kinship care (among others) as alternative care, they do not intend that formal and informal care be regulated by exactly the same standards. On the relationship between formal and informal alternative care, the UN Guidelines significantly provide as follows:

The present Guidelines apply to the appropriate use and conditions of *alternative formal care*<sup>65</sup> 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*,<sup>66</sup> 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.<sup>67</sup>

With the direct reference made to the CRC above,<sup>68</sup> this is the closest the UN Guidelines come to the definition of a family environment (in relation to responsibility for the care of the child) as comprising of not just parents, but also 'legal and customary caregivers'. However, this is done without the Guidelines shifting ground on the fact that the role of the extended family in kinship care is generally alternative care, albeit informal.<sup>69</sup> Thus, it is quite clear from the above provision that the Guidelines place greater emphasis on formal forms of alternative care. In other words, the application of the standards of the Guidelines to kinship care and informal care generally is not contemplated to be at the same level as it should be with formal alternative care placement options. For example, with reference to the phrase 'only where indicated do the Guidelines also apply to informal care settings', it is logical to argue that matters concerning the assessment and training of potential foster carers, the monitoring and regulation of institutional care facilities, the requirement to maintain standard records and compliance with certain accommodation requirements among others,<sup>70</sup> do not apply to informal (kinship) care.

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<sup>65</sup> Emphasis added.

<sup>66</sup> Emphasis added.

<sup>67</sup> Para 27, UN Guidelines.

<sup>68</sup> See Arts 5 & 18 CRC. See also Art 20(1) ACRWC.

<sup>69</sup> This is arguably the implication of the sentence, '...the Guidelines also apply to informal care settings, having due regard for...the extended and the community...and customary caregivers.'

<sup>70</sup> See generally paras 80-100 & 105-136, UN Guidelines.

The Guidelines are clear on the fact that all children deprived of parental care have the right to alternative care, including special assistance and protection by the State regardless of whether or not the alternative care option provided is formal or informal. However, not all efforts at providing alternative care need go through the formal child protection system, especially when the reality is that the bulk of the children concerned are informally absorbed into kinship care.<sup>71</sup> In fact, the inclusion of kinship care in the Guidelines, which no previous instrument had explicitly done, was based on the realisation that throughout the world, a 'sizeable majority of children unable to live with their parents are cared for under informal arrangements'.<sup>72</sup>

Consequently, the approach adopted by the Guidelines is the provision of a basic set of guidelines to guide States in organising informal care and its interaction with the child protection system. The relevant provisions in 4 paragraphs of the Guidelines are reproduced below:<sup>73</sup>

1. 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.
2. 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.
3. The State should recognize the *de facto* responsibility of informal carers for the child.
4. 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.

From the above, the first point is to the effect that States are enjoined to recognize the reality of informal care, and provide varying levels of adequate support for different informal care settings as determined by particular circumstances. Second, not all informal care situations are appropriate for official notification (or formalisation), but this should not preclude them from accessing services and benefits necessary for the carers to take proper care of the children. Third, the recognition of the *de facto* responsibility of informal carers derives from the recognition of cultures where persons other than parents may have charge over a

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<sup>71</sup> Cantwell *et al* (2012) 76.

<sup>72</sup> Cantwell *et al* (2012) 76.

<sup>73</sup> Paras 76-79, UN Guidelines. See also para 18 which provides that should ensure the welfare and protection of children in informal care '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.'

child.<sup>74</sup> Finally, as is the case with placement in formal care, State responsibility to ensure the protection of the child in informal care still subsists.

Consequently, these provisions together with Paragraph 27 (on the application of the guidelines) earlier cited, represent the drafters' acknowledgement of the fact that while a rigid formalisation process for kinship care may be problematic, it does require 'oversight and/or may benefit from State support to ensure optimum child protection. It is here that the standards [of the UN Guidelines] have their role to play.'<sup>75</sup> Thus, the Guidelines do not call for the formalisation of all situations of kinship care. Further proof of this is provided in another section of the Guidelines as follows:

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.<sup>76</sup>

The above notwithstanding, some scholars and other stakeholders do advocate more or less for the formalisation of kinship care in general on the basis that the 'formalisation of kinship care can increase the protection and well-being of children living with their relatives.'<sup>77</sup> A general call for formalisation however raises questions such as what is meant by formalisation and how do you draw the line between the requirement of formalisation and a family's right to privacy? These are some of the questions that subsequent sections and the author's proposed framework for kinship care will attempt to answer.

For now, it suffices to state that the position of the UN Guidelines with regards to informal care generally, is that States must establish measures to ensure the protection of children in such arrangements.<sup>78</sup> Due account should be taken of the principle of continuity in upbringing when placing a child in alternative care while paying attention to the promotion of all other rights of the child.<sup>79</sup> Given that the State has a duty to assist needy families in their responsibilities towards children, poverty should not be the sole justification

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<sup>74</sup> Arts 5 CRC & 20 ACRWC; para 27, UN Guidelines.

<sup>75</sup> Cantwell *et al* (2012) 31.

<sup>76</sup> Para 56, UN Guidelines.

<sup>77</sup> Oswald E *Because we care: programming guidance for children deprived of parental care* (2009) 27.

<sup>78</sup> Paras 18 & 27, UN Guidelines.

<sup>79</sup> Paras 11, 12 & 16, UN Guidelines.

for the removal of a child from parental care or his/her family environment.<sup>80</sup> In fact, separation of a child from the family should be a measure of last resort.<sup>81</sup> Additionally, every effort should be made to maintain the existing bonds among siblings unless there is other justification for their separation.<sup>82</sup> The following two sections discuss various aspects of kinship care more specifically, together with a focus on the intersections between kinship care and foster care.

### 4.3 Kinship Care: Definition, Forms, Nature, and Prevalence

In 1974, Stack documented the role of the extended family in the family and child care practices of the African American community in the United States of America (USA), a work which inspired the phrase 'kinship care'.<sup>83</sup> According to Stack, although kinship care may mean different things to different people, the implication is the same to the extent that it entails placing reliance on members of the extended family (including friends) for the day-to-day care of children to ensure their survival and development.<sup>84</sup> Thus, the UN Guidelines define kinship care as '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'.<sup>85</sup> Kinship care is variously described in different jurisdictions: 'relative care' is used predominantly in Ireland; 'family and friends' care in the United Kingdom (UK) and 'kinship care' in Australia, New Zealand and the USA.<sup>86</sup>

The inclusion of kinship care in the UN Guidelines is said to highlight the need to respect and promote traditional coping mechanisms for children in need of parental care, particularly in developing countries where the economic, social and cultural dimensions or issues are different. As put by Cantwell *et al*,

On a wider level, there is a growing tendency to promote formalised (and often legalised) alternative care arrangements as the most desirable. This view has been partly inspired by the 'Western' approach to resolving social problems. It is claimed in some quarters that only formal arrangements can provide the accountable guarantees necessary for safeguarding the best interests and other rights of the children

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<sup>80</sup> Para 15, UN Guidelines.

<sup>81</sup> Para 14, UN Guidelines.

<sup>82</sup> Para 17, UN Guidelines.

<sup>83</sup> Stack C *All our Kin: Strategies for Survival in a Black Community* (1974).

<sup>84</sup> Stack (1974) 31.

<sup>85</sup> Para 29(c)(i), UN Guidelines.

<sup>86</sup> Broomfield L & Osborn A 'Kinship care' (2007) 7 *Research Brief* (Australian Institute of Family Studies) 1; Mason J, Falloon Jm Gibbons L, Spence N & Scott E *Understanding kinship care* (2002) 1; O'Brien (2012) 127-128;

concerned. But this view has a number of negative consequences. It is somewhat dismissive of (and underrates) the benefits of care arrangements that are based more on custom and oral commitments. In doing so, it actually discourages support for informal systems and carers.

The combined consequence of this, especially in economically disadvantaged countries and communities where international intervention is common, include the unwarranted establishment of residential facilities, the introduction of culturally-unknown alternative care practices (e.g. formal foster care and adoption), or the promotion of inter-country adoption. The Guidelines militate against such initiatives.<sup>87</sup>

As noted above however, kinship care is not a phenomenon that is practised only in lower income countries; it is a key feature of the child welfare system in many developed countries of the 'West' such as Australia, New Zealand, the Netherlands, UK and the USA, albeit subject to varying considerations and contextual differences.<sup>88</sup> What is significant is the fact that while kinship care has always been a globally dominant form of child care, its emergence in law, policy and practice within the context of the right to alternative care and child protection is a recent development.<sup>89</sup>

In the African context, while evidence-based data is largely fragmented, available statistics show that at least 90 per cent of double orphans live with relatives in 35 countries of sub-Saharan Africa, including Namibia and South Africa.<sup>90</sup> Data from 8 Latin American, 2 Caribbean and 6 Asian countries show the same result.<sup>91</sup> Similarly, '85 per cent of children not living with at least one parent were living with the extended family', with grandmothers comprising the largest number of carers in high HIV-prevalence countries.<sup>92</sup> Globally, the majority of kinship carers are grandparents (especially grandmothers), followed by aunts, uncles and older siblings.<sup>93</sup>

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<sup>87</sup> Cantwell *et al* (2012) 82. This is without prejudice to the fact that 'certain traditional practices are not always respectful of the rights of children. There is evidence from many countries of children who are placed with relatives (especially uncles and aunts) only to be exploited or discriminated against. Not surprisingly, this is a genuine fear of many children who choose to set up and remain in child-headed households.' Such situations provide some of the reasons for the preference for informal care to be acknowledged/recognised and subject to some form of regulation, since States remain ultimately responsible for protecting children from all forms of maltreatment and exploitation whether or not in alternative care.

<sup>88</sup> The formal placement of children in kinship care rather than in foster care was a policy decision which began in the late 1980s in Australia, New Zealand and the United States of America, and in the 1990s in other parts of Europe. See O'Brien (2012) 127-128.

<sup>89</sup> See Broad B *Kinship Care: Providing positive and safe care for children living away from home* (2007) 1. See also UNICEF/ISS (2004); Scannapieco M & Hegar RL 'Kinship foster care in context' in Hegar RL & Scannapieco M (eds) *Kinship care: Policy, practice and research* (1999) 1.

<sup>90</sup> Roby (2011) 14.

<sup>91</sup> See Ainsworth M & Filmer D 'Inequalities in children's schooling: AIDS, orphanhood, poverty and Gender' (2006) 30(6) *World Development* 1106 – cited in Roby (2011) 14. See also Monasch R & Boerma JT 'Orphanhood and childcare patterns in sub-Saharan Africa: An analysis of national surveys from 40 countries' (2004) 18 (suppl 2) *AIDS* S55.

<sup>92</sup> USAID & UNICEF *The evidence base for programming for children affected by HIV/AIDS in low prevalence and concentrated epidemic countries* (2008) – cited in Roby (2011) 15.

<sup>93</sup> Broad (2007) 2: 'For example, in Namibia, South Africa and Zimbabwe, 60 per cent of orphans and vulnerable children are in grandparent-headed households.' See also Backhouse J & Graham A 'Grandparents raising grandchildren: Negotiating the

Broadly, kinship care (like alternative care generally) is classified into two basic forms or types: 'formal' and 'informal'. Kinship care is formal if the placement was ordered by a competent administrative body or judicial authority.<sup>94</sup> Thus, the family is subject to an assessment of its suitability for the child, and is entitled to continuous support and monitoring.<sup>95</sup> On the other hand, kinship care is informal if the placement is based on a private arrangement initiated by the child, his parents (or relatives) or other person without the involvement of any administrative body or judicial authority.<sup>96</sup> Other terminologies with similar meanings are also used by other scholars. For example, kinship care arrangements that occur without the involvement of the child protection system is also described as 'private kinship care' while those which involve the child protection system as termed 'public kinship care'.<sup>97</sup> In relation to foster care in the child protection system, 'public kinship care' is also described as 'kinship foster care'<sup>98</sup> while traditional foster care arrangements are described as 'non-relative foster care'.<sup>99</sup>

More recently in 2012, O'Brien notes that there are four settings of kinship placements, 'which can be viewed as sequential stages in a child and family's encounter with the child welfare system'.<sup>100</sup>

The first type of kinship care is called "informal care" and this occurs when the family make their own private arrangements in response to a family crisis. An informal placement can also occur as a result of state intervention, arising from a care and protection issue but, in this instance, the state diverts the child back to the extended family. The state may provide some level of assistance, but this is usually limited when compared with the supports and financial assistance available when the child is in formal care. "Formal care" is the third situation, and it is this type of care that is usually referred to as formal kinship care. A fourth situation is referred to as "kinship adoption" or "kinship guardianship". This applies when the kinship carer moves to secure the placement through legal means, such as a residence order (in the United Kingdom), or special guardianship or adoption laws that are used more widely.<sup>101</sup>

'Key differences are connected with the legal basis of entry into the care system, the reason for care and the length of time of time it is envisaged the child will remain in the care of the relatives.'<sup>102</sup> Apart from

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complexities of role-identity conflict' (2011) *Child and Family Social Work* 1; Roby (2011) 15; HelpAge International *Forgotten families: Older people as carers of orphans and vulnerable children* (2005).

<sup>94</sup> Para 29(b)(ii), UN Guidelines.

<sup>95</sup> Broad (2007) 2.

<sup>96</sup> Para 29(b)(i), UN Guidelines.

<sup>97</sup> US Department of Health and Human Services (USDHHS) 'Report to the Congress on Kinship Foster Care', June 2000, iv, available at < <http://aspe.hhs.gov/hsp/kinr2c00/index.htm> > and < <http://aspe.hhs.gov/hsp/kinr2c00/full.pdf> >.

<sup>98</sup> Takas M *Kinship care and family preservation: A guide for states in legal and policy development* (1993) 3.

<sup>99</sup> USDHHS (2000) iv; Berrick JD, Barth RP & Needell B A comparison of kinship foster homes and foster family homes: Implications for kinship foster care as family preservation (1994) 16(1/2) *Children and Youth Services Review* 33.

<sup>100</sup> O'Brien (2012) 128.

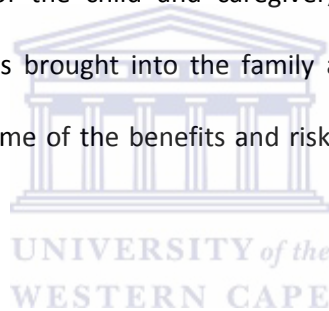
<sup>101</sup> O'Brien (2012) 128.

<sup>102</sup> O'Brien (2012) 128.



'kinship guardianship', O'Brien classifies the three other forms of kinship care as follows: 'informal care'; 'informal kinship care'; and 'formal kinship care'. The basic difference between the three stem from two factors: whether or not there was State involvement in the placement process and if so, at what stage the State intervention came into the process.

Regardless of what form of kinship care is in place, in comparison to other forms of alternative care generally, there are certain benefits as well as challenges associated with kinship care. According to Roby, available evidence on both the benefits and risks associated with kinship care are mixed, as there are factors which in varying contexts, determine such benefits and risks.<sup>103</sup> For example, a 'pivotal factor' which generally determines the quality of care that a child in informal kinship care would receive is the degree of relatedness between the child (and his parents) and the kinship carer.<sup>104</sup> Other factors include the financial ability of the kin, the age and sex of the child and caregiver, the prevailing local culture and 'the circumstances under which the child is brought into the family and many other factors we do not yet know.'<sup>105</sup> All these notwithstanding, some of the benefits and risks generally associated with kinship care are explored below.



#### **4.3.1 Benefits of Kinship Care**

First, kinship care promotes and empowers local and culturally-sensitive support systems. As a model of care derived from the traditional extended family system, it provides an opportunity for law to be developed with recourse to indigenous and non-intrusive models that encourage the natural coping mechanisms of various societies.<sup>106</sup> This is important considering that the practise of kinship care derives from cultural norms on which people and societies place significant value.<sup>107</sup> In essence, kinship care promotes the 'preservation of family [in a broad sense], community and cultural ties.'<sup>108</sup>

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<sup>103</sup> Roby (2011) 16.

<sup>104</sup> Roby (2011) 16.

<sup>105</sup> Roby (2011) 17.

<sup>106</sup> Tolfree D *A sense of belonging: Case studies in positive care options for children* (2006) 1.

<sup>107</sup> Oswald (2009) 24.

<sup>108</sup> Broad (2007) 3.



Kinship placements have been found to promote stability in children's growth and development process compared to other models of care.<sup>109</sup> In comparison to foster care for instance, the likelihood of 'multiple placements which often damage a child's ability to bond with a caregiver' is reduced.<sup>110</sup> Since the risk of disruptions and uncertainties are minimal, the chances of children being distressed, traumatised or developing low self-esteem are reduced.<sup>111</sup> This is because they do not necessarily feel a loss of identity since they are usually placed with relatives with whom they share a common history and culture.<sup>112</sup> Illustrating the importance of this element of kinship care, O'Brien cites the example of a 10-year old child, who was moved into kinship care after having lived in many different foster homes, who stated: 'I'm with me (sic) family now you know, they know me'.<sup>113</sup> Thus, children are generally able to make a smoother and easier transition into care because of the familiarity of the kinship carers.<sup>114</sup>

Kinship care thus promotes continuity in upbringing which is an important principle of the right to alternative care.<sup>115</sup> Kinship placements keep children in their original communities of origin where 'they maintain their family relationships, social networks and contact with schools, places of worship, and other familiar places'.<sup>116</sup> They are therefore able not only to preserve their self-identity but their cultural identity as well through opportunities to absorb the values of their culture, and the development a sense of belonging to a larger community.<sup>117</sup> Related to this is that kinship care increases the chances of being able to keep siblings together in cases where a sibling group requires alternative care.<sup>118</sup>

As discussed in the previous chapter, the provision of alternative care goes beyond meeting the physical needs of the child. It incorporates measures to also respond to the emotional, mental, spiritual and psycho-

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<sup>109</sup> O'Brien (2012) 129; Broad (2007) 3.

<sup>110</sup> Oswald (2009) 24. It has however been noted that within the context of kinship care, there are cases of children being 'passed around' different members of the extended family over an indefinite period of time. See Broad (2007) 3; ISS & UNICEF (2004) 3-4.

<sup>111</sup> ISS & UNICEF (2004) 4; Broad (2007) 3.

<sup>112</sup> Broad (2007) 3.

<sup>113</sup> O'Brien V 'Fostering the family: A new systemic approach to evolving networks of relative care', unpublished PhD thesis, National University of Ireland, 1997, 301 – cited in O'Brien (2012) 130.

<sup>114</sup> Messing J 'From the child's perspective: A qualitative analysis of kinship care placements' (2006) 28(12) *Children and Youth Services Review* 1415.

<sup>115</sup> See section 3.6.4 of chapter 3.

<sup>116</sup> Oswald (2009) 24. See also Tolfree (2006) 15.

<sup>117</sup> Olson K, Knight SS & Foster G *From Faith to Action: Strengthening Family and Community Care for Orphans and Vulnerable Children in Sub-Saharan Africa* (2006) 4; Williamson (2004) 4.

<sup>118</sup> Lim (2010) 152; May JW 'Utah kinship placements: Considering the intergenerational cycle of domestic violence against children' (1996) 22 *Journal of Contemporary Law* 97. See also Ministry of Gender Equality and Child Welfare (Namibia) *Foster care in Namibia: Recommendations for the Framework* (2009).

social needs of the child in an encouraging and supportive manner.<sup>119</sup> Compared to institutional form of care, it is 'commonly assumed that children who are raised by their relatives will be more likely to receive love and support by their caregivers due to kinship bonds and existing relationships'.<sup>120</sup> Consequently, the family environment provided by kinship care presents opportunities for the display and practise of love, affection and personal attention, which are essential to a child's development and well-being.<sup>121</sup> It is however important to not always take this assumption at face value as evidence shows that not all kinship relationships or care situations are 'loving and supportive.'<sup>122</sup> Besides, O'Brien notes that there is a dearth of research or literature addressing 'the question of how safe kinship care is [in practice]'.<sup>123</sup>

Of particular relevance to the African context is that kinship care generally expands children's capacity for self-sufficiency by exposing them to experiences 'valuable for social, cultural and economic self-sufficiency as the child becomes an adult.'<sup>124</sup> This is possible because kinship carers may not necessarily feel constrained in the manner of child upbringing and training adopted. In other words, they do not need to adopt standardised methods determined by State law and policy. This element of kinship care is valuable provided the children are not exploited or exposed to other forms of abuse. Children in kinship care are therefore able to gain valuable social skills in their interactions with the wider society as well knowledge, skills and experience in income-generating activities.<sup>125</sup> The importance of this cannot be over-emphasised when one considers the need for an after-care policy particularly for children placed in institutional facilities, in order to enable them gain the much needed skills for interacting with the world in their new status as independent adults.<sup>126</sup> Children in kinship care may therefore transition more comfortably into adulthood compared to children in other models of care.

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<sup>119</sup> Section 3.6.5, Chapter 3.

<sup>120</sup> Oswald (2009) 24.

<sup>121</sup> Olson *et al* (2006) 38; Oswald (2009) 24.

<sup>122</sup> Oswald (2009) 24.

<sup>123</sup> O'Brien (2012) 131.

<sup>124</sup> Oswald (2009) 25.

<sup>125</sup> Williamson (2004) 4.

<sup>126</sup> See generally paras 69-75, UN Guidelines.

In kinship care, the relationship between the parties is generally mutually beneficial such that the children and their relatives provide mutual care and support for themselves.<sup>127</sup> While the relatives are responsible for the care of the child, the child is also regarded as a source of physical and emotional support to the caregiver.

For example, orphaned children and their grandparent caregivers rely on one another during a process of mourning. Children can also physically support grandparents by taking on the physically challenging household chores. In addition, children can later provide economic security for a grandparent as they increase in age.<sup>128</sup>

Related to the above is the fact that since kinship care is based on family ties, the relationship lasts into adulthood and throughout life unlike other models of alternative care where the children become independent at 18 years and the relationships are dissolved. The continuity of kinship relations means that relatives can continually rely on one another for on-going support.<sup>129</sup> In summing up the general benefits of kinship care, O'Brien notes that:

... the outcomes for children in kinship care are generally seen as positive in terms of stability of placement, identity formation, maintaining contact with family, enabling siblings to live together, child protection, and greater tolerance by relatives for behavioural and mental health issues.<sup>130</sup>



#### 4.3.2 Challenges or Risks associated with Kinship Care

The potential for abuse, as noted above, is one of the most obvious risks associated with kinship care. Despite the general positive outlook of kinship care, a kinship tie is not necessarily a guarantee that a child will receive adequate care and protection.<sup>131</sup> There are cases of children in kinship care receiving less equal treatment in the household as compared to birth children in the same household in matters such as feeding, education and other aspects of care.<sup>132</sup> Sometimes the child in kinship care is forced to serve as an

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<sup>127</sup> Oswald (2009) 25.

<sup>128</sup> Oswald (2009) 25. See also International HIV/AIDS Alliance & HelpAge International *Building Blocks: Africa-wide briefing notes: Supporting older carers* (2004) 4.

<sup>129</sup> Loudon M, 'Implementing the UNGASS goals for orphans and other children made vulnerable by HIV/AIDS', Eastern and Southern Africa Regional Workshop on Children Affected by HIV/AIDS, 25-29 November 2002; Windhoek, Namibia, 38 – cited in Oswald (2009) 25.

<sup>130</sup> O'Brien (2012) 129.

<sup>131</sup> Tolfree (2006) 15.

<sup>132</sup> Oswald (2009) 26; Broad (2007) 4-5; Tolfree (2006) 15. This is more so when children are placed with distant or previously unknown relatives or when the caregivers live in poverty.

unpaid domestic worker for the household.<sup>133</sup> Where the child was removed from his original family environment due to a child protection concern, such as sexual exploitation or where the child is infected with HIV/AIDS, the child may be stigmatised and isolated.<sup>134</sup> In the case of abuse, the child may be re-exposed to abuse if the kin carer allows the perpetrator to have access to the child. This is possible because of the kinship bond between the perpetrator and the kin carer.<sup>135</sup> There is also the risk of the child being similarly abused by the relative, especially in an informal kinship care situation where the matter is not brought to the attention of the relevant authorities or where (the) abuse is a 'familial trait'.<sup>136</sup>

Relative carers are often poor and have fewer resources than caregivers in other models, which impacts on the ability of the caregiver to adequately protect and provide for the child, hence the need for government or other external support.<sup>137</sup> And in cases where the caregivers are uneducated, they are less likely to receive helpful services because of the informal nature of the arrangement and their lack of information and knowledge on how to access the welfare services.<sup>138</sup> The lack of services may itself make relatives unwilling to care for children, leaving only the option of their being institutionalised or placed in foster care.<sup>139</sup> The caregivers may also lack the requisite skills for properly parenting and communicating with the child, especially where the children suffer from behavioural and psychosocial issues or when the caregivers are too old to cope with the demands of raising children.<sup>140</sup>

There is also the risk of children getting drawn into family conflict such as when decisions have to be made among several extended family members 'over who should take care of the child, who has decision-making power, or the division of responsibilities for each family member'.<sup>141</sup> Where siblings are involved, they may be separated among several family members in a bid to share the burden of responsibility among themselves. While this may seem a practical thing to do, it is not necessarily in the best interests of the

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<sup>133</sup> Cantwell N 'The challenges of out-of-home care' (2005) *Early Childhood Matters* 7.

<sup>134</sup> Oswald (2009) 26; Broad (2007) 4.

<sup>135</sup> Oswald (2009) 26.

<sup>136</sup> Oswald (2009) 26. See also ISS & International Reference Center for the Rights of Children Deprived of their Family (IRC) *Fact sheet: A global policy for children and the family: Elaborating a lifelong plan: Kinship Care* (2006) 1.

<sup>137</sup> Oswald (2009) 25; Broad (2007) 7.

<sup>138</sup> ISS & IRC (2006) 1.

<sup>139</sup> Oswald (2009) 26.

<sup>140</sup> Oswald (2009) 25; Broad (2007) 4.

<sup>141</sup> Oswald (2009) 26; Broad (2007) 5.

children who ought to be together.<sup>142</sup> Besides, the reason for separating them may also be linked to the desire of each relative to benefit from a relative's child as a labour resource.<sup>143</sup>

The motives of kinship carers are not always altruistic. Apart from viewing the child as a labour resource, some relatives may also have their sights set on any property entitlement or inheritance of the child.<sup>144</sup> And where the relationship between the kinship carer and the child's parents is unhealthy, this may impact negatively on family reunification efforts.<sup>145</sup> Reunification efforts may also be abandoned in cases where the carer 'receives higher allowances than those available to parents.'<sup>146</sup> Other negative motives include fear of being haunted by a deceased relative, getting registered for support benefits or having intentions of giving a kin's female child as a wife to a friend, associate, or other relative.<sup>147</sup>

In the face of the changed nature of many African societies due to factors such as rural-urban migration, changed economic systems, and the impact of HIV/AIDS among others, it is important to avoid idealising kinship care based on historical patterns. The fact is that in the face of various crises and chronic emergencies, many families can become 'over-extended in their ability to care for additional children.'<sup>148</sup> There are cases of families that have lost an entire generation to HIV/AIDS such that there are very few relatives available to care for a significant number of orphans.<sup>149</sup> As Loudon points out concerning Africa,

We have to kill the myth of the capacity of the African extended family. This family has been over-extended for quite some time now, and is no longer the coping mechanism that communities in sub-Saharan Africa [once relied on].<sup>150</sup>

Grandparents who usually take up kinship caring responsibilities 'often suffer from health problems and because of their age, their time as caregivers is limited.'<sup>151</sup> In effect, the children in such placements face the risk of deprivation again resulting in another cycle of alternative care seeking measures. These challenges represent cracks in the kinship care system which stakeholders seek to seal rather than debating

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<sup>142</sup> Para 17, UN Guidelines.

<sup>143</sup> Cantwell (2005) 7.

<sup>144</sup> Tolfree (2006) 15; Loudon (2002) 38

<sup>145</sup> Cantwell (2005) 7.

<sup>146</sup> Broad (2007) 5.

<sup>147</sup> Mann G *Family Matters: The Care and Protection of Children Affected by HIV/AIDS in Malawi* (2002) 29-31; Broad (2007) 5.

<sup>148</sup> Oswald (2009) 25.

<sup>149</sup> Oswald (2009) 25.

<sup>150</sup> Loudon (2002) 10 – as cited in Oswald (2009) 25.

<sup>151</sup> Broad (2007) 4.

as to whether kinship care is a suitable or an ideal system of care.<sup>152</sup> Some of the problems associated with kinship care are attributable to fact that, in practice, kinship is not properly conceptualised within the framework of the right to alternative care, particularly when compared to foster care. What follows is a discussion on the relationship between kinship care and foster care with a guide as to how both should be understood within the alternative care framework, particularly with regards to kinship care's interactions with the child protection system.

#### 4.4 The Relationship between Kinship Care and Foster Care

In Chapter one of this study, child protection for purposes of this study is said to refer to formal responses or measures of intervention by the State to the abuse of children within the family or a domestic environment in order to protect the child from harm;<sup>153</sup> usually by ensuring the separation of the child from that environment (and placing the child in the State protective custody or foster care).<sup>154</sup> Foster care generally and traditionally refers to a temporary placement arrangement (usually with non-relatives of the child) for a period ranging from a few months to two years.<sup>155</sup> The UN Guidelines define foster care as:

situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care.<sup>156</sup>

The phrase 'other than the child's own family' may be interpreted in two ways. First, it may simply refer to a domestic environment that does not include the child's parents which would be a definition of family in the narrow sense of the UN Guidelines, as already alluded to.<sup>157</sup> In that case, other relatives who are not the child's parents may be his foster parents (relative foster care). The phrase may also be interpreted as a domestic environment comprising of people who are not biologically related to the child (non-relative foster care). However to the extent that, in defining kinship care (section 4.3 above), the UN Guidelines

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<sup>152</sup> Loudon (2002) 19.

<sup>153</sup> Harm here includes abuse, neglect, exploitation and all forms of violence against children.

<sup>154</sup> Doyle JJ 'Child Protection and Child Outcomes: Measuring the Effects of Foster Care' (2007) 97(5) *American Economic Review* 1583.

<sup>155</sup> Doyle (2007) 1538.

<sup>156</sup> Para 29(c)(ii), UN Guidelines.

<sup>157</sup> See section 4.2.1 above.

contrast it to foster care by a particular reference to the 'child's extended family'; I argue that the latter interpretation is the intended one. This is more so because as subsequent discussions will show, issues around the requirements of 'selection', 'qualification', 'approval' and 'supervision' in relation to kinship care (or relative foster care) are not settled among scholars. Thus, the UN Guidelines arguably define foster care as it is traditionally understood: the (temporary) placement of a child with persons other than his parents and to whom he is biologically unrelated.<sup>158</sup> Much of the controversy around the status of kinship care revolves around its interactions with the child protection system, particularly with regards to its relationship to foster care;<sup>159</sup> hence the importance of understanding the Guidelines distinction between kinship care and foster care. A particular issue is around whether financial benefits should accrue to kinship carers and how this should be organised.<sup>160</sup> (There is no controversy around financial payments for traditional foster care).

It should be pointed out that this author cannot and does not attempt to supply answers to all the questions raised by these issues, particularly in the context of the 'Western' countries where the debates have been going on for years and continue to be in issue. Some of the countries that have played a leading role in these debates include Australia, New Zealand, Ireland, the Netherlands, the United Kingdom and the United States of America (USA).<sup>161</sup> However, through an analysis of some of the provisions of the Guidelines in relation to the subject, I aim to provide some other perspectives that may contribute towards resolving

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<sup>158</sup> Williamson (2004) 12.

<sup>159</sup> Hegar & Scannapieco (1999) 5.

<sup>160</sup> Hegar & Scannapieco (1999) 6.

<sup>161</sup> See generally studies on the following countries : New Zealand: Connolly M *Kinship care - A selected literature review* (2003); Australia: Cashmore J 'Kinship care: A differentiated and sensitive approach in developing practice' (2001) *Winter Developing Practice 5* & DCSNSW *Out of home care service delivery mode: Out of home services* (2007); The Netherlands: Portgengen R & Der Neut B 'Assessing family strengths: A family systems approach' in Greeff R (ed) *Fostering kinship: An international perspective on kinship foster care* (1999); Ireland: O'Brien V 'Relative care: A different type of foster care - implications for practice' in Kelly G & Gilligan R *Issues in foster care: Policy, practice and research* (2000); O'Brien V *Assessment of the relative home. Care planning, assessment and decision making: Towards a Practice Model* (2004); Northern Ireland: Lernihan U (2010) 'Kinship Foster Care ....Equal but different', Presentation made to Queen's university students, Commissioning Lead Adoption and Permanence Health and Social Care Board, 10 November, 2012; Department of Health, Social Services and Public Safety (DHSSPSNI) *Standards for kinship foster carers in Northern Ireland Draft* (2010); the United Kingdom: Pitcher D 'Assessing grandparents carers: A framework' in Broad B (ed) *Kinship Care: The Placement Choice for Children and Young People* (2001) 153; Talbot C & Calder M (eds) *Assessment in kinship care* (2006); Hunt J, Waterhouse S & Lutman E *Keeping them in the family: Outcomes for children placed in kinship care through care proceedings* (2008); Farmer E & Moyers S *Kinship care: Fostering effective family and friends placements* (2008); Department of Education *Family and friends care: Statutory guidance in England* (2010), at < <https://www.education.gov.uk/publications/eOrderingDownload/Family%20and%20Friends%20Care.pdf> >; and the United States of America: Scannapieco M & Hegar RL 'A non-traditional assessment framework for formal kinship homes' (1996) 75 *Child Welfare* 567; Scannapieco M 'Formal kinship care practice models' in Hegar R & Scannapieco M (eds) *Kinship Foster Care: Policy Practice and Research* (1999) 71; Child Welfare League of America *Standards of excellence for kinship care services* (2000); Child Welfare League of America *A tradition of caring: A guide for assessing families for kinship care* (2003); Geen R (ed) *Kinship care: Making the most of a valuable resource* (2003).



some of the controversies, with a particular focus on Africa where the issues have only begun to be grappled with in recent years.

#### 4.4.1 The Relationship between Kinship Care and Foster Care: General Background

Prior to the popularity of, and reliance on kinship care for children in need of State protection (in the 'West'), foster care had assumed great significance as the primary placement choice for alternative care, such that by the 1990s, there was a significant increase in the volume of literature on foster care.<sup>162</sup> Over time however, the foster care system began to be faced with numerous challenges leading to its being declared to be in a crisis in many countries.<sup>163</sup> Examples of the problems include: the rapid increase in the number of children in need of placement compared to the much smaller number of available foster carers resulting in matching difficulties; increasing employment rate of women; increase in emotional and behavioural problems of children which many foster carers were unable to deal with; and the waning popularity of traditional institutional care, among others.<sup>164</sup> In addition, 'Western' nations began to pay attention to the role of the extended family in the child care practices of other minority racial groups and indigenous communities such as the African Americans in the USA and the aboriginal peoples in Australia and others.<sup>165</sup> Thus, kinship care assumed significance as part of the spectrum of care placements 'as a method of respecting the significance of cultural connection for indigenous persons and other minority groups.'<sup>166</sup>

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<sup>162</sup> Sellick C 'From famine to feast: A review of the foster care research literature' (2006) 20 *Children & Society* 67.

<sup>163</sup> Barber JG & Delfabbro PH *Children in foster care* (2004) 1.

<sup>164</sup> Hannon C, Wood C & Bazalgette L *To deliver the best for looked after children, the state must be a confident parent...* (2010); Pithouse A & Lowe K 'Children in foster care with challenging behaviour in Wales (UK): Key themes and issues for practice and research' (2008) 89 *Families in Societies: The Journal of Contemporary Social Services* 109; Sinclair I *Fostering Now* (2005); Wilson K, Sinclair I, Taylor C, Pithouse A & Sellick C *Fostering success: An exploration of the research literature in foster care* (2004).

<sup>165</sup> O'Brien (2012) 128; Atwool N 'Children in Care: A report into the quality of services provided to children in care', Office of the Children's Commissioner (New Zealand), September 2010, 35, at <[http://www.acya.org.nz/site\\_resources/library/Documents/Other\\_Resources/OCC\\_Children\\_in\\_Care\\_Report.pdf](http://www.acya.org.nz/site_resources/library/Documents/Other_Resources/OCC_Children_in_Care_Report.pdf)>; Ince (2009) 25.

<sup>166</sup> Atwool (2010) 35. In the USA for instance, about 1.3 million children in the black community are found to be in kinship while just about 300,000 are in institutional care facilities and 290,000 in 'traditional' foster care. See Rankin S 'Why they won't take the money: Black grandparents and the success of informal kinship care', (2002) 10 *The Elder Law Journal* 153; US Census Bureau US Census (2000) - cited in UNICEF/ISS (2004).





narrow conceptualization of permanency may in many cases gratuitously, or unnecessarily, result in the severance of significant family relationships from the lives of children, particularly poor children of colour.<sup>173</sup>

Without attempting to idealise kinship care, the idea of kinship care not conforming to the standard of the ideal (nuclear) family may have been responsible for the initial reluctance of practitioners to address it distinctly (especially distinctly from foster care) by developing suitable strategies for ensuring that it is effectively integrated within the child welfare system. It would seem much easier and more convenient to graft kinship care on to the existing foster care system (either as an alternative to foster care or as a sub-category of foster care). Perhaps this is also attributable to the fact that kinship care in most of these countries often applies to minority and indigenous groups within the larger society, unlike in Africa where the opposite is the case. Be that as it may, what is settled is the fact that kinship care as a preferred form of alternative care has become greatly intertwined with the foster care system, with each nation constantly devising and improving on strategies to regulate the relationship between both, especially within the child protection context.



#### **4.4.2 The Relationship between Kinship Care and Foster Care: African Context**

Although the traditional understanding of foster care as defined above (section 4.4) is not common in Africa, the concept of fostering or foster care is in itself not foreign. However, fostering as a concept is more or less the same as kinship care is broadly understood in Africa. Thus, fostering is itself rooted in the kinship tradition and structures discussed in the second chapter of this study – in essence, it finds its basis in the extended family network without necessarily contemplating ‘outsiders’ as is the case with foster care in the traditional ‘Western’ sense.<sup>174</sup> However, in light of the fact that kinship care has in terms of law and policy, come to be understood within the framework of alternative care, it is important to highlight that there are other aspects of fostering in the traditional African understanding that are not necessarily linked to the alternative care system as is understood today. Kinship care was supplementary to, or practised alongside active parental care because certain other relatives had specific roles to play in transforming a

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<sup>173</sup> Kurtz M ‘The purchase of families into foster care: Two case studies and the lessons they teach’ (1994) 26(4) *Connecticut Law Review* 1520-1521 – cited in Scannapieco & Hegar (1999) 8.

<sup>174</sup> See section 2.2.2 of Chapter 2.

child into an adult. It did not necessarily involve the child leaving his parents' home to go elsewhere, at least not for long. In the context of alternative care, kinship care was (and as is the case in contemporary law and policy) also understood to be the care option for orphans or other children whose parents are facing some crisis such as sickness, disability or loss of livelihood.

Fostering on the other hand, and more broadly, was not necessarily practised in response to crises; it was rather an organised child care practice that included children from both poor and rich as well as stable and unstable families, and is today still practised in rural areas and between families based in rural areas and others in urban areas.<sup>175</sup> Fostering in Africa traditionally refers to a family-focused form of child circulation within family networks, which is a 'traditional feature of African family systems.'<sup>176</sup> It is not considered to be an arrangement mainly for the child's benefit but is viewed as a mutually beneficial exchange for both the child (and his parents) and the host care or family.<sup>177</sup>

Thus, apart from crisis situations, fostering was relied upon for forging alliances or for apprenticeship. In such cases, children are sent as wards to the homes of relatives to learn a trade or to the homes of non-relatives such as traditional or religious leaders, for the acquisition of traditional or religious training or instruction.<sup>178</sup> Children are also fostered for domestic purposes. This includes the need to redistribute domestic services across related households, the need to maintain solidarity between related urban and rural households/families, the need to train children in certain domestic activities, and the need to provide emotional support to elderly or childless family members.<sup>179</sup> Children are also sent for fostering for the purpose of acquiring formal education when opportunities and finances for the child's parents to ensure

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<sup>175</sup> See generally Alber E, Martin J & Notermans C (eds) *Child Fostering in West Africa: New Perspectives on Theory and Practices* (2013) 1. See also Notermans C 'The emotional world of kinship: Children's experiences of fosterage in East Cameroon' (2008) 15 *Childhood* 355; Pilon M 'Foster Care and schooling in West Africa: The State of Knowledge', The UNESCO 2003 EFA Monitoring Report, available at [http://portal.unesco.org/education/en/file\\_download.php/2f4f07f5fcb8cdce16506595637b2099schooling+in+West+africa.pdf](http://portal.unesco.org/education/en/file_download.php/2f4f07f5fcb8cdce16506595637b2099schooling+in+West+africa.pdf) (accessed 31 October 2013); Serra R 'A theoretical framework for child fostering arrangements in sub-Saharan Africa', June 2000, available at < <http://www.childmigration.net/files/serra.pdf> > 6-14 (accessed 31 October 2013) 2; Umbima KJ 'Regulating foster care services: The Kenyan situation' (1991) 70(2) *Child Welfare* 169-174; Isiugo-Abanihe UC 'Child fosterage in West Africa' (1985) 11(1) *Population and Development Review* 56.

<sup>176</sup> Notermans (2008) 356; Pilon (2003) 28.

<sup>177</sup> Notermans (2008) 357-358; Serra (2000) 3.

<sup>178</sup> Alber, Martin & Notermans (2013) 1; Notermans (2008) 362; Serra (2000) 5; Isiugo-Abanihe (1985) 57.

<sup>179</sup> Alber, Martin & Notermans (2013) 3; Notermans (2008) 356; Pilon (2003) 22; Serra (2000) 8-13; Isiugo-Abanihe (1985) 58.

this are limited.<sup>180</sup> Generally, the actual purpose and outcome would depend 'on the nature of the relationship between the family of origin and the host family, and between the child and the host family.'<sup>181</sup>

With reference to kinship care in contemporary understanding (in Africa and elsewhere), it was indicated in the introductory chapter of this study that a significant feature of the recent child law reform process in Africa is the inclusion of provisions on child protection, including the right to alternative care. However, the relevant instruments rarely include kinship care, and where kinship care is featured, its relationship with foster care is not clear. South Africa and Namibia are two of the very few countries where attempts are being made to grapple with kinship care issues in law and policy, hence the focus on these two countries in the next chapter of the study. To a certain extent, South Africa allows for the formalisation of informal (kinship) or extended family care, but links it to the foster care system which presents its own set of problems.<sup>182</sup> These will be discussed in greater detail in the following chapter, with the next section of this chapter providing a basis for making relevant recommendations for addressing some of the problems.



#### **4.5 Framework for Delineating Kinship Care Models and their Intersections with Foster Care in the Child Protection System**

This section presents a proposed framework for understanding and categorising different kinship care situations; with an attempt at suggesting how and to what extent each category may interact with the child protection system, with particular reference to the intersections between kinship care and foster care. The terminologies employed are not novel, they are rather based on a combination and/or reorganisation of the various ways in which kinship care has been sub-categorised or differently interpreted by several scholars. The framework may not only clarify some of the confusion involved in categorising kinship care

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<sup>180</sup> Alber, Martin & Notermans (2013) 5; Notermans (2008) 362; Pilon (2003) 15; Serra (2000) 14; Isiugo-Abanihe (1985) 58.

<sup>181</sup> Notermans (2008) 361; Pilon (2003) 19.

<sup>182</sup> This will be discussed in greater detail in the following chapter. See generally Skelton A 'Kinship care and cash grants – South Africa' in Atkin B *The International Survey of Family Law* (2012) 333; Roby (2011) 15. Namibia is poised to take a somewhat different route in response to the challenges observed in the South African system. These issues and the attendant challenges will form part of the discussion in the following chapter.

models, but may also serve as a baseline for organising or re-organising the kinship care system in its interactions with formal alternative care systems.<sup>183</sup>

I am mindful of the fact that this attempt may not solve all the dilemmas associated with how kinship care generally interacts with the child protection system - particularly in the 'West' where the subject of kinship care within the context of the right to alternative care and child protection has been significantly researched upon. But for the context of Africa where the level of such research is comparably lower, it is hoped that the framework will serve as a basis for further engagements with the issues involved. In addition to the interpretations of other scholars, the framework also draws from the provisions of the UN Guidelines on State obligations towards informal care/kinship care as previously discussed.<sup>184</sup>

An additional motivation for the approach I adopt is the fact that context needs to be taken into consideration; the reasons for children's need for or placement in kinship care in Africa and in many 'Western' countries may be significantly different. While further research is needed to ascertain and compare the actual reasons for care in both contexts, it is arguable that the extent to which HIV/AIDS and its attendant consequences has become a major trigger for alternative care is significantly different in both contexts. In the context of the USA for instance, abuse and neglect are major reasons for which children are removed from their parents' home and placed in kinship care. The preference for kinship care over foster care is not only due to kinship care being the preferred or priority option, but is also due to the fact that many such children often have behavioural problems or conflicts with their parent(s). In addition, the parents 'are more likely to have a drug or alcohol problem and are more likely to be young and never married.'<sup>185</sup> While these are phenomena that run across the world, contextual differences do play a role in how children come into kinship care. They should also play a role in how kinship care as an alternative care model interacts with the formal child protection system and foster care, especially given the fact of resource constraints in most African countries, and the numbers involved.

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<sup>183</sup> A fourth model which is not included in the proposed framework is 'kinship guardianship' or 'kinship adoption' said by O'Brien to be an established form of kinship care in the United Kingdom: O'Brien (2012) 128.

<sup>184</sup> See section 4.2.3 above.

<sup>185</sup> USDHHS (2000) vii.

#### 4.5.1 Private Kinship Care

This refers to kinship care based on any private (extended) family arrangement on a temporary basis, with no State involvement or intervention whatsoever. The arrangement would usually be made in response to a crisis<sup>186</sup> such as the loss of a parent's job or source of income or a parent getting sick and becoming hospitalised. Private kinship care also includes voluntary family placements for fostering purposes in the traditional African understanding described earlier above.<sup>187</sup> This scenario may therefore be viewed simply as a family environment not necessarily related to the right to alternative care in the child protection context.

To conceive private kinship care otherwise or insist that it be somewhat formalised as alternative care may amount to a violation of the family's right to privacy and autonomy. Further, the lack of State involvement in private kinship care translates to two things: the State plays no role in initiating or authorising the process; and the State *ordinarily* has no obligation to provide support and assistance to the family for the benefit of the child involved, that is, support related to or based on the fact of 'alternative care'.<sup>188</sup> This does not however affect State obligation to provide support and assistance to the family, if the family requires it for its sustenance as the fundamental unit of society.<sup>189</sup>

It is important to be mindful of the fact that the situation of private kinship care may also change if for instance, a family crisis lingers or becomes indefinite such that the kinship carer can no longer cope and thereafter seeks State intervention. Private kinship care may in that case be transformed to 'public informal kinship care' as discussed below. What is important to note about private kinship care is that the reason for care did not result from a child protection issue such as abuse, neglect, violence or exploitation, but generally from an unforeseen (temporary) crisis situation or other voluntary purpose for the benefit of the child and the families or carers involved.

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<sup>186</sup> O'Brien (2012) 128.

<sup>187</sup> Sec 4.4.2 above.

<sup>188</sup> This is because parental responsibility subsists on the relatives who privately and voluntarily undertake to care for the child as provided in Article 5 of the CRC. However, this approach to private kinship care does not in any way affect other forms of support or grants, in terms of social security measures (where available) that individual members of the family or the family as a whole are entitled to. The child will also not cease to be eligible for any social security grant to which he was or would be eligible for in his own home.

<sup>189</sup> See generally section 2.4 of the discussions in Chapter 2.

#### 4.5.2 Informal Kinship Care

According to O'Brien, informal kinship care is based on a private family arrangement in response to a child protection issue, which is subsequently endorsed by State intervention.<sup>190</sup> In other words, relatives take in the child who was the subject of a child protection issue in his original family environment, and upon notifying or involving the relevant authorities, the State officially approves of the child's placement with the kinship carer(s) concerned. A limited level of support and assistance (as compared to formal kinship care) will be provided by the State.<sup>191</sup>

In addition to the above however, it is my position that informal kinship care need not be a placement in response to child protection issues only, as there are certain crisis situations that force relatives to assume the care of children of their kin, which they would not have done voluntarily if the situation did not arise. Particular examples in the African context include the death of a child's parent(s) or a life-threatening disease such as AIDS. This is especially the case with many grandparents who are caring for their grandchildren in Southern Africa. In such cases, relevant authorities are notified not necessarily because the relatives do not want to take responsibility for caring for the children, but more because they are unable to bear the cost of raising the children unassisted.

Consequently, the focus of State support and assistance in the case of informal kinship care will mainly be on ensuring an adequate standard of living for the child and the kinship carer as well as measures to support the child in addressing or coping with the effects of the reason for care. However, the kinship carer and family environment need not be subjected to an assessment of their suitability for the child or continuous supervision, as is the case with formal kinship care and foster care. This approach can be justified by the fact that the kinship home existed and was functioning as an alternative care placement prior to State intervention.<sup>192</sup>

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<sup>190</sup> O'Brien (2012) 128.

<sup>191</sup> Broad (2007) 2.

<sup>192</sup> Hegar & Scannapieco (1999) 6.

The emphasis is not on requiring kinship carers to notify the authorities of their role (for formalisation purposes). Rather it should be on the need to offer adequate support and services to such carers who require them to properly discharge their care responsibilities. This approach will in itself serve 'as an active encouragement to voluntary registration' in order to access such services, since they are usually unavailable in the absence of some form of notification or registration.<sup>193</sup> Since many kinship or informal carers are themselves usually quite poor, this approach is more attractive and practical, not only for easing the financial, material and psychological burdens of the carers but more importantly, for potentially improving the overall conditions of the children in their care.<sup>194</sup> Thus, 'informal care could occur throughout the entire continuum [of care] without a formal recognition of that relationship.'<sup>195</sup>

Two key things to note about informal kinship care: it is generally not initiated by the State but may be subsequently endorsed or approved (not 'formalised') by the State; the kinship carer will generally not be subject to 'suitability' and monitoring requirements similar to what is applicable to foster care.



### 4.5.3 Formal Kinship Care

Formal kinship care refers to a placement with relatives initiated by the State for a child in State care or custody, resulting from a child protection issue. 'It usually involves an assessment of the suitability of the family', and requires the provision of support and assistance as well as regular monitoring and supervision. The assessment is usually based on foster care regulations, hence the designation of formal kinship care in some literature as 'kinship foster care'.<sup>196</sup> Thus, the formalisation of kinship care 'includes screening relatives for placement, training caregivers and on-going monitoring of the child's well-being.'<sup>197</sup> In this case, support and assistance are targeted not only at the child, but are also targeted at the family to ensure that the family is properly equipped to care for the child in accordance with clearly spelt out regulations.

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<sup>193</sup> Cantwell *et al* (2012) 77.

<sup>194</sup> Cantwell *et al* (2012) 77. A best practice example of this found in New Zealand is highlighted in the handbook (77) with full details available in A Framework of Practice for Implementing a Kinship Care Program at < [www.bensoc.org.au](http://www.bensoc.org.au) >.

<sup>195</sup> Roby (2011) 28.

<sup>196</sup> Cantwell & Holzscheiter (2008) 37.

<sup>197</sup> Oswald (2009) 27.



Unlike private kinship care and informal kinship care, the State is generally the initiator of the placement process in the case of formal kinship care. Usually, the child would have been in State custody *ab initio*. An example would be a case of abuse or violence against the child noted by a social worker who sets the child protection process in motion. In this scenario, kinship care is considered and ordered as the first or preferred placement choice for the child upon the determination of the matter.

A comparison between informal kinship care and formal kinship care shows that the latter is that which is most akin to traditional foster care, and as such is the one which generally intersects with the foster care system. This raises questions concerning the relationship between foster care and kinship care. For example, does the formalisation of kinship care ('kinship foster care') mean that formal kinship care is subject to the exact same regulations as traditional foster care?<sup>198</sup> While some authors are of the view that the answer to this question is in the affirmative,<sup>199</sup> in actual practice, the answer is not that straightforward. A recurring debate borders on whether kinship care is fundamentally different from traditional foster care or if both are analogous, upon the formalisation of the former.<sup>200</sup> In most cases, child welfare services deal with kinship care by locating it within the foster care system, and this raises a number of challenges ranging from placement criteria to assessment measures.<sup>201</sup>

Some of the criteria for the approval of foster homes include standards around 'housing, finances, family composition, family history, relationships, attitudes about parenting and a variety of other factors.'<sup>202</sup> As it applies to housing for example, there are regulations as to the amount of space available and rules about sharing or not sharing rooms. Many kinship caregivers are not able to meet up to these high standards often prompting demands that some be waived, reviewed or adapted for kinship caregivers.<sup>203</sup> It can be argued that 'formalisation' does not necessarily refer to any rigid procedure or process which other forms of alternative care such as foster care and adoption usually require, but can include any simple procedure

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<sup>198</sup> Hegar & Scannapieco (1999) 6.

<sup>199</sup> Broad (2007) 2.

<sup>200</sup> O'Brien (2012) 133; Hegar & Scannapieco (1999) 6.

<sup>201</sup> Hegar & Scannapieco (1999) 5. Further questions are raised mainly around how formal kinship care should be differentiated from informal kinship care in policy and practice, especially considering that most studies conducted on kinship care focused on formal kinship care. It is hoped that my outline above can contribute towards efforts at making such distinction between both.

<sup>202</sup> Hegar & Scannapieco (1999) 6.

<sup>203</sup> See Scannapieco M & Hegar RL 'Kinship care providers: Providing an array of supportive services' (2002) 19(4) *Child and Adolescent Social Work Journal* 315.

by which the children and caregivers in kinship care arrangements are known to, accountable to, and accounted for by the State. These issues are raised against the background of the fact that the approaches to assessment (covering issues of selection, criteria, certification, supervision, payment, reunification efforts and permanency plans) determine eligibility for funding support applicable to traditional foster care and not to kinship care that does not conform to the foster care standards.<sup>204</sup>

While these are difficult issues to answer conclusively, some guidance can be obtained from the UN Guidelines general standards for organising kinship care. For instance, where a child is placed with relatives who were previously unknown to the child and whose home is away from the child's habitual place of residence,<sup>205</sup> in my view, it would be prudent to subject such formal kinship care to the same standards as traditional foster care, at least in the early stages. It is also important to keep in mind the fact that, the generally higher payments applicable to foster care and kinship foster care or formal kinship care (as the case may be) are also meant to ensure that the carers are able to meet the high standards that regulations demand for the care of the child. Another suggestion would be that where it is decided that formal kinship care should operate under the same conditions as traditional foster care, the kinship placement should similarly be conceived as 'temporary' (maximum of two years) with clear family reunification or permanency plans in place. As such, the additional investment into formal kinship care (and foster care) can be justified for those purposes.

For now, on the subject of the relationship between kinship care and the child protection system, it suffices to highlight that only when kinship care "is ordered [formal kinship care] or subsequently officialized [informal kinship care] by a competent authority does it qualify as 'alternative care'".<sup>206</sup> However, based on the proposed framework for classifying kinship care presented above, certain points can be established. First, the nature of the relationship between formal kinship care and traditional foster care may remain difficult to agree upon. This is more so in the absence of further broad based research to determine the effects of subjecting both to generally the same regulatory standards as is the case in the countries where

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<sup>204</sup> Scannapieco & Hegar (2002) 315; Hegar & Scannapieco (1999) 5-7.

<sup>205</sup> Para 79, UN Guidelines.

<sup>206</sup> Cantwell & Holzscheiter (2008) 37.

this is common. This study will attempt to provide recommendations as to how this can be addressed in the African context, particularly the countries of focus in the study.

Second, on the basis of the distinctions made between formal kinship care and informal kinship care, which is the most common form of kinship care, informal kinship care should be clearly separated from the foster care system in the child protection context. This will relieve States of the heavy cost and time implications of having to take all kinship care situations through the formal child protection system. However, keeping informal kinship care out of the formal child protection system does not mean that some form of monitoring should not be put in place for it – since informal kinship care carries greater ‘greater risks of child maltreatment, child labour, child sexual exploitation and other forms of abuse, neglect, or exploitation.’<sup>207</sup> Rather, methods of administering the process which do not place an undue burden on the limited resources of time, finances and personnel of State child protection systems will have to be considered.



#### **4.6 Conclusions**

This chapter has provided a more detailed discussion on issues around kinship care as an alternative care option. The analysis of the UN Guidelines provided in the chapter reveals that the CRC and the ACRWC cannot be interpreted or implemented in isolation from the Guidelines provided therein, although they are non-legally binding. The UN Guidelines serve as a supplementary instrument to the binding legal instruments and their acceptance and promotion by the Human Rights Council, the UN General Assembly and the CRC Committee reveal the support they enjoy as tools in advancing the rights and protection of children deprived of a family environment.

Apart from filling the implementation gaps in the CRC and the ACRWC, the UN Guidelines further develop the concept of alternative care both in form and content. Of significant note is the development of the two fundamental principles relevant for the appropriate implementation of the right to alternative care: that

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<sup>207</sup> Oswald (2009) 27.

children should not be placed in alternative care unnecessarily (the necessity principle), and where alternative care placement becomes necessary, the care option provided must be appropriate or suitable for the child's specific needs (the suitability principle). Other important contributions of the Guidelines include the prohibition of residential care for children less than three years and the prioritisation of the goal of de-institutionalisation.

Further, the advent of the UN Guidelines has resulted in a re-examination of the all-too-simple approach of institutionalising children without parental care resulting in a revolution in the way that institutional or residential care is viewed and practiced. There is now a shift towards family-based, family-like or family-type forms of care for children deprived of a family environment in order to safeguard their best interests. This is premised upon research outcomes which continue to attest to the fact that a family environment is important for the harmonious growth and development of the child.

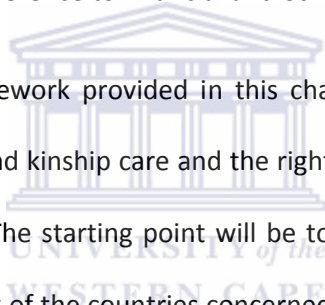
With reference to the transition of kinship care from a family environment to an alternative care model, four points have been made so far. First, the Guidelines formally recognise kinship care in international law and reconceptualise it as alternative care by effectively changing or modifying the standard for activating the right to alternative. This is achieved by narrowing the CRC and ACRWC's conceptualisation of 'family environment' to a more 'parental care' focus. The diversification and increasingly complexity of most African societies in terms of family and child care practises, among others, provide some justification for this shift.

Secondly, although clear provisions are made for both formal and informal models of alternative care, both are not held to same standards in terms of policies and regulations. There is however no compromise on the need to ensure that all child in need of alternative are protected, regardless of what model of alternative care is provided because clear guidelines are established for the organisation of informal care and the protection of the best interests of the children involved. Abiding by the Guidelines has the potential to ensure that the acknowledgment of the reality of informal care for the majority of children without parental care will result in the optimal protection of all children concerned and not just those who come into contact with State-established structures of child protection.

Thirdly, the chapter showed that regardless of what model of kinship care is in place, there are certain challenges and benefits associated with kinship care generally. These do not however diminish the importance of kinship care; rather, they provide room for further engagement with the issues involved in order to derive means of addressing them. Ultimately, the goal is to secure adequate protection and support for children in kinship care especially since kinship care, where available, has become established as the placement option of choice all across the world.

Fourthly, by presenting a discussion on the relationship between kinship care and foster care, the chapter was able to result in a proposed framework for delineating models of kinship care while providing suggestions as to how the intersections between kinship care and foster care can be managed within the framework of the child protection system. The most significant of these is an understanding of State obligation towards kinship care, with reference to financial and other measures of assistance and support.

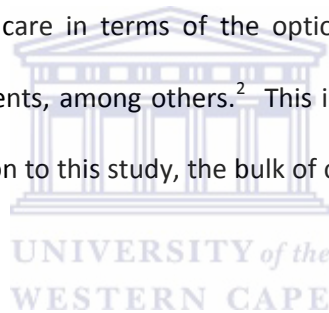
On the basis of the context and framework provided in this chapter, the next chapter will attempt to address some of the issues raised around kinship care and the right to alternative care generally within the context of South Africa and Namibia. The starting point will be to identify to what extent kinship care is provided for in the domestic framework of the countries concerned and its relationship with foster care. By engaging with these issues, best practice examples can be drawn that will be of relevance to other countries on the continent that are grappling with responding to kinship care in law, policy and practice.



## CHAPTER FIVE – THE STATUS OF KINSHIP CARE IN DOMESTIC LEGISLATION AND LINKAGES WITH SOCIAL ASSISTANCE PROVISIONING

### 5.1 Introduction

The overview of the international legal and policy framework for children's right to alternative care (the CRC, the ACRWC, and the UN Guidelines) as presented in chapters three and four serve as a backdrop for the on-going child law reform initiatives in several African countries.<sup>1</sup> This chapter seeks to examine the status of kinship care in the domestic law and policy of South Africa and Namibia, in comparison to the status of foster care. In other words, it seeks to determine whether or not, and to what extent if at all, kinship care is incorporated in the domestic legal and policy framework. The recognition or lack of recognition of kinship care, as previously discussed, has both practical and legal implications for the realisation of the right to alternative care in terms of the options available for consideration and the processes involved in securing placements, among others.<sup>2</sup> This is viewed against the background of the fact that, as indicated in the introduction to this study, the bulk of children in alternative care are in kinship care.<sup>3</sup>



It will be contended that the uncertainties around kinship care have impacted on how kinship care has been or is being addressed in the child law reform processes in South Africa and Namibia, and in Africa generally. It is evident that kinship care has not received as much thought and attention as foster care in terms of domestic provisions on the right to alternative care, and in terms of its interactions with the child protection system. For example, within the last decade in South Africa alone, the number of children in formal foster care has increased by more than a thousand per cent.<sup>4</sup>

Subsequent to this introductory section, the chapter shall proceed to explore generally the legal and policy developments and provisions on the right to alternative care in South Africa and Namibia beginning with constitutional provisions and provisions in their major child-specific instruments. This will include a

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<sup>1</sup> Articles 4 of the CRC and 1 of the ACRWC provide the legal basis for the child law reform process by placing an obligation on States to put in place legislative and other measures to appropriately implement all children's rights.

<sup>2</sup> African Child Policy Forum (ACPF) *Africa: The new frontier for intercountry adoption* (2012) 3.

<sup>3</sup> Chapter One, section 1.3.

<sup>4</sup> See discussions in section 5.4.

discussion on some of the cases that have been decided by the courts which have contributed to the development of jurisprudence on the right to alternative care generally.

Further, the chapter will examine the existing measures of State support for alternative care generally and kinship care in particular, again with a focus on how measures targeted at kinship care compare with those targeted at foster care, and the intersections or linkages between both. This will include an examination of the measures taken or being contemplated for addressing the challenges and controversies arising from the issues of recognition, regulation and support of kinship care. Comparisons and recommendations will also be made based on the framework presented in the previous chapter on how kinship care can be organised in law and policy to ensure that the attendant challenges are meaningfully dealt with.

With regards to the domestication of children's rights generally, States are required to harmonise their national laws with the standards or stipulations of the CRC and the ACRWC.<sup>5</sup> The harmonisation of national laws is an on-going process that paves the way for reviews of numerous outdated legislation scattered in several statutes (some subsisting from the colonial era).<sup>6</sup> In the absence of law reform/harmonisation, the development of children's rights, including the right to alternative care, will continue to be threatened by the existence of and reliance on obsolete legislation in many countries in the region.<sup>7</sup>

Domestication refers to the process(es) by which States give effect to their international law obligations within their domestic jurisdictions. In order to give effect to the provisions above, countries adopt varying approaches in their child law reform process ranging from the inclusion of children's rights in the constitution to amending existing children's rights statutes in accordance with international standards, and the enactment of comprehensive child-specific statutes. Both South African and Namibia provide for

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<sup>5</sup> See arts 4 CRC & 1(1) ACRWC.

<sup>6</sup> The process of harmonising laws at the domestic level to conform to internationally agreed standards is indeed an on-going one rather than a once-off event from the date of ratification. See Doek J *In the Best Interests of the Child, Harmonisation of National Laws with the Convention on the Rights of the Child: Some Observations and Suggestions* (2007) 5. See also Sloth-Nielsen (2012 – ed Freeman) 120; Sloth-Nielsen J 'A Developing Dialogue. Children's Rights, Children's Laws and Economics: Surveying Experiences from Southern and Eastern African Law Reform Processes' (2008) 12 *Electronic Journal of Comparative Law* 12 < <http://www.ejcl.org/123/art123-5.pdf> >. Since the region has a history of several differing legal systems, the harmonisation process is an attempt 'to synthesize common law, civil and customary laws, and to modernise and codify a myriad of outdated statutes affecting children that were inherited from the colonial era'.

<sup>7</sup> Mezmur (2009) 82; Sloth-Nielsen (2008) 1.

children's rights in their constitutions and also have dedicated child-specific legislation in place for addressing matters affecting children.

It has been argued that the constitutionalisation of children's rights has the advantage of providing a platform for policy development and ensuring a more permanent basis for those rights since constitutions usually remain unchanged for longer periods of time.<sup>8</sup> Further, the CRC Committee has observed as follows:

Some States have suggested to the Committee that the inclusion in their Constitution of guarantees of rights for "everyone" is adequate to ensure respect for these rights for children. The test must be whether the applicable rights are truly realized for children and can be directly invoked before the courts. The Committee welcomes the inclusion of sections on the rights of the child in national constitutions, reflecting key principles in the Convention, which helps to underline the key message of the Convention - that children alongside adults are holders of human rights.<sup>9</sup>

From the above, it is clear that the CRC Committee does not consider it sufficient to have children's rights placed under the 'Directive Principles of State Policy' section of many constitutions. These principles are usually aspirational objectives that are not enforceable via judicial action. In some cases, they are linked to socio-economic rights which are meant to be achieved progressively.<sup>10</sup> The effect of this is that some of the familial rights relevant to the family and alternative care as discussed in Chapter two of this study may be jeopardised especially in the absence of political will. Consequently, in undertaking constitutional reforms, the growing practice is for States to include dedicated sections or articles on children's rights in their constitutions besides other civil-political and socio-economic rights that are applicable to 'everyone', including children.<sup>11</sup> To date, there are about 40 African constitutions which distinctly feature children's rights in one form or the other.<sup>12</sup> The inclusion of children's rights in national constitutions, being the supreme law of the land, shows that premium is placed on children's rights. Further, apart from serving as a

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<sup>8</sup> Duncan B *Constitutional Reforms in Favor of Children* (2008) 59.

<sup>9</sup> CRC Committee GC 5 (2003) para 21.

<sup>10</sup> UNICEF (Eastern and Southern Africa Regional Office – ESARO) *Lessons learnt in child law reform in Eastern and Southern Africa* (draft 2013) 8; prepared by the Children's Rights Project, Community Law centre, University of the Western Cape – copy on file with author.

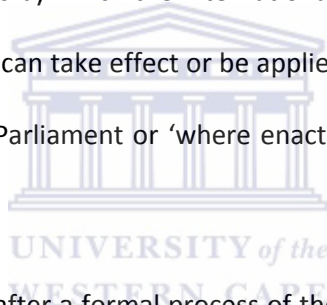
<sup>11</sup> UNICEF ESARO (2012) 8.

<sup>12</sup> Sloth-Nielsen J 'Domestication of Children's Rights in National Legal Systems in African Context' in Sloth-Nielsen (2008) 57. The most recent of these constitutions include the constitutions of Zimbabwe (2013) Angola (2012), Kenya (2010) South Sudan (2010), Democratic Republic of Congo (2006) and Burundi (2005).



policy development platform, it strengthens judicial enforcement at both the domestic and (sub) regional levels.<sup>13</sup>

While it remains important to include children's rights in national constitutions, the enactment of separate and distinct legislation on children's rights makes for an efficient harmonisation process.<sup>14</sup> The CRC and the ACRWC, being subjects of international law means that their mode of acceptance and implementation within domestic jurisdictions will depend on the legal system of any particular country in question. There are generally two means by which international law is translated to domestic law: monism and dualism.<sup>15</sup> Under the monist approach, the ratification of the CRC and the ACRWC automatically equates to the incorporation of these instruments into domestic law, with immediate effect, that is, no other process is required to translate the CRC and the ACRWC into national law.<sup>16</sup> On the other hand, the dualist approach requires a formal domestication process by which the international legislation (CRC and ACRWC) has to be transformed into national law before it can take effect or be applied within the domestic jurisdiction.<sup>17</sup> The formal process is usually by an Act of Parliament or 'where enactment has not yet taken place - through jurisprudence.'<sup>18</sup>



The legal effect of dualism is that only after a formal process of the incorporation of international law into domestic law, does such law 'create rights and obligations enforceable by domestic courts.'<sup>19</sup> South Africa and Namibia (as is the case in many other Southern African countries) are largely dualist in the incorporation of international law into domestic legislation.<sup>20</sup> This explains the enactment of separate domestic legislation on the rights affecting children, including the right to alternative care, the inclusion of

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<sup>13</sup> UNICEF ESARO (2012) 9.

<sup>14</sup> ACPF (2012) 4.

<sup>15</sup> Dugard J *International law: A South African perspective* (2011) 50. See also Nowak M *Introduction to the International Human Rights Regime* (2003) 36.

<sup>16</sup> Dugard (2011) 50; Nowak (2003) 36.

<sup>17</sup> Dugard (2011) 50; Nowak (2003) 36

<sup>18</sup> Phillips (2011) 180. Namibia and South Africa are some of the states where incorporation can be achieved by the jurisprudence of the courts where domestic enactment is yet to be in place although ratification has been done.

<sup>19</sup> Dinokopila B R 'The Prosecution and Punishment of International Crimes in Botswana' (2009) 7 *Journal of International Criminal Justice* 1078.

<sup>20</sup> See Dugard (2011) 47-64 for a discourse on 'the place of international law in South African municipal law' which analyses the position during the apartheid era and after 1994, the beginning of a democratic dispensation.

which is a new development in some national legislation.<sup>21</sup> Highlighting the importance of enacting specific legislation for children as a critical component of the child law reform process, Sloth-Nielsen notes as follows:

The review of legislation that preceded the adoption of the Kenyan Children's Act 2010 revealed the existence of more than 61 statutes affecting children, which the new law consolidated and modernized. The Children's Act 38 of 2005 of South Africa repealed at least six discrete statutes dealing with children's status and welfare. The Law of the Child of Tanzania of 2009 repealed a number of previous enactments, and the Child Rights Act of Nigeria of 2003, in a similar vein, followed the Children and Young Persons Act of 1943, which was revised in 1958... The Namibia draft Child Care and Protection Act 2011 will ... fundamentally replace the Children's Act of 1960, imported from South Africa before independence in 1990. The Lesotho (Child Welfare and Protection) Act finalized in 2010 has abrogated the colonial law which forbade the adoption of Basotho children by their own citizens of the country, privileging adoption for Europeans only.<sup>22</sup>

## 5.2 The Right to Alternative Care: Constitutional Provisions

### 5.2.1 Constitution of the Republic of South Africa (1996)

The Constitution of South Africa is one of the few African constitutions with a dedicated section on children's rights. Thus, Section 28 of the Constitution has been described as a 'mini-charter' of children's rights covering a range of issues, and including both civil and political as well as economic, social and cultural rights.<sup>23</sup> The inclusion of children's rights in the constitution was influenced by the ratification of the CRC in 1995, coupled with the concerted efforts of numerous child rights activists and organisations.<sup>24</sup> On the right to alternative care, Section 28 provides that every child has the right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'.<sup>25</sup> Thus, a child's

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<sup>21</sup> With reference to the place of international law in South Africa however, 'Rosa and Dutschke argue that a binding international instrument like the CRC should be directly applicable in any court case involving an interpretation of children's rights. [Thus] Taking this argument further, if the text of a right in the Constitution has its roots in an international human rights instrument, the courts should consider that international law as highly persuasive. [Indeed] The South African courts have frequently relied on the CRC and other international and regional instruments.' See Rosa S & Dutschke M 'Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights' (2006) 2 *South African Journal on Human Rights* 244. See also Rosa S & Dutschke M 'Child Rights at the Core: A commentary on the use of international law in South African court cases on children's socio-economic rights' (2006) A Project 28 Working Paper, May 2006.

<sup>22</sup> Sloth-Nielsen (2012 – ed Freeman) 120.

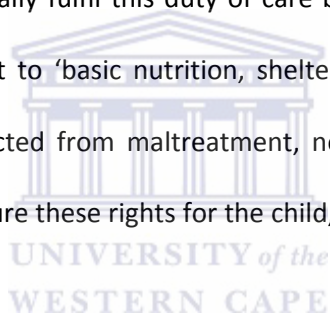
<sup>23</sup> Gallinetti J Getting to know the Child Justice Act (2009) 10; Skelton A 'Children' in Currie I & de Waal J *The Bill of Rights Handbook* (2013) 599; Proudlock P 'Children's socio-economic rights' in Boezart T (ed) *Child law in South Africa* (2009) 293.

<sup>24</sup> Skelton A & Proudlock P 'Interpretation, objects, application and implementation of the Children's Act' in Davel CJ & Skelton A (eds) *Commentary on the Children's Act* (Revision Service 2, 2010) 1-9. Citing the Technical Committee on Fundamental Rights First Progress Report of 14 May 1993, 4, they point out that "the children's section started off as one line providing for 'the right of children not to be subject to neglect, abuse or forced labour'." See also Proudlock (2009) 293.

<sup>25</sup> See sec 28(1)(b).

family is interpreted broadly to include relatives other than the parents as envisaged by the CRC and ACRWC. That is, the right to alternative care cannot be activated while there are other members of a child's family other than the parents who can be responsible for the care of the child. In other words, a child's right to care operates against its family in the broad sense (that is, including the extended family), and not only against its parents.<sup>26</sup> As further discussions will however show, this is not the practice in South Africa, especially with regards to social assistance measures for children in kinship care. Changes in family structures and socio-economic conditions as discussed in previous chapters have resulted in a shift towards the UN Guidelines approach or standard for activating the right to alternative care.

The child's right to family or parental care in Section 28 is said to broadly entail a number of possible entitlements for a child. The first entitlement is the provision of care by the parents/family, or alternatively the State.<sup>27</sup> Parents or the State generally fulfil this duty of care by providing the child with the material elements envisaged in the child's right to 'basic nutrition, shelter, basic health care services and social services',<sup>28</sup> and the right 'to be protected from maltreatment, neglect, abuse or degradation'.<sup>29</sup> Where parental or family care is lacking to secure these rights for the child, the State's duty to protect the rights of the child is triggered.<sup>30</sup>



The second is non-interference (by the State) with family or parental care, in recognition of the primary duty of parents and families to care for a child. This places an obligation on the State to respect and not unjustifiably interfere with existing parent-child (or caregiver-child) relationship within a family

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<sup>26</sup> Skelton (2013) 605-606; Skelton A 'Constitutional protection of children's rights' in Boezart T (ed) *Child law in South Africa* (2009) 286. Sec 28(1)(b) was originally drafted as the 'right to parental care' (excluding 'family care') in South Africa's interim constitution of 1993 (sec 30(1)(b)). See Dugard (2011) 60.

<sup>27</sup> Matthias C & Zaal N, 'The Child in Need of Care and Protection' in Boezart T (ed) *Child Law in South Africa* (2009) 163. With reference to alternative care, the State's obligation care arises not only in cases where a child is orphaned but in other circumstances such as where a child's familial environment and circumstances are inappropriate for or detrimental to the child's growth and developmental needs.

<sup>28</sup> Sec 28(1)(c). See also Skelton (2009) 286.

<sup>29</sup> Sec 28(1)(d). See also Skelton (2009) 286. In the case of *Jooste v Botha*, the Court found that the provision of care does not envisage the enforcement of the impossible that is, the drafters of the Constitution could not have intended to impose an obligation to love, cherish, recognise or show interest in a child on a parent, as such an obligation cannot be enforced and there is no remedy for its violation. These are intangible elements for which no legal obligation exists although it is naturally expected that they flow from parents to their children. *Jooste v Botha* [2000] 2 BCLR 187 (T) 189H. To this writer, this position is right in view of the discussion on what amounts to 'care' and 'alternative care' in section 3.6.5 of chapter three, the lack of which can lead to a claim for compensation whether in a child's original family environment or in alternative care. To argue otherwise would be to negate the role of the State in safeguarding the care and protection of the child even while within parental or family care against the background of the fact that the State plays a fiduciary role as the overall guardian of children whether or not they have parents or families in the first place. See the discussion in part 3.6.3 of chapter three of this study.

<sup>30</sup> Skelton (2013) 607; Skelton (2009) 286.

environment.<sup>31</sup> The duty of the State to intervene in favour of the child where parents are unable to fulfil their obligations, with particular reference to the provision of alternative care, has been highlighted in the case of *Centre for Child Law v MEC for Education, Gauteng*.<sup>32</sup> It was held further that the State has a direct duty to provide for the socio-economic needs of children who have been removed from the care of their parents or families.<sup>33</sup>

Finally, and related to the second is an entitlement to respect for the institution of family. The South African Constitution does not provide expressly for the 'right to family life' as contained in several international instruments.<sup>34</sup> This was deliberate to 'allow for flexibility in the recognition of different family forms in a diverse society.'<sup>35</sup> Thus, the family environment, regardless of its form is considered to be the preferable context for the care of the child, and caution must be exercised in any attempt at removing a child from his family and placing him in alternative care.<sup>36</sup>

In *Government of the Republic of South Africa v Grootboom & Others (Grootboom case)*,<sup>37</sup> the court noted that the child's right to parental or alternative care (Section 28(1)(b) must be read together with the right to the provision of 'basic nutrition, shelter, basic health care services and social services'.<sup>38</sup> Among others, the court had to decide on the enforcement of children's right to children's rights to shelter, basic nutrition and health care (all components of the right to alternative care) as provided for in Section 28(1)(c) of the

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<sup>31</sup> Skelton (2009) 285; Skelton (2013) 607:

However, the Children's Act intends that the mere fact that a child is found to be in need of care should not necessarily mean that she should be removed from her family. Instead, mechanisms which aim to maintain the family unit and to support the child within the family should be implemented. Removal should only happen where it is appropriate.

<sup>32</sup> 2008 (1) SA 223 (T) (*Luckhoff case*). Murphy J stated that the responsibility 'to provide care and social services to children removed from the family environment rests upon the state', and the state 'must provide appropriate facilities and meet the children's basic needs' (para 227).

<sup>33</sup> The *Luckhoff case* concerned the poor conditions of care under which children were placed at JW Luckhoff High School pursuant to sec 15(1)(d) of the old Child care Act on the residential placement of children who have been separated from parental/family care.

<sup>34</sup> Examples include the recognition of the family as the basic unit of society relevant for the proper growth and harmonious development of the child as provided in the preambles to the CRC and the ACRWC among others.

<sup>35</sup> Skelton (2013) 604: 'the right is indirectly protected via the right to dignity'. See also Skelton (2009) 278 where she points out that reference to 'right to family life' has however been made in several cases, and it is usually interpreted progressively. This accords with the position in international law as discussed previously in section 3.6.1 of Chapter Three. Skelton notes that the right to family life 'places a duty on the parents and family of children to provide care and, by implication, also places a duty on the state to support the institution of the family. The correlative of the duty is the child's right to parental care. Parents cannot derive any rights from the section.'

<sup>36</sup> Kruger H, 'Children in Need of Care and the Children's Act 38 of 2005' (2009) 23 *Speculum Juris* 34. See also Skelton (2013) 605-607.

<sup>37</sup> 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC).

<sup>38</sup> This point highlights the relationship between the obligation of the family and of the State to ensure an adequate standard of living for the child whether parental/family care or alternative care, as discussed in Chapter two of this study, section 2.4.4.

constitution. The case laid the foundation for what has become known as the ‘reasonableness test’ in socio-economic rights litigation; the test is determined by the exclusion of ‘a significant segment of society’ whose needs are most urgent and who are most unable to enjoy the rights in question without assistance.<sup>39</sup> The decision of the court has been criticised for several reasons including placing internal limitations on the realisation of children’s socio-economic rights in the same manner as the rights of adults.<sup>40</sup> However the court held that Section 28(1)(c) places an obligation on the State with regards to children lacking parental or family care.<sup>41</sup> This position appears anomalous as it appears to negate the obligation of the State to protect and provide for children even while under the care of parents, particularly when the parents are unable to properly care for them.<sup>42</sup>

### 5.2.2 Constitution of the Republic of Namibia (1990)

The Namibian Constitution dedicates its Section 15 to the protection of children’s rights, providing among others that:



<sup>39</sup> *Grootboom* case, paras 43-44. The ‘reasonableness test or standard’ has been shown to be in many ways similar or at least related to the ‘minimum core’ approach developed by the UN Committee on Economic, Social and Cultural Rights, an approach which was rejected by the court in favour of the ‘reasonableness approach’. See Mbazira C *Litigating socio-economic rights in South Africa* (2009) 61-72.

<sup>40</sup> The court held that giving immediate priority to the rights of children meant that children would be used as ‘stepping stones’ for adults to benefit from rights to which they were ordinarily not entitled. According to the court, this was not the intention of the constitution since the children’s socio-economic rights obligations are placed first on adults (their parents). In effect, the court failed to recognise children as distinct and independent from their parents, particularly with regards to the enjoyment of socio-economic rights. Other criticisms of the judgment include the rejection of the ‘minimum core approach’ to socio-economic rights litigation, failure to give content to socio-economic rights (including those directed at children), non-interrogation of budgetary allocations to rights realisation and of the means chosen to give effect to rights. See Mbazira (2009) 59-60. See also Sloth-Nielsen J & Kruuse H ‘A maturing manifesto: The constitutionalisation of children’s rights in South African jurisprudence 2007-2012’ (2013) 21(4) *International Journal of Children’s Rights* 649; Liebenberg S ‘*Grootboom* and the seduction of the negative/positive duties dichotomy’ (2011) 26(1) *Southern African Public Law* 37; Mbazira C ‘*Grootboom*: A paradigm of individual remedies versus reasonable programmes’ (2011) 26(1) *Southern African Public Law* 60; Stewart L ‘The *Grootboom* judgment, interpretative manoeuvring and depoliticising children’s rights’ (2011) 26(1) *Southern African Public Law* 97.

<sup>41</sup> *Grootboom* case, para 79.

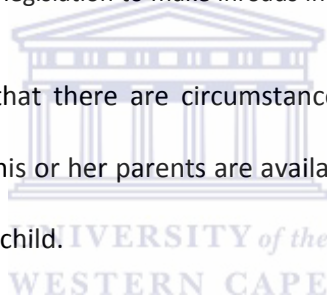
<sup>42</sup> See Chapter 2, section 2.4. See also, Liebenberg S ‘The interpretation of socio-economic rights’ in Woolman S *et al* (eds) *Constitutional law of South Africa* (2005) 33-1, 33-48; Sloth-Nielsen J ‘Too little? Too late?: The implications of the *Grootboom* case for state response to child headed households’ (2003) 1 *Law, Democracy and Development* 113; Scott C & Alston P ‘Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney’s* legacy and *Grootboom’s* promise’ (2000) 16 *South African Journal on Human Rights* 206; van Bueren G ‘Alleviating poverty through the Constitutional Court’ (1999) 15 *South African Journal on Human Rights* 57; de Vos P ‘The economic and social rights of children in South Africa’s transitional Constitution’ (1995) 2 *SA Public Law* 233. It should be noted that in a later case, *Minister of Health and Others v Treatment Action Campaign (TAC case)*, the court adjusted its earlier position in the *Grootboom* case to note that the State’s obligation towards children subsists even while they are in the care of their parents, especially when they are unable to adequately care for the children. However, the court did not address the issue of whether children’s rights are immediately realisable especially with reference to the ‘minimum core’ approach. See *TAC case* 2002 5 SA 721 (CC).

Children shall have the right from birth to a name, the right to acquire a nationality, and subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.<sup>43</sup>

The provision of Section 15 above has been interpreted by the Namibian court as providing for three distinct rights: the right to a name; to acquire a nationality; and to know and be cared for by one's parents.<sup>44</sup> With reference to the right to alternative care, in relation to the right to know and be cared for by one's parents, it was held that:

A child's right, 'as far as possible' (an expression which implies that there may be circumstances in which it is not possible) 'to know and to be cared for by its parents' is made 'subject to legislation enacted in the best interests of children'. The significance of that is that Parliament is authorised to enact legislation which may limit the child's right to be cared for by its parents, if doing so would be in the best interests of the child, the starting point being that all children have the right to be cared for by their parents, who have the corresponding duty to care for them. There may well be circumstances in which, in the child's best interests, that right and duty should be circumscribed. For example, it may not be in the child's best interests to be left in the care of a parent whose lifestyle, mental state or conduct is inimical to the best interests of the child.<sup>45</sup> ... Parliament may therefore enact legislation to make inroads into the child's right to know and be cared for by its parents.<sup>46</sup>

The above clearly highlights the fact that there are circumstances in which a child may be in need of alternative care even if one or both of his or her parents are available, giving rise to the need for the State to intervene in the best interests of the child.



While both the constitutions of South Africa and Namibia contain express provisions on children's rights including the right to alternative care, the provisions in the South African constitution are particularly strong both in language and content thereby providing a firm basis for the child law reform process that culminated in the Children's Act 38 of 2005, and its provisions on alternative care. In the case of Namibia, other important rights for children are contained in Chapter 11 on 'Principles of State Policy', and as such

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<sup>43</sup> Art. 15(1) Constitution of Namibia, 1990. Other rights provided include the right to protection from economic and other forms of exploitation and the prohibition of detention for children below 16 years, who come in conflict with the law.

<sup>44</sup> See the case of *Detmold and Another v Minister of Health and Social Services and Others* 2004 NR 174 (HC) paras D-E (*Detmold* case).

<sup>45</sup> In the *Detmold* case, the old position of Namibian law which disallowed non-citizens from adopting children was declared unconstitutional clearly highlighting some of the circumstances in which children may be in need of alternative care and the responsibility of the state to act on behalf of such children to secure them alternative care. It must however be noted that the court in the *Detmold* case stated clearly that the principle of the best interests of the child as used in the Namibian constitution is not the same as the manner in which it is entrenched in the South African Constitution. That is, it is not 'a constitutional imperative against which all legislation, except that dealing with the child's right to know and be cared for by its parents, is to be measured.' (paras H-I)

<sup>46</sup> *Detmold* case (2004) paras, C-H.



are not ordinarily justiciable. Examples include the right to public services and social security benefits.<sup>47</sup> Some of these rights have been provided in the new Child Care and Protection Bill which will be discussed subsequently. Nonetheless, it is significant to note that both constitutions specifically provide for children's rights compared to other constitutions in the region that were adopted around the same period when children's rights was beginning to gain global recognition and significance (via the CRC and the ACRWC).<sup>48</sup>

### **5.3 Child-Specific Legislation: Focus on the Status of Kinship Care in relation to Foster Care**

#### **5.3.1 South African Children's Act (2005)**

The Children's Act does not define alternative care but restates the fact that it is in the best interests of the child to be 'brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment.'<sup>49</sup> A child is in alternative care if the child has been placed in foster care,<sup>50</sup> in a Child and Youth Care Centre (CYCC)<sup>51</sup> or in temporary safe care.<sup>52</sup> These options are formal alternative care placement options that the Children's Court is empowered to make without direct reference to kinship care.

Key concepts relevant for the right to alternative care are provided in the Act.<sup>53</sup> 'Care' is defined to include the provision of a suitable living environment, the maintenance of conditions conducive for the child's development and the availability of adequate financial support. A caregiver is any person other than the (original) parent or guardian who factually cares for the child such as: a foster parent; a person caring for

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<sup>47</sup> Sec 95.

<sup>48</sup> Examples include the constitutions of Lesotho (1993) and Malawi (1994) which provide for children's rights to a limited extent, and with no reference to alternative care. Older constitutions in the region include Botswana (1966) and Tanzania (1977) which contain no express provisions on children's rights.

<sup>49</sup> Sec 7(1) (k).

<sup>50</sup> This includes placement in a 'cluster foster care scheme', which refers to a system of foster care 'managed by a non-profit organisation and registered by the provincial head of social development for this purpose.' Sec 1.

<sup>51</sup> CYCC is an umbrella term for a wide range of residential facilities or institutions, including orphanages, children's homes, places of safety, secure care facilities for awaiting trial children, children's villages and shelters for street children, among others. It is therefore not specific to alternative care placements. There are 28 CYCC 'nationally with a total capacity of 3272 beds. During 2010/11 a total of 8879 children were admitted to CYCCs'. See Ballard C 'New Report sheds light on the situation of children in South Africa's prisons' (2013) 15(1) *Article 40: The Dynamics of Youth Justice and the Convention on the Rights of the Child in South Africa* 7. Temporary safe care is however generally specific to alternative care as it 'means care of a child in an approved child and youth care centre, shelter or private home or any other place, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell.' See sec 1, Children's Act.

<sup>52</sup> Secs 46(1)(a) & 167(1).

<sup>53</sup> Sec 1.

the child with (express or implied) parental consent; the head of a CYCC, a temporary safe care or a shelter; a community child and youth care worker; and the head of a child-headed household. Although a kinship caregiver or relative is not expressly mentioned, it can be inferred from 'a person who cares for a child with the implied or express consent of a parent or guardian of the child.'<sup>54</sup> This interpretation accords with the CRC's definition of a caregiver,<sup>55</sup> which has further been elaborated upon by the CRC Committee as follows:

The definition of "caregivers", referred to in article 19, paragraph 1, as "parent(s), legal guardian(s) or any other person who has the care of the child", covers those with clear, recognized legal, professional-ethical and/or cultural responsibility for the safety, health, development and well-being of the child, primarily: parents, foster parents, adoptive parents, caregivers in *kafalah* of Islamic law, guardians, extended family and community members; education, school and early childhood personnel; child caregivers employed by parents; recreational and sports coaches – including youth group supervisors; workplace employers or supervisors; and institutional personnel (governmental or non-governmental) in the position of caregivers for example responsible adults in health-care, juvenile justice and drop-in and residential-care settings. In the case of unaccompanied children, the State is the de facto caregiver.<sup>56</sup>

With reference to child protection generally, the main objectives of the Act include family preservation; giving effect to children's right to parental or family care, or alternative care, where necessary; ensuring the provision of social services to children; and protecting children from abuse, degradation, maltreatment, or neglect.<sup>57</sup> Thus, the provision of alternative care for children deprived of a family environment forms a component part of a variety of services available for children under the broader child protection framework.<sup>58</sup>

The Children's Court decides on whether a child is in need of care and protection if the child:

- a. has been abandoned or orphaned and is without any visible means of support;
- b. displays behaviour which cannot be controlled by the parent or care-giver;
- c. lives or works on the streets or begs for a living;
- d. is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- e. has been exploited or lives in circumstances that expose the child to exploitation; lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

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<sup>54</sup> Sec 1, 'care-giver' (b).

<sup>55</sup> Art 19(1) CRC.

<sup>56</sup> CRC Committee GC 13 (2011) para 33. It will be recalled that some of these were discussed in previous chapters of this study based on the provisions of Articles 5 of the CRC and 20(1) of the ACRWC in 'clear recognition of the fact that the extended family and other de facto care-givers play a role especially in traditional and rural communities in Africa.' See sections 2.2.2, Chapter Two and 3.6.1, Chapter Three. See also Mezmur (2008) 25-26.

<sup>57</sup> Sec 2(a)(b)(i)-(iii).

<sup>58</sup> Dutschke M *Defining Children's Constitutional Right to Social Services – A Project 28 Working Paper* (2006) 57. Other components of a child protection system include prevention and early intervention measures, family reunification services, and adoption. See Sloth-Nielsen J 'Protection of Children' in Davel CJ & Skelton AM *Commentary on the Children's Act* (Revision Service 2, 2010) 7-2H.



- f. may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- g. is in a state of physical or mental neglect; or
- h. is being maltreated, abused, deliberately neglected or degraded by a parent, care-giver, a person who parental responsibilities and rights or a family member of the child or by a person under whose control the child is.<sup>59</sup>

A child in any of the circumstances listed above is automatically considered to be in need of care and protection. Where a police officer or social worker in an emergency situation is of the view that a child is in need of care and protection leading to a removal of the child from his parent, guardian or caregiver, the Constitutional Court has held that such removal is subject to automatic review by the a children's court on the day following the removal. The decision was handed down in the case of *C and Others & v Department of Health and Social Development, Gauteng & Others*,<sup>60</sup> the first case to challenge the constitutionality of the Children's Act. This is to ensure that the children and families or caregivers involved get a chance to be heard thereby minimising the possibility of an incorrect action or decision on the matter, leading the court to order the inclusion of additions to the provisions of Sections 151 and 152 of the Children's Act.<sup>61</sup> The Constitutional Court noted that the absence of a provision on automatic review in the Act as 'retrogressive' considering that it was present in the old Child Care Act.<sup>62</sup> The court noted that the removal, in appropriate circumstances, of a child from parental/family care, leading to placement in alternative is a limitation on the child's right to parental/family care. However, the right to alternative care is a 'secondary right, not an equivalent alternative right'; the right to parental/family care remains the primary right that should not be carelessly interfered with.<sup>63</sup> Thus:

The coercive removal of a child from her or his home environment is undoubtedly a deeply invasive and disruptive measure. Uninvited intervention by the state into the private sphere of family life threatens to

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<sup>59</sup> Sec 150(1)(a)-(h).

<sup>60</sup> [2012] ZACC 1. See also Zaal FN, 'A first finding of unconstitutionality regarding the Children's Act 38 of 2005' (2012) 75 *Journal of Contemporary Roman-Dutch Law* 168. This was in relation to the High court decision that preceded the Constitutional Court's judgment.

<sup>61</sup> *C v Department of Health*, paras 22-39.

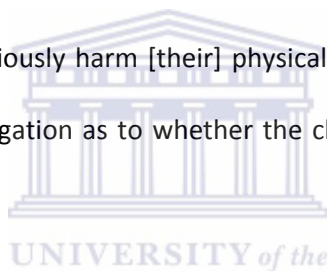
<sup>62</sup> *C v Department of Health*, para 17. Earlier in 2009, Gallinetti already pointed out that the omission is 'highly prejudicial' to children, as well as their parents or caregivers. See Gallinetti J, 'The wisdom of Solomon: Removal of children as part of the child protection system in the Children's Act 38 of 2005' (2009) 23 *Speculum Juris* 54. See also Zaal FN, 'Imperilling children and social workers? Preliminary care removals under the Children's Act 38/2005' (2008) *Social Work Practitioner-Researcher* 290; Zaal FN, 'Child removal procedures under the Child Care Act: Some new dangers to contend with' (1998) *South African Law Journal* 233; Matthias & Zaal 'Can we build up a better children's court? Some recommendations for improving the processing of child-removal cases' in Keightley (ed) *Children's Rights* (1996) 53-54.

<sup>63</sup> *C v Department of Health*, para 24; Skelton (2013) 605.

rupture the integrity and continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their own esteem as well as in the eyes of their community. Both sections 151 and 152 of the Children's Act authorise removals, yet neither section subjects removals to automatic review, which would enable the affected family, including the removed child, to make representations on whether removal was in the best interests of the child.<sup>64</sup>

In effect, the State should not arbitrarily 'interfere with the integrity of the family,'<sup>65</sup> and where the removal of a child from the family is contemplated, it requires an adequate degree of consideration in relation to the best interests of the child and the sanctity of the family.<sup>66</sup>

With reference to (f) above (returning a child to the care of a parent, guardian or caregiver), the Constitutional Court emphasised the importance of the quality of care available to children within the family environment in the case of *van der Burg v National Director of Public Prosecutions*.<sup>67</sup> Although the focus of the case was the civil forfeiture of a home illegally used for the storage and sale of liquor, the court held that it was not in the best interests of the children to be raised in such an environment which exposed them to 'circumstances which may seriously harm [their] physical, mental or social well-being'.<sup>68</sup> This led the court to *suo moto* order an investigation as to whether the children concerned were in need of care and protection.<sup>69</sup>



Further, the Constitutional Court has developed jurisprudence with reference to children who become in need of care and protection due to lawful separation from their parent(s) or caregiver(s), arising from incarceration or the risk of custodial sentences.<sup>70</sup> Since consideration has to be given to the provision of alternative care for the children involved, it was noted in the case of *S v M* that the best interests of children should not be 'swallowed up' or 'subsumed' when considering the culpability and sentencing regime for the caregiver concerned.<sup>71</sup> The court developed a set of guidelines for the sentencing process to among others ensure that the interests of children of a person who faces a custodial sentence are

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<sup>64</sup> *C v Department of Health*, para 23.

<sup>65</sup> *C v Department of Health*, para 24.

<sup>66</sup> *C v Department of Health*, para 27.

<sup>67</sup> [2012] ZACC 12.

<sup>68</sup> *van der Burg* case, para 77.

<sup>69</sup> Sec 155.

<sup>70</sup> See secs 9(4) CRC & 30(1) ACRWC.

<sup>71</sup> *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) paras 30, 33.

separately considered in the course of the case before reaching a decision as to what the most appropriate sentence for the caregiver should be.<sup>72</sup>

In the subsequent case of *MS v S*,<sup>73</sup> the court made it clear that recourse to non-custodial sentences for caregivers is not a general rule that would allow offenders who have children to use them ‘as a pretext for escaping otherwise just consequences of their own misconduct.’<sup>74</sup> The court stated that there are appropriate circumstances where it is necessary to sentence a caregiver to a custodial sentence, particularly in cases where the convicted offender was not the *sole* primary caregiver of the child. In this case, it was shown that there was an adequate family support system to care for the children while S served her sentence.<sup>75</sup> It could therefore not be maintained that the court did not adopt a child-centred approach in arriving at a decision on a custodial sentence; in other words, the best interests of the children, including the quality of (alternative) care they would receive ‘in the event of her incarceration’ were duly considered in the matter.<sup>76</sup>

Apart from the categories of children listed in Section 150 above, children in child-headed households and those found to be victims of child labour may also be considered to be in need of care and protection - subject to the outcome of investigations and assessments by a social worker.<sup>77</sup> Thus, a child is ‘potentially in need of a state-imposed care intervention and possibly even removal to an alternative care placement when his or her present familial environment or other living circumstances are so inappropriate that harm

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<sup>72</sup> *S v M*, para 36. In this case, the court eventually sentenced M to a more restorative, non-custodial sentence, to among others secure the best interests of M’s children. See para 59.

<sup>73</sup> 2011 (2) SACR 88 (CC); Case CCT 63/10 [2011] ZACC 7; *S v S* (Centre for Child Law as Amicus Curiae) 2011(7) BCLR 740 (CC).

<sup>74</sup> *S v M*, para 35. The aim of the recourse to non-custodial sentences in appropriate circumstances ‘is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.’ It will be recalled that the matter of quality of care was again raised in the 2012 *van der Burg* case discussed previously.

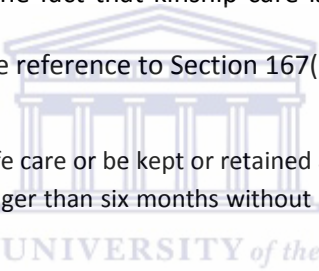
<sup>75</sup> *MS v S*, paras 63-64. Thus, this case was clearly distinguished from the earlier case of *S v M* because the convicted caregiver in this case was not a single parent exclusively responsible for the care of the children. Initially, there was evidence that she had a mother-in-law who was willing to care for the children together with her husband. And when the mother-in-law was no longer willing to do so, the husband was still available and by engaging other child care resources, would be able to make sure they were adequately cared for while he worked long hours.

<sup>76</sup> *MS v S*, paras 63, 65. In a dissenting opinion however, Khampepe J noted that it is important to conduct an inquiry into the quality of the (alternative) care that would be available to the children upon the incarceration of a (co-)caregiver; this is an essential aspect of the guidelines developed in *S v M*. The learned judge noted that the ‘physical presence of the father does not mean that the father will be able to take adequate care of the children’, and that the fact of being married alone, ‘without regard to the realities of that family’s life, is too normative an assessment of how parental responsibility in marriage is apportioned’, paras 36, 47.

<sup>77</sup> Sec 150(2).

is occurring or likely.<sup>78</sup> Where children in the second category are found not to be in need of care and protection, other measures are required to assist the child; they include counselling, mediation, and family rehabilitation services.<sup>79</sup>

From the foregoing, it is clear that the South African Children's Act does not specifically recognise kinship care as a form of alternative care but defines foster care as the court-ordered placement of a child in the care a person other than the child's parent or guardian.<sup>80</sup> The foster parent appointed may however be the child's relative and not necessarily a non-relative.<sup>81</sup> On the face of it therefore, the Act appears to provide for traditional foster care by non-relatives and 'kinship foster care' or 'formal kinship care' (operating within the foster care system) as discussed in the previous chapter.<sup>82</sup> Consequently, informal kinship care arrangements made without recourse to the court are not covered, leaving out a significant number of children in kinship care.<sup>83</sup> Highlighting the fact that kinship care is not provided for in the Act as distinct from foster care, Zaal and Matthias make reference to Section 167(2) which provides as follows:

  
A child may not be in temporary safe care or be kept or retained at any place or facility, including a registered child and youth care centre, for longer than six months without a court order placing the child in alternative care.

It is clear from the above that placement in temporary safe care or in a CYCC or other (institutional) facility is envisaged to be a short term placement until a more appropriate and longer term alternative care placement can be determined and made available by an order of court.<sup>84</sup> But with reference to a child being in a 'place or facility', Zaal and Matthias note that this wide terminology raises the question 'whether a relative who provides informal kinship care at her home (clearly a 'place') for more than six months without court authority contravenes s 167(2).'<sup>85</sup> If so, 'it would appear that the legislature's intention is to prohibit informal provision of substitute-parental care (including that by extended family members) beyond

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<sup>78</sup> Matthias C & Zaal N, 'The Child in Need of Care and Protection' in Boezaart T (ed) *Child Law in South Africa* (2009) 163.

<sup>79</sup> Sec 150(3).

<sup>80</sup> Sec. 180(1)(a). A child may also be placed in foster care through a ministerial transfer from another alternative placement, typical placement in a residential facility. See Sec. 180(1)(b) in terms of sec. 171, Children's Act.

<sup>81</sup> Sec 180(3)(a)(b). A person in a registered cluster foster care scheme also qualifies as a foster parent (c).

<sup>82</sup> See section 4.3.2 of Chapter Four.

<sup>83</sup> Schafer L *Child Law in South Africa: Domestic and International Perspectives* (2011) 467.

<sup>84</sup> Zaal N & Matthias C 'Alternative Care' in Davel CJ & Skelton AM *Commentary on the Children's Act* (Revision Service 2, 2010) 11-4. It is however possible that an order is made for a child to remain in such arrangement (for example, a CYCC) such that it is no longer a temporary arrangement.

<sup>85</sup> Zaal & Matthias (2010) 11-4.

a period of six months.<sup>86</sup> The effect of this is that kinship care is not considered to be alternative care (at least on a long-term basis) unless it is backed by an order of court, in which case it functions as foster care.

However, foster care was conceived to operate solely within the child protection system<sup>87</sup> since

A decision to place a child in foster care is made by a children's court which is satisfied, on the basis of a social worker's report and any other evidence it calls for, that the child is in need of care and protection, that the prospective foster parent is a fit and proper person and that the placement is in the best interests of the child. Once a child is placed in foster care, there must be ongoing social work oversight of the placement, and subsequent reports to court, usually every 2 years, to recommend whether the foster care placement should be extended or whether some other care arrangement is more appropriate.<sup>88</sup>

The extension of a foster care order, in specified circumstances, is aimed at ensuring stability in the child's life<sup>89</sup> as well as minimising the burden of monitoring and supervision placed on the limited human and material resources available within the social work sector.<sup>90</sup> Where kinship caregivers are appointed as foster carers however, the initial placement order may be made for more than two years, and subsequently extended for more than two years until the child turns 18 years.<sup>91</sup> This therefore reduces or completely obviates the need for court-ordered extensions where a foster care placement is with a relative or family member. However, it is still required that a social worker supervises the placement by at least one visit in two years regardless of whether the placement (and extension) is with a relative or non-relative.<sup>92</sup>

While such allowance is made in the case of kinship foster carers, the South African approach has however resulted in a number of problems as a result of the intersections between the social assistance or social

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<sup>86</sup> Zaal & Matthias (2010) 11-4.

<sup>87</sup> Skelton A & Carnelley M (eds) *Family Law in South Africa* (2010) 318.

<sup>88</sup> Skelton A 'Kinship care and cash grants – South Africa' in Atkin B (ed) *The International Survey of Family Law* (2012) 336. See also Skelton & Carnelley (2010) 323; Secs 159(1)(a)(b) & 186(1)-(2) Children's Act. See also sec 186(3) which provides for the continued supervisory role of a social worker once in two years in case of an extended foster care placement, in specified circumstances after the initial two years. See also Sloth-Nielsen J 'Care and vulnerability in the context of the absence of a comprehensive social security system: The case of Southern and Eastern Africa', paper presented at the International Society of Family Law Conference (2010) 10 – copy on file with author.

<sup>89</sup> Sec 186(1).

<sup>90</sup> Sloth-Nielsen (2010 ISFL paper) 10: In the case of foster care placement with relatives, 'children were often looked after in safe long-term care by relatives, which in practice did not require on-going supervision and monitoring.'

<sup>91</sup> Sec 186(2). A longer duration and extension in case of placement with a relative is considered in any of the following circumstances: the child has been abandoned by the biological parents; the child's biological parents are deceased; there is for any other reason no purpose in attempting reunification between the child and the child's biological parents; and it is in the best interests of the child.

<sup>92</sup> Sec 186(3). The responsibilities and rights of foster parents are spelt out in the regulations to the Children's Act and include, the responsibility to ensure that any social assistance or financial contribution for the child is used for the child's upbringing and in the child's best interests, and the right to take 'all day to day decisions necessary for the care, upbringing and development of the foster child in his or her care.' See Chapter 13, section 65(1)-(4) of the General Regulations regarding Children for the full list of responsibilities and section 66(1)-(8) for the full list of rights.

grant system and foster care as a form of alternative care. With over 4 million children (about 27% of the total population of children) living in the care of extended family members for various reasons,<sup>93</sup> and nearly 70% of the country's child population living in poverty,<sup>94</sup> it is more beneficial to access grants targeted at foster care than any other available State support, considering the actual cost of caring for children.<sup>95</sup> The issues leading to this development and other related matters will be discussed further in section 5.4 of this study. It must however be mentioned that around the period of completing this study (September-October 2013), the Department of Social Development (DSD) introduced a bill aimed at amending the Children's Act in order to proffer solutions to these problems.<sup>96</sup>

### 5.3.2 Namibia's Draft Child Care and Protection Bill (2012)

Namibia ratified the CRC in 1990 and the ACRWC in 2004. However, for over a decade, the drafting process for a comprehensive legislation on children's rights in Namibia has been on-going. The drafting process which remains the most extensively consultative in the region has resulted in Namibia's draft Child Care and Protection Bill.<sup>97</sup> The (final) draft was approved by Cabinet in 2012, and was mentioned during the opening of Parliament in February 2013, signifying that it is soon to be tabled for possible adoption into law. Thus, in this study, reference will only be made to the new Child Care and Protection Bill which repeals the outdated Children's Act of 1960 (inherited from South Africa) and incorporates, with minor amendments, the Children's Status Act of 2006.<sup>98</sup> Since both countries share the same legal and social background, the South African process has greatly influenced Namibia's law reform process - the Bill is in many respects similar to South Africa's Children's Act, with some variations made to accommodate Namibian peculiarities.<sup>99</sup> The objective of the Bill is to comprehensively provide for and uphold children's

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<sup>93</sup> Hall K, Woolard I, Lake L & Smith C (eds) *South African Child Gauge 2012* (2012) 83; Jamieson L, Bray R, Viviers A, Lake L, Pendlebury S & Smith C (eds) *South African Child Gauge 2010/2011* (2011) 80.

<sup>94</sup> Hall *et al* (2012) 82; Jamieson *et al* (2011) 85.

<sup>95</sup> It also calls into question the practicality and financial viability of paying a higher amount in grants for a much longer period of time for foster care which was originally designed as a temporary measure of alternative care.

<sup>96</sup> It is expected that the bill will become public sometime in November 2013.

<sup>97</sup> The law reform process has been backed by an unprecedented level of media campaigns, involved consultations with youth and children, with several consultative workshops held in different parts of the country with several stakeholders.

<sup>98</sup> The 2006 Act was driven by a gender equality agenda.

<sup>99</sup> Kangandiela LN and Mapaire C 'Work in progress: The Child Care and Protection Act in Namibia' in Ruppel O C (ed) *Children's Rights in Namibia* (2009) 125; Sloth-Nielsen (2008 - ejournal) 2.

rights as enshrined in the Constitution as well as to give domestic effect to the international agreements that are binding on Namibia, i.e. the CRC and the ACRWC among others.<sup>100</sup>

The Bill's definitions section (1) also provides a list of relevant definitions that run through the Bill. 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. The latter four are residential care facilities which should be resorted to only when it is in the child's best interests.<sup>101</sup> These facilities function on the basis of the Minimum Standards for Residential Child Care Facilities, introduced in 2009 by the Namibian Ministry of Gender Equality and Child Welfare (MGECW). The standards were developed from the UN Guidelines (while in draft form) and contain guidelines for the care of children, the organisation of facilities, management and staff, premises, administration, and finances.<sup>102</sup>

Similar to the South African Children's Act, the Namibian Bill defines a caregiver as any person other than a parent or guardian, who takes primary responsibility for the day-to-day care of a child – including 'a kinship-care-giver'.<sup>103</sup> With respect to the role of kin in the care of children, the Bill defines a child's 'family member' to mean:

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

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<sup>100</sup> Preamble to CCPB. See also Nakale A, 'Namibia: Child Protection Bill Underway' NEW ERA, available at < <http://allafrica.com/stories/20110030805.html> > (published 2011; accessed 18 September 2013). Some of the specific issues which the proposed bill is meant to address include the protection of families and the interests of children; protection from discrimination, exploitation and other forms of harm against children, etc.

<sup>101</sup> See generally secs 59-65, CCPB (2012 final draft). A Children's Home is a non-family based residential care facility for orphaned and abandoned children for whom suitable kinship or foster care is unavailable (Art 63, CCPB) while a Shelter is a facility that provides for the basic needs of abused children, street children and other children who voluntarily show up at the facility. Art 62, CCPB.

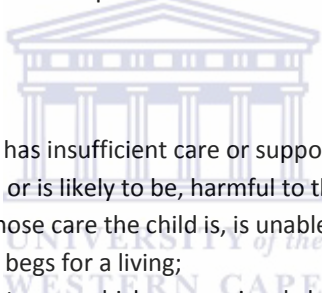
<sup>102</sup> Ministry of Gender Equality and Child Welfare (MGECW) *Minimum Standards for Residential Child Care Facilities* (2009).

<sup>103</sup> Others include, as is the case with the Children's Act of South Africa, 'a foster parent; a primary caretaker; a person who cares for a child whilst the child is in a place of safety; the person at the head of a facility where a child has been placed; and the child at the head of a child-headed household.' Distinguishing between a care-giver and a 'primary caretaker', it defines 'primary caretaker' as 'a person other than the parent or other legal care-giver of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the care-giver of the child'.



With reference to child protection, a novel feature of the CCPB is that it replaces the usual expression 'child in need of care and protection' with a more appropriate term 'child in need of protective services'. It is submitted that the latter expression is not merely an exercise in semantics; the change is appropriate because, as alluded to in earlier chapters of this study, all children are generally in need of care and protection regardless of whether or not they are in a family environment, due to the vulnerability that childhood presents. Consequently, the term 'child in need of protective services' has the potential of directing attention to particular categories of children in need of care and protection due to their being doubly or otherwise vulnerable as a result of, for example, having been deprived of their family environment. In the course of drafting the Bill, many stakeholders involved in the drafting process considered the old term ('children in need of care and protection') to be misleading and confusing.<sup>104</sup>

Under the CCPB therefore, a child is in need of protective services if he or she is found to be in any of the following circumstances:

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- a. is abandoned or orphaned and has insufficient care or support;
  - b. is engaged in behaviour that is, or is likely to be, harmful to the child or any other person and the parent or guardian or the person in whose care the child is, is unable or unwilling to control that behaviour;
  - c. lives or works on the streets or begs for a living;
  - d. lives in or is exposed to circumstances which may seriously harm the physical, mental, emotional or social welfare of the child;
  - e. is in a state of physical or mental neglect;
  - f. is addicted to alcohol or other dependence producing drug and is without any support to obtain treatment for such dependency;
  - g. is below the age of 14 years and is involved in an offence other than a minor criminal matter;
  - h. is an unaccompanied migrant or refugee;
  - i. is chronically or terminally ill and lacks a suitable care-giver;
  - j. is being kept in premises which, in the opinion of a medical officer, are over-crowded, highly unsanitary or dangerous; or
  - k. is being, or is likely to be, neglected, maltreated or abused.<sup>105</sup>

The children listed above are more or less automatically considered to be in need of protective services.

However, in the case of children in child-headed households,<sup>106</sup> children of imprisoned mothers and victims

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<sup>104</sup> See the explanatory introduction to Chapter 11 of the CCPB on 'Child Protection Proceedings'.

<sup>105</sup> Sec 127(1).

<sup>106</sup> There is however one main difference in how each country regulates child-headed households. The CCPB of Namibia does not set a minimum age limit for the child heading a household (16 years old in South Africa). The absence of an age limit for a child heading a household may give rise to scenarios where a child who is too young may be entrusted with the responsibility of caring for younger siblings, as the head of a household. See Sec 137(c) SA Children's Act and sec 205 CCPB. It has however been noted that children as young as 12 head some households in Namibia due to factors such as orphanhood, parental illness or disability which



of child labour among others,<sup>107</sup> each situation ‘must be referred for investigation by a designated social worker’ before a conclusion can be reached as to whether the child concerned is actually in need of protective services.<sup>108</sup>

From the definition of alternative care above, it is clear that the CCPB makes provision for both kinship care and foster care as distinct models of alternative care. This was done in recognition of the vast number of children in kinship care, not necessarily due to child protection matters. It was thus recommended that:

Kinship care should be authorised through less formal procedures, while a system of formalised, non-relative foster care should be developed as an alternative to residential care where suitable kinship care is not available. It was also recommended that kinship care should be the preferred option where possible.<sup>109</sup>

Foster care is defined as the placement of a child with a person ‘who is not the parent, guardian, family member or extended family member of the child in terms of an order of a children’s court ... after a child protection hearing ...’<sup>110</sup> On the other hand,

A child is in kinship care if the child has been placed in the care of a member of the child’s family or extended family (“the kinship care-giver”), other than the parent or guardian of the child or a person who has parental responsibilities and rights in respect of the child, with the express or implied consent of the child’s parent or guardian, or by order of court in terms of section 141(3)(e)(i).<sup>111</sup>

Thus, it is clear that foster care is designed to be a child protection (alternative care) measure<sup>112</sup> while the Bill provides for two forms of kinship care: court-ordered kinship care (‘formal kinship care’ to operate within the child protection framework) and informal kinship care arranged by members of a family and not necessarily resulting from a child care and protection matter. Section 141(3)(e)(i) mentioned above refers

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perhaps explains the reason for not placing a minimum age limit. See Kangandiela & Mapaure (2009) 141. There are close to 4,000 child-headed households in Namibia (one per cent of all households). See UNICEF *Children and Adolescents in Namibia 2010: a situation analysis* (2010) 42.

<sup>107</sup> Sec 127(2) (a)-(n).

<sup>108</sup> Sec 127(2).

<sup>109</sup> Ministry of Gender Equality and Child Welfare (MGE CW), Legal Assistance Centre (LAC) and UNICEF *Public Participation in Law Reform: Revision of Namibia’s Child Care and Protection Bill: Final Report* (2010) 163.

<sup>110</sup> Sec 150(1). This traditional understanding of foster care in Namibia is more or less the same as what is contained in the Children’s Act of 1960, which the new Bill is set to repeal. There was however no provision on kinship care in the old Act, and in light of the problems in the South African case where a clear demarcation has not been made between kinship care and foster care, it became important to do so in the Namibian context given the similarities between the systems in both nations.

<sup>111</sup> Sec 114(1). The preamble to Chapter 8 of the CCPB on kinship care provides (para 1) that:

Kinship care is a new concept in Namibian law (although it is already used in some other countries). It is designed to cover the common situation where families make their own arrangements for children to live with and be cared for by someone other than their birth parents – such as extended family members, friends or someone in the local community.

<sup>112</sup> It is construed as a professional service aimed at children who have no one to care for them including those with ‘behavioural problems or other special needs.’ See the introductory clause to Chapter 12 of the CCPB on foster care.

to the former: the placement in kinship care resulting from a children's court hearing where a child is declared to be in need of protective services.<sup>113</sup>

In the case of an informal kinship care arrangement, the child's parent or guardian may conclude a kinship care agreement with the kinship caregiver, and have it registered with the court clerk. It is a compulsory requirement to do so where the caregiver intends to claim any social assistance benefits on the child's behalf.<sup>114</sup> The aim is to protect children from being snatched for grant purposes.<sup>115</sup> The registration process is designed to be 'a simple administrative procedure' since the Bill anticipates 'that few kinship care arrangements will be the result of court orders.'<sup>116</sup>

Both kinship care (court-ordered) and foster care involve the transfer of parental responsibilities and rights to the caregiver for the duration of the placement.<sup>117</sup> Based on a UNICEF-sponsored study on the foster care system in Namibia, it has been noted that there are varying kinship care situations as there are with kinship care, further emphasising the importance of providing separately for kinship care and foster care:

[T]here are a range of different roles for which foster care could be utilised in Namibia: (1) short term foster care for emergencies or for short absences of a caregiver; (2) longer-term foster care for stays of over 6 months; (3) permanent foster care which could be established as an alternative to adoption; and (4) respite foster care on weekends or holidays, which could be used to give regular caregivers a break from their duties. The study recommended that kinship care needs to be superimposed on the range of options presented above, allowing family members to provide any of these forms of care.<sup>118</sup>

Since family members already provide for such a range of options of care for children in need of alternative care, the statement above should be understood as highlighting the fact that kinship care in itself does not pre-suppose a uniform form of care. Rather, the recognition of kinship care should be cognisant of the fact that kinship care, like foster care can also range from 'emergency' to 'temporary' and/or 'permanent',

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<sup>113</sup> Particularly 'if the child does not have a parent or care-giver or has a parent or care-giver who is unable or unsuitable to care for the child.'

<sup>114</sup> Sec 114(2). See sections 114(3)-(5) provides for the format of the agreement as well as the contents, facilitators and other necessary issues.

<sup>115</sup> Sloth-Nielsen (2010 ISFL paper) 13.

<sup>116</sup> Paras 3-4, Preamble to Chapter 8 of the CCPB. In the commentary introducing Chapter 12 of the bill on foster care, it is noted as follows:

Because kinship care is now a separate category, the provisions for foster care by strangers will involve a much smaller pool of people. Foster parents, many of whom will undergo specialised training, will provide a professional service aimed at children who have no one to care for them. This could include children with behavioural problems or other special needs. The Ministry will establish support services for children and foster parents, and develop formal guidelines and standards. (Para 2)

<sup>117</sup> Sec 145 CCPB.

<sup>118</sup> MGEWCW, LAC & UNICEF (2010) 162; MGEWCW *Draft Child Care and protection Bill Summary* (2009) 43. See also the study referred to: van Sloten B (for MGEWCW) *Foster Care in Namibia: Recommendations for the Framework* (2009).

depending on the circumstance(s) surrounding each case.<sup>119</sup> Thus, the Namibian Bill not only recognises kinship care but goes further to place it above foster care in the hierarchy of care options, as is the norm in international and regional law on alternative care for children.<sup>120</sup>

The clear distinction between foster care and care by extended family members or kinship care is a conscious and deliberate attempt to deviate from the South African model due to the problems associated with the absence of such clarity.<sup>121</sup> The distinction is also considered to be important because it enables the State to better monitor and safeguard the interests of children in kinship care while respecting or maintaining its informality and managing the process where formal regulation is required.<sup>122</sup>

Prominent among the problems mentioned above is the abuse of the foster care system through excessive workloads thereby restricting the ability of social workers 'to do more preventative work and engage in efforts to assist and reunite families.'<sup>123</sup> These problems will be discussed in greater detail in the next section of this chapter.



#### **5.4 Kinship Care and Social Assistance**

In the second chapter of this study, there was a discussion on the relationship between children's right to social security assistance and an adequate standard of living, and the importance of these rights for children within the family environment, and in the context of alternative care.<sup>124</sup> In this section, national measures of social assistance applicable to children, and particularly within the alternative care context in South Africa and Namibia will be examined.

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<sup>119</sup> Hence the use of the word, 'superimposed'.

<sup>120</sup> See Chapter Four, section 4.2.1 & 4.3.

<sup>121</sup> Sloth-Nielsen, who was involved in the drafting process of the South African Children's Act and who was a member of the team of experts that worked on the drafting of the CCPB has stressed this point. See Sloth-Nielsen (2010 ISFL paper) 17.

<sup>122</sup> MGEWC, LAC & UNICEF (2010) 163; MGEWC (2009) 43-44.

<sup>123</sup> MGEWC, LAC & UNICEF (2010) 163.

<sup>124</sup> Section 2.4.4.

### 5.4.1 South Africa

South Africa has the most comprehensive social assistance system, not only in (Southern) Africa but also among many middle income countries.<sup>125</sup> Section 27 of the constitution provides the legal basis for the country's social security system; it provides for the right of everyone to access social security, including appropriate social assistance 'if they are unable to support themselves and their dependants.'<sup>126</sup> The Constitutional Court in the case of *Khosa & Ors v Minister of Social Development & Ors*,<sup>127</sup> where it was held that permanent residents are also entitled to claim social assistance benefits for child care purposes, provided the rationale for the inclusion of the right in the constitution as follows:

The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.<sup>128</sup>

The Social Assistance Act (2004) provides the legislative framework for the right to social security in South Africa. It sets out the eligibility criteria and procedures for accessing social grants for children living in poverty, children in need of foster care, and persons with disabilities, among others.<sup>129</sup> With reference to these, the Act is implemented through the provision of the Child Support Grant (CSG), the Foster Child Grant (FCG) and the Care Dependency Grant (CDG). The South African Social Security Agency (SASSA) is responsible for the management, administration and payment of social grants.<sup>130</sup>

Apart from Section 27 on the right of 'everyone' to access social security, every child also has the constitutional right 'to basic nutrition, shelter, basic health care services and social services' (discussed

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<sup>125</sup> Hall K & Proudlock P 'Orphaning and the foster child grant: A return to the "care or cash" debate' (2011) 29(5&6) *Child and Youth Care Worker* 23; Jordann B, Kalula E & Strydom E (eds) *Understanding social security law* (2009) 19; Kaseke E 'The role of social security in South Africa', (2010) 53 *International Social Work* 160.

<sup>126</sup> Sec 27(1). By framing the right as a 'right to access' and not a 'right to social security', the intention is to highlight the fact that it is not an automatic right; it is rather a right which has to be activated through the application of certain processes. See Strydom EML (ed) *Essential Social Security Law* (2001) 21. Thus, in keeping with the socio-economic nature of the right to social security, section 27(1) is to be read together with section 27(2) which provides: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights [that is, all rights contained in the Bill of Rights].'

<sup>127</sup> 2004(6) BCLR 569 (CC).

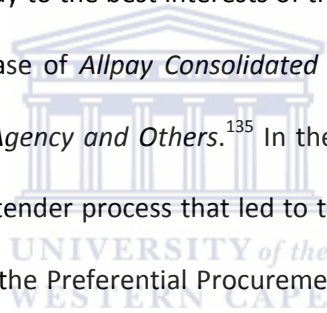
<sup>128</sup> *Khosa* case, para 52.

<sup>129</sup> See section 5-14 Social Assistance Act 13 of 2004; sections 2-10, Regulations in terms of the Social Assistance Act 13 of 2004, Regulation 162, Government Gazette No 27316, 22 February 2005. See generally also Proudlock P, Dutschke M, Jamieson L, Monson J & Smith C (eds) *South African Child Gauge 2007/20008* (2008) 1.

<sup>130</sup> The SASSA is established in terms of the South African Social Security Agency Act of 2004 as a public entity. Prior to the Social Assistance Act of 2004 was the Social Assistance Act 59 of 1992 in terms of which the payment of social security was delegated to the provincial departments.

previously in relation to the *Grootboom* case).<sup>131</sup> While social services are often equated with the right to social security, Dutschke and Monson clearly point out that there is a distinction between the provision of social services and the broader right to social security. Thus, 'the right to social services for children is in addition to and distinct from the broad right to social security'.<sup>132</sup> This position accords with the South African White Paper for Social Welfare (1997) which in describing the areas of social security to include 'poverty alleviation, social compensation and income distribution' refers to 'social security', 'social services' and 'social development programmes' as distinct factors that result in economic gains and growth.<sup>133</sup>

In addition, the jurisprudence of the Constitutional Court and legal analyses by academics suggest that children's right to social services and social security as a whole must be read in the context of the care and protection rights of children whether within the context of existing family care or alternative care.<sup>134</sup> The importance that South African courts pay to the best interests of the child, this time in the context of social grants, was again highlighted in the case of *Allpay Consolidated Investments Holdings (Pty) Limited and others v South African Social Security Agency and Others*.<sup>135</sup> In the initial case at the North Gauteng High Court, irregularities were found in the tender process that led to the award of a contract to a company to provide State social grants in terms of the Preferential Procurement Policy Framework Act 5 of 2000; this led the court to declare the tender process as illegal and invalid. However, rather than set it aside, the court ordered the irregular contract to continue due to the adverse effect that setting it aside would have on over 10 million children who are the main beneficiaries of social grants.<sup>136</sup>



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<sup>131</sup> Sec 28(1)(c).

<sup>132</sup> Dutschke M & Monson J 'Children's constitutional right to social services', in Proudlock P, Dutschke M, Jamieson L, Monson J & Smith C (eds) *South African Child Gauge 2007/2008* (2008) 25.

<sup>133</sup> See Chapter 1 paragraph 8 and Chapter 7 of the White Paper for Social Welfare 1997. See also Dutschke M 'Developmental social welfare policies and children's right to social services' in Proudlock P *et al* (2008) 29; Dutschke M *Defining children's constitutional right to social services* (2006) 8; Olivier MP, Smit N & Kalula ER (eds) *Social security: A legal analysis* (2003) 49; Van Rensburg LJ & Olivier MP 'International and supra-national law' in Olivier MP, Smit N & Kalula ER (eds) *Social security: A legal analysis* (2003) 619

<sup>134</sup> Dutschke & Monson (2008) 25.

<sup>135</sup> (678/12) [2013] ZASCA 29; [2013] 2 All SA 501 (SCA); 2013 (4) SA 557 (SCA) (27 March 2013).

<sup>136</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* (7447/2012) [2012] ZAGPPHC 185 (28 August 2012), para 73 (initial High Court case).

On appeal and cross-appeal however, the court found that there was no illegality in the process that could render the contract invalid.<sup>137</sup> Thus, there was no merit in the appeal while the cross-appeal was upheld. With reference to making a decision that is in the best interests of the child, among others, the court stated as follows:

We need no evidence to know the immense disruption that would be caused, with dire consequences to millions of the elderly, children and the poor if this contract were to be summarily dismissed. The prospect of that occurring has prompted the Centre for Child Law to intervene as *amicus curiae* in this case. We value the contribution they have made but they had no cause for concern. It is unthinkable that such should occur.<sup>138</sup>

Of the three social assistance grants that relate to the care of children mentioned above (CSG, FCG and CDG),<sup>139</sup> the first two are of direct relevance to this study and are discussed further below.

#### 5.4.1.1 The Child Support Grant (CSG)

The Child Support Grant (CSG) was introduced in 1998, two years after the new constitution was adopted.<sup>140</sup> The main purpose of the CSG is to provide basic sustenance to children, in response to child poverty and is payable to the child's primary caregiver for the direct costs of child care.<sup>141</sup> One of the core objectives of the CSG is 'to prevent children from unnecessarily entering or remaining in statutory substitute care', by ensuring that the caregivers are assisted in fulfilling their obligations towards the children in their care.<sup>142</sup> The CSG which targets the child as the main beneficiary was originally available to

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<sup>137</sup> The Supreme Court of Appeal noted that if at all there was any irregularity, they were 'inconsequential irregularities' that alone were not capable of invalidating the contract. 'An irregularity that leads to invalidity is one that is in conflict with the law. It is because it is in conflict with the law that it is not able to produce a legally valid result', para 58.

<sup>138</sup> *Allpay* case, para 99. It is expected that this case will be taken to the constitutional court where a final decision will be reached.

<sup>139</sup> The Care Dependency Grant (CDG), which will not be discussed further, is available to caregivers of children with disabilities, determined by strict medical and other parameters which fall outside the scope of this study.

<sup>140</sup> It replaced the State Maintenance Grant (SMG) which catered only for children of poor white and 'coloured' women whose spouses were no longer present, during the apartheid era. See UNICEF SA & Department of Social Development (DSD) *Review of the Child Support Grant: Uses, Implementation and Obstacles* (2008) 12.

<sup>141</sup> UNICEF SA & DSD (2008) 7. As previously mentioned, a primary caregiver may not be related to the child, the focus is primarily responsible for the day-to-day care of the child. According to Skelton, this broadening of the definition 'gives recognition to the many family forms and care arrangements that are commonplace in South Africa, most notably children being cared for by extended family members.' See Skelton (2012) 335. See also Giese S 'Setting the scene for social services: The gap between service and delivery', in Proudlock P, Dutschke M, Jamieson L, Monson J & Smith C *South African Child Gauge 2007/2008* (2008) 17, 20; Case A, Hosegood V & Lund F 'The reach and impact of Child Support Grants: Evidence from KwaZulu-Natal' (2005) 22 *Development Southern Africa* 468; Sections 6 Social Assistance Act 2004 and 4(1) and 10(3)(a) Regulation 162 (22 February 2005) of the Social Assistance Act 13 of 2004. This broadening of a caregiver's definition also highlights a major difference between the old SMG, payable strictly to a parent and not to non-biological caregivers. See Strydom (2001) 172.

<sup>142</sup> Triegaardt JD 'The Child Support Grant in South Africa: a social policy for poverty alleviation?' (2005) 14 *International Journal of Social Welfare* 252.



the poorest and youngest children, up to seven years old.<sup>143</sup> Over the years however, the age of eligibility has progressively increased such that the CSG is now available to all children up to 18 years.<sup>144</sup>

The CSG is a small amount of money paid per month (R300)<sup>145</sup> which is means tested based on household income set at 10 times the amount of the grant. Thus, a child is eligible for the CSG if he is in the custody of a single caregiver who earns a maximum of R3,000 per month and a joint income of R6,000 for a caregiver and spouse (if the caregiver is married).<sup>146</sup> Despite criticisms that the amount offered in CSG is not sufficient for children's actual needs,<sup>147</sup> it has become known as one of the largest financial aid schemes or poverty alleviation/eradication measures for children anywhere in the world.<sup>148</sup> It has been shown that the CSG, among other grants, 'is also associated with improved nutritional, health and education outcomes.'<sup>149</sup>

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<sup>143</sup> Goldblatt B & Liebenberg S 'Giving money to children: The state's constitutional obligation to provide child support grants to child headed households' (2004) 20 *South African Journal on Human Rights* 152. See also Meintjes H, Budlender D, Giese S & Johnson L 'Children in "need of care" or in "need of cash"? Questioning social security provisions for orphans in the context of the South African AIDS pandemic' (2003) *Joint Working Paper of the Children's Institute and Centre for Actuarial Research*.

<sup>144</sup> The last increase in the threshold of beneficiaries began in 2009: 15 year-olds started benefitting from the grant on 1 January 2010 while 16 year-olds were included on 1 January 2011 and 17 year-olds were finally included on 1 January 2012.

<sup>145</sup> R300 is approximately USD 30 as at October 2013 exchange rates. The CSG was introduced in 1998 at a value of R100 and has been progressively increased over time; it was recently increased to R300 in October 2013.

<sup>146</sup> Hall K 'Income poverty, unemployment and social grants' in Berry L, Biersteker L, Dawes A, Lake L & Smith C (eds) *South African Child Gauge 2013* (2013) 92. For about 10 years previously (1998-2008), the eligibility threshold for CSG was based on a caregiver and spouse earning a joint monthly income of up to R800, if living in a formal house or an urban area, and R1, 100 if living in rural areas or informal housing.

<sup>147</sup> Skelton (2012) 335. It is noteworthy that concerted action on the part of civil society organisations (CSOs) such as the Children's Institute and Black Sash, among others, has been instrumental in putting pressure on the government to ensure progressive change and increase in the social assistance policy and legislation on the CSG, with regards to the eligibility age range, and the means test among others. As mentioned above for example, the means test was initially based on household income generally, with a distinction made between urban and rural households and between those living in formal and informal housing. However, due to the fact that household income is not necessarily distributed equitably among members, a change was effected to apply the test to the personal income of the caregiver (and spouse, if applicable). See generally, Seyisi K & Proudlock P 'When the grant stops, the hope stops. The impact of the lapsing of the child support grant at age 15: Testimonies from caregivers of children aged 15 to 18, Report for Parliament', October 2009. See also See the case of *Ncamile and the Children's Institute v South African Social Security Agency, Eastern Cape Regional Office and Others*, Case No 227/08, Eastern Cape Provincial Division of the High Court (withdrawn and unreported) – cited in Jamieson L, Hall K & Kassan D 'Key legislative developments in 2008/2009' in Pendlebury S, Lake L & Smith C (eds) *South African Child Gauge 2008/2009* (2009) 14.

<sup>148</sup> Hagen-Zanker J, Morgan J & Meth C *South Africa's social security system: Expanding coverage of grants and limiting increases in inequality* (2011) 3; Hall K 'Children's access to social assistance', in Pendlebury S, Lake L & Smith C (eds) *South African Child Gauge 2008/2009* (2009) 79; UNICEF South Africa 'Overview: Child Protection-A protective environment for children' available at < <http://www.unicef.org/southafrica/protection347.html> >. See also South Africa Social Security Agency (SASSA) 'Annual Report 2009/2010', visit < [www.sassa.gov.za](http://www.sassa.gov.za) >.

<sup>149</sup> Hall (2013) 92. See also Triegaardt JD 'The Child Support Grant in South Africa: A social policy for poverty alleviation?' (2005)14 *International Journal of Social Welfare* 254; Nkosi G 'An analysis of the South African social assistance system as it applies to children in rural communities: A perspective from the *Grootboom* case' (2011) 26(1) *Southern African Public Law* 81; Hall K 'Children's access to social assistance' in Pendlebury S, Lake L & Smith C (eds) *South African Child Gauge 2008/2009* (2009) 79; Mirugi-Mukundi G 'Realising the social security rights of children in South Africa, with particular reference to the child support grant' (2009) 6. A research paper prepared for the Socio-Economic Rights Project of the Community Law Centre, University of the Western Cape (UWC).

The CSG is payable for a maximum of six children per household, and as at March 2013, over 11.3 million children (0-17 years) received the CSG.<sup>150</sup>

The success of the South African CSG as a model of cash transfer has promoted the development of various cash transfer schemes in other countries in the sub-region and the continent at large. The bulk of these programmes target families that are most in need with a particular focus on those affected by HIV/AIDS, including grandparent-headed households and child-headed households.<sup>151</sup> The CSG model has also received praise from the World Bank, (among other international aid assistance partners), as an efficient social assistance mechanism; they have drawn inspiration from it in their aid assistance programmes in several other countries.<sup>152</sup>

#### 5.4.1.2 The Foster Child Grant (FCG)

The Foster Child Grant (FCG) refers to a monthly non-means tested cash grant payment payable as a government subsidy to foster parents of children placed in foster care after being declared to be 'in need of care and protection by a children's court.'<sup>153</sup> In the old South African Children's Act of 1960, foster care was recognised and applicable in the traditional child protection sense of placing children in need of care and protection with non-relatives, especially children for whom adoption was considered inappropriate.<sup>154</sup> However, as a result of the rise in the number of orphans and child-headed households due to HIV, among

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<sup>150</sup> Hall (2013) 92.

<sup>151</sup> See among others, Hofmann S, Heslop M, Clacherty G & Kessy F *Salt, soap and shoes for school, Evaluation Report: The impact of pensions on the lives of older people and grandchildren in the KwaZulu-Natal project in Tanzania's Kagera region* (2008).

<sup>152</sup> See among others Garcia M & Moore CMT *The Cash Dividend: The rise of cash transfers programs in sub-Saharan Africa* (2012) The World Bank; Arnold C, Conway T & Greenslade M (Department For International Development) *DFID Cash Transfers Evidence Paper* (2011); Arnold C, Conway T & Greenslade M (Department For International Development) *DFID Cash Transfers Literature Review* (2011); Devereux S *Building social protection systems in Southern Africa* (2010) Institute of Social (European Development Report on Development); Ellis F, Devereux S & White P *Social Protection in Africa* (2009).

<sup>153</sup> Hall *et al* (2012) 50; Skelton (2012) 335.

<sup>154</sup> Gallinetti J & Loffell J 'Foster Care' in Davel & Skelton (Revision Service 2, 2010) 12-1; Skelton A & Proudlock P 'Interpretation, objects, application and implementation of the Act' in Davel & Skelton (Revision Service 2, 2010) 1-1; Skelton (2012) 335. Foster care was also considered to be more cost effective in comparison to residential care placements.



others, reliance on foster care became more widespread.<sup>155</sup> As noted by research conducted by the Children's Institute:

The number of FCGs remained stable for many years [1960-2002] while foster care was applicable only to children in the traditional child protection system. Its rapid expansion since 2003 coincides with the rise in HIV-related orphaning and an implied policy change by the Department of Social Development, which from 2003 started encouraging family members (particularly grandmothers) caring for orphaned children to apply for foster care and the associated grant. Over the following five years the number of FCGs increased by over 50,000 per year as orphans were brought into the foster care system.<sup>156</sup>

Thus, the number of children receiving the FCG increased dramatically within the last decade. However, the increase was not only due to the fact that there was a drive to promote the fostering of HIV/AIDS orphans but also due to the higher monetary value of the FCG as compared to the CSG.<sup>157</sup> The FCG was valued at R800 per month in 2012,<sup>158</sup> and by March 2013, over 530, 000 children were receiving the FCG.<sup>159</sup> Consequently, the bulk of children in alternative care in South Africa are in 'foster care' with close to 90% of such placements being with relatives, usually grandmothers. Thus, about 90% of FCGs are paid to extended family members with less than 10% being paid for other children in foster care due to child protection issues such as abandonment, parental inadequacy and maltreatment.<sup>160</sup>

The difference in amount between the two grants 'understandably causes poor families caring for children who are not biologically their own to seek regularisation of their child care arrangements through the foster care system.'<sup>161</sup> This is despite the fact that in a strict sense, the foster care system and the financial support attached to or flowing from it does not form part of the social security system.<sup>162</sup> With over 4 million children (about 27% of the total population of children) living in the care of extended family

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<sup>155</sup> Hall K 'Children's access to social assistance' in Pendlebury S, Lake L & Smith C (eds) *South African Child Gauge 2008/2009* (2009) 79.

<sup>156</sup> Hall (2013) 93; Skelton (2012) 335-336.

<sup>157</sup> Skelton (2012) 335-336; Leatt A *Grants for children: A brief look at the eligibility and take up of the Child Support Grant and other cash grants* (2006) 3. Between 2000 and 2010, the number of children in formal foster care increased from just under 30, 000 to over half a million. See UNICEF South Africa 'Overview: Child Protection-A protective environment for children' available at < <http://www.unicef.org/southafrica/protection347.html> > There are however indications that the numbers have been on the decline since 2011. See Hall (2013) 93.

<sup>158</sup> Approximately USD 80 as at October 2013. See Hall (2013) 93.

<sup>159</sup> Hall (2013) 93.

<sup>160</sup> Sloth-Nielsen (2008) 6.

<sup>161</sup> Skelton (2012) 336.

<sup>162</sup> Skelton & Carnelley (2010) 318; Skelton (2012) 336. Foster care and the financial support attached to it is a specialised welfare mechanism to temporarily protect children who are at risk in their family environments until the risk factors are dealt with.

members for various reasons,<sup>163</sup> this scenario is against the background of the fact that nearly 70% of the total number of children in South Africa live in poverty.<sup>164</sup> The implication of this however is that many children who need not come in contact with the formal child protection system (without prejudice to the fact that they require other services) are brought into the system through foster care thereby placing undue 'burdens on an [already] over-stretched care and protection system.'<sup>165</sup>

The court and social work oversight required for foster care makes the administration of the FCG much more cumbersome than the CSG which is easier to access through an administrative application to SASSA, with no oversight requirement after the initial approval of the grant.<sup>166</sup> Thus, by 2009, it became obvious that the foster care system could not cope with the volume of foster care and FGC applications to the extent that between April 2009 and March 2011, over 110, 000 FCGs lapsed due to backlogs in the extension of the court orders.<sup>167</sup> As a stopgap measure, it was then decided via a court-ordered settlement that the court-ordered foster care placements that had expired or were due to expire in the following two years (2012 and 2013) be deemed extended until 8 June 2013.<sup>168</sup> In effect, a moratorium was placed on the lapsing of FCGs, and in the meantime, social workers are empowered to administratively extend foster care orders until December 2014 when it is expected that 'a comprehensive legal solution' would have been found to address the issue of lapses.<sup>169</sup> This is one of the major goals of the previously mentioned on-going process towards the amendment of the Children's Act.

A more sustainable approach however is to seek how to effectively contain the large number of FCG applicants rather than focusing on only on how to prevent lapses in the future. This is against the

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<sup>163</sup> Meintjes H & Hall K 'Demography of South Africa's children' in Hall K, Woolard I, Lake L & Smith C (eds) *South African Child Gauge 2012* (2012) 83; Meintjes H & Hall K 'Demography of South Africa's children' in Jamieson L, Bray R, Viviers A, Lake L, Pendlebury S & Smith C (eds) *South African Child Gauge 2010-2011* (2011) 80.

<sup>164</sup> Meintjes & Hall (2012) 82; Meintjes & Hall (2011) 85.

<sup>165</sup> Skelton (2012) 336. According to Skelton at 337, 'The SALRC prophesied that the foster care system would lack sufficient capacity to absorb the numbers of children who were orphaned or were for other reasons living with members of the extended family'.

<sup>166</sup> Hall (2013) 93; Skelton (2012) 336. With reference to FCG, SASSA is not mandated to pay the grant without a valid court order or extension order of foster care.

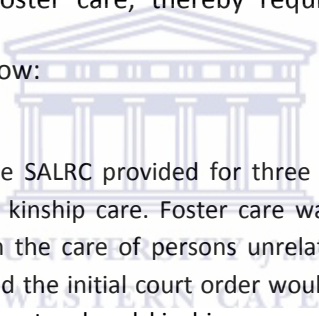
<sup>167</sup> Hall (2013) 93; Skelton (2012) 340. Between April 2009 and March 2010, 129, 500 FCGs lapsed and 164, 900 lapsed between April 2010 and March 2011. A significant portion of these lapses (39, 200 and 74, 200 respectively) was due to expiration of court orders as a result of failure to review the placements. See Hall & Proudlock (2011) 25.

<sup>168</sup> *Centre for Child Law v Minister of Social Development and Others* (21122/13) [2013] ZAGPPHC 305. The order was granted in April 2012. See also Hall (2013) 93; Skelton (2012) 341.

<sup>169</sup> Hall (2013) 93; Skelton (2012) 341. Under the old Child Care Act, foster care orders could be administratively extended without court orders unlike the position of the Children's Act which requires extension by a children's court.

background of the following facts: there is still a significant shortage of social workers (for all services required under the Act); the majority of the children concerned need not engage with the formal child protection system; and the FCG was not envisaged to be a poverty alleviation tool.<sup>170</sup> It is therefore encouraging that, as previously alluded to, the DSD has initiated a process towards making amendments to the Children's Act, with the question of foster care and its overlap with kinship care being one of the subjects to be considered for amendment in light of these challenges.<sup>171</sup>

According to Skelton, the genesis of this crisis is traceable to the refusal of the South African Parliament (for political and other reasons) to adopt the proposal of the SALRC on the right to alternative care while the Children's Act was still in the Bill stage.<sup>172</sup> The proposal was to the effect that kinship care should be expressly provided for as distinct from foster care as, among others, care by relatives tends to be permanent in comparison to classic foster care, thereby requiring a different approach in law and practice.<sup>173</sup> Skelton sets it out clearly below:



The Children's Bill produced by the SALRC provided for three models of care, namely foster care, court-ordered kinship care and informal kinship care. Foster care was limited to children placed by the formal childcare and protection system in the care of persons unrelated to them. These foster carers would be screened and carefully selected, and the initial court order would be of limited duration, with the emphasis on family reunification services. Court-ordered kinship care would aim to provide care with relatives for children who were unable to remain in their own homes due to abuse or neglect. Although reunification services would often be appropriate in these cases, the court should also have a discretion to make a longer term order from the outset, and to dispense with social work supervision in appropriate cases. Informal kinship care was for the recognition of children being cared for by their families in situations where they did not need care and protection services, but needed social security to help the families financially.<sup>174</sup>

She notes further that while deliberations on kinship care and foster care were on-going, it was noted that 'there is a difference between family care and alternative care, and that kinship care should be resuscitated to solve the problem of the high uptake of foster care by caregivers related to children.'<sup>175</sup> This was however not reflected in the Bill since the parliamentarians did not want to held responsible for preventing

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<sup>170</sup> Skelton (2012) 338, 342; Hall & Proudlock (2011) 26; Leatt (2006) 4; Barberton C *The cost of the Children's Bill* (2006) 94; SALRC 'Report on Project 110: Review of the Child Care Act' (2002) 318.

<sup>171</sup> Skelton (2012) 341.

<sup>172</sup> Skelton (2012) 338-340; Budlender D, Proudlock P & Jamieson L *Developing social policy for children in the context of HIV/AIDS: A South African case study* (2008) 43.

<sup>173</sup> SALRC 'Discussion Paper on the Review of the Child Care Act, Project 110' (2001) 17.2.2. See also Mahery P 'Partial Care' in Davel & Skelton (Revision Service 2, 2010) 5-4.

<sup>174</sup> Skelton (2012) 337.

<sup>175</sup> Skelton (2012) 339.

relatives from accessing the much higher FCG, coupled with the fact that the definition of foster care 'had eclipsed the concept of kinship care in the Children's Bill.'<sup>176</sup> It is submitted that the issues that should have been considered include factors such as were discussed in the previous chapter on amongst others, the requirements for foster care in the classic sense – coupled with deliberations on how to close the gap between the FCG and the CSG or at least, how to justify the higher value of the former.<sup>177</sup> The SALRC had recommended different and separate approaches to grants for foster care, court-ordered kinship care and informal kinship care as follows:<sup>178</sup>

- Kinship care placements not requiring court intervention should be facilitated through a non-means-tested child grant (payable in respect of all children in need who are South African citizens and resident in the Republic) or, in the absence of such a measure, a specific grant designed for this purpose. This grant should be supplemented with an additional needs-based grant such as the care dependency grant if the child has special needs with cost implications.
- Foster care placements with persons unrelated to the child should be supported through a non-means-tested grant as is presently the case. Should a child grant be introduced, this would be an additional source of support for persons willing to provide substitute care for children in need thereof.
- Children who require formal protective services and are placed in care with relatives by means of a court order should qualify for a grant, which could be structured on the same basis as the foster care grant. In addition to the current foster care grant, an allowance should be paid to foster parents and relatives caring for children with special needs.

Thus, it was recommended that foster care be supported via the FCG as it currently operates with the exception that it was meant to be applicable to classic foster care of children by non-relatives. An addition which also did not make it to the final draft was that the CSG would also be payable to the foster carer as an additional source of support.<sup>179</sup>

With reference to court-ordered kinship care, the recommendation was that the applicable grant should equally be structured in the same manner as foster care. That is, the provision of support through a non-

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<sup>176</sup> Skelton (2012) 338-339; Budlender, Proudlock & Jamieson (2008) 43.

<sup>177</sup> Some of these were also addressed in section 4.5 of Chapter Four.

<sup>178</sup> SALRC (2002) 230. See also Skelton (2012) 338. It was also recommended that recipients of any of the grants should be 'should be exempted from school fees in respect of the children at whom the grant is targeted.' SALRC (2002) 319.

<sup>179</sup> In a joint submission by the Children's Institute (UCT), the AIDS Law Project (University of Witwatersrand), and the Alliance for Children's Entitlement to Social Security (ACCESS) - endorsed by the AIDS Consortium and the AIDS Legal Network pointed out an additional grant in the form of the CSG should not be available to foster carers as the provision of 'both grants would not help with efforts to move towards substantive equality in the child care system, specifically with reference to children in urban versus rural settings.' SALRC (2002) 230. But in circumstances where a person may be able to claim more than one grant, it was also recommended that with reference to a 'care by relative situation' (kinship care, court-ordered), the amount payable as FCG may be lower than the usual amount. SALRC (2002) 320.

means tested grant, which could be the FCG applicable to foster care. Additionally, where foster carers or court-ordered kinship carers are placed with children with special needs, it was recommended that an additional allowance be paid in either case.

Finally, non-court-ordered kinship care was to be facilitated through a means tested grant in the method developed as the eventual CSG. While an additional grant would also be payable to an informal kinship carer if caring for a child with special needs (for example, the CDG), it is clear that the CSG was not envisaged to be applicable to court-ordered kinship care. Since the bulk of children in kinship care are informally placed, this approach 'would assist in the prevention of children being drawn into the care and protection system.'<sup>180</sup>

It can be observed that the proposals set out by the SALRC above are in many respects similar to the framework presented in the previous chapter on how kinship care models should be delineated, and to what extent kinship care should intersect with the child protection system.<sup>181</sup> Foster care was proposed to be maintained in the traditional sense with an emphasis on its temporary nature and family reunification services, such that where foster care becomes long-term or extended, measures should be put in place for its conversion to adoption in appropriate cases.<sup>182</sup> 'Court-ordered kinship care' is more or less the same as 'formal kinship care' (or 'kinship foster care') while 'informal kinship care' remains the same in both proposals, with adequate provision for other measures of assistance outside the child protection system.<sup>183</sup>

In order to place a child in foster care or regularise an existing care arrangement (ordinarily (informal) kinship care) as foster care, the court has to make a finding that the child is in need of care and protection

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<sup>180</sup> Skelton (2012) 338.

<sup>181</sup> Sec 4.5. The framework presented recommends a clear demarcation between kinship care and foster care with foster care remaining within the child protection system, as a temporary alternative care measure in the classic sense. The FCG or other similar grant will be applicable in this instance. Second is the provision for court-ordered kinship care (which may also be described as 'kinship foster care' or 'formal kinship care'), which may also be linked to the child protection system but with some room for flexibility in terms of specific requirements when compared to traditional foster care. Skelton suggests a means-tested grant system for court-ordered kinship care, which to my view is practical given the recommendation that there should be some flexibility related to that model of care unlike traditional foster care. Finally, informal kinship care which is the most common of all should not interact with the child protection system; a universal grant system ('following the method of the child support grant administration') should be made available in this circumstance to cater for children informally placed in the care of relatives. Where the parameters for each model of alternative care are clearly spelt out, it becomes easier to avoid the possibility of jumping from one form to the other due to differences in the grants system. To this end, Meintjes *et al* have argued that the means-test (in the case of informal kinship care) should be abolished to accommodate as many children in need as possible 'irrespective of their parental circumstances'. Meintjes *et al* (2003) 54. See also Skelton (2012) 338.

<sup>182</sup> Skelton (2012) 338.

<sup>183</sup> See sections 4.5.1, 4.5.2 and 4.5.3 of Chapter Four.

based on the circumstances listed in section 150 of the Children's Act mentioned previously. The first of these grounds is what has turned out to be the most controversial in relation to the interaction between kinship care and the foster care system. It provides that a child is in need of care and protection if 'the child has been abandoned or orphaned *and* is without any visible means of support.'<sup>184</sup> While the Act was still a Bill however, the 'and' was rendered as 'or', but it was eventually deleted and replaced with 'and'. This seemingly small change has however resulted in a situation where different courts interpret the meaning of the provision differently, leading to 'inconsistency and unequal application of the law.'<sup>185</sup> Some courts (particularly lower courts) hold the view that a child already in the care of a relative (especially a grandmother) cannot be said to be in need of care and protection by virtue of not being abandoned. Further, they hold the view that the child cannot be said to be without visible means of support since grandmothers are generally entitled to a separate grant (old age grant) which can assist with raising the child. Consequently, the care arrangement would not be regularised as foster care to enable the caregiver receive the FCG.<sup>186</sup> This position is apparently correct considering the fact that the manner in which sec 150(1)(a) was framed was a deliberate attempt 'to oust children already being cared for by their relatives from the care and protection system, thereby excluding them from foster care and the accompanying grant.'<sup>187</sup> However, the fact that the Act provides that a child can be fostered by a relative with no specifications as to under what circumstances leaves the provision open to differing interpretations.<sup>188</sup>

In *SS v Presiding Officer Children's Court, Krugersdorp*,<sup>189</sup> an uncle and an aunt were denied access to the FCG for the care of a relative-child in their care, and the decision was reversed upon appeal.<sup>190</sup> The child in this case had been living with his uncle and aunt for 8 years after which his caregivers, on the advice of a social worker, approached the children's court to have boy legally placed in their (foster) care so they could

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<sup>184</sup> Sec 150(1)(a).

<sup>185</sup> Skelton (2012) 343.

<sup>186</sup> Skelton (2012) 339, 343; Sloth-Nielsen (2010 ISFL paper) 18.

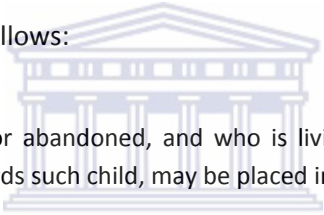
<sup>187</sup> Skelton (2012) 342.

<sup>188</sup> Skelton (2012) 342.

<sup>189</sup> 2012 (6) SA 45 (GSJ).

<sup>190</sup> The case originated as Krugersdorp Children's Court; case no 14/1/4/-206/10.

access the FCG rather than the CSG which they were already receiving.<sup>191</sup> The issue in question therefore was the determination of whether the child was ‘without visible means of support’ requiring placement in foster care.<sup>192</sup> The argument for the caregivers centred on the fact that the Act permits foster care by relatives and the case should be so interpreted. It was however held that foster care was designed for children who had no one to care for them and that the FCG was not for ‘income maintenance’ as it was clear that ‘the main reason for this enquiry is to alleviate the parties’ financial position by a foster care order.’<sup>193</sup> On appeal to the South Gauteng High Court, the reversal of this judgment turned on the fact that under common law, an uncle and an aunt do not owe a duty of support to a nephew or niece, and as such, the child in question was ‘without visible means of support’ in which case he could be placed in foster care as a child in need of care and protection.<sup>194</sup> Further, ‘visible’ (means of support) should be interpreted ordinarily with a focus on the child ‘rather than on others upon whom he or she is dependent.’<sup>195</sup> Consequently, the court concluded as follows:



A child who has been orphaned or abandoned, and who is living with a caregiver, who does not have a common law duty of support towards such child, may be placed in foster care with that caregiver.<sup>196</sup>

It was hoped that the outcome of this appeal would provide some temporary solutions to the crisis even though there is an acknowledgment of the fact the judiciary alone cannot provide answers to all the issues involved.<sup>197</sup> Indeed, the judgment has only further served to prove that unless firm and concrete changes are made to the entire system in terms of separating foster care and its accompanying grant from kinship care, there will continue to be inconsistencies in how decisions are arrived at as a subsequent case in the same court will show.

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<sup>191</sup> The child was an orphan as his mother (who raised him as a single mother) was dead and father unknown. The mother and son had lived with his grandmother for the first two years of his life. It was upon the death of his grandmother that his mother placed him in the care of the uncle and aunt a while before her own death.

<sup>192</sup> It was settled that he was an orphan although he has started living with his caregivers before his mother’s death.

<sup>193</sup> Judgment, Krugersdorp Children’s Court, case no 14/1/4/-206/10 – cited in Skelton (2012) 343.

<sup>194</sup> In effect, the caregivers are entitled to the FCG for the care of the child.

<sup>195</sup> *Krugersdorp* case (“the *Stemele* matter”), paras 7, 30-31.

<sup>196</sup> The *Stemele* matter, para 29.

<sup>197</sup> Skelton (2012) 343.



In *Manana and Others v Presiding Officer of the Children's Court Krugersdorp*,<sup>198</sup> a grandmother sought to access the FCG for the care of three grandchildren in her care.<sup>199</sup> The Court held that the Commissioner in the initial case had erred in the enquiry by holding that they were not in need of care necessitating foster placement as they were already being cared for; and that they were not without visible means of support since they had a capable and suitable caregiver.<sup>200</sup> Children having a visible means of support should not be interpreted as the same as having a caregiver who has a visible means of support (that is a secondary enquiry determined by whether a legal duty of support rests upon such a person).<sup>201</sup> It was argued that since grandmothers owe a duty of care to their grandchildren at common law, the child could not be said to be 'without visible means of support' and in need of care and protection.<sup>202</sup> This was the main point of distinction between the *SS* case above and this one.<sup>203</sup> The court held that although such a duty rests on grandparents, no such distinction is made in the Act; therefore to follow the reasoning in the earlier decision may therefore 'result in untold hardships for children who end up being classified into groups of those who have caregivers who have a legal duty of support and those who do not.'<sup>204</sup> Further, 'such a conclusion would exclude children in the care of their grandparents who are found to be abandoned or orphaned from accessing government sources of support.'<sup>205</sup>

Such constitutes unjustified discrimination which is contrary to section 7 of the Bill of Rights. This is surely not in keeping with the spirit of Ubuntu and it will certainly not be in the best interest of children if this distinction persists. All orphaned children are to be treated equally before the law.<sup>206</sup>

Two points are particularly striking to me from the foregoing. First is the fact that it appears the CSG is not considered to be a 'government source of support' basically because it is not as high as the FCG or perhaps because the court is not involved in the CSG administration. This again puts into perspective the need for a change in the manner in which the grant system currently operates as it applies to alternative care,

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<sup>198</sup> South Gauteng High Court, Johannesburg, unreported Case No A3075/2011 (12 April 2013).

<sup>199</sup> Her daughter, the biological mother of the three children died in 2008 with the father unknown. She and the children had been living with the grandmother up to her death.

<sup>200</sup> *Manana* case, para 13.

<sup>201</sup> *Manana* case, para 13, 21, 30-31.

<sup>202</sup> Thereby denying her of access to the FCG as a foster parent.

<sup>203</sup> Like the earlier case however, she was receiving the CSG on behalf of each child, but the amount was shown to be insufficient for their needs therefore putting a strain on the caregiver.

<sup>204</sup> *Manana* case, para 24.

<sup>205</sup> *Manana* case, para 24.

<sup>206</sup> *Manana* case, para 24, para 28.



particularly kinship care and foster care. The need for a reconceptualisation of the social assistance system in connection to kinship and foster care is thus urgent. This will begin with a clear separation of the two and a review or re-creation of the accompanying grants, including the requirements and rationale behind each. If clear demarcations are made between foster care and models of kinship care, regulations can also be developed as to what social grant accompanies which and under what circumstances. This may serve to resolve questions around the appropriateness and effectiveness of making the FCG available for kinship care generally.<sup>207</sup>

Second is the reference to the 'spirit of Ubuntu'. I think it is significant that it is (perhaps unwittingly) juxtaposed with the position of common law on relatives who owe a duty of care and those who do not. It will be recalled that in the second chapter of this study, it was made clear that kinship care in traditional African societies placed a greater obligation on uncles and aunts than on grandparents with reference to caring for children, especially when they are orphaned.<sup>208</sup> It is thus quite interesting to observe that the position at English common law is opposite to what obtains in African cultural norms underlined by the principle of Ubuntu. I therefore feel that the decision of the court in this direction is welcome as it places due regard on the African understanding of caring for children without parental care. This shows an attempt at linking the traditional understanding of kinship care in Africa to its 'new' identity as a model of alternative care which was hinted at in Chapter one of this study.<sup>209</sup>

Further, with regard to contemporary developments on the right to alternative care and with reference to 'visible means of support', it is unfair to expect grandmothers (or other relatives) to rely on other grants to which they are personally entitled for the care of children in their *de facto* care - by law or as of right. Such grants are provided on the basis of the individual needs of the persons concerned in the same manner that grants targeted towards children are met for the needs of the children. The focus should therefore be on whether the caregiver has sufficient financial means to properly care for the child not on whether or not a duty exists at common law. This does not however mean that foster care and the FCG should be seen as the

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<sup>207</sup> Hall (2013) 93; Meintjes *et al* (2003) 1.

<sup>208</sup> Sec 2.2.2.

<sup>209</sup> Section 1.3.

solution; the suggested changes to the understanding of kinship care in relation to foster care and the accompanying grants would be proper steps in the right direction for more sustainable solutions.<sup>210</sup>

#### 5.4.2 Namibia

As previously noted, the provision of welfare benefits to various categories of people in Namibia is contained only in the non-justiciable 'Principles of State Policy' chapter of the constitution.<sup>211</sup> It provides that the 'State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at':

enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State.<sup>212</sup>

Thus, the Preamble to the CCPB provides among others that the Bill aims to provide for kinship care of children, for foster care and 'to provide for grants payable in respect of certain children.' Grants are provided for in Chapter 17 of the Bill, and the introduction to the chapter provides as follows:

This chapter adjusts the existing means-tested state maintenance grant, to make it available to a parent, guardian, or kinship caregiver who is looking after a child. There are currently a vast number of cases in Namibia where families need the assistance a grant can provide but are unable to receive it as both parents are alive. A means tested grant under these revised criteria will also remove a huge bottleneck in the courts, because family members caring for children will no longer need court-ordered placements to be eligible for grants. This has been accomplished by treating foster care by strangers separately from kinship care by family members. This should produce a considerable savings in administration costs and free up social workers for more proactive work.

The amounts of each grant and the eligibility requirement and other rules are to be provided for by regulation through the Minister. He or she must fulfil the following requirements:

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<sup>210</sup> While most of the cases around qualification to apply for the FCG centre around cases of children already in the care of relatives, it must be borne in mind that the mere fact that a child is in the care of a relative does not automatically translate to the child receiving proper care, support and protection especially if the child comes into care via a child protection issue (other than orphanhood). The child may require certain child protection services which may require a change or at least a review of the present care circumstances. Thus, there is the need to acknowledge the fact that all kinship care situations are not the same such that in situations that intersect with the child protection system, provisions are made to ensure a different treatment or approach. See previous discussions in Chapter four (section 4.5).

<sup>211</sup> Sec 95(e)-(g).

<sup>212</sup> Sec 95(1)(g). others include the 'ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law'; and 'ensurance that senior citizens are entitled to and do receive a regular pension adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities' (e)(f).

- (a) prescribe the amounts payable during a financial year, and the schedule and method of payment, in respect of any grant contemplated in terms of this Chapter; and
- (b) prescribe additional requirements to be complied with by the recipient of any grants contemplated in terms of this Chapter;
- (c) prescribe procedures to monitor and prevent possible misuse or mismanagement of aid or a grant contemplated in this Chapter;
- (d) prescribe the circumstances in which a grant which has been suspended or cancelled may be reinstated;
- (e) adjust the amounts of any grants payable in terms of this Chapter from time to time to keep pace with rising costs.<sup>213</sup>

Children who receive any of the grants are automatically exempted from school fees, and 'exemption from payment of any fees when applying for official documents from any organ of state. They are also entitled to 'subsidised school uniforms, shoes and stationary; and free basic health care.'<sup>214</sup> These exemptions are to ensure that the grant does not become 'simply a transfer from one ministry's budget to another's.'<sup>215</sup> It is also significant to note that a grant may be extended until a person is 21 years, in circumstances prescribed by regulation.<sup>216</sup>

The Bill provides for five types of grants that are applicable to children in differing circumstances. They are: the state maintenance grant; the foster parent grant; the residential child care facility grant; the child disability grant; and the short-term emergency grant or assistance in kind. While all of the grants are relevant to the subject of alternative care generally, only three of them, which are most relevant to this study (and for purposes of comparison with the South African grants previously discussed), will be elaborated upon below: the state maintenance grant; the foster parent grant; and the short-term emergency grant or assistance in kind.

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<sup>213</sup> Sec 229(1)(a)-(e).

<sup>214</sup> Sec 223(a)-(d).

<sup>215</sup> MGECW, LAC & UNICEF (2010) 163.

<sup>216</sup> Sec 229(2).

### 5.4.2.1 The State Maintenance Grant (SMG)

The SMG<sup>217</sup> is payable to any 'parent, guardian or care-giver of a child' (including a child who heads a household) upon the caregiver satisfying the following requirements:

- (a) that the child or children normally resides or reside with him or her and that he or she is in fact primarily responsible for the daily, physical care of the child or children;
- (b) that the grant will be used for the benefit of the child or children;
- (c) that the child or children has or have Namibian citizenship or permanent residency;
- (d) that the child or children is or are under the age of 18 years;
- (e) that he or she satisfies the prescribed means test; and
- (f) that he or she satisfies any other requirements as may be prescribed: Provided that such requirements may not include any limit on the total number of children in a single household who may receive such a grant.<sup>218</sup>

The SMG is more or less the Namibian equivalent of the CSG; it will be recalled that the CSG in South Africa was transformed from the SMG that obtained in South Africa prior to the democratic dispensation. Thus, the Namibian SMG is also subject to a means test, is payable to one who factually cares for the child daily and is for the benefit of the child or children. Unlike the CSG however, no limit is placed on the number of children for which applications can be made for the SMG in Namibia.<sup>219</sup>

It is important to point out that by virtue of the introduction to Chapter 17 on grants quoted above, it is clear that the SMG is the grant that is applicable to kinship care and no other. One is not quite certain if this is the right approach seeing that one of the strong recommendations made by the MGECSW was the creation of a specific kinship care grant 'that is means tested with a sliding scale related to the size of the household and the number of children in the care of one primary caregiver.'<sup>220</sup> Alternatively, if a general basic income or child care grant (such as the SMG) is maintained for kinship carers, an additional allowance

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<sup>217</sup> Sec 217. The amount and frequency of payment are to be prescribed by regulation as appropriated by Parliament or another source (1)-(2).

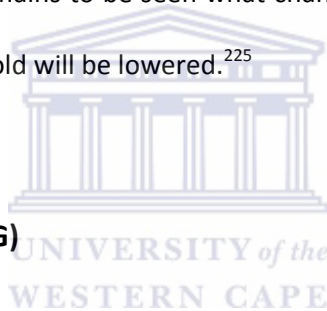
<sup>218</sup> Sec 217(2).

<sup>219</sup> Further, a successful SMG application will be paid out to the actual caregiver regardless of who put in the application and an adult supervising a child-headed household may also apply for it on behalf of the children in the household. Sec 217(4)(5). Prior to the CCPB however, the SMG was payable for a maximum of three children per household.

<sup>220</sup> van Sloten (2009) x.

should be provided 'to cover the costs of fostering the child',<sup>221</sup> such addition not being the grant prescribed for foster care. And where a dedicated kinship care grant is created, the application process should be administratively comparable to the SMG for ease of processing except in cases where there is a child protection issue requiring investigation.<sup>222</sup>

In my view, a clear recognition of kinship care as distinct from foster care demands a separate grant. This is because a general basic income is ordinarily applicable to all children in need, not necessarily in the context of alternative care, while a specific kinship care grant should be organised within the framework of the right to alternative care. Both the SMG and the foster care grant are currently fixed at the same amounts (200 Namibian dollars - N\$);<sup>223</sup> perhaps this explains why it is not considered important to maintain a designated 'kinship care grant'. However, the SMG is means-tested and one is not certain if a means-test is appropriate to all situations of kinship care.<sup>224</sup> It remains to be seen what changes will be made in terms of the means test, although it is clear that the threshold will be lowered.<sup>225</sup>



#### 5.4.2.2 The Foster Parent Grant (FPG)

This is a non-means tested grant payable to a foster parent in whose care a child has been placed by order of court.<sup>226</sup> The Bill is clear on the fact that this grant is of a separate category that is strictly applicable to non-relative foster care as defined by the Bill.<sup>227</sup> To further buttress this, the Bill provides:

<sup>221</sup> van Sloten (2009) x.

<sup>222</sup> van Sloten (2009) x.

<sup>223</sup> Approximately USD 20 as at October 2013 exchange rates.

<sup>224</sup> The means test prior to the CCPB reads thus: 'A biological parent who earns less than N\$1000 per month and supports a child under 18 years of age, where either the other parent receives an old-age pension or a disability grant, or is unemployed or is in prison for six months or longer; or has died is eligible for this grant.' See Gender Research & Advocacy Project (GRAP) & Legal Assistance Centre (LAC) *'Alternative report to Namibia's first, second and third periodic reports on the implementation of the United Nations Convention on the Rights of the Child and two optional protocols'* (1997-2008) (2012) 11. See also MGECW *Child welfare grants in Namibia* (pamphlet) 2010. The rigidity of the means test (prior to the CCPB) perhaps offers an additional explanation for why relatives would seek to be named as foster parents in order to receive the non-means tested foster care grant.

<sup>225</sup> In the build-up to the CCPB, a universal grant was recommended in place of means tested grants. This was against the background of the fact that Namibia had in fact pioneered 'the first universal cash-transfer pilot project in the world' for 24 months up to December 2009, which resulted in a significant drop in household poverty. The government was however dismissive of the idea from the outset as reflected by the outcome of the final Bill. See GRAP & LAC (2012) 12-13. See also C Haarmann *et al Making the difference! The BIG in Namibia* (2009) 13-17.

<sup>226</sup> Sec 218(1).

<sup>227</sup> See the introduction to Chapter 12 on foster care, para 3.

A court order contemplated in section 150(1) and a kinship care agreement concluded and registered in terms of section 114(2) serve as authorisation for a foster parent or kinship care-giver who complies with the prescribed requirements to gain immediate access to such aid or grant which a child in foster care or kinship care is entitled to.<sup>228</sup>

A distinction is thus made between the grant which applies to kinship care and that which applies to foster care. Not more than six children can be placed in one foster home (and thus entitled to a FPG) unless it is otherwise determined to be in the best interests of the children.<sup>229</sup> As a measure to prevent the crisis of lapsed foster care grants in South Africa, the Namibian Bill further provides that:

Where a foster parent grant is terminated upon the lapsing of an order placing a child in foster care in terms of section 147(1) but the child remains in such foster care, such grant must be extended until such time as the children's court has made a decision on whether or not to extend the order placing the child in foster care.<sup>230</sup>

The Namibian Children's Act of 1960 did not provide for kinship care and so many caregivers who had the children of other relatives in their care went to the courts to be named foster carers in order to be eligible for grants available to foster carers.<sup>231</sup> This increased the burden placed on courts, and social workers, which in turn caused delays in accessing the grant in approved cases.<sup>232</sup> In many cases, approval was granted for private arrangements to be registered as foster care enabling the caregivers to access the grants. However, there were also inconsistencies in the decisions since many others, regardless of their financial status did not have their placement arrangements authorised as foster care and as such were denied from accessing the grant.<sup>233</sup> There were also concerns in Namibia that many were abusing the foster care system by utilising it as means for accessing financial benefits through children. These among others revealed the urgent need to overhaul the entire grants system as linked to alternative care, resulting in the radical changes introduced by the CCPB.<sup>234</sup>

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<sup>228</sup> Sec 222(1).

<sup>229</sup> Sec 154.

<sup>230</sup> Sec 218(2).

<sup>231</sup> GRAP & LAC (2012) 12.

<sup>232</sup> UNICEF *Children and Adolescents in Namibia 2010: a situation analysis* (2010) 44; van Sloten (2009) x.

<sup>233</sup> Hubbard D, Paper presented at the Miller Du Toit and UWC Child and Family Law Conference, March 2011, Cape Town, South Africa (on file with the author). Hubbard and the Legal Assistance Centre in Windhoek, Namibia have been at the forefront of the production of the new Bill.

<sup>234</sup> Sloth-Nielsen (2010 ISFL paper) 12.

As at 2010, the foster care grant in Namibia was valued at 200 Namibian dollars (N\$) per month, for the first child (including general household expenses), and an additional N\$ 100 for additional children.<sup>235</sup> Given that the South African rand and Namibian dollars are equivalent, the South African foster care grant is four times the amount of the grant in Namibia. Combined figures show that the number of children who have received child welfare grants (including the SMG and foster care grant) has grown from 9,000 beneficiaries in 2002 to 113,995 in April 2010.<sup>236</sup> It may therefore be safely assumed that the money is not a huge driver for the preference of the foster care grant. Rather, it is the more stringent means test applicable to the SMG and not applicable to the foster care grant that drives the push for individual seeking to be named as foster carers thereby becoming eligible for the accompanying grant.

#### **5.4.2.3 The Short-term Emergency Grant or Assistance in Kind**

The short-term emergency grant is a new grant introduced by Namibia in the CCPB.<sup>237</sup> The importance of this grant relates to the wider scope of children to which alternative care is applicable as discussed in the previous two chapters.<sup>238</sup> The short-term emergency grant is payable in cash or kind (including food aid)<sup>239</sup> in emergency situations caused as a result of:

- (a) the accidental loss by a child of his or her family;
- (b) the accidental loss by a child of his or her home or possessions;
- (c) natural disasters and which are not covered by any other Government relief measures;
- (d) as a result of armed conflicts;
- (e) illness of the child or his or her financial provider; and
- (f) as may be prescribed.

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<sup>235</sup> MGECW, LAC & UNICEF (2010) 162.

<sup>236</sup> MGECW *The Effectiveness of Child Welfare Grants in Namibia* (2010); UNICEF (2010) 32.

<sup>237</sup> GRAP & LAC (2012) 12.

<sup>238</sup> Section 3.6.2, Chapter Three and section 4.2.1.3, Chapter Four.

<sup>239</sup> Sec 221(1)(2).

These are circumstances which may eventually lead to the child requiring placement in alternative care. However, the provision of the grant is a positive first step towards stabilising the child and planning for family reunification or permanency where possible.

## **5.5 Conclusions**

This chapter presented an overview of national legislation and policy guiding alternative care generally at the domestic level, in South Africa and Namibia. It is clear the national laws have been influenced in a general way by the CRC and the ACRWC especially considering the inclusion of rights specific to children in the constitutions of the two countries. Both constitutions recognise the right to parental care and the primary obligation of parents to provide care and support for their children. South Africa is however a step ahead in that it clearly provides for the right to alternative care where parental care is no longer available or adequate. Through several cases decided in South African courts, considerable jurisprudence has been developed for understanding and interpreting the right to alternative care in practical ways. Namibia (and indeed many other countries) may be guided by such a rich legal culture in taking forward the realisation of the right to alternative when the Child Care and Protection Bill becomes law.

Both the South African Children's Act and the Namibian Child Care and Protection Bill are very comprehensive with regards to children's rights generally, and the right to alternative care in particular. They also both provide a wide variety of key terms and detailed descriptions of situations in which children are categorised as being in need of care and protection and in need of alternative care specifically. Further, they have developed various (and in some cases novel) forms of alternative care especially in the area of residential or institutional care; these include temporary safe care or places of safety, child and youth care facilities, shelters as well as education and development centres. This development is a welcome one as both countries are in compliance with the UN Guidelines in this regard. It is also significant that both the Act and the Bill maintain that such facilities be regarded as measures of last resort and should be relied upon only when it is in the best interests of the children concerned. Additionally, the Act and the Bill are in conformity with the UN Guidelines in terms of the recognition of and provision for child-headed



households. The UN Guidelines further urge States to take special measures to ensure that the head of a child-headed household enjoys all rights inherent to his or her child status including access to education and leisure.<sup>240</sup> The two instruments are cognisant of this fact and address it through the provision of adequate supervision for all children in child-headed households.<sup>241</sup>

The major distinction between both instruments is with regards to the status of kinship care. The Namibian Bill is noteworthy for expressly embodying this form of alternative care in law, while clearly distinguishing it from foster care. This approach is quite revolutionary in that it not only provides for the recognition of kinship care but also rightly places it above foster care in the hierarchy of care options. It is submitted that this position is cognisant of the realities of alternative care in the African context, and presents a more practical manner of addressing the problem which affects the vast majority of children deprived of their family environment and therefore in need of alternative care. By providing separately for kinship care and foster care in terms of law and regulations, the Bill is in full compliance with the UN Guidelines, and in many respects, with the framework provided and discussed in the previous chapter.<sup>242</sup>

The Bill can be said to acknowledge 'private kinship care' (which would ordinarily attract no State obligation as discussed in chapter four)<sup>243</sup> while providing for 'informal kinship care' since it is recognised that there will be few cases of 'court-ordered kinship care' ('formal kinship care'). However, since a registration process and a written agreement (between the original caregiver and kinship caregiver) are required for a kinship caregiver to access grants, the line between 'informal kinship care' and 'formal kinship care' seems to have been blurred. This is further highlighted by the fact that there is no provision for a 'kinship care grant' as is the case for 'foster care grant'. Rather it is the SMG that is available to kinship care. Full compliance with the framework presented in chapter four requires a specific grant for 'formal kinship care' while a general or basic grant such as the SMG will be accessible to informal kinship carers, among other

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<sup>240</sup> Para 37 UNG.

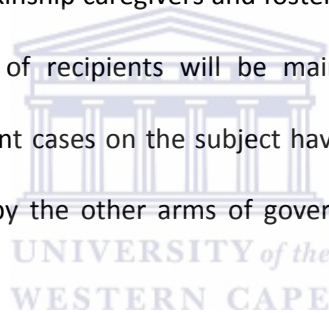
<sup>241</sup> See generally sections 137 SA Children's Act and 127 CCPB.

<sup>242</sup> Sections 4.2.1, 4.2.3 and 4.2.5.

<sup>243</sup> Section 4.5.1.

categories of children generally in need of care whether in parental or alternative care. This was better captured in the rejected proposal of the SALRC before the adoption of the South African Children's Act.<sup>244</sup>

It has been shown that the general opening provided for kinship carers to be identified as foster care (within the foster care system) has resulted in a situation where financial motivation is the catalyst for the dramatic increase in the number of children in foster care within the last decade – in both South Africa and Namibia. However, it is expected that the implementation of the Child Care and Protection Bill and accompanying regulations (when it becomes law) will be significant in turning the tide based on the foundation of providing separately for kinship care and foster care. In the case of South Africa, with three amendment Bills to the Children's Act now in circulation and a court-imposed deadline of 2014, it is expected that clear strategies that will provide sustainable solutions will be adopted. With specific reference to the relationship between kinship caregivers and foster care grants, it is hoped that the current stability and decline in the upsurge of recipients will be maintained while operating a sustainable alternative arrangement.<sup>245</sup> While recent cases on the subject have attempted to provide a way forward, other strategies have to be adopted by the other arms of government to arrive at a more wholesome solution.



In the next chapter of this study, which is the concluding chapter, some of the recommendations that have been made by other scholars and academics will be re-visited without attempting to raise new issues. With reference to South Africa, in the face of the on-going consultations towards the amendment of the Children's Act, it is important to synthesize various thoughts and opinions as to the way forward in order contribute towards a viable and feasible way forward. One of the thoughts that immediately come to my mind is that South Africa may need to borrow in part from the Namibian approach. Alternatively, there may be a need to revisit, in part or in whole, the initial/original proposal of the SALRC on providing for models of kinship care distinct from foster care, and the accompanying grants, while the Children's Act was still in the Bill stage. One fact is however obvious: there are no simple solutions to all the issues involved.

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<sup>244</sup> See section 5.4.1.2 of this chapter.

<sup>245</sup> New FCG applicants and recipients have declined since 2011 due to factors such as the termination of the grants for beneficiaries who have turned 18, and perhaps the lapse of many grants leading to a moratorium on FCGs lapsing until 2014. See Hall (2013) 93.

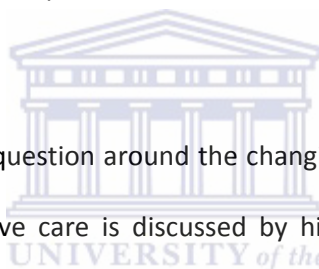


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## **CHAPTER SIX – CONCLUSIONS AND RECOMMENDATIONS: TOWARDS EFFECTIVE RECOGNITION AND UTILISATION OF KINSHIP CARE AS ALTERNATIVE CARE**

### **6.1 Introduction**

This research presents an insight into the right to alternative care for children deprived of parental care/family environment, with a focus on the status of kinship care in comparison with foster care generally. This is achieved through analysis of international treaties and declarations, regional instruments, universal guidelines and other relevant international instruments. At the domestic level, national legislation relevant to alternative care in two southern African countries are also presented and analysed in terms of their conformity with international and regional law on alternative care again with a focus on the status of kinship care in domestic law and policy coupled with measures of social assistance provisioning for kinship care and foster care.



In this concluding chapter, the central question around the changing context of kinship care from a family environment to an option of alternative care is discussed by highlighting the answers to the research questions posed at the beginning of the study in order to bring the thesis to a close. More conclusions will be drawn and recommendations targeted at the improvement of law and policy-making on kinship care will be made.

### **6.2 Kinship Care: The Transition from a Traditional Family Environment to Alternative Care**

In Chapter two, this research provided an insight into the utilisation of kinship-based family environments and the child-rearing practice of kinship care among African families in historical and contemporary periods. It drew attention to the various ways in which families constructed kinship networks and the purposes they served: family preservation and identity formation as well as a coping mechanism or survival strategy, amongst others. This history plays a decisive role in how kinship patterns of family organisations subsist even today. Consequently, despite the changes that have impacted on the traditional practice of

kinship care over time due to factors such as migration, the rise of the nuclear family system, modern economic systems and labour relations, HIV/AIDS, poverty and other socio-economic conditions, kinship families and systems have had to adapt rather than be annihilated.

However, the result of the erosion on the structure of the historical/traditional family by these factors on the ancient child-rearing practice of kinship care is to a large extent no longer an automatic expectation. The gradual shift from kinship care as a shared responsibility to kinship care largely being the sole responsibility of an individual relative (or branch of the larger extended family) is a major trigger for the transition of kinship care into a form of alternative care in contemporary understanding. Most families and individuals are severely overburdened that they may not willingly and adequately take up the role of caring the children of their relatives without assistance.

### **6.2.1 Kinship Care: Status in International and Regional Law and Policy**

Upon establishing the fact that kinship care has always been an integral part of child care in African societies, it was pointed out that kinship care is only just beginning to be acknowledged in studies and practice around child welfare/child protection and children's rights generally – within the framework of the right to alternative care. In most contemporary studies and literature on kinship care, kinship care is largely presented as a self-standing form of alternative care within the care continuum, in the same manner as foster care, adoption or placement in institutions, and it is promoted as the best form of family-based alternative that should be adopted for the care of children deprived of parental care.<sup>1</sup> This despite kinship care being the least protected and supported form of alternative care for children deprived parental care, and in which the majority of children in alternative care are informally placed.

This prompted the discussions in Chapter three on the international rules and regulations guiding the right to alternative care. This chapter presented an analysis of the key instruments on children's rights including alternative care, mainly the CRC, the African Children's Charter and the Hague Intercountry Adoption

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<sup>1</sup> See among others Save the Children UK (2007); EveryChild and HelpAge International *Family first: Prioritising support to kinship carers, especially older carers* (2012); Cantwell *et al* (2012).

Convention. While the CRC and the ACRWC provide for the obligation of States Parties to secure alternative care, neither makes any direct reference to kinship care as a form of alternative. In fact, it was clearly shown that the original intent of the CRC was not for care by extended family members to count as alternative care but rather as part and parcel of a child's family environment. The African Children's Charter provides for a wider notion of the 'family' based on the recognition of the role of the extended family and larger community in the upbringing of children in African, as discussed in chapters two and three. This serves to explain the non-reference to kinship care as alternative care in the Charter. However, in light of contemporary developments resulting in kinship care becoming accepted as alternative care as discussed in chapter two and four, the reference to 'alternative family care' rather than 'alternative care' in the Charter has become in my opinion a basis for inferring kinship care as alternative care in terms of the African Children's Charter.

It will be recalled that beginning with an analysis of instruments that were adopted prior to the CRC and ACRWC, the discussions in chapter three further revealed the history and discussions around the conceptualisation of the right to alternative care as it is understood and interpreted today. With reference to kinship care, the 1986 Declaration first provided for 'care by relatives of the child's parents' as the first alternative care measure to be considered where the parents are 'unavailable or inappropriate'.<sup>2</sup> This provision did not make it into the eventual CRC and ACRWC based on the understanding of 'family environment' with regard to child care as mentioned in the preceding paragraph. Thus chapter three also elaborated on certain key concepts crucial for understanding the right to alternative generally and the transition of kinship care into that framework. The concepts, which also laid the foundation for further discussions in subsequent chapters include: 'family environment'; 'children deprived of their family environment'; 'special protection and assistance'; 'the best interests of the child'; 'continuity in upbringing'; and 'alternative care'.

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<sup>2</sup> Art 4 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 (1986).

## 6.2.2 Kinship Care: Conceptualisation as Alternative Care

Following from the above, the thesis proceeded in Chapter four to dwell on the conceptualisation of kinship care as alternative through the UN Guidelines on the Alternative care of Children (2009). As already discussed, kinship had long before 2009 started to be reflected as a form of alternative care, but the role of the UN Guidelines is significant in universally establishing it as such. This is achieved by a shift in the standard for activating the right to alternative care under the UN Guidelines which is different from the standard in terms of the CRC and the African Children's Charter. The main focus of the UN Guidelines in activating alternative care is the loss of 'parental care', and not 'family environment' as broadly defined previously to include members of the extended family. This is cognisant of the structural changes that the family has undergone before and after the adoption of the CRC as well as the ACRWC. The diversification and increasing complexity of most African societies with regard to family and child care practices reveal that it is idealistic to assume that the kinship network or system is an automatic haven of care for children deprived of parental care.

The UN Guidelines however develop the right to alternative care more progressively by establishing the two pillars of alternative care: the necessity principle and the suitability principle. Both principles are central to kinship care whether interpreted as family environment or in the framework of alternative care. Through the necessity principle the Guidelines place a great emphasis on the need to exhaust all measures to keep children in their original family environment before contemplating alternative care. This means in a situation where a child's existing/original/primary family environment is based on kinship care, as discussed in the introductory chapter to this study, family preservation measures must be taken to keep the family together through financial and other resources thereby ensuring that the child does not become deprived of his family environment unnecessarily. While kinship care generally enjoys the status of being the most natural, least intrusive and family-based model of alternative care, the suitability principle requires that there must be clear evidence of this in particular cases before deeming it appropriate for the child or children concerned as the focus is on the importance of safeguarding the best interests of the child or children concerned. Despite the beneficial aspects of kinship care as presented in Chapter four, the risks

involved must not be ignored or underestimated which pre-supposes that the decision as to the suitability of kinship care ought to be arrived at on a case-by-case basis.

Also discussed in the chapter is the clear distinction that the UN Guidelines make between formal alternative and informal alternative, the latter mostly comprising kinship care generally. This set the basis for an examination of the interactions between kinship care and the child protection system in comparison to foster care. While (non-relative) foster care is relatively unknown or practiced in Africa, it was made clear the concept of fostering is not a strange concept to African culture. Although rooted in kinship tradition, aspects of fostering as traditionally understood in Africa were highlighted in order to distinguish it from the understanding of kinship care as alternative care, especially in contemporary law and practice.

It must however be borne in mind that foster care as a component of child protection has been introduced into the legislation of many African countries; it is one of the new features prompted by the child law reform processes all across the continent. Its introduction is largely considered a response to the scourge of HIV/AIDS and other disasters that have impacted on the care of children in Africa by crippling the traditional kinship care system. However, the fact that kinship care still absorbs the lion's share of children deprived of parental care shows the introduction of (non-relative) foster care without a focus on the status and role of kinship care is in my opinion, not a holistic approach. This is without prejudice to the fact that foster care as well as other emerging forms of alternative care should be provided for; it is imperative to have a variety of care options to choose from in order to determine that which is most suited to the needs and best interests of the child.

In that light this writer, drawing inspiration and guidance from the UN Guidelines and the works of other authors on the subject, presented a framework for delineating models of kinship care and their intersections with the child protection system in comparison to foster care which is historically a child protection device. Thus, private kinship care, informal kinship care, and formal kinship care were re-defined and differently aligned or non-aligned with the child protection system in terms of formalisation. A blanket demand for the formalisation of kinship care (particularly within the framework of foster care) is problematic for several reasons such as the huge and largely unrealistic burden it places on the social



welfare departments or formal child protection system as discussed in Chapter five. Others include the fact that some children drop in and out of kinship care because the placement is not static. There are also concerns about the intrusion of the State into family life and the impact this may have on further development of traditional kinship care structures, among others.<sup>3</sup> An example of this is 'customary adoption' which may be jeopardised by perceived State intrusion into family life.

'Customary adoption' is in many respects what is understood as fosterage in the African context, as discussed in Chapter four; it is conducted by agreement between the families and involves government institutions or officers.<sup>4</sup> States Parties, the CRC Committee and the ACERWC should give attention to how customary adoptions can be developed in promoting children's right to alternative care rather than dismissing it for lack of information or understanding about it.<sup>5</sup> While it has been suggested that the deep-rooted nature of customary adoption is a reason why common law adoption is not common in Africa, it is also clear that the level of government involvement (perceived as intrusion) in the latter is a major hindrance.<sup>6</sup> However, once there is support for it (as alternative care), legal and policy intervention measures can be more readily received as a critical strategy for the protection of the children involved.<sup>7</sup>

The discussions in Chapter four also provided for appropriate circumstances where the formalisation of kinship care should be promoted, especially where the need for alternative care arises out of a child protection issue. In such cases, vulnerable and otherwise victimised children can access other services specific to their needs and can receive a higher degree of monitoring for the prevention of further abuse, exploitation or neglect. What all these suggest is that 'careful decisions need to be made about whether or not kinship care is formalised, based on the needs and wishes of the child and the family, and the capacities

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<sup>3</sup> EveryChild and HelpAge International (2012) 17.

<sup>4</sup> See also Bennet (1995) 107. Customary adoption is common in many African countries and continues to be practised in, among others, Burkina Faso, Cameroon, Ethiopia, Ghana, Kenya, Lesotho, Malawi, Sierra Leone, South Africa, Swaziland, and Uganda.

<sup>5</sup> Mezmur (2009) 49, 325-326.

<sup>6</sup> EveryChild *Making social work: Improving social work for vulnerable children and families around the world* (2012); Mezmur (2009) 47-48; Ngwafor E 'The Family Code: A satisfactory gestation period' in Bainham A (ed) *The International Survey of Family Law* (2006) 128.

<sup>7</sup> Mezmur (2009) 49.

of social services departments.’<sup>8</sup> ‘Regardless of whether or not care is formalised, child protection measures should be in place and children and carers should be fully supported.’<sup>9</sup>

### **6.3 Kinship Care: Status in National Legislation and Policy**

In Chapter 1 and 5 (among others), it was pointed out that the on-going child law reform processes across several African countries are intended to repeal obsolete legislation concerning children while harmonising new ones with the standards of the CRC and the ACRWC as part of efforts to domesticate those instruments. A significant feature of all the child law reform processes is the inclusion of provisions on child protection and the right to alternative care. Thus, this thesis, after analysing the right to alternative care at the international and regional levels focused on the place of the right at the national level, using South Africa and Namibia as focal points.

The inclusion of children’s rights in national constitutions generally is a relatively new and progressive development. It was therefore significant to note that children’s rights not only notably feature in the constitutions of the countries under study, the right to alternative is also specifically provided for, with particular reference to the constitution of South Africa. Section 28 of the constitution clearly states that every child has the right ‘to family care or parental care, or to appropriate alternative care when removed from the family environment’.<sup>10</sup> It was pointed out that the family environment as provided in the constitution is understood to be inclusive of kin or other relatives of the child apart from the biological parents. However, the implementation has not been that simple due to the overlaps between kinship care and foster as provided in the South African Children’s Act; a situation arising from the structural and other changes that the family has undergone as discussed in Chapter 2.

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<sup>8</sup> EveryChild and HelpAge International (2012) 18.

<sup>9</sup> As above: ‘However kinship care is formalised, family resistance to the formalising of care is likely to be reduced if officials are sympathetic and operate in partnership with the family.’

<sup>10</sup> Sec 28(1)(b).

With regards to the right to alternative care in the child-specific legislation of both countries – the Children’s Act and the Child Care and Protection Bill – both provided for a range of alternative care measures including foster care, but address kinship care differently.

### **6.3.1 Kinship Care: Comparisons with Foster Care**

Although the South African Children’s Act does not expressly provide for kinship care as alternative care, kinship care is subsumed within the foster care system since an appointed foster carer may be the child’s relative. The challenge with this approach, as discussed previously, is that the foster care system which was designed to operate as a child protection mechanism has become over-burdened with cases of children who ordinarily should not fall within the child protection system.

In the case of Namibia, kinship care is expressly provided for and a list is provided to give clarity on who is understood to be a ‘family member’ and therefore a (potential) ‘kinship caregiver’. It is submitted that this is good practice to help guide the separation of kinship care from foster care as alternative care measures. It maintains the understanding of foster care in the classic/traditional sense of care provided by non-relatives with kinship care being restricted to alternative care provided by relatives of the child. A clear line of demarcation between kinship care and foster care is in line with the directions provided by the UN Guidelines on how the alternative care of children should be regulated and managed. It also makes data collection easier for planning purposes; where kinship care and foster care are mixed up, it may be difficult to investigate and address particular problems applicable to each form of alternative care, among others.

The Namibia Bill also introduces the concept of ‘children in need of protective services’ as against ‘children in need of care and protection’. This distinction is significant in the context of kinship care because it draws attention to the discussions in Chapter 4 about the fact that there are circumstances in which children in kinship care may interact with the child protection system – highlighted by the delineation of kinship care models as discussed in that chapter (private kinship care, informal kinship care and formal kinship care). The distinction also draws attention to the fact that, as discussed in Chapter 5, kinship care just like foster

care is applicable for a range of situations ranging from 'emergency' to 'temporary' and 'long-term' depending on the circumstances of each case.

### **6.3.2 Kinship Care: Social Assistance Provisioning**

One of the subject matters discussed in Chapter 2 of this study is the importance of the rights to social security and an adequate standard of living as it applies to children and their families. It was clearly pointed out that the right to an adequate standard of living cannot be separated from the right to social security; the latter generally serves as the means through which the former is realised. These rights serve as a basis for the provision of social assistance through grants as it concerns the right to alternative care and particularly kinship care. This is because as previously highlighted, the socio-economic condition of poverty and changes in the economic systems and structures impact greatly on the nature and quality of parental/family care which in turn give rise to the need for alternative care. Increasingly therefore, States' obligation to provide the right to alternative care for children deprived of their family environment or parental care cannot be separated from States' obligations to guarantee children's rights to social security and an adequate standard of living.

Chapter 3 of this study alluded to Principle 6 of the 1959 Declaration of the Rights of the Child which stated that States have a duty, through the payment of State and other assistance, to 'extend particular support to children without a family and to those without adequate means of support.' This duty is even more relevant in today's context in light of the challenges militating against many families, especially poverty. In the context of alternative care, the need for the provision of support by the State to children in kinship care cannot be overemphasised. This is because while kinship carers may be motivated based on a sense of moral duty (unlike classic foster care), the reality in Africa is that a broad base of support is required to carry through with the care of children in one's care. This is especially the case where the caregivers are themselves not financially stable because, 'while caregivers are highly motivated, an overload of

responsibility can contribute to negative outcomes.<sup>11</sup> States cannot rely on individual acts of kindness where the best interests of the child is in issue; laws and policies have to change in accordance with the changes in society, and children do not have the luxury of time to wait for effective change that impacts on their growth and development. It is therefore important to stress that social policies targeted at the provision of support for kinship care should be based on law in order to ensure sustainability.

Various forms of social assistance are provided for kinship caregivers in many African countries but there is very little government involvement in the process; non-governmental organisations and civil society organisations generally are the drivers of the process. While this is commendable, it must be emphasised that it is the responsibility of the State to secure the protection of all children within its territory, and the provision of assistance where necessary is one major way of fulfilling the obligation placed upon States Parties. Indeed, the fact that social assistance provisioning relevant to kinship care are provided in legislation in both South Africa and Namibia, informed the decision to focus on these two countries in this study. The inclusion of socio-economic rights as justiciable rights in national constitutions and other legislation is one way to entrench the obligation of States as well as monitor or measure implementation. The challenges faced by children deprived of parental care/family environment cannot be left to the discretion of the government.<sup>12</sup> As some of the cases previously discussed have shown, decisions concerning children's care arrangement cannot be done without giving consideration to the socio-economic conditions of the children and their caregivers. Thus, while legislation provides the foundation for establishing State obligation, it also serves as a tool for moving political will in the direction of facilitating other measures (non-legal) for effectively raising the profile of kinship care and establishing regulatory standards around the subject.

However, the manner in which support is provided for kinship care has to be carefully considered and organised. The discussions in the previous chapter showed that where the lines between foster care and kinship care are blurred, it becomes complicated to organise social grants system around them as the focus may be shifted from what form of alternative care is most appropriate for a particular child to what form of

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<sup>11</sup> Ince (2009) 335.

<sup>12</sup> UNICEF *Handbook on legislative reform: Realising children's rights* (2008) 21.

alternative care provides a certain form, calibre or amount of support. In both South Africa and Namibia, it has been shown that treating kinship care separately from foster care will drastically reduce the number of children in the child protection system thereby eliminating or at least reducing the undue burden placed on the social work or social welfare system. This does not however mean that children in kinship care but out of the child protection system are left without support, but that the medium of support is changed to eliminate the technicalities around the foster care system.

In the South African context, there may be the need to review the child support grant as it currently stands against the foster child grant. It is hoped that the on-going consultations with a view to amending the Children's Act will provide solutions in this regard. The most obvious recommendations for now are those highlighted by Skelton and discussed in Chapter 5 as well as those elaborated upon within the framework provided in Chapter 4 of this study. For now, it is practical to ensure that all kinship caregivers currently entitled to the FCG continue to receive it until the 2014 deadline after which they will be incorporated into the new and emerging regime. This will include the provision of all grants deemed extended by the court while new/future applications will be processed in terms of the new approach to be developed. A more sustainable approach however, is to consider bringing together a range of support services beyond the provision of social grants to sustain kinship care as a stable form of alternative care both within and outside the child protection system.<sup>13</sup>

Further, it is submitted that since children are the target in terms of the provision of support when in kinship care, the children in kinship care should also be made aware of the financial incentives and other forms of support made available to their caregivers on their behalf. This promotes the participation of children in matters concerning them and may also boost their self-esteem so they are not made to feel like they are burdens on their caregivers when due provisions have been made. Further, the children are in a better position to speak up whenever they are not benefitting from provisions made on their behalf, and appropriate action can be taken to remedy the situation.

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<sup>13</sup> Ince (2009) 337.

## 6.4 Recommendations

In this section, a number of recommendations are provided for different stakeholders concerned with children's rights generally and the right to alternative care in particular. These recommendations are aimed at suggesting and encouraging further action towards the full implementation of the right to alternative care, particularly kinship care.

### 6.4.1 The Roles of the CRC Committee and the ACERWC

It has been suggested previously that it is important for the CRC Committee to issue a general comment on the right to alternative care, including 'explanatory principles that enable States to harmonise national rules and regulations with the UN Guidelines.'<sup>14</sup> This writer recommends the same because as has been shown in the course of this study, there are several subjects that require clarification and interpretation by the CRC Committee to enable States comply with their obligations as they concern children's right to alternative care. Examples include the position of child-headed households, the relationship between parental care and family environment, and with particular reference to the subject of this research, the status of kinship care and its relationship with foster care, as well as the importance of highlighting the role of the State in providing various forms of support for kinship care.

It is submitted that it is even more important for the ACERWC to also issue a general comment on the right to alternative care with a particular focus on the predominance of kinship care across the continent. It will be recalled that in Chapter 3, a distinction was made between the right to 'alternative care' as expressed in the CRC and the right to 'alternative family care' as contained in the ACRWC. It was shown that this points to an African understanding of the care of the child within a family environment. It is important for the general comment to incorporate elements of the right to social security and social assistance, as derived from other rights and as discussed in this study, particularly against the background of the lack of express

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<sup>14</sup> Phillips (2011) 287.

provisions on social security in the ACRWC as discussed in Chapter 2. In addition to the general comment, it is also recommended that the general comment should be preceded by the dedication of a Day of the African Child (DAC) celebration to the theme of alternative care for children deprived of parental care in Africa.<sup>15</sup> All these will serve towards understanding and tailoring kinship care and the right to alternative care generally in a manner that is responsive to the realities of family life and alternative care across the continent.

#### **6.4.2 The Role of States Parties**

A central theme of the thesis is the proposition that kinship care needs to be expressly recognised as alternative care separate and distinct from foster care in order for the concerns of children and caregivers in such circumstances to be adequately understood and responded to. Thus, States Parties, as part of the on-going harmonisation of child law process need to take this into account and comply accordingly in line with the standards in international law as already discussed. While the majority of the new legislation on children's rights provides for foster care, no clear provisions are made for kinship care; this despite the fact that classic foster care is not a common practice in Africa while kinship care is the predominant form of alternative care for children deprived of parental care. Without clear laws and policies in place, proper standards cannot be put in place and regulation cannot be guaranteed for situations where it is required. The situation where the status of kinship care is not clear or where it is not (legally) recognised although it is being practiced, does not augur well for the best interests of the affected children and for their overall survival and development. It is also the responsibility of States to put in place practical measures for making all rules, guidelines and standards accessible and understandable to the general public, including those who are poor and illiterate. This will ensure that the entire populace owns and supports the process, which will

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<sup>15</sup> The DAC is an annual celebration/event (every June 16) by which the ACEWRC calls on political leaders and other children's rights stakeholders to assess and improve upon their obligation to effectively promote and protect children's rights across the continent. In 2012, the selected theme was 'The Rights of Children with disabilities: the duty to protect, respect, promote and fulfill', and for 2013, it is 'Eliminating Harmful Social and Cultural Practices affecting children: Our Responsibility.'



further ensure that as many children as are in kinship care can be reached and adequately protected; this is true for the realisation of all children's rights in Africa.<sup>16</sup>

Considering the predominance of kinship care, and the significant number of children involved, it is not sustainable for States to expect relatives and other kinship caregivers to bear the financial and other burdens alone. Else, the States abdicate their role as the ultimate guardian of every child within their territory which is in violation of the duty to promote and protect the rights of the child. On the basis of the framework presented in Chapter 4, States should establish an efficient alternative care system with kinship care given the honour and assistance it deserves. Where necessary, it should be formalised, and as previously discussed, it is left to the discretion of the State whether or not to merge formal kinship care with the foster care system within the child protection system or to organise both separately. It must however be re-iterated that kinship care as a model of alternative care must generally be distinguished from foster care which operates more strictly within the child protection system. There can be no justification for a situation where foster carers are entitled to State support (on the basis on being legally recognised) while maintaining kinship care as an unpaid responsibility of the carer. This goes against the fundamental non-discrimination principle of children's rights earlier discussed in Chapter 3. All caregivers of children require assistance and compensation; what is required is for the prescribed standards and requirements to be put in place and properly monitored.

It is equally important for States to work with other stakeholders within the civil society who have been at the forefront of promoting and providing assistance for kinship carers of children deprived of parental care. Along with drawing from the examples provided by South Africa and Namibia in this study, this forms part of the duty of the State to seek assistance 'within the framework of international co-operation' in order to secure the rights of the child.<sup>17</sup> The realisation of all children's rights requires both human and financial resources;<sup>18</sup> the full implementation of the right to alternative care is one area where this need is even

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<sup>16</sup> Kaime (2010) 645.

<sup>17</sup> Art 2 CRC.

<sup>18</sup> ACPF *The African Report on Child Wellbeing 2011: Budgeting for Children* (2010) 21.

more evident.<sup>19</sup> Thus, while political will backed by the law is important, the importance of resources cannot be over-emphasised if effective implementation is to be achieved.<sup>20</sup> Although many sub-Saharan African States face the challenge of inadequate resources, there is still an urgent need to improve in terms of budgetary allocations to children's rights over a long period of time.<sup>21</sup> It must be borne in mind that the provision of adequate resources does not only relate to the provision of direct cash assistance but also to the need to train competent professionals, such as social workers and kinship carers where necessary, to adequately implement children's right to alternative care. It will be recalled that even in South Africa, which is classified as a middle income country, there remains a shortage of adequately trained professionals and this poses a threat to the implementation of children's rights especially in the context of the right to alternative care.<sup>22</sup>

#### 6.4.3 Further Research and Data-Based Interventions

This research is largely qualitative and based analysis and desk review of relevant international instruments and other materials. Thus, the focus has been on providing insight into understanding the right to alternative care more broadly and kinship care as alternative care particularly. The subject of kinship care is however one which will benefit immensely from quantitative research, particularly with regards identifying the different factors giving rise to kinship care and the various practices of kinship care. This will be useful for purposes of delineating the different forms of kinship care as discussed in Chapter 4 in order to address each one differently.

The role of the CRC, the ACRWC and other international instruments relevant for children's rights and welfare, is to make children a subject of focus beyond the family or private sphere without attempting to usurp the role of the family (in an ideal situation). They ensure this by establishing the recognition of

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<sup>19</sup> Doek J 'Policy and Legislative Frameworks Providing for Family Based Care', presented at the First International Conference in Africa on Family Based Care for Children, 28-30 September 2009, Intercontinental Hotel, Nairobi, Kenya.

<sup>20</sup> Arts (2010) 10.

<sup>21</sup> ACPF (2010) 105.

<sup>22</sup> South Africa is said to have a shortage of over 50,000 social workers, a shortage which has crippled the efficiency of child welfare services generally. See among others Mike Waters (Shadow Minister of Social Development) 'South Africa has a 77% social worker shortage', August 2013, available at < <http://www.da.org.za/newsroom.htm?action=view-news-item&id=12781> >; Earle N 'Social Work as a Scarce and Critical profession', research commissioned by the Department of Labour, South Africa, March 2008.

children as 'visible human beings' fully entitled to rights so as to live lives of dignity and fulfilment in the here and now. The concept of children's rights combines the idea of every individual being entitled to rights with the idea of children as individuals and therefore, equally deserving of rights. Consequently, the CRC Committee places great emphasis on 'the development of a comprehensive national strategy or national plan of action for children, built on the framework of the Convention.'<sup>23</sup> Further,

If such a strategy is to be effective, it needs to relate to the situation of all children, and to all the rights in the Convention. It will need to be developed through a process of consultation, including with children and young people and those living and working with them..., meaningful consultation with children requires special child-sensitive materials and processes; it is not simply about extending to children access to adult processes.<sup>24</sup>

With regards to alternative care and kinship care therefore, there is value in research which pools together the actual experiences of children in kinship care as well as kinship caregivers in different African countries to gain a broad picture of what the contextual issues are. The CRC Committee makes it clear that the experiences of children should be given serious consideration in the development of effective strategies. In addition, the CRC Committee recommends that the

Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation. The Committee reminds States parties that data collection needs to extend over the whole period of childhood, up to the age of 18 years. It also needs to be coordinated throughout the jurisdiction, ensuring nationally applicable indicators. States should collaborate with appropriate research institutes and aim to build up a complete picture of progress towards implementation, with qualitative as well as quantitative studies. The reporting guidelines for periodic reports call for detailed disaggregated statistical and other information covering all areas of the Convention. It is essential not merely to establish effective systems for data collection, but to ensure that the data collected are evaluated and used to assess progress in implementation, to identify problems and to inform all policy development for children. Evaluation requires the development of indicators related to all rights guaranteed by the Convention.<sup>25</sup>

While this study focuses on kinship care, it must be mentioned that the above are relevant for all aspects of the right to alternative care including getting data-based information on children in *kafalah* of Islamic law, children in institutional or residential care facilities, and children in child-headed households, among others. The outcome of such research will impact on the development of broader and more progressive policies and programmes for the proper implementation of the right to alternative care as a whole. This study merely represents an exploratory attempt understanding the right to alternative care and kinship

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<sup>23</sup> CRC Committee General Comment 5 (2003) para 29.

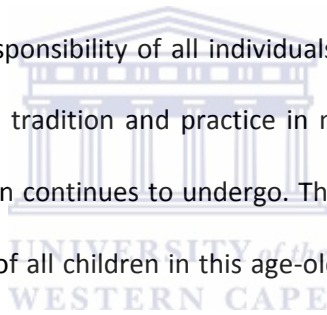
<sup>24</sup> As above.

<sup>25</sup> As above, para 48.

care as well as providing insights into problems and opportunities and identifying gaps and subjects for subsequent research projects.

## **6.5 Concluding Remarks**

The universal acceptance of the CRC (and the ACRWC) represents global consensus on matters concerning children by providing the world with shared norms, standards and values in relation to children and childhood. Thus, although children can generally not be protected in isolation from a family environment (the ideal is for children to be raised within a family environment), every individual member of society at large, has a role to play in ensuring the protection of children, at the very least, due to the particular vulnerability of children. Kinship care, a practice which is almost certain to endure for all time is a tradition which brings to focus the collective responsibility of all individuals, families, societies and States towards children. It is an established child care tradition and practice in many cultures and societies despite the changes that the family as an institution continues to undergo. Thus, more emphasis should be placed on securing the wellbeing and protection of all children in this age-old tradition based on helping, caring and sharing.





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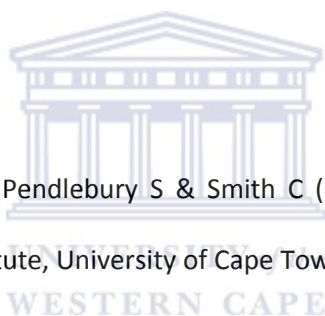
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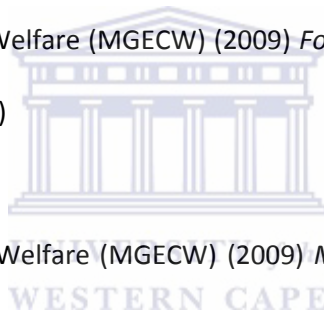
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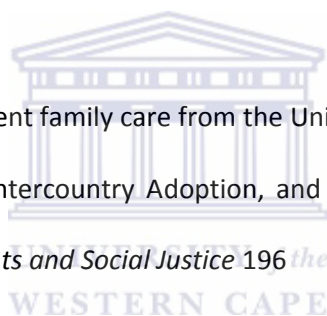
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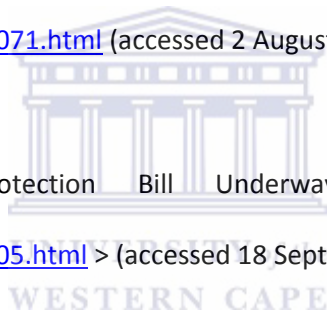
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