THE RIGHT TO ALTERNATIVE CARE OF CHILDREN WITH DISABILITIES IN ETHIOPIA AND SOUTH AFRICA

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DECLARATION

I, Meseret K. Ande, declare that *The Right to Alternative Care of Children with Disabilities in Ethiopia and South Africa* is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: ________ Meseret K Ande
February 2020

The law and information reviewed in this study is stated as at the end of October 2019.

DEDICATION

To my parents, Tsehay Benti and Kifle Ande.

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I thank God for giving me good health and peace to pursue this noble cause. If any of these were lacking, I would not have completed this study.

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ABSTRACT

The importance of a nurturing environment on early child development and the central role that a family environment plays to this end are widely recognised. However, most children with disabilities lack family life and parental care and often find themselves disproportionately represented in the category of children that need alternative care arrangements. The limited access to family-based alternative care options for children with disabilities deprived of their family environment is the primary concern of this study. Studies have shown excessive dependence on institutions as a means to provide care for children with disabilities deprived of their family environment, despite the overwhelming evidence on the negative effects of placement in institutions on the development and well-being of children. This contradicts with a number of rights articulated in international and regional standards dealing with the alternative care of children in general, and children with disabilities in particular.

This study seeks to examine the extent to which the rights of children with disabilities are respected in the context of alternative care in two jurisdictions in Africa – Ethiopia and South Africa. The two countries are State Parties to the applicable international and regional instruments concerning the alternative care of children with disabilities. These standards include the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the African Charter on the Rights and Welfare of the Child. The UN Guidelines for the Alternative Care of Children and its principles of 'necessity' and 'suitability' also offer some guidance.

Thus the study aims to identify the gaps in relation to domestic legislative and to some extent, policy frameworks and makes recommendations with a view to ensuring adequate, focused and effective legislative frameworks to meet the state's obligations to guarantee the right to alternative care of children with disabilities. To this end, the study first critically analyses the right to alternative care of children with disabilities and the obligations imposed on South Africa and Ethiopia by international human rights standards. This is followed by an examination of the domestic laws and policies of Ethiopia and South Africa pertaining to the alternative care of children with disabilities to determine their sufficiency in keeping up with the international standards. Finally, the institutional and administrative measures taken by South Africa and Ethiopia to uphold the right to alternative care of children with disabilities are assessed. Based on the discussion in preceding chapters, a conclusion and recommendations are provided.

The study finds that, the legislative, administrative and institutional frameworks of Ethiopia and South Africa have positive aspects, as well as gaps that result in both compliance and non-compliance to certain obligations in international standards.

Key words: Alternative care; family-based care; institutions; residential care; children with disabilities; foster care; Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child; UN Guidelines for the Alternative care of Children; African Charter on the Rights and Welfare of the Child

LIST OF ACRONYMS AND ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
BOLSA	Bureau of Labour and Social Affairs (Ethiopia)
BOWCYA	Bureau of Women, Children and Youth Affairs (Ethiopia)
CASE	Community Agency for Social Enquiry (South Africa)
CDG	Care Dependency Grant (South Africa)
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
CSG	Child Support Grant (South Africa)
CSOs	Civil Society Organisations
CYCCs	Child and Youth Care Centres (South Africa)
DJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development (South Africa)
DWCPD	Department of Women, Children and People with Disabilities (South Africa)

EHRC	Ethiopian Human Rights Commission
EIO	Ethiopian Institution of the Ombudsman
FCG	Foster Care Grant (South Africa)
FDRE	Federal Democratic Republic of Ethiopia
FHI	Family Health International
Geneva Declaration	The Geneva Declaration of the Rights of the Child
GHS	General Household Survey
GTP	Growth and Transformation Plan
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICF	International Classification of Functioning, Disability and Health
IMS	Information Management System
ISS	International Social Service
MECs	Members of the Executive Council (South Africa)
MOJ	Ministry of Justice (Ethiopia)
MOLSA	Ministry of Labour and Social Affairs (Ethiopia)
MOWA	Ministry of Women Affairs (Ethiopia)
MOWCYA	Ministry of Women, Children and Youth Affairs (Ethiopia)

National Guidelines	Alternative Childcare Guidelines on Community-Based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service (Ethiopia)
NAWONGO	National Association of Welfare Organisation and Non-Governmental Organisations (South Africa)
NCP	National Children’s Policy (Ethiopia)
NGOs	Non-Profit Organisations
NHRIs	National Human Rights Institutions
NPA	National Plan of Action
NPOs	Non-profit Organisations
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
OVC	Orphans and Vulnerable Children
PEPUDA	Promotion of Equality and Prohibition of Unfair Discrimination Act (South Africa)
RFC	Revised Family Code (Ethiopia)
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
The 1959 Declaration	The Declaration of the Rights of the Child

The 1986 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
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Guidelines	United Nations Guidelines for the Alternative Care of Children (2009)
UNICEF	United Nations Children’s Fund
WHO	World Health Organisation
WPRPD	White Paper on the Rights of Persons with Disabilities (South Africa)

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Chapter 1:
Introduction

1.1 Background to the study

Children with disabilities in Africa are among the most marginalised groups in society.[1] Generally, they face barriers in realising their human rights and lack access to basic services including education and health care.[2] In many African countries, giving birth to a child with a disability is shrouded in misconceptions that disability is retribution for sinful behaviour, or a result of witchcraft or demonic intervention.[3] Consequently, children with disabilities face a higher risk than other children of abandonment and being hidden from public view.[4] Accordingly, they are often not registered at birth.[5] The lack of registration poses a long-lasting challenge, as it effectively excludes them from exercising their rights as citizens.[6]

In particular, children with disabilities are at a higher risk than children without disabilities of being deprived of their family environment and placed in alternative care.[7] The root of the problem lies in the stigma and discrimination associated with having a child with a disability,

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[1] See generally African Child Policy Forum (ACPF) *The lives of children with disabilities in Africa: A glimpse into a hidden world* (2011a); WHO & UNICEF *Early Childhood Development and Disability: A Discussion Paper* (2012) 14.

[2] ACPF (2011a); ACPF *The African report on children with disabilities: Promising starts and persisting challenges* (2014) 29; ACPF *Children with Disabilities in Africa: Challenges and Opportunities* (2011b); ACPF *Educating children with disabilities: Ethiopia* (2011c); Ransom B *Missing voices: Children with disabilities in Africa* (2009); UNICEF Innocenti Research Centre *Promoting the Rights of Children with Disabilities* (2007) 1.

[3] ACPF (2011b) 34; ACPF (2011a) 42; ACPF (2014) 29.

[4] Hodgkin R & Newell P *Implementation Handbook for the Convention on the Rights of the Child* (2007) 285.

[5] ACPF (2011b) 34; Sabatello M 'Children with disabilities: A critical appraisal' (2013) 21 *International Journal of Human Rights* 469.

[6] ACPF (2011b) 34–5. UNICEF *Every Child's Birth Right – Inequities and Trends in Birth Registration* (2013) 6.

[7] United Nations *Towards a World Free from Violence*: *Global Survey on Violence Against Children* (2013); Lang-Holmen P 'In the blind spot: Documenting the situation of children without parental care or at risk losing it' (2016) 20 available at *http://bit.ly/2SR510Y* (accessed 14 May 2017); UNICEF, Christian Aid & Islamic Relief *A Matter of Belonging: How Faith-Based Organisations Can Strengthen Families and Communities to Support Orphans and Vulnerable Children* (2006) 9; Rimmerman A 'Out-of-home placement of children with intellectual disabilities: The need for a family support Policy' in Herr S, Gostin L & Koh H (eds) *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (2003) 415; Tolfree D *Roofs and Roots: The Care of Separated Children in the Developing World* (1995) 55.

which force some parents to abandon or give away their child at birth.[8] Moreover, poor availability of inclusive basic services and lack of psychological support within communities undermines parents' confidence and ability to care for a child with a disability and thus heightens the risk of children with disabilities being placed in alternative care.[9]

Deprivation of family environment exposes children to the risk of violation of their internationally recognised rights, including the right to life, survival and development, and to be free from violence, abuse and exploitation and discrimination.[10] What is more, for children with disabilities who are deprived of their family environment, research suggests that their access to family-based alternative care options, such as foster care and adoption, is not equal to that enjoyed by children without disabilities.[11] This is evident in the fact that a number of countries have embarked on deinstitutionalisation initiatives and managed to find family-based alternatives for the majority of children – except in the case of children with disabilities, where alternatives such as foster care services have been neither designed nor equipped to care for them.[12] This has been linked to, among other factors, the limited resources devoted to training and preparing potential foster carers and the lack of necessary support services.[13] Another factor that generally plays a role in the limited availability of family-based care is the paucity of support for it by those involved in financing alternative care, including governments and

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[8] WHO & the Gulbenkian Global Mental Health Platform *Promoting Rights and Community Living for Children with Psychosocial Disabilities* (2015) 25; Ransom (2009) 30.

[9] UNICEF Innocenti Research Centre (2007)17; International Social Service (ISS) & SOS Children's Villages International 'Safeguarding the rights of children with disabilities in alternative care' (2012) 1 available at *http://bit.ly/2MTHxV4* (accessed 17 June 2015); Clements, Luke J & Read J *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Basic Human Rights* (2008) 212.

[10] Delap E, Georgalakis J & Wansbrough-Jones A *Missing: Children without parental care in international development policy* (2009) 5; Hodgkin & Newell (2007) 280.

[11] Better Care Network & EveryChild 'Enabling Reform: Why supporting children with disabilities must be at the heart of successful child care reform' (2012) 19–21 available at *http://bit.ly/2MUUUEA* (accessed 20 April 2015); Tolfree (1995) 55; Cousins J 'Disability still taboo in family placement?' (2009) 33(2) *Adoption and Fostering* 6; Hodgkin & Newell (2007) 285.

[12] Family for Every Child 'Strategies for delivering safe and effective foster care: A review of the evidence for those designing and delivering foster care programmes' (2015) 33 available at *http://bit.ly/37BVSxg* (accessed 29 September 2016).

[13] EveryChild & Better Care Network (2012) 19–21; ISS & SOS Children's Villages International (2012) 1; Family for Every Child (2015) 33.

international donors, owing to the complexity of developing new infrastructure and child protection systems.[14] The limited child protection options in some countries have led some to argue that a halt on institutional care 'will do more harm than good to vulnerable children'.[15]

The absence of equal access to family-based alternative care and lack of support for developing such care in most countries have meant that the most widely available form of alternative care for children with disabilities is placement in institutional care.[16] Numerous studies report that children with disabilities are disproportionately represented in institutions and that in most countries family-based alternatives such as foster care are not available.[17] A recent report by the United Nations (UN) on children deprived of liberty reveals that one in three children in institutions is a child with a disability.[18] It estimates that in 2018 the total number of children placed in institutions ranged from 3.5 to 5.5 million.[19] The study further reveals at least 1.3 to 1.5 million children, including children with disabilities are deprived of liberty every year, the majority of whom (430,000–680,000) are found in institutions.[20] In many states, once children

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[14] Csaky C *Keeping children out of harmful institutions – Why we should be investing in family-based care* (2009) 11; Pinheiro P *World Report on Violence against Children* (2006)186.

[15] Berens AE & Nelson CA 'The science of early adversity: Is there a role for large institutions in the care of vulnerable children?' (2015) 386 *The Lancet* 395.

[16] EveryChild & Better Care Network (2012) 11–14; UNICEF *At Home or in a Home? Formal Care and Adoption of Children in Eastern Europe and Central Asia* (2010) 27.

[17] Mulheir G 'Deinstitutionalisation – A human rights priority for children with disabilities' (2012) 9 *The Equal Rights Review* 117 and 130; UNICEF *The State of the World's Children 2013: Children with Disabilities* (2013) 46; UNICEF, Christian Aid & Islamic Relief (2006) 9; WHO et al. (2015) 22; UNICEF (2010) 27; Pinheiro (2006) 185.

[18] United Nations General Assembly (UNGA) *Global Study on Children Deprived of Liberty* (UN Doc. A/74/136, 2019) available at *http://bit.ly/37Aua43* (accessed 30 June 2019) para 31.

[19] UNGA *Global Study on Children Deprived of Liberty* (2019) para 62. Nonetheless, such figures have been deemed to be an underestimation of the actual number, as many countries lack such data given the large of numbers of unregistered institutions. Early estimates of the number of children placed in institutions globally range from 2 million to 8 million. UNICEF *Progress for Children: A Report Card on Child Protection Number 8* (2009); Pinheiro (2006) 183; Barriga SR, Buchanan J, Ćerimović E et al. 'Children with disabilities: Deprivation of liberty in the name of care and treatment' in *Protecting Children against Torture in Detention: Global Solutions* (2017).

[20] UNGA *Global Study on Children Deprived of Liberty* (2019) paras 62 and 86. However, the estimate covered only children who are deprived of their liberty in institutions *de jure* (children placed in institutions by an order of judicial or administrative authority), and did not include children who are deprived of their liberty in institutions *de facto*. As such, the study acknowledges that the total number of children deprived of their liberty in institutions may well be much higher.

are placed in institutions, particularly in non-state institutions run by private actors, they fall off the radar of those states.[21]

In responding to children with disabilities deprived of their family environment, a one-size-fits-all approach will not suffice, as all alternative care options come with their own strengths and weaknesses. Thus, determining the best form of alternative care for a given child with a disability requires taking into account the pros and cons of each form of alternative care, while bearing in mind his or her short- and long-term needs and circumstances. However, setting aside that alternative care settings might differ in living conditions and caregiving environment, research has proven that almost all aspects of development are significantly affected by placement in institutions.[22] Children placed in institutions have been found to suffer from stunted social and interpersonal development, attachment disorders, and delayed language development and cognitive functioning.[23] They also have limited opportunities for rehabilitation, and are often exposed to abuse, neglect and lack of individualised attention.[24] Further evidence of the negative effects of institutions on children is contained in the latest global report on children deprived of their liberty, which emphasises that institutions are inherently detrimental to children.[25] The study underscores the point that institutions should not be used as a means to 'provide care, protection, education, rehabilitation or treatment' for children, as such settings cannot replace the benefits that growing up in family or family-type settings within the community offers.[26]

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[21] UNGA *Global Study on Children Deprived of Liberty* (2019) para 61.

[22] Petrowski N, Cappa C & Gross P 'Estimating the number of children in informal alternative care: challenges and results' (2017) 83 *Child and Abuse Neglect, The International Journal* 389.

[23] Petrowski et al. (2017) 389; Mulheir (2012) 120–21.

[24] EveryChild & Better Care Network (2012) 4; Pinheiro (2006) 183; Hodgkin & Newell (2007) 284.

[25] UNGA *Global Study on Children Deprived of Liberty* (2019) para 64.

[26] UNGA *Global Study on Children Deprived of Liberty* (2019) para 65.

Institutional care is said to be particularly damaging to children under the age of three years.[27] Research has also shown that children who are placed in institutional care before the age of six months face long-term developmental setbacks.[28] Institutional settings, even ones that are clean, properly managed and adequately resourced, pose higher risks to the life and health of children than family-based settings do.[29] Furthermore, although in rare cases institutional care may serve to fulfil the physical needs of children, it does not provide the individual attention and 'family-quality emotional nurture and interpersonal bonding' that are critical for normal child development.[30]

The effect on children with disabilities of the loss of family environment and institutionalisation may be particularly grave owing to the heightened vulnerability associated with their impairment.[31] In this respect, children with disabilities are reported to suffer even more from physical neglect and violence than other institutionalised children.[32] Research also suggests that in some instances an institutional regimen can cause further disabilities or aggravate existing ones.[33] Children with disabilities in institutional settings often do not receive quality basic services such as education, health and rehabilitative services due to a lack of standards or to inadequate monitoring and enforcement of standards where they do exist.[34]

These findings are consistent with the growing consensus on the central role that a family environment plays in the development and well-being of children.[35] Numerous empirical

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[27] OHCHR Regional Office for Europe 'The rights of vulnerable children under the age of three: Ending their placement in institutional care' (2012) 17 available at *http://bit.ly/39H7zEH* (accessed 15 May 2016).
[28] OHCHR Regional Office for Europe (2012) 17.
[29] UNICEF (2013) 42.
[30] Carlson RR 'A child's right to a family versus a State's discretion to institutionalise the child' (2016) 47 *Georgetown Journal of International Law* 939; UNICEF (2013) 42; Bartholet E 'International adoption: The child's story' (2012) 24 *Georgia State University Law Review* 346–47.
[31] ISS & SOS Children's Villages International (2012) 1; Better Care Network & EveryChild (2012) 14–5.
[32] OHCHR Regional Office for Europe (2012) 19; UNICEF (2010) 27; Mulheir (2012) 120.
[33] Tolfree (1995) 58–9; Better Care Network & EveryChild (2012) 4; UNICEF (2013) 46; Mulheir (2012) 120.
[34] UNICEF (2013) 42.
[35] John Bowlby theorised this in the 1950s via the notion of 'attachment'. The theory of attachment stresses the importance of a primary caregiver for the healthy development of a child and the negative effects of institutional care in comparison with family-based care. Much empirical evidence has supported this theory. Bowlby J

studies in various disciplines stress the importance of a nurturing environment in early child development and the value that quality of parenting and stable emotional bond with at least one care-giver have in improving child well-being outcomes.[36] Studies have also found that when children are removed from an institution and placed into a family-based environment, whether with biological families or foster or adoptive families, they make significant improvements in terms of their 'intellectual functioning and attachment patterns, reduced signs of emotional withdrawal, and reduced prevalence of mental health conditions'.[37] Across any measure, children have a better chance of developing fully in a family-based alternative care setting than in the best institutional setting.[38]

In the light of this evidence, it is safe to argue that, for children with disabilities who are deprived of their family environment, family-based alternative care is the best option for their survival and development. However, contrary to the human rights model of disability and despite agreements in international standards that institutional care should be used only as a last resort, the literature shows that disability is often a predictor of institutionalisation.

Attachment and Loss: Attachment (1969). The importance of the family environment for the well-being of children has been further stressed in Williamson J & Greenberg A *Families, not orphanages* (2010) Better Care Network available at http://bit.ly/2sLYv0R (accessed 22 November 2015); Browne K *The Risk of harm to young children in institutional care* (2009); Csaky (2009); Carlson (2016) 939.

[36] See for instance, Browne (2009); Williamson & Greenberg (2010); Csaky (2009); Johnson R, Browne K, Hamilton-Giachritsis C 'Young children in institutional care at risk of harm' (2006) 7 *Trauma, Violence & Abuse*; Mulheir (2012); EveryChild & Better Care Network (2012).

[37] Johnson et al. (2006); Barriga et al. (2017); Martin FS & Zulaika G 'Who Cares for children? A descriptive study of care-related data available through global household surveys and how these could be better mined to inform policies and services to strengthen family care' (2016) 3 *Global Social Welfare* 51–2.

[38] The Bucharest Early Intervention Project compared the development of children placed in large-scale institutions with that of those placed in non-residential care settings and in foster care. This was done by assessing the overall development of children placed in large-scale institutions in Romania and integrating some of those children into foster care. The findings were alarming in that the development of children who remained in institutional care was far more likely to have been delayed or stunted in terms of physical, social, emotional and cognitive functioning. By contrast, children who were placed into foster care from institutional care before the age of 2 years made significant developmental gains. OHCHR Regional Office for Europe (2012)18; Carlson (2016) 939.

1.2 Problem statement

Although a large body of evidence has illustrated that institutions are harmful to children and underlined the importance of growing up in a family or an environment that resembles a family environment, there is a lack of clarity as to what the term 'institution' entails. Coming up with a clear-cut definition of the term 'institution' is difficult. Various sources have attempted to do so by describing what is known as 'institutional culture'.[39]

The Convention on the Rights of the Child (CRC)[40] uses the qualifying phrase 'if necessary' before prescribing placement of children in 'suitable institution' as a potential form of alternative care. The African Charter on the Rights and Welfare of the Child (ACRWC)[41] employs the phrase 'alternative family care' to be provided to children in need of alternative care but it also allows placement in 'suitable institutions'.[42] The UN Guidelines for the Alternative Care of Children (UN Guidelines)[43] equates institutions to 'large residential care facilities' and requires such settings to be gradually eliminated.[44] The Convention of the Rights of Persons with Disabilities (CRPD) neither explicitly prohibits nor allows institutional care as a form of alternative care for children with disabilities deprived of their family environment.[45]

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[39] Cantwell N, Davidson J, Elsley S, et al. *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children* (2012) 34; UNICEF & Inter-American Commission on Human Right & Organization of American States *The Right of Boys and Girls to a Family: Alternative Care. Ending Institutionalization in the Americas* (2013) 137; Csáky C *Why Care Matters: The importance of adequate care for children and society* (2014) 6; Pinheiro (2006) 176. In section 2(6)(3) of Chapter 2 of this thesis, a definition of the term 'institutions' has been adopted for the purposes of this thesis.

[40] UN Convention on the Rights of the Child (adopted 20 November 1989) (entered into force September 1990) (hereafter CRC), art 20.

[41] Organisations of African Unity (OAU) African Charter on the Rights and Welfare of the Child (adopted 1990) (entered into force 29 October 1999) (hereafter ACRWC), art 25.

[42] See art 20(3) of the CRC and art 25(2) (a) of the ACRWC.

[43] UN Guidelines for the Alternative Care of Children (UN Doc. A/RES/64/142, 2009) (hereafter UN Guidelines).

[44] UN Guidelines, para 23.

[45] UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006) (entered into force 3 May 2008) (hereafter CRPD), art 23(5).

Rather, it requires alternative care to be provided 'within the wider family, and failing that, within the community in a family setting'.[46]

However, in stark contrast to the above and the CRC, ACRWC and the UN Guidelines, the Committee on the Rights of Persons with Disabilities (CRPD Committee) in its General Comment No. 5 on children with disabilities' right to live independently and be included in the community has taken a firm stand in stating that neither small-group homes nor large-scale institutions promote the rights of children to be included in the community and, indeed, are harmful for children, for 'whom there is no substitute for the need to grow up with a family'.[47] The Committee asserts that '[f]or children, the core of the right to live independently and be included in the community entails a right to grow up in a family'.[48]

Thus, it can be observed that there is a divergence in the obligations imposed on states by international standards regulating the alternative care of children with disabilities deprived of their family environment. Both Ethiopia and South Africa have ratified the relevant standards dealing with the right to alternative care of children with disabilities – namely, the CRC, ACRWC and CRPD.[49]

Against the background above, this study first establishes a framework for the right to alternative care of children with disabilities by assessing the different, and at times conflicting, obligations imposed on Ethiopia and South Africa by the CRC, ACRWC and CRPD. The study thereafter examines whether the legislative frameworks of Ethiopia and South Africa are in

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[46] See art 23(5) of the CRPD.
[47] UN Committee on the Rights of Persons with Disabilities (hereafter CRPD Committee) General Comment No. 5 'Article 19: Living Independently and Being Included in the Community' (2017) (UN Doc CRPD/C/18/R) (hereafter CRPD Committee, GC No. 5 (2017), para 16(c).
[48] CRPD Committee GC No. 5 (2017) para 37.
[49] Ethiopia ratified the CRC and the CRPD in 1991 and 2010 respectively. South Africa ratified the CRC and the CRPD in 1995 and 2007 respectively. United Nations, Office of the High Commissioner 'UN treaty body database' available at *https://bit.ly/2GVpavA* (accessed 15 February 2016). Ethiopia and South Africa ratified the ACRWC in 2002 and 2000 respectively. African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 'Ratifications table' available at *https://bit.ly/2TMcRt9* (accessed on 15 February 2016).

line with minimum standards and adequate to ensure that children with disabilities have equal access to family-based alternative care options when they find themselves deprived of a family environment and in need of alternative care.

1.3 Research questions

This study seeks to investigate the problem relating to the limited access to family-based alternative care options for children with disabilities deprived of their family environment in Ethiopia and South Africa. It doing so, it examines whether South Africa's and Ethiopia's legislative frameworks are adequate to ensure the rights of children with disabilities deprived of their family environment to be provided with family-based alternative care. The main research question is this: To what extent are Ethiopia and South Africa complying with their obligations under international child-rights law to provide children with disabilities with alternative care? The sub-questions to be explored are the following:

- What are the obligations imposed on states by the international standards (the CRC, ACRWC and CRPD) in relation to the right to alternative care of children with disabilities, what are the implications of discrepancies or synergies across these instruments, and what minimum standards can be derived?
- To what extent are the national legislative frameworks of Ethiopia and South Africa in compliance with current international human rights standards for the realisation of the rights of children with disabilities in the context of alternative care?
- What are the administrative and institutional measures that Ethiopia and South Africa have taken to uphold the right to suitable alternative care for children with disabilities?

1.4 Underlying assumption

This thesis assumes that if Ethiopia's and South Africa's legislative, administrative and institutional frameworks comply with international and regional standards dealing with the rights of children with disabilities to alternative care, children with disabilities who are deprived of their family environment will enjoy equal access to family-based alternative care options.[50]

The primary aim of this study is to determine the sufficiency of the domestic legislative, administrative and institutional measures taken by Ethiopia and South Africa in upholding of the rights of children with disabilities in the context of alternative care vis-à-vis international standards. The study aims to identify the gaps in the two countries' frameworks which impede children with disabilities from equal access to family-based alternative care options and to offer recommendations to ensure adequate, focused and effective legislative frameworks to meet the state's obligations in this respect.

1.5 Research methodology and choice of jurisdictions

To answer the central question posed above, this study adopts a number of methodologies. The main one entails desk review of literature, including both primary and secondary sources, relevant to the subject of discussion. The study consists of international law (both 'soft' law and 'hard' law) as well as national laws (composed of constitutions, acts, case law, and so forth). In the former category are conventions and charters, resolutions, declarations, general comments, and State Party reports under the various international and regional human rights instruments. The study will be based on secondary sources as well, which include books, journals, and academic articles.

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[50] For a detailed discussion on the international and regional legal framework for the right to alternative care of children with disabilities, see Chapter 3 of this thesis.

Two countries have been chosen for this study: Ethiopia[51] and South Africa.[52] Methodologically, the intention is not to compare, in the strict sense, the two jurisdictions in terms of their laws, policies and practices. Rather, it is to map the contrasting and common features of their legal frameworks on the alternative care for children with disabilities vis-à-vis international standards. In other words, these selected jurisdictions are used in a supplementary fashion to mirror African countries' experiences. The study is not intended either to be a thorough assessment of the laws and practices of the chosen countries; instead, the countries are used to augment discussion in this study. The experiences of a number of other countries (both African and otherwise) are also referred to when necessary.

The choice of countries was made on the basis of a combination of thematic, substantive, and, to a lesser extent, practical factors. As a common feature, these countries experience high levels of orphanhood,[53] HIV/AIDS[54] and poverty,[55] which in turn has led to the existence of a large

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[51] A recent UNICEF report estimated the total population of Ethiopia at 98,665,000 in 2019, based on a Central Statistical Agency (CSA) 2019 calculated projection (2007–2037). The percentage of the population below the age of 19 amounted to 49.6 per cent of the total population; about 38.7 per cent are children below the age of 15. UNICEF & Ministry of Finance *National Situation Analysis of Children and Women in Ethiopia* (2019) XV; CSA *Population Projections 2007–2037* (2013); UNICEF & Ministry of Women and Children Affairs (MOWCA) *Ethiopia: Children Fact Sheet* (2018).

[52] In mid-2019, the total population of South Africa was estimated at 58.78 million, about 17 million of which were children aged 0–14 years old – close to a third of the total population – and about 4.6 million of which were children 15–19 years old. Statistics South Africa (Stats SA) *Mid-Year Population Estimates* (2019).

[53] A recent report reveals that in Ethiopia 1 in 10 children under the age of 18 does not live with a biological parent, with 7 per cent of such children being single or double orphans. UNICEF & Ministry of Finance (2019) 80. It is also reported that Ethiopia has the largest orphaned population in the world: five million children were found to be orphans and vulnerable children (OVC). Petersen S 'Exploring ethical dilemmas in development practices linked to intercountry adoption: An Ethiopia-Australia case study (2011) 3 *Australian Journal of Adoption* 2. Save the Children Sweden Regional Office for Eastern and Central Africa 'A study on child protection mechanisms in Ethiopia' (2010) 2 available at http://bit.ly/2N07Adl (accessed 15 June 2015). South Africa, by comparison, had, in 2017, an estimated 2.8 million orphans who had lost one or both parents. Hall K & Sambu W 'Demography of South Africa's children' in Hall K, Richter L, Mokomane Z et al. *South African Child Gauge 2018: Children, Families and the State* (2018) 134.

[54] In South Africa, mid-year population estimates in 2019 indicated that 13.5 per cent of the total population is HIV-positive. Stats SA (2019) v.

[55] In Ethiopia, 1 in 4 residents, which amounts to 24 million people, is categorised as absolutely poor. Among these are children, who are found to be poorer than adults, with 32.4 per cent of children under 18 having been found monetarily poor in 2011 compared with 29.6 per cent of adults. Furthermore, persons with disabilities are disproportionately affected by poverty. Persons with disabilities who live in extreme poverty in urban areas are estimated at 41 per cent of all urban poor. Children with disabilities are particularly vulnerable as they represent 27 per cent, the highest rate of extreme poverty. UNICEF & Ministry of Finance (2019) 10 and 14.

number of children without parental care and in need of alternative care.[56] In Ethiopia, the need for alternative care options for vulnerable children is growing,[57] an increase which has contributed to the emergence of many new institutions formed by non-state actors, among them faith-based ones.[58] This rise in the number of institutions has overlapped with the global recognition of the negative effects of institutionalisation on the child's physical, emotional, and cognitive development.[59] However, the development of family-based alternative care options has not grown at the same pace.[60] The level of integration of services for children with disabilities remains poor. A study observed that the needs of children with disabilities remain unnoticed by agencies providing community-based care and that only half (54.3 per cent) of those agencies included services for children with disabilities.[61] The problem is exacerbated by the stigma and discrimination attached to children with disabilities[62] as well as by the lack of disability-friendly service provision within the community.[63] A significant over-representation of children with disabilities in institutions due to scarce options is thus evident. It has been noted that the number of children with intellectual disabilities in institutional care is higher than those with other disabilities.[64]

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[56] South African Human Rights Commission (SAHRC), Department of Women, Children and People with Disabilities (DWCPD) & UNICEF *South Africa's Children: A Review of Equity and Child Rights* (2011); Family Health International (FHI), UNICEF, Ministry of Women's Affairs, & Child Investment Fund Foundation *Improving care options for children* (2010) 31; Save the Children Sweden Regional Office for Eastern and Central Africa (2010); UNICEF 'Alternative childcare' Thematic Briefing Note (2013) 1 available at https://uni.cf/2MYtA8s (accessed 02 May 2015).

[57] The growth in the number of children without parental care and in need of alternative care arises from many contributory factors, including poverty, HIV/AIDS, natural disasters, internal migration and the breakdown of family structures. Disability has been cited as one of these factors. FHI et al. (2010) 10; Save the Children Sweden Regional Office for Eastern and Central Africa (2010) 2; Lemma M (2012); UNICEF (2014) 1.

[58] FHI et al. (2010) 10.

[59] FHI et al. (2010) 10.

[60] UNICEF 'Alternative childcare' Thematic Briefing Note (2013) 1 available at https://uni.cf/2MYtA8s (accessed 02 May 2015).

[61] Tadele G, Ayode D, Kifle W *Assessment of community and family-based alternative child-Care services in Ethiopia* (2013) 2 available at http://bit.ly/2N05cmV (accessed 26 April 2015).

[62] Tadele et al. (2013) 2.

[63] UNICEF & Ministry of Finance (2019) 14.

[64] Intellectual disability in particular is misunderstood in Ethiopia, where it is seen as a major burden on the family. ACPF *Children with disabilities in Ethiopia: The hidden reality* (2011d) 7.

In South Africa, there is limited commitment to investing in the development of systems to monitor family-based alternative care, which in turn has led to the proliferation of and preference for ‘children’s homes’ to care for children deprived of their family environment.[65] Furthermore, children with disabilities are more likely than children without disabilities to be orphaned and 10 times more likely to be placed in institutions.[66] However, the quality and safety of institutions, the frequency with which children are placed, and the long-term duration of their placements have raised concerns.[67] In particular, many of the facilities are found to be unequipped to care for children with disabilities or ensure their integration into society.[68] For instance, ramps for wheelchairs were available only in a quarter of all registered centres.[69] The incidence in institutions of sexual assault and abuse of children with disabilities is also found to be very high, with 80 to 85 per cent of criminal abuse of children never being reported to the authorities.[70] In this regard, NGOs in the field of disability have expressed major concerns about the high level of abuse of children with disabilities in institutions.[71]

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[65] Delap et al. (2009) 28.

[66] In South Africa, it has been found that 1 in every 4 children with disabilities does not have one or both parents, whereas for children without disabilities the ratio is 1 in 5. Stats SA *Community Survey 2007* (2008); Department of Social Development (DSD) *White Paper on the Rights of Persons with Disabilities* (2015) 98. The cause of this disparity remains unclear; it is argued, however, that given that HIV/AIDS is still prevalent in the country, children whose disability was caused by the epidemic are more prone to losing their parents. At the time of Census 2001, children with disabilities were found to be over-represented among children placed in institutional care, with 1 in 5 children being a child with a disability. DSD, DWCPD and UNICEF C*hildren with Disabilities in South Africa: A Situation Analysis: 2001–2011* (2012) 31 and 50. Another survey found that children with disabilities accounted for 28 per cent of the 13,000 children staying in registered child and youth care centres. Community Agency for Social Enquiry (CASE) *Baseline Study on Registered Child and Youth Care Centres* (2010).

[67] Jamieson L ‘Children’s rights to appropriate alternative care when removed from the family environment: A review of South Africa’s child and youth care centres’ in Proudlcok P (ed) S*outh Africa’s Progress in Realising Children’s Rights: A Law Review* (2014) 233.

[68] DSD, DWCPD and UNICEF (2012) 12 and 51; Martin P *Analysis of the children’s sector in South Africa* (2015) 56.

[69] Jamieson (2014) 239. Among children with disabilities living in institutions, those between the age 15–17 were found to higher in number (9.7 per cent) than those between the age 0–4 (1.2 per cent). Moreover, children with multiple disabilities are over-represented among children with disabilities living in institutions. DSD, DWCPD and UNICEF (2012); Martin (2015) 50.

[70] DSD, DWCPD & UNICEF (2012); Martin (2015) 53.

[71] Lansdown G *Disabled children in South Africa progress in implementing the Convention on the Rights of the Child* (2002) 14.

A further reason for choosing the two countries is that both have ratified the international standards pertinent to the right to alternative care for children with disabilities (the CRC, ACRWC and CRPD). Both have reported to the African Committee on the Rights and Welfare of the Child (ACERWC), the Committee on the Rights of the Child (CRC Committee) and the CRPD Committee. Furthermore, both countries were active in the development of the UN Guidelines and are currently implementing them.

1.6 Scope of the study

The scope of the study is limited geographically, as it focuses on Ethiopia and South Africa. However, where relevant and available, experience from elsewhere (especially other African countries) will be used to substantiate arguments and clarify points. It is not assumed that the two countries in the study do justice to the diversity of the African experience when it comes to alternative care for children with disabilities; nonetheless, it is safe to say that the main issues pertaining to alternative care for children with disabilities in Africa are similar and that the discussion of the two countries under study is generally applicable to other African countries.

The scope of the study is also limited to investigating alternative care measures for children with disabilities, particularly foster care and residential care (adoption is referred to as a potential outcome of alternative care, rather than a form of alternative care).[72] As a result, other types of alternative care are not a concern of the enquiry. Given that state intervention is required in relation to formal alternative care placements, the scope of this study is also limited to investigating such form of care as opposed to informal ones.

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[72] This is in accordance with the UN Guidelines. UN Guidelines (2009), para 30 (b).

The study further focuses on the legislative measures undertaken by the two jurisdictions, while other measures, such as policy measures, are discussed only in so far as they are directly relevant to the alternative care of children with disabilities.

Moreover, the scope of this study is limited to issues related to the provision of alternative care rather than prevention of the need for it. Thus, the study deals only with children with disabilities who for whatever reason are found to be in need of alternative care, and focuses on investigating the measures that have been put in place to ensure that children with disabilities deprived of their family environment and in need of alternative are provided with family-based alternative care. Thus, issues related to the prevention of alternative care for children with disabilities do not feature prominently in this thesis, unless where it is deemed relevant. Furthermore, in the light of the fact that Ethiopia has a federal system of government, this thesis limits itself to a detailed analysis of the federal laws.

1.7 Significance of the study

This study serves to help locate gaps in domestic policy and legislative frameworks, in addition to which it makes recommendations to ensure adequate, focused and effective legislative frameworks to meet the state’s obligations in relation to measures on alternative care for children with disabilities. It also highlights important lessons for other African countries with similar situations to those in Ethiopia and South Africa, and aims to inspire further research in this area. Although various studies have brought up the issue of over-representation of children with disabilities in institutional care, the current study is distinctive for addressing it specifically through a rights-based approach applied to the context of South Africa and Ethiopia.

1.8 Outline of the study

This study consists of six chapters. Chapter 1, the current chapter, introduces the thesis and sets out the background to the study, the research methodology, the significance of the study, and related background information that provides general guidance on the research.

Chapter 2 examines the conceptual framework for the alternative care of children with disabilities. It looks into definitions and concepts surrounding the term 'alternative care'. It also examines forms of alternative care, with a focus on foster care and residential care. This chapter discusses key principles in the UN Guidelines, namely the principles of 'necessity' and 'suitability', and contextualises them so that they have meaning for children with disabilities. The chapter also discusses the term 'disability' as well the various models identified by scholars to understand the concept.

Chapter 3 establishes the legal basis of the right to alternative care for children with disabilities, which other chapters will subsequently use to adjudge the extent to which Ethiopia, and South Africa are ensuring the rights of children with disabilities in the context of alternative care. The main instruments that receive attention are the ACRWC, CRC and CRPD.

Chapter 4 focuses on the national legislative framework relevant for the alternative care of children with disabilities in the selected jurisdictions of Ethiopia and South Africa, and critically analyses whether those frameworks are in compliance with international and regional obligations pertaining to the alternative care of children with disabilities.

Chapter 5 critically assesses the adequacy of the institutional and administrative measures that Ethiopia and South Africa have taken to the uphold the right to alternative care of children with disabilities deprived of their family environment.

The final chapter, Chapter 6, provides a conclusion and recommendations based on the discussion in the preceding chapters.

Chapter 2:
Conceptual Framework for the Alternative Care of Children with Disabilities

2.1 Introduction

This chapter seeks to clarify concepts pertinent to the alternative care of children with disabilities. It thus aims to enable clearer understanding of the scope and framework of the concepts used in this thesis and explain how different alternative care settings are understood in different contexts. The chapter commences by exploring the concept of ‘disability’, and discusses the three prominent models of disability identified by scholars in examining the lens through which the term is understood, and implication for, the alternative care of children with disabilities. It further unpacks what is meant by ‘alternative care’ and discussing the conceptual differences that are evident in the international human rights standards dealing with the right to alternative care of children with disabilities. The chapter also discusses the concept of ‘family environment’, as it is pivotal for grasping children with disabilities’ right to alternative care. Thereafter, it looks in more detail at forms of alternative care individually; in doing so, it identifies the distinctive features of family-based alternative care options, in particular foster care and ‘other forms of family-based care’. The content of the various non-family-based alternative care options, including ‘family-like care placements’ and residential care as specified in the UN Guidelines, is also examined. In respect of non-family-based alternative care, this chapter differentiates between ‘residential care’ and ‘institutions’. The two core principles stipulated in the UN Guidelines, those of necessity and suitability, are also discussed.

As mentioned already, the prevention of the need for alternative care for children with disabilities does not form part of this chapter, given that the scope of the thesis is limited to the provision of alternative care for children with disabilities and does not include issues related to the need to prevent recourse to it (prevention). Thus, with regard to the necessity and suitability principles in the UN Guidelines, this thesis places more emphasis on the suitability principle, as the former deals with the prevention of alternative care rather than the provision of alternative care, which is the focus of this thesis.

2.2 Describing disability

The question of disability and who may be considered a person with a disability has long been disputed.[1] In conceptualising disability, three prominent frameworks have been identified by scholars. These models include the medical model, social model and human rights model of disability. They encompass all aspect of life and reveal how disability is perceived in a given society and consequently how persons with disabilities are treated and to what extent they are afforded protection.[2]

A central element of the medical model is that disability is a condition that needs to be cured and treated, with the ultimate goal of bringing persons with disabilities to a state of normalcy, similar with those without disabilities.[3] This model identifies the individual's impairment as the problem, and results in the person with a disability being viewed as deficient or defective.[4] Hence, this model seeks to address the cause of the disabling condition through medical interventions, including the treatment and rehabilitation of the person in order to reverse or

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[1] Traustadóttir R 'Disability studies, the social model and legal developments' in Arnardóttir OM & Quinn G (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (2009) 8.

[2] Grobbelaar-du Plessis I & Van Eck S 'Protection of disabled employees in South Africa: An analysis of the Constitution and Labour Legislation' in Grobbelaar-du Plessis I & Van Reenen T (eds) *Aspects of Disability Law in Africa* (2011) 233.

[3] Grobbelaar-du Plessis I & Van Reenen T 'Introduction to aspects of disability law in Africa' in Grobbelaar-du Plessis & Van Reenen (eds) (2011) xxiii; Degener T 'A new human rights model of disability' in Fina VD, Cera R & Palmisano G (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 42; Lawson A 'The United Nations Convention on the Rights of Persons with Disabilities: new era or false dawn?' (2006) 34 *Syracuse Journal of International Law and Commerce* 571.

[4] Grobbelaar-du Plessis & Van in Grobbelaar-du Plessis & Van Reenen (eds) (2011) xxiv; Areheart BA 'When disability isn't "just right": The entrenchment of the medical model of disability and the Goldilocks Dilemma' (2008) 83 *Indiana Law Journal* 185–86; Kanter S 'The globalisation of disability rights law' (2003) 30 *Syracuse Journal of International Law and Commerce* 243.

prevent the condition.[5] Within the ambit of this model, a person's impairment is further used to justify the exclusion of children with disabilities and the creation of separate systems, as well as 'specialised' institutions for them to receive services.[6] Examples of such segregated facilities include special schools for children with disabilities and placement in institutional care.[7] This is done on the grounds that providing services in separate facilities is best suited to serve their 'specialised needs'.[8] The medical model of disability further views persons with disabilities as mere recipients of welfare, health and charity programmes as opposed to subjects of rights.[9] Unfortunately, a number of international human rights declarations arose from this premise, and thus emphasise the prevention of disability and rehabilitation of persons with disabilities.[10]

Conversely, the social model of disability follows a more integrated approach which recognises the contributory role that 'extrinsic factors' play in the 'creation of disability'.[11] It recognises that an 'individual's ability to function' is determined by social and environmental barriers.[12] Hence, in contrast to the medical model, the social model of disability shifts the focus away from the individual's impairment and acknowledges the environmental and social strictures that construct disability.[13] Elements of the social model of disability at policy level are integration, equal opportunity and non-discrimination of persons with disabilities.[14]

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[5] Areheart (2008) 186; Lawson (2006) 571.
[6] Degener (2017) 42; Stein MA 'Disability human rights' (2007) 95 *California Law Review* 86.
[7] Degener (2017) 42; Stein (2007) 86.
[8] Combrinck H 'The hidden ones: Children with disabilities in Africa and the right to education' in Sloth- Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 301.
[9] Combrinck (2008) 301.
[10] An example of this is the 1950 resolution of the Economic and Social Council on Social Rehabilitation of the Physically Handicapped. As will be shown in ss 3(6)(1) and 3(6)(2) of Chapter 3 of this thesis, the provisions dedicated to the rights of children with disabilities under the CRC and ACRWC, also reflect the medical model of disability.
[11] Stein (2007) 86; Jere V 'The right to equality in the workplace for persons with physical disabilities in Malawi: Does the Convention on the Rights of Persons with Disabilities offer any hope?' in Grobbelaar-du Plessis & Van Reenen (eds) (2011) 164.
[12] Grobbelaar-du Plessis & Van in Grobbelaar-du Plessis & Van Reenen (eds) (2011) xxv; Stein (2007) 86.
[13] Traustadóttir (2009) 3.
[14] Combrinck (2008) 301.

While the medical and social models of disability have been presented as contradictory concepts in understanding disability, the International Classification of Functioning, Disability and Health (ICF)[15] adopts what is known as the 'bio-psycho-social model', comprising elements of both models.[16] In terms of the ICF, disability is conceptualised as a 'dynamic interaction between health conditions and contextual factors, both personal and environmental'[17] and it is said to occur at three levels; an impairment in body function or structure, a limitation in activity and a restriction in participation.[18]

Most importantly, the human rights model, which is closely associated and often used interchangeably with the social model of disability,[19] recognises that all human beings, irrespective of their disabilities, are equal and have inalienable rights.[20] This model places emphasis on the 'inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics'.[21] One of the distinct features of the human rights model is that it offers principles for disability policy that emphasises the inherent dignity of persons with disabilities unlike the social model of disability that simply explains how disability is ought to be understood.[22] The main aim of the human rights model of disability is transforming societies to be more inclusive, and to respect the dignity and equality of all human beings regardless of differences.[23] Within the framework of this model, persons with disabilities are viewed as subjects of legal rights and members of communities.[24] In terms of

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[15] WHO 'The International Classification of Functioning, Disability and Health: children and youth version' (2007).

[16] WHO & World Bank 'World report on disability' (2011) 4.

[17] WHO & World Bank (2011) 4.

[18] WHO & World Bank (2011) 4.

[19] Retief M & Letšosa R 'Models of disability: A brief overview' (2018) 74 *Theological Studies* 5.

[20] Jere (2011) 165.

[21] Quinn G & Degener T *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 14.

[22] Degener (2017) 43.

[23] Quinn & Degener (2002) 15.

[24] Kanter A 'The promise and challenge of the United Nations Convention on the rights of persons with disabilities' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 291.

this model, the 'problem' lies in the failure of state and non-state actors' to take the necessary actions to overcome socially engineered barriers in order to ensure that all human beings enjoy equal rights and their dignity is valued.[25]

In the context of alternative care, the over-reliance on institutions as a means of caring for children with disabilities is an indication of the discrimination and social exclusion that children with disabilities face and the prevalence of the medical model.[26] The routine institutionalisation of children with disabilities is believed to be 'inherently influenced by the medical model of disability'.[27] As mentioned above, this model of disability places the problem with the child and the family, a diagnosis it uses to justify children with disabilities' exclusion and placement in institutional care under the guise of providing 'special care'.[28] The human rights-based model of disability, by contrast, is about removing barriers that impede the inclusion and participation of children with disabilities in their own communities, and does not allow the exclusion of children with disabilities on any grounds.[29] The placement of children with disabilities in institutional care is certainly against the essence of the human rights model of disability.[30]

None of the international human rights standards discussed in this thesis contain a definition of disability. However, in respect of the conceptualisation of disability in the CRPD, it has been argued that it 'goes beyond the social model of disability and codifies a human rights model of

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[25] Jere (2011) 165.

[26] UNICEF *At Home or in a Home? Formal Care and Adoption of Children in Eastern Europe and Central Asia* (2010) 7; Pinheiro P *World Report on Violence against Children* (2006) 87 and 176; Family for Every Child 'Strategies for delivering safe and effective foster care: A review of the evidence for those designing and delivering foster care programmes' (2015) 185.

[27] Jackson MA 'Models of disability and human rights: Informing the improvement of built environment accessibility for people with disabilities at neighbourhood scale?' (2018) 7 *Laws* 4; Brisenden S 'Independent living and the medical model of disability' (1986) 1 D*isability, Handicap and Society* 173.

[28] UNICEF (2010) 7.

[29] UN Committee on the Rights of Persons with Disabilities (hereafter CRPD Committee) General Comment No. 5 'Article 19: Living Independently and Being Included in the Community' (2017) (UN Doc CRPD/C/18/R) (hereafter CRPD Committee, GC No. 5 (2017) para 60.

[30] WHO & the Gulbenkian Global Mental Health Platform *Promoting Rights and Community Living for Children with Psychosocial Disabilities* (2015) 25.

disability.'[31] While the drafting history of the CRPD indicates that there was a debate on whether to a definition should be adopted, it was ultimately agreed that it should not be included.[32] Given the complex nature of the concept, it was felt that including a definition might limit the scope of the Convention's application.[33] The CRPD does however include a description of the term persons with disabilities in its article 1 which includes

> those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[34]

In this manner, the CRPD adopts an open-ended description of disability to allow those involved in its interpretation and implementation to accommodate differing conceptualisations of disability as they evolve overtime and in different sociocultural contexts.[35] This position is also evident in its Preamble which recognises that disability is 'an evolving concept' and underlines the fact that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.[36] For the purpose of this thesis, the terms 'persons with disabilities' and 'children with disabilities' are to be understood in accordance with article 1 of the CRPD.

2.3 Defining alternative care

Alternative care is not defined in the pertinent international instruments, that is, the ACRWC, CRC, CRPD and UN Guidelines.[37] Furthermore, it can be observed that there is considerable

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[31] Degener (2017) 42.

[32] Item 12 of the Report of the third session of the Ad Hoc Committee (A/AC.265/2004/5).

[33] Fina VD '[Article 1: Purpose]' in Fina VD, Cera R & Palmisano G (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 95; Sixth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights of Disabilities.

[34] CRPD, art 1.

[35] Jere (2011) 164–65.

[36] CRPD, Preamble (e).

[37] To explore the meaning and scope of concepts related to the alternative care of children with disabilities, this chapter relies strongly on the UN Guidelines. However, the UN Guidelines are a non-binding international

conceptual difference as to what triggers a child's right to alternative care in these instruments. On the one hand, in the UN Guidelines a child without parental care is defined as a child 'not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances'.[38] Hence, according to the UN Guidelines, the loss of 'parental care' is what sets off the child's right to alternative care.[39] On the other hand, the ACRWC and CRC require that alternative care be provided to a child 'temporarily or permanently deprived of his or her family environment'[40] whereas the CRPD requires that children with disabilities whose 'immediate family' are unable to care for them be provided with alternative care.[41] However, no definition is provided of the terms 'family environment' or 'immediate family' in the respective standards. The terms 'family environment' and 'family' are dynamic concepts which are influenced by cultural and social factors.[42] The meaning of the term 'parental care' is relatively less contested, albeit that the term 'parent' can be contentious in some cultural and legal contexts.[43]

Although there is no clear-cut definition of 'alternative care', the UN Guidelines divide it into two categories, namely formal and informal alternative care.[44] Informal alternative care is a type of care arrangement that obtains between two individuals on an informal basis without the involvement of competent authorities.[45] Notwithstanding that informal care is provided without

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instrument and as such do not have legal or binding force on states or any other parties. This is evident in the fact that the principles of the Guidelines are formulated using 'should' in lieu of 'shall' or 'must', except in cases where they refer to rights that already recognised, particularly those in the CRC. Cantwell N, Davidson J, Elsley S, et al. *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children* (2012) 20.

[38] This does not include children who are deprived of their liberty because they were in conflict with the law, or who have chosen to stay with relatives or friends of their own accord rather than because their parents were unable or unwilling to provide them with adequate care. UN Guidelines, paras 29(a) and 30(a) and (c).

[39] UN Guidelines, para 3; Assim U *Understanding Kinship Care of Children in Africa: A Family Environment or an Alternative Care Option*? (unpublished LLD thesis, University of the Western Cape, 2013) 135.

[40] See art 20 of the CRC and art 25 of the ACRWC.

[41] CRPD, art 23(5) provides: 'States Parties shall, where *the immediate family* is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting' (emphasis added).

[42] Roby JL, JD, MSW, et al. *Children in informal alternative care* (2011) 9.

[43] Roby et al. (2011) 9.

[44] UN Guidelines, para 29(b)(i) and (ii).

[45] UN Guidelines, para 29(b)(i).

the intervention of the state, the UN Guidelines stress the duty of states to protect children in informal care.[46] As for formal alternative care, the UN Guidelines define it as

> all care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures.[47]

Depending on the environment where the care is offered, alternative care may be categorised as kinship care, foster care, 'other forms of family-based placements', 'family-like care placement', residential care, or supervised independent living arrangements.[48] Formal care can be provided or arranged by the state or private actors (faith-based organisations, NGOs, and any other private agencies).[49] As mentioned in Chapter 1, this thesis is concerned only with the categories of formal settings considered in the UN Guidelines, in particular, foster care (non-kin) and residential care.[50] Therefore, kinship care, whether formal or informal, is not discussed in this chapter.

The UN Guidelines provide definitions for the various formal alternative care settings for children deprived of their 'parental care'.[51] However, some of the forms of alternative care settings are not defined in the UN Guidelines, making it difficult to grasp what is meant by 'other forms of family-based placements' or 'family-like' placements; the difference between foster care and 'other family-based placements'; the difference between residential care and 'institutions'; and whether 'family-like' placements are in any way different to residential care.

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[46] UN Guidelines, para 18.

[47] UN Guidelines, para 29(b)(ii).

[48] UN Guidelines, para 29(c)(i)–(v).

[49] Cantwell et al. (2012) 32; Petrowski N, Cappa C & Gross P 'Estimating the number of children in informal alternative care: challenges and results' (2017) 83 *Child and Abuse Neglect, The International Journal* 390.

[50] See s 1(6) of Chapter 1, where the scope of this thesis is demarcated.

[51] See UN Guidelines, para 29 b(i)–(v).

Similarly, in regard to the definitions of alternative care settings in the UN Guidelines, it would not be advisable to treat them as conclusive and unassailable concepts.[52] This is partly because from a global position, various factors have informed the concept of formal alternative care across different societies.[53] These factors include historical, political, economic, religious, social and legal factors leading to divergent alternative care settings across the globe.[54] For instance, the distinction between what is considered formal and informal care in the UN Guidelines is not clear in some contexts, where 'foster care' and 'adoption' may refer to entirely informal arrangements that would be more commonly regarded as kinship care.[55] Conversely, in other settings, including in South Africa, formal care arrangements include 'kinship' (or 'relative') foster care involving state intervention, where children are looked after by friends, relatives or kin.[56] Similarly, terms used to refer to residential care do not always reflect the diversity of such settings in their nature, size and purpose.[57] In particular, the term 'institution' is equated with 'residential care' in most countries,[58] whereas 'residential care' is a blanket term encompassing a broad range of settings that include family-like care settings, small-group homes and large facilities.[59]

There are two important points to highlight in terms of the category of formal alternative care settings in the UN Guidelines. The first is that legally recognised adoption is considered not a

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[52] Cantwell et al. (2012) 34; Chaitkin S, Cantwell N, Gale C, et al. *Towards the right care for children: Orientations for reforming alternative care systems Africa, Asia, Latin America* (2017) 8.
[53] Cantwell N 'The Human Rights of Children in the Context of Formal Alternative Care' in Reynaert D, Lembrechts S & Desmet E, *Routledge International Handbook of Children's Rights Studies* (2015) 258.
[54] Petrowski et al. (2017) 391; Cantwell N 'The Human Rights of Children in the Context of Formal Alternative Care' in Reynaert D, Lembrechts S & Desmet E, *Routledge International Handbook of Children's Rights Studies* (2015) 258.
[55] Chaitkin et al. (2017) 7.
[56] Delap E & Melville L *Fostering better care: Improving foster care provision around the world* (2011) 8.
[57] Chaitkin et al. (2017) 7.
[58] Chaitkin et al. (2017) 7.
[59] Chaitkin et al. (2017) 7.

form of alternative care but a permanent care arrangement equivalent to parental care.[60] Adoption is regarded as a potential outcome for children in formal or informal alternative care for whom reintegration with the family is not deemed feasible or is contrary the best interests of the child but who would benefit from living in another 'permanent' family.[61] However, a child who is placed with prospective adoptive parents on a probationary basis is considered to be in alternative care.[62] Moreover, the pre-adoption period is also regarded as a form of alternative care, and thus the Guidelines remain applicable in such cases.[63] Following the UN Guidelines' approach, for the purpose of this thesis adoption is not considered a form of alternative care. However, reference to adoption cannot be dismissed altogether from discussion of alternative care measures, given the intricate bond between the two.[64] Thus, bearing in mind that adoption is a potential outcome of alternative care, this thesis will make reference to it when referring to options of family-based alternative care for children with disabilities.

The second point is that any placement in residential facilities is regarded as a formal alternative care placement, irrespective of by whom the placement was carried out.[65] This is mainly because residential care should be provided by the state, or in principle, should be subject to registration and authorisation.[66]

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[60] See UN Guidelines para 30(b), which provides that '[c]are by adoptive parents from the moment the child concerned is effectively placed in their custody pursuant to a final adoption order, as of which moment, for the purposes of the present Guidelines, the child is considered to be in parental care'.
[61] UN Guidelines, para 161.
[62] UN Guidelines, para 30(b).
[63] UN Guidelines, para 30(b).
[64] Cantwell N 'The human rights of children in the context of formal alternative care' in Vandenhole W, Desmet E, Reynaert D, et al (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 257–58.
[65] UN Guidelines, para 29(b)(ii). Chaitkin et al. (2017) 7–8.
[66] Chaitkin et al. (2017) 7–8; Better Care Network, Family for Every Child, International Social Service, et al. *Identifying basic characteristics of formal alternative care settings for children* (2013) 5 available at http://bit.ly/35vS8fg (accessed 18 March 2017)

2.4 Family environment

Another term key to demarcating the scope of the right to alternative care is the concept of 'family environment'. As mentioned, the ACRWC and CRC require that alternative care is be provided to a child who is 'temporarily or permanently deprived of his or her family environment',[67] whereas the CRPD requires that a child with a disability whose 'immediate family' is unable to care for him or her be provided with alternative care.[68] Under international law, three intersecting concepts with regard to the family are used interchangeably: 'family', 'family life' and 'family environment'.[69] The latter is a new concept initially introduced by the CRC and subsequently adopted by the ACRWC.[70] In the CRC and ACRWC, reference is made to both 'family environment' and 'family'.[71] These three concepts appear 'to cover common ground and protect similar interests'.[72]

In respect of the meaning of the terms 'family' or 'family environment', however, none of the human rights instruments discussed in this thesis define them. In fact, while all the prominent human rights standards contain provisions that directly and indirectly recognise and provide protection to the family, none of them defines the term 'family'.[73] Attempts were made to find a universally acceptable and sufficiently comprehensive definition of the term 'family', but without success.[74] The absence in the CRC of a definition of the concept of 'family' was intentional – the drafters sought to focus on the role and function of the family and leave the

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[67] CRC, art 20(1) and ACRWC, art 25(2)(a).

[68] CRPD, art 23(5).

[69] Van Bueren G *The International Law on the Rights of the Child* (1995) 69.

[70] Assim (2013)105–6.

[71] See, for instance, CRC, Preamble, arts 5, 9, 10, 16, 20 and 22. See also ACRWC, Preamble, arts 10, 17, 18 and 19.

[72] Moyo PT *The Relevance of Culture and Religion to the Understanding of Children's Rights in South Africa* (unpublished LLM thesis University of Cape Town, 2014) 18.

[73] Moyo (2014) 15.

[74] Alen A, Bosly H, Bie MD et al. (eds) *The UN Children's Rights Convention: Theory Meets Practice* (2007) 390.

definitional issues to states' discretion[75] in recognition of the fact that family is a dynamic concept[76] and the existence of different interpretation of the term in various socio-cultural contexts.[77]

It can be observed from the *Travaux Preparatoires* of the CRC that at some stages of the drafting process, the terms 'natural family environment' and 'parental care' were used interchangeably,[78] indicating that the link between family environment and parental care was not yet clearly established at that stage. However, during the working group session, the term 'deprived of parental care' was considered but challenged by delegates who regarded the term as narrow as it did not take into consideration the broader concept of kinship relations found in many cultures.[79] After weighing a number of recommendations, including 'normal family environment', 'natural family environment' and 'biological family', the term 'family environment' was ultimately chosen.[80]

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[75] Okon E 'Towards defining the "right to a family" for the African Child' (2012) 2 *African Human Rights Law Journal* 387; Mezmur BD *Intercountry Adoption in an African Context: A Legal Perspective* (unpublished LLD thesis, University of the Western Cape, 2009) 156. This resonates with the approach adopted by the Human Rights Committee (HRC), mandated to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR), in the way it refrains from assigning a single definition to the concept of 'family', thereby taking into account the diversity of ways in which the concept is understood worldwide and even within a given country. UN Human Rights Committee (HRC) *CCPR GC No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouse* (1990) para 2.

[76] Van Bueren G 'The International protection of family members' rights as the 21st century approaches' (1995) 17 *Human Rights Quarterly* 733.

[77] Okon E 'Towards defining the "right to a family" for the African child' (2012) 2 *AHRLJ* 377. The absence of a single definition of 'family' is also due to the emergence of a variety of family configurations, including child-headed households. Some of the other factors impeding the definition of 'family' are the rise in the number of unmarried couples with children, the increase in rates of divorce and re-marriage, and the decrease in the number of legal marriages.

[78] See the working text as adopted by the 1980 Working Group. The text employs both terms, that is, 'deprived of parental care' and 'deprived of his natural family environment', in the same provision. Detrick S (ed) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires* (1992) 297.

[79] Detrick (1992) 300; for a detailed discussion of the drafting process, see 298–301.

[80] Other changes made by the 1989 Working Group included the addition of *kafalah* to the list of possible forms of alternative care. The qualifying phrase 'if necessary' preceding 'placement in suitable institutions' was also inserted at this stage. In addition, the term 'alternative family care' was replaced by 'alternative care'. Cantwell N & Holzscheiter A 'A commentary on the United Nations Convention on the Rights of the Child article 20: Children deprived of their family environment' in Alen, A *et al* (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2008) para 53; Detrick (1992) 300 and 304.

Cantwell and Holzscheiter point out that the decision finally to adopt the term 'deprived of his or her family environment' indicates an attempt to widen the scope of the term beyond parental care and a recognition of the impracticality of attempting to provide a single definition of the family.[81] In view of the intention of the drafters of the CRC not to constrain the concept of 'family' only to 'parents', it has been argued that children who are looked after by a member of an extended family do not fall within the scope of article 20 and that states are thus not under any obligation to ensure alternative care for these children even though they are not in the care of their parents.[82]

Despite the absence of a definition for the term 'family environment' in the CRC, the Committee on the Rights of the Child (CRC Committee) follows a flexible approach in determining what the terms 'family' and 'family environment' constitute, taking into account the fact that a family assumes different forms in different parts of the world.[83] The CRC Committee, in its General Day of Discussion on the 'Role of the Family in the Promotion of the Rights of the Child', stated:

> 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 family, separated parents, single parent family, common law family and adoptive family.[84]

The CRC Committee reaffirmed this position in its Day of General Discussion on Children without Parental Care held in 2005,[85] as it did in General Comment No. 7, stating that the term 'family' denotes not just the nuclear family but the extended family and members of the

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[81] Cantwell & Holzscheiter (2008) 32.

[82] Cantwell & Holzscheiter (2008) 37.

[83] Hodgkin R & Newell P *Implementation Handbook for the Convention on the Rights of the Child* (2007) 76; Mezmur (2009) 160.

[84] UN Committee on the Rights of the Child (CRC Committee), *Day of General Discussion: Role of the family in the promotion of the rights of the child* (1994) para. 2.1.

[85] CRC Committee, *Day of General Discussion 'Children without parental care'* (2005) para 644.

community (in some instances).[86] Similarly, some scholars have sought to draw the widest definition possible from article 5 of the CRC and use it as the reference point for interpretation throughout the treaty.[87] It has been argued that the inclusion in article 5 of the CRC of 'the members of the extended family or community as provided by local custom' reflects the context of the use of the notion of 'family environment' under article 20 of the CRC.[88]

In this respect, the validity of considering article 5 of the CRC an 'umbrella' provision has been questioned, however.[89] One of the reasons is that even though such broad interpretation is well-suited to article 5, which concerns only specific duties – 'to provid[e] appropriate direction and guidance in the exercise by the child of the rights recognised' – applying the same definition throughout the Convention might not be ideal for the protection of children's rights in other instances.[90] In the context of article 20, as mentioned above, applying the broader definition of 'family environment' might mean that state intervention is not required under the CRC if a child without parental care is looked after informally within the extended family.[91] This in turn would put the protection of the child in informal care at risk and the role of the state unknown.[92] Consequently, the need to stipulate a more restricted list of duty-bearers has been pointed out on the ground that it would be inappropriate to use a 'blanket application' of the wider definition of the term 'family environment' in the context of article 20 by acknowledging the potential vulnerability of children in informal care.[93]

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[86] CRC Committee, General Comment No. 7 'Implementing child rights in early childhood' (2005) para 15.

[87] Alen et al. (2007) 391; Detrick (1992) 98; Mezmur (2009) 160.

[88] Detrick S "Family rights" under the United Nations Convention on the Rights of the Child' in Lowe N & Douglas G (eds) *Families across Frontiers: Facts, Conflicts, and Trends* (1996) 98.

[89] Mezmur (2009) 161.

[90] Cantwell & Holzscheiter (2008) 34–5.

[91] Cantwell & Holzscheiter (2008) 37.

[92] Alen et al. (2007) 396.

[93] Alen et al. (2007) 391.

The ACRWC does not, however, provide any further clarification of the notion of the 'family', nor is there an equivalent provision to article 5 of the CRC in the ACRWC to help interpret the concept.[94]

2.5 Family-based alternative care settings

2.5.1 Foster care

The term 'foster care' is defined differently from one country to another.[95] Nevertheless, it is imperative to have a clear understanding of what the term entails; what distinguishes 'foster care' from other forms of alternative care; and the safeguards included for children. In most African countries, the term 'foster care' is open to a variety of interpretations[96] that do not always correspond to the definition in the UN Guidelines or the common meaning attached to the term in more developed countries, namely the legal placement of a child within a family other than its biological family.[97]

In the same vein, the terms 'foster care' and 'fostering' represent diverse types of care arrangements in different countries.[98] The word 'fostering' has been used in some contexts to generally describe substitute family placement.[99] In West Africa, for instance, both the words 'fostering' and 'foster care' are used to refer to informal traditional care arrangements that involve the deliberate act of parents placing their child into another family without any state intervention and regardless of kinship bonds.[100] This type of arrangement is known as

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[94] Alen et al. (2007) 391.

[95] South African Law Commission (Project 110) *Report on the Review of the Child Care Act* (2002); Williamson J & Greenberg A *Families, not orphanages* (2010) 17 available at http://bit.ly/2sLYv0R (accessed 22 November 2015).

[96] Williamson & Greenberg (2010) 17.

[97] UN Guidelines, para 29(c)(ii)

[98] Williamson & Greenberg (2010) 17; Tolfree D *Roofs and Roots: The Care of Separated Children in the Developing World* (1995) 257.

[99] Tolfree (1995) 257.

[100] Williamson & Greenberg (2010) 18; Tolfree (1995) 257.

‘spontaneous’ or ‘informal’ fostering.[101] The term ‘fostering’ is also used incorrectly to describe ‘sponsored children’, which is not an accurate reflection of the relationship between the child and the sponsor.[102]

In other contexts, the term ‘fostering’ refers to an ‘agency-arranged’ placement of a child within the extended family network.[103] Along the same lines, ‘formal’ or ‘agency’ fostering is the term used to refer to the placement of children in the care of others as initiated by an agency that assumes the responsibility of regularly overseeing such placement.[104] This form of care is increasingly an alternative to residential care; however, research suggests that it is not common practice in sub-Saharan countries. In many African countries, the use of formal foster care for children deprived of their family environment as a substitute for institutional care is either in its early stages or non-existent.[105] Conversely, informal fostering is prevalent in the region. In the two countries examined in this thesis, however, formal foster care is considered appropriate for children deprived of their family environment; while South Africa is one of the few African countries where formal foster care is prevalent,[106] in Ethiopia, too, it is ‘found to be an acceptable form of alternative care and readily fits into current cultural practices’.[107]

Formal foster care can be short-term, medium-term or long-term.[108] It is commonly used for a certain period of time, that is, until a child can be reintegrated with his or her parent, legally adopted, or attains adulthood.[109] In some contexts, foster care is generally long-term and similar

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[101] Tolfree D *Facing the Crisis: Supporting Children through Positive Care Options* (2005) iv.
[102] Tolfree (1995) 257.
[103] Tolfree 1995) 257.
[104] Tolfree (2005) iv.
[105] Engle PL, Groza VK, Groark CJ, et al ‘The situation of children without parental care and strategies for policy change’ (2011) 76 *Monographs of the Society for Research in Child Development* 197.
[106] Engle et al. (2011) 197.
[107] Family Health International (FHI), UNICEF, Ministry of Women’s Affairs, & Child Investment Fund Foundation *Improving care options for children in Ethiopia through understanding institutional care and factors driving institutionalization* (2010)15.
[108] Cantwell et al. (2012) 33.
[109] Williamson & Greenberg (2010) 17.

to adoption.[110] In the South African context, it is commonly considered a temporary alternative care arrangement and does not necessarily involve the transfer of parental responsibility or terminate the rights of biological parents.[111] It is regarded as the favourable option for children for whom remaining in parental care, reunification and adoption are not possible.[112] In terms of the Children's Act 38 of 2005, foster care is defined as the placement of a child in the care of a person other than a parent or guardian.[113] The court can place a child in the care of a non-family member or a family member other than a parent or guardian, or in a registered cluster foster care scheme.[114] Thus, in South Africa, kinship foster care or 'relative foster care' may refer to a formal care arrangement where children are cared for by relatives or kin but which may ordered, supported and monitored by the state.[115]

In Ethiopia, in terms of the Alternative Childcare Guidelines on Community-Based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service (National Guidelines), foster care refers to the placement of children who are unable to live with their biological parents in the care of foster families.[116] Foster care may be long- or short-term.[117] Although the National Guidelines do not specify whether foster parents could be relatives of the child, they describe a foster family as

> [a] family which has applied to and is selected by a foster family care organization to provide a temporary physical care and emotional support and protection for an unaccompanied child placed through a foster family care program for an unspecified time.[118]

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[110] Williamson & Greenberg (2010) 17.

[111] Skelton A 'Children' in Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 608.

[112] South African Law Commission (Project 110) *Report on the Review of the Child Care Act* (2002) 215; Gallinetti J & Loffell J 'Foster care' in Davel CJ & Skelton A (eds) *Commentary on the Children's Act* (2010) 9.

[113] Children's Act 38 of 2005, s 180(1).

[114] Children's Act, s 180(3).

[115] Children's Act, s 180(3)(b).

[116] Ministry of Women Affairs *Alternative Childcare Guidelines on Community-Based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service* (2009) (hereafter National Guidelines) 28.

[117] National Guidelines, 28.

[118] National Guidelines, 10.

A foster family care organisation is an 'organization which is registered and licensed by the accredited governmental body to implement foster family care placement'.[119] According to the National Guidelines, foster care may take the form of transitional homes,[120] foster family care[121] and community-based foster homes.[122] All three forms of foster placements are to be arranged by a foster care organisation, one which also determines which model suits the child the most and serves the best interests of the child.[123] Thus, it can be inferred that the 'competent authority' in respect of foster placements in the Ethiopian context is the foster care organisation.

A feature of these forms of foster care share is that the care is provided within a family environment and foster carers do not acquire parental rights in their entirety.[124] If informal kinship care is neither available nor appropriate, then foster care is widely recognised as the next preferred form of alternative care.[125] In the UN Guidelines, foster care is defined as

> [s]ituations 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.[126]

The 'competent authority' commonly refers to the state, but it could also be an NGO, in particular in cases where the formal child protection system is underdeveloped.[127] The definition of 'foster care' does not place a restriction on the number of children who can be

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[119] National Guidelines, 11.

[120] Ethiopia's National Guidelines describe transitional homes as places 'where children shall be placed in a family or a centre until they get other permanent alternative placement'. National Guidelines, 33.

[121] Foster family care is described as a situation 'where children shall be placed within a volunteer family supported by the Foster Care Organizations'. National Guidelines, 33.

[122] Community-based foster homes refer to places 'where a group of children who are full orphans or whose parents/relatives are untraceable shall be placed in rented houses in the community and cared by a home mother/caretaker recruited by the organization'.

[123] National Guidelines, 33.

[124] Delap et al. (2011) 7.

[125] Cantwell (2015) 267.

[126] UN Guidelines, para 29(c)(ii).

[127] Petrowski et al. (2017) 390.

placed in such a care setting.[128] This raises the issue of whether there should be a maximum limit on the number of children for a setting to remain in the 'foster care' category.[129] In South Africa, six is the maximum number of children that can be placed in the care of a single foster parent or in a household shared by two people unless the intention is to keep siblings or blood relatives together or it is believed to be in the best interests of the children.[130] In addition to foster care, cluster foster care has been introduced by the Children's Act of South Africa and enables more than six children to be cared for in such setting.[131] The Children's Act does not limit the maximum number of children that can be placed in cluster foster care. It has been argued, however, that with regard to the number of children that can be placed in foster care, there is no need to set a specific limit providing that 'the care proceedings, arrangements and setting' maintain the elements of a family-based setting.[132]

While this study focuses on formal rather than informal or spontaneous foster care, it does not include kinship foster care (whether formal or informal); instead, the focus is on formal foster care arrangements with non-kin.

2.5.2 'Other forms of family-based care'

As noted above, 'other forms of family-based care'[133] and 'family-like'[134] care placements are among the 'range of options' recommended for children in need of care. However, no indication is given in the UN Guidelines as to what these forms of care settings entail or how to distinguish them from foster care or any other type of care.

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[128] UN Guidelines, para 29(c)(ii).
[129] Better Care Network et al. (2013) 8.
[130] Children's Act, s 185(1)(a) and (b).
[131] Children's Act, s 185(2).
[132] Better Care Network et al. (2013) 8.
[133] UN Guidelines, para 29(c)(iii).
[134] UN Guidelines, para 29(c)(iii).

Researchers have described ‘other family-based care’ as including care settings where a child is cared for by and within an existing family which has a similar formal role as a conventional foster carer but does not function within the foster care system.[135] Thus, a feature of foster care distinguishing it from ‘other forms of family-based care’ is the intervention of a ‘competent authority’ ordering the placement in the context of ‘foster care’.[136] This indicates that ‘other forms of family-based care’ are informal in nature and do not involve the intervention of the state. One example of ‘other forms of family-based care’ is where families are assigned to care for children ‘transitioning out of residential care, or to act as “guardians” for children with long-term alternative care needs’.[137] Given the lack of state involvement, this thesis will not deal with ‘other forms of family-based care’.

2.6 Non-family-based forms of alternative care

2.6.1 ‘Family-like care placements’

‘Family-like’ refers to care provided in small groups and organised under conditions resembling a family but in which specific carers play a parental role albeit in a setting outside their domestic environment.[138] In other words, ‘family-like’ care does not refer to a care setting that is structured in an existing family’s domestic setting; it refers instead to the way in which this care is organised.[139]

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[135] Cantwell et al. (2012) 33; Better Care Network et al. (2013) 9.
[136] Better Care Network et al. (2013) 7.
[137] Cantwell et al. (2012) 33.
[138] Better Care Network et al. (2013) 12; Cantwell et al. (2012) 33; Žegarac N *The child’s right to quality Care: Review of the implementation of the United Nations Guidelines for the Alternative Care of Children in Western Balkan countries* (2014) 14.
[139] Cantwell et al. (2012) 33.

Cluster foster care was introduced by the Children's Act, and although it is not mentioned as a form of alternative care in the UN Guidelines, it fits the description of 'family-like care placements'.

2.6.2 Residential care

The UN Guidelines recommend that a wide range of alternatives be made available so that children in need of alterative care can be offered care that meets their individual needs.[140] A residential care setting is among the options considered potentially suitable for the care of children deprived of their 'parental care' provided that it conforms to certain standards.[141] 'Residential care' is defined in the Guidelines as '[c]are provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes'.[142]

Despite this definition, given that there are a wide range of non-family-based care settings throughout the world, it would be a challenging task to neatly fit and classify them into groups with clear delineations that hold in all circumstances.[143] With regard to residential care, for instance, some sources define this form of care as including institutions and 'hospital units, schools, homes, training and correction facilities, and settings where children may be admitted that do not technically qualify'.[144] The UN Guidelines also urge the relevant authorities to use the principles of the Guidelines 'as applicable, at boarding schools, hospitals, centres for children with mental and physical disabilities or other special needs, camps, the workplace and other places which may be responsible for the care of children'.[145] The use of the term

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[140] UN Guidelines, paras 53 and 54.
[141] UN Guidelines paras 21, 29(c)(iv), and 126.
[142] UN Guidelines, para 29(c)(iv).
[143] Better Care Network et al. (2013) 6.
[144] Tolfree (1995) 11.
[145] UN Guidelines, para 31.

‘applicable’ should not be taken as a qualification of such facilities as alternative care settings.[146] This is because some facilities may provide ‘care’ other than ‘alternative care’. A case is point includes hospitals and schools that may provide ‘alternative care’ or ‘care’ or both. This is an indication that children in such facilities like hospitals or schools can only be in alternative care as far as the facilities provide ‘alternative care’, as opposed to ‘care’ per se.[147]

Even though the UN Guidelines consider residential care complementary to family-based care and an option that should be made available, they set out ‘strict’ conditions to be complied with, along with clear restrictions on the placement of children in residential care.[148] Thus, placement in residential care is justified only to the extent that it is ‘appropriate, necessary and constructive for the individual child and … based on an assessment of what is best for the child’.[149] This implies that the unavailability of family-based alternative care options, whether due to lack of time or resources, does not justify a child’s placement in residential care.[150]

The UN Guidelines, however, insist that residential care should not be used for children under three, subject to a number of exceptions.[151] Where large child-care facilities (institutions) exist, the Guidelines demand the development of alternatives within the context of an overall de-institutionalisation strategy to facilitate their gradual elimination.[152] They further require the establishment of care standards by which to judge the extent to which facilities are in compliance with such standards, and by which to ensure that the quality of the care provided, and the conditions under which care are provided, are conducive to the child’s development.[153]

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[146] UN Guidelines, para 31; Better Care Network et al. (2013) 10–11.
[147] Better Care Network et al. (2013) 10–11.
[148] UN Guidelines, para 21; Cantwell et al. (2012) 33.
[149] UN Guidelines, para 21.
[150] Cantwell et al. (2012) 38.
[151] UN Guidelines, para 22.
[152] UN Guidelines, para 23.
[153] UN Guidelines, para 23.

While greater research attention has been given to the impact of placement in non-family-based alternative care settings on children under the age of three than on older children, the emotional and developmental risks of placement in such setting for older children have not been entirely dismissed.[154] The negative impacts caused by attachment disorder have been found to be evident in children in middle childhood and in adolescents.[155] One study states that 'highly specialised, therapeutic' residential care can be beneficial to children with 'very complex needs or challenging behaviours' given that it is offered in 'small groups, living in normal houses, integrated into the community'.[156] The study highlights that in situations where deinstitutionalisation has proved to be effective, residential placements have played a role in providing the small share of the care provided to children with disabilities.[157]

2.6.3 'Residential care' versus 'institutions'

Although the negative consequences of institutional care for children and society in general are well documented, there is no universally agreed-upon definition in the UN Guidelines or elsewhere of what constitutes an 'institution', nor is there a clear, agreed-upon distinction between such care and residential care settings.[158] As can be observed from the definition of 'residential care' in the Guidelines, there is no size limit attached to residential care facilities, which adds to the confusion regarding 'institutions' and 'residential care'.[159] A number of sources have used the two terms interchangeably as if they were synonymous.[160] Unfortunately,

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[154] Rosenthal E 'A mandate to end placement of children in institutions and orphanages: The duty of Governments and donors to prevent segregation and torture' in Protecting Children against Torture in Detention: Global Solutions for a Global Problem (2017) 316.

[155] Rosenthal (2017) 316.

[156] Mulheir G 'Deinstitutionalisation – A human rights priority for children with disabilities' (2012) 9 *The Equal Rights Review* 119.

[157] Mulheir (2012) 119.

[158] Chaitkin et al. (2017) 8; Davidson J 'Closing the implementation gap: Moving forward with the United Nations Guidelines for the Alternative Care of Children' (2015) 6 *International Journal of Child, Youth and Family Studies* 384.

[159] UN Guidelines, para 29(C)(iv).

[160] Williamson J & Greenberg A *Families, not orphanages* (2010) 12 available at *http://bit.ly/2sLYv0R* (accessed 22 November 2015); Browne K *The Risk of harm to young children in institutional care* (2009).

the CRC mentions ‘suitable institutions’ as the only explicit form of residential care constituting an alternative to family-based care settings.[161] Thus, the need to draw a distinction between ‘institutions’ and ‘residential facilities’ has been recognised. It is also crucial for the purposes of this thesis to distinguish between ‘residential care’ and ‘institutions’, to define what is meant when using the term ‘institutions’, and to identify common elements of institutional care.

Some sources consider ‘institutions’ as a form of residential care, which is in keeping with the approach adopted by the UN Guidelines.[162] Under the CRC, ‘institutions’ are mentioned as the only non-family-based alternative care, whereas the term is only mentioned in the UN Guidelines to refer to ‘large’ residential facilities.[163] Accordingly, the UN Guidelines require institutions, rather than all residential facilities, to be eliminated gradually through a ‘de-institutionalisation strategy’.[164]

However, although size is generally a determining feature of institutions, it is possible for an institutional regime to be evident in a small care setting.[165] For instance, a small-group home with less than eight children might maintain the staffing structure and regimen of a much larger institution.[166] As such, size is not the only, or determining, factor,[167] although the mere mention of ‘large’ facilities in the UN Guidelines indicates that size has relevance in determining whether a setting falls into the category of an institution. A common understanding, although not indisputable, in relation to size is that 10 is the maximum number of children who can be cared for in ‘residential care’ for such setting to fall under the category of ‘family-like care’.[168]

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[161] CRC, art 20(3). Chaitkin et al. (2017) 8.
[162] Tolfree (1995) 6.
[163] Cantwell et al. (2012) 42.
[164] UN Guidelines, para 23.
[165] Better Care Network et al. (2013) 14.
[166] Mulheir (2012) 119.
[167] Cantwell et al. (2012) 42.
[168] Better Care Network et al. (2013) 15.

To this end, a number of sources have emphasised the need to challenge what is often called an 'institutional culture'.[169] The latter consists in an impersonal regime that takes little account of individuality, focuses only on the physical needs of the child, such as food and shelter, to the exclusion of psychological and emotional needs, and tends to isolate children from the outside world.[170] Other factors may also be important in detecting an institutional culture in a given care setting: for instance, each caregiver is responsible for a large number of children; salaries are generally low; there is little to no training of staff who care for children; rotating shifts are the norm; and staff lack psychological investment in the children.[171] In relation to children with disabilities, institutional culture is said to include circumstances where the conditions set by the facility take precedence over the needs of the children in care and are based on a medical model of care that tends to 'reduc[e] individuals to their diagnoses'.[172] One source describes institutions from the perspective of residential facilities: they are secluded from the 'mainstream community', offering little prospect of integration in regular day-to-day life and experiences; accommodate large groups of unrelated children who are made to live together; separate children from their parents, extended family, friends and community for prolonged periods of time; and are structured in an impersonal and rigid routine that is incapable of responding to the individual needs of the children.[173]

However, another study insists that, to distinguish institutions from other types of care settings, the focus should be on whether carers in 'institutions' work predetermined hours/shifts and

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[170] Cantwell et al. (2012) 34; UNICEF & Inter-American Commission on Human Right & Organization of American States *The Right of Boys and Girls to a Family: Alternative Care. Ending Institutionalization in the Americas* (2013) 137; Csáky C *Why Care Matters: The importance of adequate care for children and society* (2014) 6.

[171] Dozier M, Zeanah CH, Wallin AR, et al. 'Institutional care for young children: Review of literature and policy implications (2012) 6(1) *Social Issues and Policy Review* 3.

[172] European Commission *Report by the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care* (2009) 119.

[173] Mulheir (2012) 119.

whether they act as surrogate parents, rather than on the caregiver-to-child ratio.[174] The reason for this is that the ratio of children to carers in a family-type home, or family-based care, such as foster care, may also be low.[175] In respect of 'geographical location', which some sources have used to distinguish institutional care, it has been argued that this is not always applicable, as there are facilities which are located centrally and are accessible but have a fundamentally 'isolationist regime'.[176]

From the above discussion, it is clear that there is no definition of 'institutions' that is 'fool proof', given the 'heterogeneous and hybrid alternative care environment'.[177] Since an institutional culture can be present in smaller care settings, this broader understanding of institutional cultures should be the determining factor to establish whether a particular facility falls into the category of 'institution'.[178] However, for the purpose of this thesis, an 'institution' refers to 'residential care settings where children are looked after in any public or private facility, staffed by salaried carers or volunteers working predetermined hours/shifts, and based on collective living arrangements, with a large capacity'.[179]

2.7 The principles of necessity and suitability

The decision-making process for alternative care under the UN Guidelines is founded on two fundamental principles: 'necessity' and 'suitability'. Put in simple terms, these principles require that no child should be placed in alternative care if it is not genuinely warranted and where an appropriate solution would have been the provision of support to the family. However, when separation becomes necessary, the choices made regarding the care provided

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[174] Better Care Network et al. (2013) 15.
[175] Better Care Network et al. (2013) 15.
[176] Better Care Network et al. (2013) 15.
[177] Better Care Network et al. (2013) 11.
[178] Davidson (2015) 384.
[179] This definition was proposed by the NGO Working Group on Children without Parental Care to differentiate institutional care from other forms of residential care. Better Care Network et al. (2013) 15.

for children should be appropriate and determined on a case-by-case basis. For the purpose of this thesis, the suitability principle is the more relevant, as the necessity principle is concerned with the prevention aspect of alternative care. Therefore, the following discussion gives greater emphasis to the suitability principle and explores its implications for the alternative care of children with disabilities.

2.7.1 Suitability principle: Determination of the most appropriate care placement

The suitability principle requires making sure that, in cases where alternative care is necessary, such care is provided in a manner that is appropriate.[180] The suitability principle necessitates that all aspects of a certain alternative care setting comply with the overall requirements of the rights of children.[181] The principle also entails a setting wherein the child is cared for in such a way as to meet his or her specific needs.[182] In relation to the latter requirement, that is ensuring ‘case-by-case’ suitability, a precondition is that there should be a variety of options available so that the setting that is chosen is likely to respond to a specific child’s individual needs and circumstances.[183] In addition to family-based alternative care, residential care facilities are one of the alternative care options considered suitable for children deprived of parental care.[184] These two types of care arrangements are regarded as complementary in meeting the needs of the child[185] and should be used when they offer the ‘most suitable solution’ for the individual needs of the child.[186] However, clear priority is given to family-based forms of alternative care.[187]

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[180] Cantwell et al. (2012) 22.

[181] Cantwell (2015) 261.

[182] Cantwell N *The Best Interests of the Child in Intercountry Adoption* (2014) 34; Cantwell et al. (2012) 22–3 and 66–74.

[183] Cantwell et al. (2012) 22.

[184] UN Guidelines, para 23.

[185] UN Guidelines, para 23.

[186] UN Guidelines, para 21.

[187] UN Guidelines, para 53.

Thus, in respect of the suitability of residential care settings, even though the UN Guidelines consider this form of care as potentially suitable, they have to comply with certain standards and be used only when deemed appropriate and necessary for the child in question.[188] Nonetheless, the term 'institutions', as discussed earlier, is not synonymous with 'residential care': the former are equated with 'large care residential facilities' in the UN Guidelines and are subject to 'progressive elimination'.[189] Therefore, the suitability principle is reinforced by the shift towards deinstitutionalising the alternative care system and fostering family-based or family-type settings.[190]

For countries with limited resources such as Ethiopia and South Africa, it may be argued that endorsing deinstitutionalisation and family-based alternative care options for children with disabilities is idealistic and unfeasible. However, studies have shown that family-based alternative care options, such as foster care, are much more cost-effective than institutional care.[191] This is also true in the context of caring for children with disabilities.[192] Although the initial cost of deinstitutionalisation and transforming the alternative care system are high, the long-term gains of deinstitutionalisation and investing in family-based alternative care options are higher, not just in terms of its cost-effectiveness, but also the positive outcomes for children and society at large, such as lower dependency and greater social inclusion.[193]

In the light of the above, it is unfortunate that the CRC considers 'suitable institutions' to be available for children deprived of their family environment.[194] The prescription in the CRC of 'suitable institutions' as one of the potential forms of alternative care to be considered for

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[188] UN Guidelines, para 21; Cantwell et al. (2012) 22 and 71.

[189] UN Guidelines, para 23.

[190] Cantwell (2015) 261.

[191] Cantwell et al. (2012) 91; Engle et al. (2011) 213; Eurochild *De-institutionalisation and Quality Alternative Care for Children in Europe: Lesson Learned and the Way Forward* (2012) 5.

[192] Engle et al. (2011) 213.

[193] Eurochild (2012) 5.

[194] Cantwell (2014) 34.

children deprived of their family environment is a manifestation of the influence of the Soviet Union and allied states that were among the active drafters of the CRC in the 1980s.[195] Hence, the terminology of the CRC in this regard is explicable, given that placement of children in institutional care was a component of the 'ideology governing child protection systems' during the 1980s.[196] However, more than two decades since the CRC came into force and at a time when the negative effects of institutions are widely acknowledged by the international community, it is fitting to question the 'suitability' of institutions for the care of any child deprived of his or her family environment.[197]

In relation to the suitability of alternative care options, the CRPD takes a strong stand by only mentioning community and family-based alternative care to be provided when children with disabilities are found to be in need of alternative care.[198] Thus, in respect of the CRPD, there is no room to question whether institutions are a 'suitable' form of alternative care, as the focus is clearly on providing children with disabilities with alternative care within the extended family, or, when that proves impossible, within the community in a family setting.[199]

Ensuring that alternative care is suitable also requires giving due regard to the child's right to periodic review of his or her placement.[200] This step is crucial in evaluating whether or not the child's placement in alternative care remains necessary and the alternative care setting continues to meet his or her individual needs.[201] Alternative care is regarded as primarily a short-term measure, and thus its quality depends largely on the extent to which the child's safe

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[195] Cantwell (2014) 34; OHCHR Regional Office for Europe 'The rights of vulnerable children under the age of three: Ending their placement in institutional care' (2012)10 available at *http://bit.ly/39H7zEH* (accessed 15 May 2016).

[196] OHCHR Regional Office for Europe (2012) 10.

[197] OHCHR Regional Office for Europe (2012) 10–11.

[198] CRPD, art 23(5).

[199] CRPD, art 23(5).

[200] Cantwell et al. (2012) 22.

[201] Cantwell (2014) 34; Cantwell (2015) 261.

and effective departure from it can be facilitated as quickly as possible.[202] At the same time, the UN Guidelines require that formal alternative care ensure 'permanency' wherever possible.[203] Ensuring permanency helps to enable the child's stable connection with a family or caregiver and to avoid frequent 'transition and changing care arrangements' which can be detrimental to his or her development. For the small percentage of children for whom reunification with their family is not feasible, foster care and adoption are deemed to be means of attaining the goals of stability stipulated by the Guidelines.[204]

2.7.2 The necessity principle: Preventing the need for alternative care

The UN Guidelines provide different sets of measures from the global to the individual that, through family strengthening and support, are aimed at discouraging recourse to alternative care options, such as institutions for the care of children with disabilities.[205] In this manner, the Guidelines acknowledge the linkage between economic and social policy and the alternative care system.[206] Therefore, apart from ensuring 'quality' and 'suitable' alternative care, the need to prevent the factors driving family breakdown is emphasised in the Guidelines.[207] Adherence to this principle necessitates the availability and development of a wide range of effective preventive services, such as family strengthening and support, day-care, and 'respite care' to provide caregivers and families of children with disabilities with temporary relief from their responsibilities.[208] The necessity principle further implies supporting and strengthening appropriate domestic solutions for the care of children deprived of their family environment.[209]

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[202] Cantwell (2015) 261.
[203] UN Guidelines, paras 2(a) and 60–3.
[204] Delap et al. (2011) 22.
[205] See UN Guidelines, paras 32–52. Cantwell (2015) 260.
[206] Cantwell (2015) 260.
[207] See UN Guidelines, paras 39–48. Cantwell (2015) 260.
[208] Chaitkin et al. (2017) 8.
[209] Chaitkin et al. (2017) 8.

The UN Guidelines provide for three levels of prevention to alternative care as primary, secondary and tertiary levels of prevention.[210] The primary level of prevention involves wide-ranging measures that address the 'root causes' and societal factors that lead a parent to abandon or relinquish a child.[211] As a consequence, this level of prevention ensures that all children including children with disabilities, have access to basic services, social justice and are afforded rights without discrimination.[212] The significance of this level of prevention lies in its role in addressing inappropriate, inadequate or poor quality service provision for children with disabilities. This level of prevention reiterates the role that caregivers play in the choices they make about children's care and well-being.[213]

The secondary level prevention offers relief to individuals who have not been successful with primary prevention.[214] It requires the provision of financial assistance and services to children with disabilities and their caregivers in an integrated and 'non-intrusive' manner.[215] According to the UN Guidelines, poverty is not regarded as an adequate justification for the removal of a child from family care, rather it should trigger the extension of support for the family.[216] It is noteworthy that the CPRD asserts that the disability of either a parent or a child is not a sufficient reason for removing the child from his or her family.[217]

The tertiary level of prevention is used when the primary and secondary levels of prevention have failed and the placement of the child in alternative care cannot be avoided.[218] This level

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[210] European Network of National Observatories on Childhood *Alternative forms of care for children without adequate family support: Sharing good practices and positive experiences* (2012) 12; Cantwell et al. (2012).
[211] Chiwaula et al. (2014) 41; Cantwell et al. (2012) 50.
[212] Chiwaula et al. (2014) 41; Cantwell et al. (2012) 50.
[213] Better Care Network & EveryChild 'Enabling Reform: Why supporting children with disabilities must be at the heart of successful child care reform' (2012) 30.
[214] Chiwaula et al. (2014) 41.
[215] UN Guidelines, para 34(b) and 35; Cantwell et al. (2012) 54.
[216] UN Guidelines, para 15.
[217] CRPD, art 23(4).
[218] Chiwaula et al. (2014) 41.

of prevention entails that the child is ultimately reintegrated with his or her family whenever appropriate and possible.[219]

2.8 Conclusion

This chapter has discussed the three models of disability and unpacked how the term 'disability' is conceptualised within the ambit of those models. Following the discussion on the models of disability, the chapter has highlighted how they inform the provision of alternative care to children with disabilities. The chapter established that the terms 'disability', 'persons with disabilities' and 'children with disabilities' are not defined in the applicable standards. For the purpose of this thesis, the chapter adopted the CRPD's description of the term 'persons with disabilities' as stated in article 1 of the Convention.

Moreover, this chapter has provided a conceptual framework for the right to alternative care of children with disabilities by using the UN Guidelines and the CRPD as the basis thereof. It was observed that there is a difference between the international standards and the UN Guidelines in terms of when alternative care should be provided. According to the UN Guidelines, loss of parental care entitles a child to be provided with alternative care, whereas in the CRC and ACRWC deprivation of 'family environment' is what triggers the right. Similarly, in the CRC, ACRWC and CRPD, a child with a disability who can no longer be cared for by the 'immediate family' should be provided with alternative care.

This chapter also discussed what the term 'family environment' means and what implications are for the provision of alternative care. In addition, it looked at the definitions of the various forms of formal alternative care provided by the UN Guidelines. Furthermore, a distinction was made between 'residential care' and 'institutions'. Various sources describe the basic

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[219] European Network of National Observatories on Childhood (2012) 13.

characteristics of ‘institutions’ in contradistinction to those of ‘residential care’. However, it has been emphasised that some level of rationality is required in establishing whether a particular facility should be considered as an ‘institution’.

It has been noted that the principles of necessity and suitability entail that children are not placed in alternative care in cases where it is not absolutely necessary and where an appropriate solution would have been the provision of support within the family. However, when separation becomes necessary, the choices made regarding the care provided for children need to be appropriate and determined on a case-by-case basis. It has been highlighted that the suitability principle is reinforced by the shift towards deinstitutionalising the alternative care system and the preference for family-based or family-type settings.

Chapter 3:
The International and Regional Legal Framework for the Right to Alternative Care of Children with Disabilities

3.1 Introduction

The previous chapter examined the conceptual framework for the alternative care of children with disabilities. The present chapter considers, first, what the right to alternative care for children with disabilities entails and what State Parties' obligations are in terms of international and regional standards, and, secondly, what minimum standards are set out in the instruments governing the right to alternative care. The aim of this chapter is thus to establish the legal basis of the right to alternative care for children with disabilities, so that this can be used in subsequent chapters to assess the extent to which Ethiopia and South Africa are complying with their obligations under international child-rights law.

However, this chapter does not provide a review of an exhaustive list of instruments, but concentrates on instruments that focus either on children's rights or disability rights, that is, CRC, ACRWC and CRPD. Thus, the chapter examines the normative aspect of the right to alternative care of children with disabilities by critically analysing provisions in the three instruments read together with the general comments and concluding observations of the respective committees. The chapter also relies on the legislative histories and reporting guidelines of the relevant standards. In addition to these instruments, there are also non-binding declarations and guidelines that deal with the right to alternative care of children in general, and children with disabilities in particular. These instruments form part of the discussion in this chapter. The chapter commences by presenting a brief background to the right to alternative care of children in international law as it stood before the adoption of the CRC.

Given that the applicable standards differ in the obligations they impose on states and that both Ethiopia and South Africa are bound by all three standards, the discussion identifies provisions that provide a higher level of protection to children with disabilities deprived of their family environment in the context of alternative care. This is done on the basis of article 30 of the Vienna Convention on the Law of Treaties which provides that, as regards parties to one treaty who become parties to a second, the general trend is that the second governs any point where it is incompatible with the first.[1] So, in cases where the provisions of CRC and ACRWC, on one hand, conflict with the provisions of the CRPD, on the other, the latter should prevail. Along the same lines, all three instruments, that is, the CRC, ACRWC and CRPD, explicitly recognise that the standards incorporated in them are the minimum standards that are to be adhered to by State Parties. These instruments contain provisions which declare that nothing in the respective standards 'shall affect any provisions more conducive to the realisation to the right of the child and which may be contained in the law of a State Party' or any other international convention or agreement in force in that state.[2]

3.2 Children's right to alternative care before the CRC

The 1924 Declaration of the Rights of the Child (the Geneva Declaration) is the first appeal to states to respond to the situation of parentless and destitute children.[3] This is reflected in the Declaration's second principle, which provides that 'the orphan and the waif must be sheltered and succored'.[4] Despite what the name implied, that is, the Declaration of the *Rights* of the

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[1] Borgen C 'Resolving treaty conflicts' (2005) 37 *George Washington International Law Review* 577; art 30(2) of the VCLT states that '[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'.

[2] See art 4(4) of the CRPD, art 41 of the CRC and art 1(2) of the ACRWC.

[3] The Geneva Declaration of the Rights of the Child (1924) (hereafter Geneva Declaration) was a brief document consisting of five stipulations that summarised the general needs of children.

[4] See the Geneva Declaration, Principle 2.

Child, it did not impose any legal obligation on states or bestow rights on children.[5] Rather, its aim was to provide charitable support and welfare to children who were destitute and without parental care.[6] Hence, the now well-established obligation to provide special protection and assistance to children deprived of their parental care was initiated by the second principle of the Geneva Declaration.[7]

Subsequently, building upon the principles in the Geneva Declaration, the 1959 UN Declaration of the Rights of the Child asserted the importance of 'love and understanding' for the 'full and harmonious development' of a child, and stipulated that a child should grow up in the care of parents wherever possible.[8] It underlined the responsibility of public authorities and society in general to provide care to children deprived of their family or 'those without adequate means of support'.[9] In comparison with the Geneva Declaration, the 1959 Declaration broadened the scope of circumstances under which a child might need alternative care by using the phrase 'without a family', which is much wider than the term 'orphan' used in the Geneva Declaration.[10] The use of the word 'duty' instead of 'moral obligation' also suggests that a higher degree of responsibility is expected of states.[11] Although the Declaration put greater emphasis on children's rights and corresponding state duties than its predecessor, it did not establish any legal rights.[12] The significance of 1959 Declaration is undeniable, however, in that it paved the way for the subsequent development of children's rights.[13]

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[5] Kaime T *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) 12; Van Bueren G *The International Law on the Rights of the Child* (1995) 7.
[6] Cantwell N 'The human rights of children in the context of formal alternative care' in Vandenhole W, Desmet E, Reynaert D, et al. (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 258.
[7] See art 20(1) of the CRC and art 25(1) of the ACRWC.
[8] See the Declaration of the Rights of the Child (1959) (hereafter the 1959 Declaration), Principle 6.
[9] See the 1959 Declaration, Principle 6.
[10] Cantwell (2015) 258–59.
[11] Cantwell (2015) 259.
[12] Kaime (2009) 12–4.
[13] Kaime (2009) 13–4.

Perhaps the most significant declaration in respect of the development of the right to alternative care is the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally (the 1986 Declaration).[14] It established for the first time how alternative care should be sought and provided.[15] The Declaration shows a clear preference for family-based alternative care by stating that care should be provided 'by relatives of the child's parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution …'[16] The qualifying term 'if necessary' is reproduced in article 20 of the CRC, which echoes the hierarchy between family-based alternative care options and institutions.[17] It has been argued that the insertion of the restrictive phrase, 'if necessary', implies a recognition in the 1980s of concerns about over-reliance on institutions as a means to care for children.[18] Thus, it can be seen that the consideration of institutional care as a last resort and the preference given to family-based care has its origin in the 1986 Declaration.

The 1986 Declaration is simply a declaration of intent with no binding character; however, it is significant in the advancement of children's rights in general and the right to alternative care in particular. Moreover, although there is no clear evidence in the *Travaux Préparatoires* that there was a direct influence, it is safe to assume that the basic principles and articulations of the 1986 Declaration were incorporated in the CRC.[19]

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[14] 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) (hereafter the 1986 Declaration) was adopted by the UN General Assembly as a response to concerns expressed by member states about the growing number of children without family care. The 1986 Declaration, Preamble.
[15] Cantwell (2015) 259.
[16] See art 4 of the 1986 Declaration. Cantwell (2015) 259.
[17] Cantwell N & Holzscheiter A 'A commentary on the United Nations Convention on the Rights of the Child article 20: Children deprived of their family environment' in Alen, A *et al* (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2008) 16–7.
[18] Cantwell & Holzscheiter (2008) 16.
[19] Cantwell & Holzscheiter (2008) 16.

3.3 International and regional legal frameworks and guidelines

3.3.1 Convention on the Rights of the Child

Adopted in 1989, the CRC was the first binding global instrument with a focus on the rights of children;[20] since then, it has been ratified by all states, except the United States.[21] The CRC represents a shift from earlier thinking which viewed children as groups of society predominantly needing protection and welfare to their recognition as active holders of rights.[22] At the same time, the CRC affords children additional levels of protection by acknowledging their vulnerability as a result of their youth.[23] From a reading of its Preamble and substantive articles, it can be observed that the CRC has borrowed from the principles of preceding declarations, as evidenced by the references made to the 1924 Geneva Declaration, and the 1959 Declaration, among others.[24] It can be concluded that the final content of the CRC is a collection of all international human rights for children.[25]

3.3.2 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted in July 1990 and entered into force on 29 November 1999.[26] It is the second binding instrument at the

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[20] Despite initial hopes of speedy completion, the drafting took 10 years. The Working Group met once each year for one week, just prior to the annual session of the Commission on Human Rights. Originally, there was so little interest in the Convention that few governments or NGOs attended the drafting sessions. However, in 1983, drafting of the Convention began to develop momentum, and by 1985 the number of participating delegations and NGOs had more than doubled**.** Cohen CP & Naimark H 'United Nations Convention on the Rights of the Child: Individual rights concepts and their significance for social scientist' (1991) 46(1) *American Psychologist* 61; Detrick S *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 1; Mezmur BD 'The United Nations Convention on the Rights of the Child' in Boezaart T (ed) *Child Law in South Africa* 2 ed (2017) 403–4.

[21] Mezmur (2017) 403–4.

[22] Cohen & Naimark (1991) 60; Lansdown G *Using the human rights framework to promote the rights of children with disabilities: Working paper: An analysis of the synergies between CRC, CPRD and CEDAW* (2012) 6.

[23] Lansdown (2012) 6.

[24] Assim U *Understanding Kinship Care of Children in Africa: A Family Environment or an Alternative Care Option?* (2013) 83.

[25] Assim (2013) 83.

[26] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

global level and the first at the regional level to comprehensively provide for the rights of children.[27] Its adoption was driven by the objective of ensuring that the CRC was given specific application in the continent[28] and take into account the social, cultural, and economic realities of children in the African context.[29] Despite differences in the background against which they are formulated, it must be noted that the two treaties are complementary[30] and that most of the ACRWC's provisions are in fact more or less the same as the CRC's.[31] Some scholars suggest that the ACRWC's provisions offer a higher level of protection to the rights of children than the CRC's.[32]

It is important to highlight that the rights of children with disabilities in Africa is further enhanced by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Rights Protocol), which was adopted in 2018.[33] It contains a provision that is solely dedicated to the rights of children with disabilities.[34] The Protocol will only come into force after it has been ratified by 15 countries.[35]

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[27] 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.

[28] 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* 179–80; Mezmur BD 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law Journal* 6; Viljoen F 'Supra-national human rights instrument for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 205.

[29] See the ACRWC, Preamble; Lloyd (2002)180.

[30] Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 128.

[31] Lloyd A 'Regional Developments on the Rights and Welfare of Children in Africa: A general report on the African Charter on the Rights and Welfare of the Child and the African Committee of Experts' (unpublished article, University of the West of England, 2003).

[32] Lloyd (2003) 1.

[33] African Union (AU) *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* (2018) (hereafter African Disability Rights Protocol).

[34] Article 28 of the African Disability Rights Protocol. Although most of the provisions of the Protocol dealing with children with disabilities are similar to those in the CRPD, the African Disability Rights Protocol affords additional protections to children with disabilities, including the requirement that the best interests of children with disabilities be *the* primary consideration in all matters affecting them. It further requires that children with disabilities be provided with assistance that is not only age- and disability-appropriate, but also 'gender-appropriate', to facilitate their right to participate in matters affecting them.

[35] African Disability Rights Protocol, art 38(1).

So far, it has been signed by eight countries, but has not yet been ratified by any of the 54 countries.[36]

It is, however, regrettable that the African Disability Rights Protocol does not address the alternative care of children with disabilities who are deprived of their family environment. For this reason, and as the Protocol has not yet been ratified by either Ethiopian or South Africa, it will not be discussed further in this chapter.

3.3.3 Convention on the Rights of Persons with Disabilities

The CRPD was adopted on 13 December 2006 and entered into force on 3 May 2008.[37] It is the first legally binding international instrument to deal with the rights of persons with disabilities, the first international human rights treaty of the 21st century, and the fastest negotiated human rights treaty.[38] The CRPD was not intended to create new rights but to 'clarify, consolidate and strengthen' rights which already exist in human rights standards[39] and reintroduce them in a manner 'tailored … in response to specific needs and circumstances of people with disabilities'.[40] The CRPD shifts from the medical model of disability, which views persons with disabilities as sick and in need of a cure, by adopting a human rights-based approach which considers them as rights-holders and acknowledges environmental barriers as causes of disability.[41] It further endorses the social model of disability that recognises disability

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[36] As of June 17, 2020, the African Disability Rights Protocol has been signed by only eight African countries but it has not yet been ratified by any of the countries. African Union, *List of Countries Which has Signed, Ratified or Acceded to the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa*. Available at https://bit.ly/3bbWxZg (accessed 31August 2020)

[37] United Nations, Office of the High Commissioner for Human Rights (OHCHR) *Professional Training Series No 19: The Convention on the Rights of Persons with Disabilities, Training Guide* (2014).

[38] The Convention was negotiated during eight sessions of an Ad Hoc Committee of the General Assembly from 2002 to 2006. Waterstone M 'Foreword: The significance of the United Nations Convention on the Rights of Persons with Disabilities' (2010) 33 *Loyola of Los Angeles International and Comparative Law Review* 2.

[39] OHCHR *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (2010) 24; Sabatello M 'Children with disabilities: A critical appraisal' (2013) 21 *International Journal of Human Rights* 473.

[40] Akiyama A 'Convergence between the International Convention on the Rights of Persons with Disabilities and the Biwako Millennium Framework for Action' (2007) 18 *Asia Pacific Disability Rehabilitation Journal* 22.

[41] Kanter AS 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law and Commerce* 291.

as the result of 'the interaction between persons with impairments and attitudinal and environmental barriers'.[42] Hence, it provides an unmatched level of protection for persons/children with disabilities, with rights that speak to their specific needs and circumstances.[43]

3.3.4 The UN Guidelines for the Alternative Care of Children

The first appeal to develop a guideline on the alternative care of children was made by UNICEF in 2004.[44] The need to develop such a guideline was also raised by the CRC Committee, which in 2005 dedicated its Day of General Discussion to Children without Parental Care.[45] One of the outcomes of the discussion was a recommendation for the international community to develop guidelines to ameliorate the situation of children deprived of their family environment.[46]

Although the basic state obligations in respect of the right to alternative care of children deprived of their family environment are set out in the CRC, detailed guidance on how to meet these obligations is lacking in the Convention. To this end, the UN Guidelines were adopted with the aim to fill in the missing pieces and assist State Parties in the implementation of the CRC as well as other pertinent international instruments dealing with the protection and welfare of children deprived of parental care and at risk of losing it.[47] Subsequently, the UN Guidelines were adopted by the UN General Assembly in November 2009.[48]

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[42] See CRPD Preamble, para (e); OHCHR (2010) 13; Akiyama A 'Convergence between the International Convention on the Rights of Persons with Disabilities and the Biwako Millennium Framework for Action' (2007) 18 *Asia Pacific Disability Rehabilitation Journal* 22.

[43] With some exceptions, the rights of children with disabilities were not explicitly provided for in earlier main human rights instruments. Byrne B 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in Freeman M (ed) *Law and Childhood Studies: Current Legal Issues* Volume 14 (2012) 422.

[44] Cantwell N, Davidson J, Elsley S, et al. *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children* (2012) 19.

[45] Cantwell et al. (2012) 20.

[46] Cantwell et al. (2012) 20.

[47] Cantwell et al. (2012) 20.

[48] For a history of the development of the UN Guidelines, see Cantwell et al. (2012) 19–20.

Despite their lack of legal binding force, the UN Guidelines are believed to have ‘a strong moral impact, as they are mostly based on or derived from legally binding standards’.[49] The fact that the Guidelines were adopted by the UN General Assembly by a unanimous vote enables them to serve as a strong tool to inform the approach to the alternative care of children.[50] Moreover, the UN Guidelines have gained prominence in part because of their ‘systematic use’ as a point of reference by the CRC Committee in its concluding observations to determine State Parties’ compliance with the provisions of the Convention relating to the alternative care of children.[51] It is for these reasons that this chapter relies on the UN Guidelines to explore the content of the right to alternative care, notwithstanding the Guidelines’ non-binding nature.

3.4 General state obligations under the pertinent standards

The CRC, ACRWC and CRPD contain provisions dedicated to specifying the overall implementation obligations of states that have ratified the respective treaties and to setting out broad strategies for the latter’s implementation.[52] The measures states are expected to undertake include legislative, administrative, and other measures.[53] The term ‘appropriate’ allows states to adopt measures according to their domestic laws, provided that such measures

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[49] Phillips C *Child-Headed Households: A Feasible Way Forward, or an Infringement of Children’s Right to Alternative Care?* (2011) 21.

[50] Cantwell et al. (2012) 20–21; Davidson J ‘Closing the implementation gap: Moving forward with the United Nations Guidelines for the Alternative Care of Children’ (2015) 6 *International Journal of Child, Youth and Family Studies* 382.

[51] Cantwell et al. (2012) 21; Davidson (2015) 382; Chaitkin S, Cantwell N, Gale C, et al *Towards the right care for children: Orientations for reforming alternative care systems Africa, Asia, Latin America* (2017) 8. For instance, in 2016 the CRC Committee made reference to the UN Guidelines in response to 20 out of 27 State Parties’ reports. Sandberg K ‘Alternative Care and Children’s Rights’ in Kilkelly U & Liefaard T (eds) *International Human Rights of Children* (2019) 190.

[52] See art 4 of the CRC, art 1 of the ACRWC and art 4 of the CRPD.

[53] While the CRC and art 4 of the CRPD require states to take appropriate legislative, administrative and other measures, the ACRWC requires states to adopt legislative and other measures ‘in accordance with their Constitutional processes’ to implement the provisions of the Charter. See art 4 of the CRC, art 1 of the ACRWC and art 4(1)(a) of the CRPD.

meet the requirements of article 4.[54] Other measures may include financial, judicial and educational ones.[55]

Similarly, the CRPD requires states to take legislative, administrative and other measures to 'ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.[56]

Article 20 of the CRC has been regarded as innovative in that what the right provides and protects does not fit neatly into the category of either of civil or political rights or social, economic and cultural rights.[57] In respect of the nature of states' obligations under the treaties, the CRC and the CRPD make the implementation of economic, social and cultural rights subject to progressive realisation to the maximum extent of states' available resources.[58] However, this does not include obligations that, under international law, must be implemented immediately, such as the obligation not to discriminate.[59]

This indicates that the relevant provision governing the alternative care of children with disabilities is subject to progressive realisation. One point of distinction is that article 1 of the ACRWC neither makes the implementation of economic, social and cultural right subject to available resources nor includes the element of progressive realisation.[60] The African

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[54] Rishmawi M 'A commentary on the United Nations Convention on the Rights of the Child: Article 4: The nature of states parties' obligations' in Alen, A *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006), para 10.
[55] Fina VD 'Article 4 [General obligations] in Fina VD, Cera R & Palmisano G (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 143.
[56] CRPD, art 4(1)(a).
[57] Zilliox 'Where is the village going? Maintaining and including cultural strengths to protect children orphaned in Kenya' (2006) 44 *Family Court Review* 377.
[58] CRC, art 4 and CRPD, art 4(2).
[59] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The nature of States parties' obligations (article 2, para 1) (1990), para 1; CRPD, arts 4(2); OHCHR (2010) 29; Mezmur BD 'The United Nations Convention on the Rights of the Child' in Boezaart T (ed) *Child Law in South Africa* 2 ed (2017) 407.
[60] The ACERWC makes it clear that it was intentional not to constrain the implementation of economic, social and cultural rights by the principle of the progressive realisation or lack of reference to the degree of realisation within the 'maximum extent of available resources'. African Committee of Experts on the Rights and Welfare of the Child (ACERWC) General Comment No. 5 'State Party Obligations under the African Charter on the Rights

Committee of Experts on the Rights and Welfare of the Child (ACERWC) underscores the point that there is no hierarchy of rights in the Charter in that all rights are equally important and must be implemented immediately.[61] It emphasises that states are not allowed to use lack of resources as a justification for not implementing socio-economic rights.[62] In this respect, it can be argued that the position of the ACERWC places a stronger responsibility on States Parties to make adequate budgetary resources available for the implementation of the rights of children with disabilities in the context of alternative care than the CRC and the CRPD.

Furthermore, the nature of the State Parties' obligations under the relevant provisions indicates that while the primary responsibility to implement the treaties lies with the state, the full implementation of the rights in the applicable standards necessitates shared responsibility that extends to international cooperation.[63] Thus, as part of the obligation to progressively realise economic, social and cultural rights, the state bears the responsibility to establish that the necessary measures have been taken to implement the rights under the Convention 'to the maximum extent of their available resources' and that, where necessary, international cooperation has been sought.[64]

3.5 General principles of most of the international standards

While the CRC does not refer to the general principles itself, the CRC Committee has highlighted four of them. The principles were drawn from the following CRC provisions: article 2 (non-discrimination); article 3 (the best interests of the child); article 6 (the right to life, survival and development); and article 12 (the right of the child to express his or her views

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and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection' (2018) (hereafter ACERWC, GC. 5 (2018) sec iii 5–7. See Rishmawi (2006), para 28.

[61] ACERWC, GC No. 5 (2018) 7.

[62] ACERWC, GC No. 5 (2018) 7.

[63] CRC, art 4; Mezmur (2017) 407. See art 4(2) of the CRPD.

[64] CRC, art 4; Rishmawi (2006) para 92.

and to be heard, sometimes also referred to as the right to participation).[65] These general principles were first instituted by the CRC Committee in the guidelines for initial reports and are arguably relevant to the interpretation and implementation of all the rights in the CRC.[66] It has been argued that the four general principles (also known as the 'four cardinal principles') portray the essence of the CRC and assert its object and purpose.[67] On this basis, some refer to the four principles as the 'soul' of the Convention.[68]

The CRC Committee, in addition to making various references to the four general principles in previous general comments, has issued separate general comments on two of the principles so far: the principle of the best interests of the child and of respect for the views of the child.[69] The general comments have shed some light on the role of the two principles and the 'general principles' as a whole.[70] Jurisprudence on the CRC underscores that the general principles

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[65] It is noteworthy, however, that despite the mention of arts 2, 3, 6 and 12 as whole, it is only their first paragraphs that are considered a 'general principle' and not the provisions as whole. This has resulted in the rest of the sub-articles, in particular art 3(2) and art 3(3), being overlooked in the reporting guidelines. Hanson K & Lundy L 'Does exactly what it says on the tin?: A critical analysis and alternative conceptualisation of the so-called 'general principles' of the Convention on the Rights of the Child' (2017) 25 *International Journal of Children's Rights* 292.

[66] Hanson & Lundy (2017) 290 and 301.

[67] Rios-Kohn R 'The Convention on the Rights of the Child: progress and challenges' (1998) 5 *Georgetown Journal on Fighting Poverty* 143.

[68] Rios-Kohn (1998) 143. The concept of 'general principles' and their intended role has been contested. The history of the preparation of the guidelines for reporting by the CRC Committee suggests that the term 'general principles' was more a measure of structure than of content. The term 'principles' was seen as confusing as it gives the impression that the provisions are guiding and not binding, although all four are dealing with rights. In particular, the inclusion of art 6 on the right to life, survival and development as one of the general principles has been disputed on the ground that although 'fundamentally important', the provision is not 'cross-cutting' in nature as it is not always pertinent to the implementation of all other articles in the Convention. Questions were raised about the meaning of these principles and why other provisions, for example art 4 (specifying State Parties' general obligations) and art 5 (on evolving capacities), did not qualify for the status of general principles as they would better qualify as 'cross-cutting', given that they are formulated in direct relation to to other rights in the CRC. See Abramson B *A Commentary on the United Nations Convention on the Rights of the Child: Article 2: The Right of Non-Discrimination* (2008) 64–7; Hanson & Lundy (2017) 301.

[69] CRC Committee General Comment No. 14, 'The right of the child to have his or her best interests taken as a primary consideration' (2013) (hereafter CRC Committee, GC No. 14 (2013); CRC Committee General Comment No. 12, 'The right of the child to be heard' (2009) (hereafter CRC Committee, GC No. 12. (2009). Given that the CRC Committee has not fully explored the meaning and application of the 'general principles' as a set, there is concern that how the CRC Committee interprets and applies the general principles may create 'unintended effects'. Hanson & Lundy (2017) 286.

[70] The general comment provides specific guidance for the implementation of art 12 and art 3 and on the links between these articles and other articles of the CRC and their meaning for the implementation of these other articles, among others. See generally CRC Committee, GC No. 14 (2013) & GC No. 12 (2009). Buck T *International Child Law,* 3 ed (2014) 138.

should be applied to the interpretation and implementation all the rights in the Convention.[71] Similarly, the ACRWC provides for the four rights that make up the four general principles of the CRC and they too have been described as the 'soul' of the Charter.[72]

In respect of the CRPD, article 3 identifies eight principles foundational to the Convention.[73] These are respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and their right to preserve their identities.[74] As is the case in the CRC, the purpose of these general principles is to aid interpretation of the Convention's substantive obligations.[75] The principles serve as a basis for 'understanding and interpreting the rights of persons with disabilities and [are] central to monitoring the rights of persons with disabilities, providing benchmarks against which each right is measured'.[76] They should also be used as a benchmark

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[71] CRC Committee GC No. 12 (2009) para 2; CRC Committee GC No. 14 (2013) para 1.

[72] Gose M *The African Charter on the Rights and Welfare of the Child* (2002) 17.

[73] Fina VD 'Article 3 [General principles]' in Fina VD, Cera R & Palmisano G (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 120.

[74] The CRPD is the first international human rights treaty to include 'general principles' in a stand-alone article; unlike in the CRC, the principles are not attached to specific articles of the CRPD but apply across the whole Convention. The CRPD's general principles are expressly set out in the Convention as its general principles, unlike in the CRC where the Committee had to develop the cardinal principles through its reporting guidelines and general comments. Of the eight principles, the first five appeared in the draft art 2 prepared by the Working Group in 2004. These principles were little contested and only somewhat altered. Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* (2010) 45; Fina (2017) 120–21.

[75] Of the four general principles of the CRC, art 6, which concerns the right to life, survival and development, is the only one not included in the CRPD as a general principle. It is claimed, however, that this principle can be inferred from the principle of the best interests of the child. Willems, JCM 'Principles and promises in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities' in Waddington, L; Quinn, G & Flynn, E (eds) (2012) *European Yearbook of Disability Law* 13.

[76] OHCHR (2010) 17.

in which to evaluate whether a specific domestic law is in line with the 'object and purpose of the CRPD'.[77]

For the purpose of this thesis, the principle of non-discrimination will be discussed together with the respective obligations in the CRC and ACRWC. The reason for focusing on only the non-discrimination obligation is because it has a direct bearing on the alternative care of children with disabilities.

Below is an evaluation of the content and application of these principles in the CRC, ACRWC and the CRPD to the rights of children with disabilities to alternative care.

3.5.1 Non-discrimination

The provision on non-discrimination in article 2 of the CRC[78] provides that

> 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.

The non-discrimination obligation has been characterised as a norm of *jus cogens* to which derogation from and reservation to would not have any effect.[79] Article 2 is of particular importance to children with disabilities as it prohibits disability-based discrimination by listing disability among the prohibited grounds for discrimination.[80] It affords protection from

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[77] Lord JE & Stein MA 'The domestic incorporation of human rights law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington Law Review* 460; Fina (2017) 120.

[78] Hodgkin R & Newell P *Implementation Handbook for the Convention on the Rights of the Child* (2007) 22. Abramson (2008) 19; see also CRC Committee General Comment No. 3 'HIV/AIDS and the rights of the child' (2003) para 6; and CRC Committee General Comment No. 5 'General measures of implementation of the Convention on the Rights of the Child' (2003) (hereafter CRC Committee, GC No. 5. (2003) paras 4 and 12.

[79] Shabas WA 'Reservations to the Convention on the Rights of the Child' (1996) 18(2) *Human Rights Quarterly* 480.

[80] Byrne (2012) 423.

discrimination on the basis not only of the child's disability but that of his or her parents or guardians.[81]

The obligation to 'ensure' is also a high obligation and surpasses the obligation to 'respect' as it indicates that State Parties have to take positive steps to enable individuals to enjoy and exercise their rights.[82] The CRC Committee also reflects the same approach when it asserts that the obligation to ensure non-discrimination necessitates that the state take 'proactive measures' to ensure that every child is given equal opportunities to exercise the rights in the Convention.[83] Moreover, positive discrimination in the form of affirmative action on behalf of disadvantaged or vulnerable groups, including children with disabilities, is also a component of the obligation not to discriminate.[84]

In regard to the nature of states' obligations under the treaties, the CRC and the CRPD make the implementation of economic, social and cultural rights subject to progressive realisation to the maximum extent of states' available resources.[85] This does not include those obligations which must be implemented immediately in terms of international law, such as the obligation to ensure non-discrimination.[86] This implies that states have an immediate obligation to ensure that children with disabilities are not discriminated against in the provision of alternative care services. For instance, the routine placement of children with disabilities constitutes discrimination on the basis of disability. The immediate applicability of the non-discrimination obligation entails that states have to examine current legislation, policies, practices and

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[81] CRC, art 2; Cohen C 'The United Nations Convention on the Rights of the Child: A feminist landmark' (1997) *3 William & Mary Journal of Race, Gender, and Social Justice* 34.

[82] Buck (2014) 132.

[83] CRC Committee, GC No. 14. (2013) para 41.

[84] 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* 452.

[85] In the CRC Committee's view, the reference to 'resource availability' reflects a recognition of the reality that the full realisation of socio-economic rights is generally not achievable in a short period of time and can be hampered by lack of sufficient resources. CRC, art 4; CRC Committee, GC No. 5. (2003) paras 6 and 7. In relation to the CRPD, see art 4(2); Schulze (2010) 56–7; OHCHR (2010) 28–9.

[86] OHCHR (2010) 29; CRPD arts. 4(2) and 32; Besson (2005) 447.

procedures to ensure that children with disabilities are not discriminated against in alternative care measures and that they have equal access to family-based alternatives when they are deprived of their family environment.

In regard to obligations pertaining to the principle of non-discrimination in relation to children with disabilities, the CRC Committee has issued guidance in its General Comment No. 9.[87] Here, it is indicated that, notwithstanding limited budgetary resources, this principle is applicable to 'each child within (a state party's) jurisdiction'.[88] Thus, states cannot use lack of resources to justify discrimination against children with disabilities in alternative care measures.[89] The Committee expects State Parties to implement the right by, inter alia, including disability as a prohibited ground of discrimination in constitutions and legislation; providing effective and accessible remedies in case of violations; and taking extra measures to protect girls with disabilities and ensure their access to services and full inclusion in society.[90] Additional measures to implement the obligation to ensure non-discrimination include awareness-raising and educational campaigns aimed at diminishing and eradicating de facto discrimination against children with disabilities.[91]

Moreover, the duty not to discriminate applies not only to the state but to private institutions and individuals.[92] To this end, the CRC Committee requires that domestic legislation extend the obligation not to-discriminate to both the state and private sector.[93] Thus, in cases where states outsource the provision of alternative care to the private sector, the state remains

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[87] CRC Committee General Comment No. 9 'The rights of children with disabilities' (2006) (hereafter CRC Committee, GC No.9. (2006).

[88] Mezmur (2017) 411.

[89] CRC, art 20.

[90] CRC Committee, GC No. 9, paras 9(a)(b) and 10.

[91] CRC Committee, GC No. 9, paras 9(c).

[92] Hodgkin & Newell (2007) 22; Abramson (2008) 103.

[93] CRC Committee C*oncluding Observations on Zimbabwe* (1996) (UN Doc CRC/C/15/Add.55), para 12 as cited in Hodgkin & Newell (2008) 22.

responsible for ensuring that non-state actors are subject to and compliant with the non-discrimination obligation and equality norms in relation to children with disabilities.

The corresponding right to the non-discrimination principle is found under article 3 of the ACRWC, which uses similar wording to the CRC.[94] A major difference between the two provisions is that, unlike the CRC, the ACRWC fails to prohibit discrimination based on disability in that it does not list 'disability' among the prohibited grounds for discrimination.[95] This omission is regrettable as the ACRWC did not take advantage of the opportunity to reaffirm the rights of children with disabilities.[96] However, the omission should not be used as a basis to argue that the ACRWC permits disability-based discrimination, since article 3 makes it mandatory for 'every child' to enjoy the rights under the Charter without discrimination, a provision that includes children with disabilities.[97] The phrase 'other status' can also be extended to include 'disability', thereby affording children with disabilities protection against discrimination,[98] including in regard to their right to alternative care.

Under the CRPD, equality and non-discrimination are considered as both a principle and a stand-alone right.[99] The CRPD defines the discrimination on the basis of disability as

> any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.[100]

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[94] Gose (2002) 47. Article 3 provides: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognised 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.'

[95] Gose (2002) 48.

[96] Gose (2002) 48.

[97] See Gose (2002) 48; Combrinck H 'The hidden ones: Children with disabilities in Africa and the right to education' in Sloth- Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 310.

[98] Biegon J 'The promotion and protection of disability rights in the African human rights system' in Grobbelaar-du Plessis I & Van Reenen T (eds) *Aspects of Disability Law in Africa* (2011) 62.

[99] CRPD Committee General Comment No. 6 'Equality and non-discrimination' (2018), para 12 (hereafter CRPD Committee, GC No. 6. (2018). See CRPD, arts 3(b) and 5.

[100] CRPD, art 2.

The CRPD is distinct from the obligation stipulated in the CRC and the ACRWC in respect of the non-discrimination obligation as it contains a broad definition of discrimination on grounds of disability, by recognising 'discrimination on the basis of disability as including denial of reasonable accommodation'.[101] The CRPD's explicit recognition of the provision of reasonable accommodation as an integral component of the non-discrimination obligation has been acclaimed as offering the 'highest normative standard of the right to freedom from disability-based discrimination'.[102] Reasonable accommodation has been defined in the CRPD as a

> necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[103]

In other words, reasonable accommodation is an essential element in ensuring that children with disabilities are on a 'level playing field' as other people.[104] Reasonable accommodation is part of a broad legal framework necessary to achieve de facto and substantive equality.[105] The CRPD Committee in its General Comment No. 6 on equality and non-discrimination has emphasised that 'reasonable accommodation is also an intrinsic part of the immediately applicable duty of non-discrimination in the context of disability'.[106] In terms of this approach, the institutionalisation of children with disabilities deprived of family environment due to reasons such as lack of training of potential caregivers may amount not only to direct violation of a substantive right (article 23(5) but also to discrimination on the basis of disability and lack

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[101] CRPD, art 2.

[102] Chilemba EM 'International law on the rights of children with disabilities' in Kilkelly U & Liefaard T (eds) *International Human Rights of Children* (2019) 370.

[103] CRPD, art 2.

[104] McCallum R & Martin H 'Comment: The CRPD and children with disabilities' (2013) 20 *Australian International Law Journal* 21.

[105] McCallum (2013) 21.

[106] CRPD Committee, GC No. 6. (2018) para 23.

of reasonable accommodation. It should be noted that the obligation to ensure non-discrimination is an obligation of immediate realisation.[107]

In view of the above, it is established that the CRPD and the CRC provide stronger protection to children with disabilities in respect of explicitly prohibiting discrimination on the basis of the disability of the child. Furthermore, the CRC and ACRWC prohibit the discrimination of a child on the basis of the child's disability and the disability of parents or legal guardians in the enjoyment of the rights in the Convention. Discrimination by the state and private sector is also prohibited. The CRPD elevates the obligation to ensure non-discrimination by making the denial of reasonable accommodation constitute discrimination on the basis of disability.

The obligation to ensure non-discrimination has a direct bearing on alternative care for children with disabilities. First, the non-discrimination obligation is intended to address discriminatory practices that often lead to a child's deprivation of family environment and subsequent placement in alternative care.[108] In the context of the alternative care of children with disabilities, the obligation to ensure non-discrimination is of particular importance as social and structural discrimination play a major role in loss of family environment and placement in alternative care.[109] The right of non-discrimination would thus entail addressing all forms of disability-based discrimination that could cause unnecessary separation from families or impede family preservation.

Secondly, the non-discrimination obligation is also applicable as it entails taking the necessary measures to ensure that vulnerable groups, including children with disabilities, have equal opportunities in growing up in a family environment[110] such as through having equal access to

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[107] CRPD Committee, GC No. 6. (2018) para 12.
[108] Cantwell & Holzscheiter (2008) 6; Mezmur (2009) 138.
[109] See s 1(1) of Chapter one of this thesis, for further discussion on the factors driving the placement of children with disabilities in alternative care.
[110] Mezmur (2009) 138.

family-based alternative care when they are unable to live with their families. For instance, the routine placement of children with disabilities in institutional care can amount to direct discrimination on the basis of disability. In view of the discussion above on special measures and affirmative action to ensure equality, it is crucial for states to take positive measures to ensure non-discrimination against children with disabilities as regards access to family-based alternative care options like foster care. This could involve, for instance, raising awareness to change societal attitudes towards children with disabilities that perpetuate their placement in institutional care and impede efforts to find family-based alternatives. It could also involve providing proper training to foster carers to enable them to care for children with disabilities. In terms of article 20 of the CRC, preference is given to family-based alternative care over institutional care, and in view of the right of non-discrimination, this must apply equally to children with disabilities.[111] The above argument is in keeping with article 23 of the CRC in the sense that the primary purpose of the provision is the elimination of discrimination against children with disabilities in various aspects of their lives and the promotion of their 'active participation in the community' and social integration to the fullest extent possible.

Thirdly, the right to non-discrimination is applicable to 'guarantee equivalent rights and protections'[112] for children with disabilities who are already in alternative care. Once placed in institutions, children deprived of their family environment face 'widespread discrimination with respect to access to education, health and other social services'.[113] This right (to non-discrimination) serves to ensure that children with disabilities' rights to education and health care, among other things, are realised in alternative care. Considering that discrimination on the basis of disability is common in alternative care, attention needs to be given to children

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[111] Hodgkin & Newell (2007) 22. Abramson (2008) 337.
[112] Mezmur (2009) 138.
[113] Cantwell & Holzscheiter (2008) 6.

with disabilities in respect of article 20 of the CRC.[114] For children with disabilities, the denial of their rights on the basis of the severity of their impairment is common, not just in institutions but in their homes, foster homes, or other family-like residential placements.[115] These children may be thus be subjected to the culture of institutionalisation without actually being placed in institutions, by being kept at home, educated separately and isolated from or rejected by their communities.[116] For instance, the denial of access to health care for children with severe intellectual disabilities in institutions is based on the misconception that treatment would not make a difference anyway as there is no cure for such children.[117] Thus, the obligation to ensure non-discrimination would entail taking additional measures to ensure that children with disabilities, including children with severe intellectual disabilities, placed in alternative care enjoy all the rights in the Convention without discrimination, and to ensure that they equal have access to education, health care and social services.

3.5.2 The best interests of the child

Under the CRC, article 3(1) requires that the '[i]n 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'.[118] The CRC itself does not define what constitutes the best interests of the child,[119] a concept that remains shrouded in controversy and regarded as 'vague' due to the fact

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[114] Cantwell & Holzscheiter (2008) 6–7.

[115] WHO *Better Health, Better Lives: Children and Young People with Intellectual Disabilities and their Families* (2010) 10.

[116] WHO (2010) 10.

[117] WHO (2010) 11.

[118] See CRC, art 3(1). The principle of the best interests first appeared in the 1959 Declaration of the Rights of the Child and subsequently found its way into the CRC, ACRWC, and CRPD. The principle has become a benchmark against which to evaluate all the laws, policies and actions of a state that affect children. Mezmur (2009) 113; Cantwell N *The Best Interests of the Child in Intercountry Adoption* (2014) 6; Freeman M *A Commentary on the United Nations Convention on the Rights of the Child: Article 3: The Best Interests of the Child* (2007) 1.

[119] The definition of 'best interests' was not discussed further by the Working Group drafting the CRC, although there is evidence of attempts to give flesh to the concept in the first polished draft. Freeman (2007) 50; Hodgkin & Newell (2007) 37. However, the meaning of the concept did not receive any attention during the drafting stages, which has been attributed to the familiarity of the drafters with the term from its 'extensive usage in the domestic

that its meaning varies depending on 'social and political context, and the subjective point of view of the judge, parent, or social worker who applies it'.[120] Due to its indeterminate nature, the principle has been a topic of scholarly debate over the years.[121] The controversy is not limited to the meaning of the concept but extends to the 'weighting' or 'prioritisation' to be given to the best interests of the child relative to other interests.[122]

As mentioned above, the CRC Committee has issued a separate general comment on the principle of the best interests of the child, in addition to making various references to the concept in previous general comments.[123] The Committee asserts the main goal of the best interests standard is to 'fully and effectively' ensure the 'enjoyment of all the rights recognized in the Convention and the holistic development of the child'.[124] The Committee further requires the term 'development' to be interpreted in its broadest sense as to include 'the child's physical, mental, spiritual, moral, psychological and social development'.[125]Given the indeterminate nature of the principle, the Committee has acknowledged that its application requires 'a degree of flexibility' and that it be determined on a case-by-case basis.[126]

In an attempt to clarify the concept, the CRC Committee assigns three roles to the best interests of the child standard: a substantive right; a fundamental interpretative legal principle; and a rule of procedure.[127] The best interests of the child as a substantive right bestows a right on the

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law of many countries'. Kilkelly U 'The best interests of the child: A gateway to children's rights?' in Sutherland EE & Macfarlane LB (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) 53.

[120] Peleg N 'International children's rights Law: General principles' in Kilkelly U & Liefaard T (eds) *International Human Rights of Children* (2019) 141.

[121] See, for example, Mezmur (2009) 118; Elster J 'Solomonic judgments: Against the best interest of the child' 54 (1987) *University of Chicago Law Review* 12.

[122] Eekelaar J 'Two dimensions of the best interests principle: Decisions about children and decisions affecting children' in Sutherland EE & Macfarlane LB (eds) *Implementing Article 3 of the United Nationals Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) 99.

[123] CRC Committee GC No. 14. (2013).

[124] CRC Committee, GC No. 14. (2013), para 4.

[125] CRC Committee, GC No. 5 (2003), para 12.

[126] CRC Committee, GC No. 14. (2013) paras 39 and 32.

[127] CRC Committee, GC No. 14. (2013), para 6(a)–(c). Sutherland EE 'Article 3 of the United Nations Convention on the Rights of the Child: The challenges of vagueness and priorities' in Sutherland EE & Macfarlane LB (eds)

child that his or her interests are to be assessed and taken as a primary consideration in reaching decisions affecting him or her.[128] In this respect, it has been argued that a distinction needs to be made when applying the principle in decisions that directly and indirectly affect children.[129] The latter scenario requires decision-makers to focus on achieving the 'best' solution to the *issue to be decided* rather than on what outcome would be best for the child,[130] whereas in respect to the former case, the focus is on obtaining the '*best outcome for the child'*.[131] Choosing what is best for the child entails 'a holistic examination of a wide range of possible outcomes, and, subject to weighting, other relevant interests'.[132]

The best interests standard as an interpretative principle entails choosing an interpretation of a legal provision which best serves the child's best interests.[133] It is noteworthy that the best interests of the child under the CRC are considered *'a'* primary consideration as opposed to *'the'* primary consideration, which implies that the principle is not an overriding or paramount consideration.[134] The best interests of the child are therefore to be balanced with other interests.[135] In circumstances where there are conflicting interests, the consideration of the best interests of the child as 'a' primary consideration requires that these interests be given 'high priority' and not merely be 'one of several considerations'.[136]

Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Wellbeing (2016) 22.

[128] CRC Committee, GC No. 14. (2013), para 6(a).

[129] Eekelaar (2016) 5.

[130] Eekelaar (2016) 99–100.

[131] Eekelaar (2016) 99–100.

[132] Eekelaar (2016) 100.

[133] CRC Committee, GC No. 14 (2013) para 6(b).

[134] CRC Committee, GC No. 5 (2003) paras 36–40; Amanda L 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 17.

[135] Wording to the effect that the best interests of the child shall be 'the primary consideration' was considered but rejected during the drafting of the CRC in view of the broad scope of application – namely, 'in all actions considering children'. Freeman M (2007) 6. Detrick S (1992) 132–33.

[136] CRC Committee, GC No. 14 (2013) para 39.

The best interests of the child as a procedural rule requires that any decision-making process has to involve an 'evaluation of the possible impact (positive or negative) of the decision on the child or children concerned'.[137] The determination of the best interests of the child also necessitates 'procedural guarantees'; accordingly, states must demonstrate that decision-making has considered the best interests of the child and indicate how the child's interests have been weighed against other considerations.[138] Thus, although the best interests of the child will not always prevail over other interests, they should always be deliberately taken into account; it needs to be demonstratable that they have been explored and considered.[139] The obligation to 'consider' the best interests of the child entails taking into account those interests and not just simply observing them.[140]

The word 'action' under article 3(1) is said to include 'all acts, conduct, proposals, services, procedures and other measures' in addition to decisions.[141] In this case, failure to act or inaction and omission also falls under article 3(1); for instance, social welfare authorities are acting against the best interests of the child when they fail to take action to protect the child from abuse and neglect.[142]

In the context of alternative care, the indeterminate nature of the best interests principle implies that there cannot be a 'one solution fits all' approach in determining whether a certain form of alternative care is suitable to a particular child. Through all stages of placement in alternative care, the determination of what is in the best interests of a particular child with a disability should be carried out on a case-by-case basis. However, given the segregatory nature of

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[137] CRC Committee, GC No. 14 (2013) para 6(c).
[138] CRC Committee, GC No. 14 (2013) para 6(c).
[139] Hodgkin & Newell (2007) 38.
[140] Mahery P 'The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law' in Boezaart T (ed) *Child Law in South Africa* (2009) 319.
[141] See CRC Committee, GC No. 14 (2013) para 17.
[142] See CRC Committee, GC No. 14 (2013) para 18.

institutional care, there is ‘little evidence’ to claim that this form of care is in the best interests of a child.[143] The CRC Committee offers a list of ‘non-exhaustive and non-hierarchical’ elements to be considered by decision-makers in respect of the assessment and determination of the best interests of the child.[144] These elements include the child’s views; the child’s identity; preservation of family environment and maintaining relations; care, protection and safety; situations of vulnerability; right to health; and right to education.[145]

In applying the Committee’s interpretation of the elements to be considered in the context of the alternative care of children with disabilities, the determination of what is in the best interests of a given child with a disability in the context of alternative care entails taking into account his or her situation of vulnerability by considering the disability of the child when choosing the form of alternative care.[146] Consideration of situations of vulnerability in the context of disability also means taking into account that the best interests of a child with a disability will not be the same as those of other children without disabilities – in other words, it involves giving due regard to the ‘the different kind and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child’s uniqueness’.[147]

Another element to consider is whether a particular form of alternative care facilitates the care, protection and safety of the child – such care should involve not just protection from harm but promote the ‘material, physical, educational, and emotional needs, as well as needs for affection and safety’ of the child.[148] Consideration has to be given to whether the particular

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[143] UNICEF Innocenti Research Centre *Promoting the Rights of Children with Disabilities* (2007) 18.

[144] Given that the elements to be considered are non-exhaustive, it provides the opportunity for other elements to be considered. This is supported by the Committee’s allowance for other elements to be added in accordance with the ‘legal tradition’ of the state, unless those elements are contrary to the rights in the Convention. CRC Committee, GC No. 14 (2013) para 51–2. Sutherland (2016) 38.

[145] CRC Committee, GC No. 14 (2013) paras 52–79.

[146] CRC Committee, GC No. 14 (2013) para 71.

[147] CRC Committee, GC No. 14 (2013) para 76.

[148] CRC Committee, GC No. 14 (2013) para 71.

form of care allows the child to form an attachment to a caregiver[149] as well as to how well it protects the child from violence, abuse and exploitation.[150] When assessing and determining the best interests of children with disabilities in the context of placement in alternative care, it is also crucial to take into account the potential future harm and risk that the form of care presents to the child at the current time as well as in the long-term.[151]

Moreover, the principle has to be understood in the light of other rights under the CRC and in relation to the other three general principles.[152] Usually it is very unlikely that a measure not in line with the other three general principles of the CRC and ACRWC would be in the best interests of the child.[153] Thus, the other three general principles[154] are of particular importance in determining the best interests of a child or group of children.[155] Children who can form views have the right to express them in relation to what is in their best interests, and these views should be given due consideration.[156]

Along the same lines, the CRC Committee acknowledges the friction between welfare and rights, as it states that 'an adult's judgement of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'.[157] For instance in countries where the medical model of disability is still prevalent, the belief may be that institutional care is in the best interests of a given child with a disability deprived of family environment.[158] Thus, given the dangers of over-reliance on the best interests principle, it has been noted that

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[149] CRC committee, GC No. 14 (2013) para 72.
[150] CRC Committee, GC No. 14 (2013) para 73.
[151] CRC Committee, GC No. 14 (2013) para 74.
[152] Archard D and Skivenes M 'Balancing a child's best interests and a child's views' (2009) 17 *International Journal of Children's Rights* 2.
[153] Mezmur (2009) 119.
[154] These are the principles of non-discrimination, right to life and maximum survival and development, and respect for the views of the child.
[155] Mahery (2009) 318.
[156] Vandenhole W 'Children's rights from a legal perspective: Children's rights law' in Vandenhole W, Desmet E, Reynaert D, et al (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 32.
[157] CRC Committee, GC No. 14 (2013) para 4; Sutherland (2016) 34–5.
[158] Sutherland (2016) 34–5.

its application has to be balanced and complemented by the recognition of other rights in the Convention, including children's right to participate in matters affecting them.[159]

Although the scope of the General Principle is limited to article 3(1) of the CRC, article 3(3) has further implications for the right to alternative care, which will be discussed in later sections along with the obligation to periodically review alternative care placements.[160]

The ACRWC adopts a similar but higher standard than the CRC in requiring that the best interests of the child be *the* primary consideration in all actions concerning the child.[161] This means that they trump other interests.[162] In doing so, the ACRWC raises the bar by elevating the status of the best interests of the child above other considerations and not allowing them to override the interests of children. The phrase 'any person or authority' also suggests that the best interests principle in the ACRWC is broader than it is in the CRC.[163] Both provisions are said to be applicable to states as well as to non-state actors. It has been argued that this provision is important considering that, in many African countries, services to children are provided by private actors.[164]

The best interests standard is reiterated in article 20 of the CRC.[165] However, in the context of article 20, the best interests of the child are not intended to be applicable to decisions regarding placement in alternative care but to be used to determine the removal of a child from his or her family environment, as envisaged in article 9 of the Convention.[166] However article 25 of the ACRWC envisions that the best interests of the child are considered both in the decision to take

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[159] Sutherland (2016) 34–5.
[160] See s 3(8) of Chapter 3 of this thesis.
[161] ACRWC, art 4(1) (emphasis added). Chirwa (2002) 160; Mahery (2009) 319.
[162] Vandenhole (2015) 32.
[163] Freeman (2007) 21; Mezmur (2009) 117.
[164] Lim H *Legally Recognising Child-Headed Households Through a Rights-Based Approach: The Case of South Africa* (unpublished LLD thesis, University of Pretoria, 2010) 141.
[165] Article 20(1) of the CRC reads: 'A child temporarily or permanently deprived of his or her family environment, or in whose own *best interests* cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.' Emphasis added.
[166] Cantwell & Holzscheiter (2008) 48.

the child out of his or her family environment, as well as in any decision regarding the choice of an alternative placement.[167] It is argued that the best interests principle in the ACRWC is stronger than its counterpart, the CRC.[168]

3.5.3 The right to life, survival and development

The right to life, survival and development, derived from article 6 of the CRC, is one of the four general principles and therefore informs the interpretation of all the articles in the Convention.[169] Its counterpart can be found in article 5 of ACRWC, which also provides that every child has an inherent right to life, that this right must be protected by law, and that states are obligated to ensure the survival, protection and development of the child.[170] It has been stressed by the CRC Committee that this principle calls for an emphasis on children with disabilities, due to the significant barriers that they face in the enjoyment of their rights and are subjected to practices that undermine their survival and development.[171]

There is a direct link between child survival and child development in the sense that the maximum survival and development engages a process that begins from survival and advances to an outcome of optimum child development.[172] In respect of the 'development' aspect of the right, the CRC Committee defines the term broadly to include the 'physical, mental, psychological and social development' of the child.[173]

Both the CRC and the ACRWC obligate states to ensure the realisation of this right to the maximum extent possible.[174] As with other economic, social, and cultural rights contained in

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[167] See art 25(3) of the ACRWC. See also Cantwell & Holzscheiter (2008) 23.
[168] Cantwell & Holzscheiter (2008) 23.
[169] Article 6 of the CRC.
[170] ACRWC art 5(1) and (2).
[171] CRC Committee, GC No. 9 (2006) para 31. For further discussion on the principle of the child's life, survival and development, see generally 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).
[172] Dutschke M & Abrahams K 'Children's right to maximum survival and development' (2006) 1.
[173] See CRC Committee, GC No. 5 (2003), para 12.
[174] See CRC, art 6(2) and ACRWC, art 5(2).

the Convention, the obligation is toned down by a qualifying phrase – 'to the maximum extent possible'.[175] The phrase, appearing in article 5(2) of the ACRWC and 6(2) of the CRC, implies that measures in this respect are relative to the state's level of development.[176]

The principle of the right to life, survival and development is particularly relevant where children with disabilities deprived of their family environment are concerned because the way in which children are cared for has a profound effect on their survival and development.[177] Moreover, the significance of this principle lies in the consideration that the family is the main source of support for life, development and survival and that its absence thus leaves children exposed in a vulnerable situation.[178] The CRC Committee, in its Day of General Discussion on Children without Parental Care held in 2005, underscored the importance that growing up in a family environment has for children's development.[179] It recommends that states avoid the long-term placement of children in institutional care, as it does not meet the survival and developmental needs of children.[180] The extensive evidence of the negative effects of institutional care on the healthy development of the child also reaffirms the argument that placement of a child with a disability in institutional care is against the principle of the best interests of the child and the right to survival and development.[181] Such a setting often fails to provide children with an environment that allows them to develop holistically.[182]

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[175] Mower AG *The Convention on the Rights of the Child: International Law Support for Children* (1997) 31.

[176] Murungi LN *The Significance of Article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the Right to Primary Education of Children with Disabilities: A Comparative Study of Kenya and South Africa* (unpublished LL D thesis, University of the Western Cape, 2013) 148.

[177] Richter L *The importance of caregiver-child interactions for the survival and healthy development of young children: A review* (2004) 2.

[178] Assim (2013) 100.

[179] See CRC Committee, Day of General Discussion 'Children without parental care' (2005) para 665.

[180] See CRC Committee, Day of General Discussion 'Children without parental care' (2005) para 666.

[181] See s 1(1) of Chapter 1 of this thesis, for further discussion on the negative effects of institutionalisation on the development and wellbeing of children.

[182] See OHCHR Regional Office for Europe (2012) 9–10.

Moreover, the placement of children in institutions restricts the evolving capacities of the child as it results in the child becoming overly dependent on others and losing his or her autonomy.[183] Institutionalisation, in other words, often results in loss of independence and autonomy due to its segregated nature.[184] In the light of this, it can be argued that the principle of the right to survival and development entails the provision of family-based alternatives to children with disabilities deprived of their family environment as these alternatives can facilitate their right to survive and develop.

3.5.4 Child participation

The right to participation encompasses a number of rights, the most central of which is the right to express one's view and have that view taken into account.[185] Article 12(1) requires states to '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'. The phrase 'assure to the child' implies that states are under an obligation to take measures to ensure the realisation of the child's rights in this regard by adopting the necessary legislation and policy to this effect.[186]

The CRC Committee provides guidance on the practical requirements for implementation of the principle of participation. It has underscored that the phrase 'shall assure' in article 12 imposes a strong obligation that does not leave any room for states' discretion.[187] It has further been stressed that the word 'assure' implies a 'positive obligation to take proactive steps to encourage children to express their views; that is, to invite and encourage their input rather

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[183] Dunn A, Jareg E & Webb D *A last resort: The growing concern about children in residential care* (2003) 12.
[184] Dunn et al. (2003) 12.
[185] Vandenhole (2015) 32.
[186] Lansdown G *Every child's right to be heard: A guide on the UN Committee on the Rights of the Child General Comment No. 12* (2011) 19.
[187] CRC Committee, GC No. 12 (2009), para 19.

than simply acting as a recipient of views if children happen to provide them'.[188] In this regard, the importance of understanding the concept of child's participation from a rights-based perspective, as opposed to a matter of choice, has been stressed.[189] This is particularly important considering adults' inclination to rationalise not giving due weight to the views of children.[190] The Committee further points out that the phrase 'capable of forming his/her own views' should not be viewed as a 'limitation' but be interpreted to the advantage of the child by assuming that the child is capable of forming his or her own views.[191] It has also stressed that article 12 does not impose a minimum age limit at which children can start expressing their views freely, nor does it put a restriction on the contexts in which children can express their views.[192] As such, the CRC recognises that children are capable of forming views from a very early age, and refers to children's 'evolving capacity' for decision-making.[193]

Through the insertion of the term 'maturity', article 12 implicitly acknowledges that a child's degree of perception is not 'uniformly' related to his or her age and therefore should not be the only determining factor in evaluating the relevance of a child's views.[194] The CRC Committee has described maturity as

> the ability to understand and assess the implications of a particular matter [… It] must therefore be considered when determining the individual capacity of a child. Maturity is difficult to define; in the context of art 12, it is the capacity of the child to express her or his views on issues in a reasonable and independent manner. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of the child.[195]

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[188] Lundy L "Voice" is not enough: Conceptualising article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 933–34.

[189] Lundy (2007) 931.

[190] Lundy (2007) 931.

[191] CRC Committee, GC No. 12 (2009), para 20.

[192] CRC Committee, GC No. 12 (2009), para 21.

[193] CRC Committee, GC No. 12 (2009), paras 84–5.

[194] CRC Committee, GC No. 12 (2009), para 29.

[195] CRC Committee, GC No. 12 (2009), para 30.

Taking into account the factors contributing to level of understanding of a child, including information, experience, environment, social and cultural expectations, and levels of support, the Committee requires that the capacity of a child be determined on a case-by-case basis.[196] Moreover, the provision is significant in that it requires the views of the child not just to be heard but to be given 'due weight.'[197] In this regard, it has been argued that although the phrase 'in accordance with the age and maturity of the child' may be misconstrued to restrict the right of the child to participate, however the 'age and maturity of the child' only determines the level of weight that the child's views should receive.[198] This indicates that the child's right to express his or her views is not dependent on his or her level of maturity.[199] However, this may be problematic to the extent that it is ultimately leaves the determination of the level of weight to be given to the views of the child to the discretion of adults' 'perception of children's capacity'.[200]

The principle of child participation is particularly important in realising the rights of children with disabilities, given that in most societies children with disabilities are considered inferior, incapable and unworthy of having an opinion.[201] In respect of children with disabilities, the implementation article 12 presents an added challenge as the general presumption that children lack the maturity to express views is heightened in the case of children with disabilities as they experience a two-fold discrimination – both on the basis of their age and disability.[202] In this regard, in relation to children with disabilities, additional measure may be necessary to ensure the realisation of this right.[203]

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[196] CRC Committee, GC No. 12 (2009), para 29.

[197] CRC, art 12(1).

[198] Lundy (2007) 935.

[199] Lundy (2007) 935.

[200] Lundy (2007) 937.

[201] Kilkelly U 'Disability and children: The Convention on the Rights of the Child (CRC)' in Quinn G & Degenner T (eds) *Human Rights and Disability* (2002) 121.

[202] Byrne (2012) 430.

[203] Lansdown (2011) 19.

The CRC Committee in its General Comment No. 12 explicitly takes into account the needs of children with disabilities in respect of facilitating their participation in a number of circumstances.[204] First, it requires states to ensure the implementation of article 12 without discrimination on the grounds listed in article 2 of the CRC, including disability, and further requires states to address discrimination that excludes marginalised children from participating in all matters affecting them on an equal basis with others.[205] The Committee also recognises the obligation imposed on states by article 7(3) of the CRPD, which requires children with disabilities to be provided with the appropriate assistance to enable them to express their views freely and have those views be given due weight.[206] The Committee strengthens this position by requiring states to ensure the participation of children with disabilities by facilitating the use of 'any mode of communication' through which they could express their views.[207] This could be achieved by, among others, the provision of assistive devices and the involvement of interpreters to facilitate the participation of children with disabilities.[208]

The CRC Committee has stressed the importance of participation of children with disabilities in General Comment No. 9 and requires states to consider the evolving capacities of children with disabilities in respecting their views.[209] It has expressed concern over the fact that it is common for the views of children with disabilities not be sought and heard during separation and placement processes.[210] To this end, the Committee urges states to increase their efforts in ensuring that the views of children with disabilities are taken into account and to support their

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[204] CRC Committee, GC No. 12 (2009), paras 9, 20, 100 and115. Nonetheless, the CRC Committee has faced criticism for failing to adequately elaborate on the content of article 12 in the context of children with disabilities in its GC No. 12. Sandland R 'A clash of Conventions? Participation, power and the rights of disabled children' (2017) 5 *Social Inclusion* 100.

[205] CRC Committee, GC No. 12 (2009), para 75.

[206] CRC Committee, GC No. 12 (2009), para 78. Despite the Committee's reference to art 7(3) in its GC No. 12, it has been criticised for failing to elaborate on the provision in a detailed manner. Sandland (2017) 99–100.

[207] CRC Committee, GC No. 12 (2009), para 21.

[208] Lundy (2007) 936.

[209] CRC Committee, GC No. 9 (2006), para 32; CRC Committee, GC No. 12, paras 31 and 84.

[210] CRC Committee, GC No. 9 (2006), para 48.

participation during the ‘evaluation, separation and placement process in out-of-home care, and during the transition process’.[211]

A similar provision in the ACRWC requires that a child capable of communicating his or her own views should be accorded the opportunity to do so directly or through an impartial representative.[212] The child’s view has to be taken into consideration by the relevant authorities. The phrase ‘who is capable of communicating his or her views’ is said to be limiting in that this ability may be attached to ‘age, level of education and the ability to communicate verbally or to write’ and may be used to marginalise children who cannot communicate in traditional ways but have to rely on other means such as body language.[213] For children with disabilities, this provision is restrictive if they are only able to communicate in non-traditional ways such as sign language.[214] The ACRWC also limits the scope of the provision to judicial and administrative proceedings, thereby overlooking other ‘forums or spaces’ where the participation of the child may be necessary.[215] In addition, while the CRC ties the principle of child participation to the evolving capacities of the child, the ACRWC is silent on this.

In relation to the participation of children in alternative care measures, the importance of the right has been stressed as the process involves placing a child outside of his or her family environment.[216] In recognition of this, the CRC Committee requires states to enact legislation to provide for the right of the child to information regarding his or her placement in alternative care and opportunities for meaningful participation during all stages of the decision-making process.[217] Hence, it is crucial that children are given the opportunity to participate in all stages

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[211] CRC Committee, GC No. 9 (2006), para 48.
[212] ACRWC, art 4(2).
[213] Viljoen F ‘The African Charter on the Rights and Welfare of the Child’ in Boezaart T (ed) *Child Law in South Africa* (2009) 338; Gose (2002) 125; Hansungule & Boezaart (2017) 48.
[214] Hansungule & Boezaart (2017) 48.
[215] Hansungule & Boezaart (2017) 48.
[216] Assim (2013) 104.
[217] CRC Committee, GC No. 12 (2009), para 97.

of the alternative care placement process, including in decisions regarding the form of alternative care to be provided as well as in matters affecting the child post-placement in alternative care.[218] The Committee further requires states to establish mechanisms to ensure that 'children in all forms of alternative care, including in institutions, are able to express their views and that those views be given due weight in matters of their placement, the regulations of care in foster families or homes and their daily lives'.[219] To obtain the informed consent of the child in question, it is necessary to ensure that the child has been given all the necessary information regarding the effect of the form of alternative care selected.[220]

Additionally, the Committee requires that children's views be taken into account in the development of 'child-friendly care services'.[221] States are required, furthermore, to establish an independent mechanism, such as a children's ombudsperson, to monitor compliance with criteria and standards in respect of the provision of alternative care.[222] The Committee requires this institution to be empowered with a mandate to have unrestricted access to residential care settings to be able to directly solicit the views of children placed in such settings and to evaluate whether the obligation under article 12 is being adhered to by the institution.[223]

The second clause of article 12 requires that the child be given opportunities to express his or her views freely and have those views be given due weight 'in any judicial and administrative proceedings affecting the child'.[224] The participation of children in legal proceedings can be realised through direct participation or indirectly through a representative or other measure of

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[218] Lim (2010) 146.
[219] CRC Committee, GC No. 12 (2009), para 97.
[220] CRC Committee, GC No. 12 (2009), para 56.
[221] CRC Committee, GC No. 12 (2009), para 97.
[222] CRC Committee, GC No. 12 (2009), para 97; Lansdown (2011) 88.
[223] This is significant in protecting the rights of children with disabilities in alternative care, particularly those that are placed in institutions, as they face a higher risk of violence and abuse than other children in alternative care and those living with their families. CRC Committee, GC No. 12 (2009), para 97. Lansdown (2011) 86.
[224] CRC, art 12(2).

support.[225] The Committee notes that the scope of this provision is not restricted and applies across all judicial proceedings affecting the child;[226] hence, it includes legal proceedings regarding the alternative care of children with disabilities. In this regard, states are required to ensure that the views of children are sought and given due weight in decisions about their placement, development of care plans and family and parental visits.[227]

Along the same lines, the UN Guidelines require that decision-making in the best interests of the child to determine the most appropriate alternative care for the child, to involve consultation with the child at all stages and to have legal representation in any legal proceedings.[228] To this end, the Guidelines require states to take every effort to provide sufficient resources and training for those involved in the decision-making process of determining the best form of care.[229]

In view of the various obligations relating to the right of children with disabilities to participate in the applicable standards, it can be inferred that both the CRC and ACRWC provide for the views of the child to be heard and given due weight.[230] These two provisions, however, contain restrictive phrases such as ‘capable of communicating his/her views’ and ‘capable of forming his or her own views’ that could be used to undermine the right. As will be discussed below, the CRPD provides better protection in this regard as it does not attach such restriction to the right.[231]

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[225] Article 12 of the CRC read with art 12(3) of the CRPD.
[226] CRC Committee, GC No. 12 (2009) para 32.
[227] See CRC Committee, GC No. 12 (2009) para 54.
[228] UN Guidelines, para 57.
[229] UN Guidelines, para 57.
[230] Article 12 of the CRC and art 4(2) of the ACRWC.
[231] Article 7(3) of the CRPD.

3.6 An analysis of the CRC, ACRWC and CRPD

3.6.1 Children with disabilities under the CRC

In addition to its being the first globally binding instrument to unequivocally prohibit discrimination on the basis of disability,[232] the CRC is also the first to dedicate a provision to the rights of children with disabilities, which it does so in article 23.[233] However, it has been emphasised that assigning a particular provision to the rights of children with disabilities should not be taken to mean that the rights of these children are confined to that provision.[234] Rather, the entitlements afforded to children with disabilities in article 23 should be recognised without disregarding the general principles or other provisions of the CRC.[235]

Article 23(1) requires State Parties to recognise that children with disabilities 'should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'.[236] The formulation of this provision has been criticised by commentators as failing to provide children with disabilities with 'effective equal

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[232] Byrne (2012) 423.

[233] Combrinck (2008) 306. Article 23 of the CRC reads: '1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. 2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. 4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.'

[234] CRC Committee, GC No. 9 (2006), para 5.

[235] UNICEF Innocenti Research Centre (2007) 7.

[236] CRC, art 23(1).

protection of human rights' on an equal basis with children without disabilities.[237] The manner in which the first paragraph of the provision is phrased neither grants rights to children with disabilities, nor imposes obligation on states to take measures to realise the right.[238] In addition, in terms of article 23(2), states are obliged to recognise children with disabilities' right to 'special care', but measures to ensure that children with disabilities receive such care are not specified.[239]

Article 23(2) further requires states to extend assistance to children with disabilities provided they are eligible and apply for such services. This provision has been criticised for failing to bestow an unqualified right of assistance on children with disabilities, as it is made subject to conditions such as eligibility, application for such services, and the availability of resources.[240] In the same vein, article 23(3) has been criticised on the ground that it does not bestow an explicit right to have access to or benefit from the services set forth in the clause.[241] Furthermore, this clause requires the provision of services 'in a manner conducive to the child's achieving the *fullest possible social integration*', which has been said to imply that, for some children with disabilities, achieving full integration might not be feasible.[242]

Given the limitations of article 23, it has been argued that the provision reflects the medical approach in which children with disabilities have been viewed historically as 'objects of charity and passive recipients of welfare' rather than rights-holders.[243] The provision to a large extent

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[237] Skarstad K & Stein MA 'Mainstreaming disability in the United Nations treaty bodies' (2018) 17 *Journal of Human Rights* 4.
[238] Kilkelly (2002) 192.
[239] Kilkelly (2002) 192.
[240] Kilkelly (2002) 192–93; Combrinck (2008) 307; Skarstad & Stein (2018) 4.
[241] Kilkelly (2002) 193.
[242] Rosenthal E 'The right of all children to grow up in with a family under international law: Implications for placement in orphanages, residential care and group homes' (2019) 25 *Buffalo Human Rights Law Review* (emphasis added).
[243] Sabatello (2013) 468–69; Skarstad & Stein (2018) 4; Lord JE 'Child rights trending: Accommodating children with disabilities in the global human rights framework and US foreign policy' (2017) 16 *Whittier Journal of Child and Family Advocacy* 3 and 6.

views children with disabilities through the lens of the medical model of disability in which they are thought of as subjects of protection requiring 'special care', 'treatment' and 'rehabilitation'.[244] It can easily be misconstrued as characterising children with disabilities as needing primarily 'protective measures rather than [being] active holders of rights'.[245] The CRC's medical-based approach in providing for children with disabilities may result in failure to ensure their rights in accordance with the human rights model of disability.[246]

This poses a challenge to the implementation of the rights of children with disabilities, as states are disinclined to implement 'welfare rights', which are often perceived as resource-intensive and imposing an excessive burden on states.[247] This is evident as the provision makes the right to assistance subject to available resources.[248] Article 23 thus does not reflect the CRC's overall recognition of children as active agents and bearers of rights, suggesting that the welfare approach is the 'only – or at least the paramount – aspect that ought to be addressed' when it comes to children with disabilities.[249] Because of the limitations of the disability-specific provision, it has been contended that the other provisions of the CRC present a stronger potential to protect the rights of children with disabilities by virtue of the non-discrimination obligation in article 2 of the Convention.[250]

The CRC Committee identifies article 23(1) as crucial to the protection of children with disabilities.[251] It states furthermore that children with disabilities should be included in society and that states should take measures to realise this goal.[252] On this basis, one could argue that

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[244] Byrne (2012) 424.
[245] Byrne (2012) 424.
[246] Nonetheless, the counter argument to this assertion could be that, the reference to 'special measures' implies an obligation to take 'specific measures' that are geared towards achieving their substantive equality on an equal basis with children without disabilities. Chilemba (2014) 45.
[247] Sabatello (2013) 468–69
[248] CRC, art 23(2). Sabatello (2013) 468–69
[249] Sabatello (2013) 468–69.
[250] Kilkelly (2002) 193.
[251] CRC Committee, GC No. 9 (2006), para 11.
[252] CRC Committee, GC No. 9 (2006), para 11.

when children with disabilities are deprived of their family environment, states should ensure that alternative-care responses for these children facilitate their inclusion in society. It has been argued that article 23 upholds the idea that a child's right to a family environment is connected to the child's participation in the community.[253]

In the context of alternative care, the medical model of disability has been used to justify the institutionalisation of persons with disabilities.[254] It is also known to reinforce the practice of keeping children with disabilities in separate facilities, including in special schools and other systems of segregation, under the guise of providing services considered 'special' to their needs.[255] Thus, in the context of alternative care, the language of the CRC and its medicalised approach to disability could be misinterpreted as a validation of the institutionalisation of children with disabilities.

The CRC Committee's General Comment No. 9 is for the most part in line with the CRPD, and purports to draw upon the social model of disability.[256] However, it also seems to perpetuate the medical-based approach to disability by making reference to the 'stress and difficulties' that families of children with disabilities have to bear,[257] thus implying that children with disabilities are burdens.[258]

3.6.2 Children with disabilities under the ACRWC

The ACRWC affords children with disabilities much the same rights as the CRC. While its article 13 addresses children with disabilities under the degrading term, 'handicapped

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[253] Weisz V & Tomkins AJ 'The right to a family environment for children with disabilities' (1996) 51 *American Psychologist* 1243.
[254] Bediako KA 'Relevance of disability models from the perspective of a developing country: An analysis' (2013) 3(11) *Developing Country Studies* 123.
[255] Schulze (2010) 16.
[256] Murungi (2013) 75; CRC Committee, GC No. 9 (2006), para 7.
[257] CRC Committee, GC No. 9 (2006), para 27.
[258] Byrne (2012) 425.

children',[259] it has been noted that, at the time of drafting, the term 'handicapped' was not considered derogatory to persons with disabilities.[260] It is clear that the intention of the ACRWC was not to undermine the human dignity of children with disabilities.[261] Nevertheless, article 13 may be interpreted as legitimising the segregation of children with disabilities, which usually entails their institutionalisation, as it identifies, similar to the article 23 of the CRC, distinct needs and measures to consider in relation to children with disabilities, rather than adopting a rights-based approach.[262] The provision of assistance to children with disabilities is also made subject to available resources, and the ACRWC fails to include education, health care and rehabilitation facilities as among the services they are entitled to.[263] On a positive note, this provision is said to offer children with disabilities a higher level of protection than article 23 of the CRC in that it is not linked to the parents or caregivers' situation.[264] Article 13 of the ACRWC is also specific about measures as regards children with disabilities, unlike the CRC, which (as discussed above) is broad and vague about the rights of children with disabilities.[265]

3.6.3 Children with disabilities under the CRPD

The CRPD devotes its article 7 to the rights of children with disabilities. The first paragraph recalls the non-discrimination principle of article 2 of CRC, which prohibits discrimination on the basis of a disability. Conversely, article 7(1) 'differs in its positive formulation of an "equal basis" provision'.[266] The phrase 'on an equal basis with others' links the non-discrimination

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[259] ACRWC, art 13.
[260] Wakefield L & Assim UM 'Dawn of a new decade? The 16th and 17th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2001) 2 *African Human Rights Law Journal* 717.
[261] Wakefield & Assim (2011) 717.
[262] Article 13(1) of the ACRWC provides: 'Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self- reliance and active participation in the community.'
[263] Gose (2002) 90–1.
[264] Gose (2002) 90.
[265] Gose (2002) 89.
[266] Willems (2012) 3.

principle to the rights of children with disabilities.[267] Thus, for states to fulfil their obligation under article 7(1), a precondition is ensuring the explicit prohibition of discrimination against children with disabilities in domestic laws and policies.[268]

Hence, from the outset, it can be observed that the CRPD provides children with disabilities with a high level of protection by making it an explicit requirement that they are to enjoy all rights in the Convention 'equally with others'. Neither the CRC nor ACRWC explicitly require that children with disabilities be treated or considered equally with other children. Moreover, the CRPD does not link the needs of children with disabilities with that of their parents, as is the case in the CRC. Article 7 of the CRPD also diverges from the medicalised approach employed in article 23 of the CRC by recognising the link between impairment and social barriers.[269]

Article 7(2) requires that the best interests of the child must be a primary consideration in all actions concerning children with disabilities, reflecting the position of the CRC.[270] This provision, however, does not impose any higher obligation on State Parties than under the CRC.[271] In its General Comment No.1 on the right of persons with disabilities to equal recognition before the law, the CRPD Committee requires states to replace the best interests standard with 'the best interpretation of will and preferences' standard for decision-making.[272] In making the link between article 7 and 12 of the CRPD, the Committee first reiterates that the best interests standard in article 7(2) and states that it should be a primary consideration in

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[267] CRPD Committee, General Comment No. 6 'Equality and non-discrimination' (2018) (hereafter CRPD Committee, GC No. 6 (2018) para 7.

[268] Broderick A 'Article 7 [Children with disabilities]' in Fina VD, Cera R & Palmisano G (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 201.

[269] Byrne (2012) 428; Broderick (2017) 200.

[270] CRC, art 3(1).

[271] McCallum & Martin (2013) 23.

[272] In respect of the support offered to persons with disabilities in exercising his or her legal capacity, the CRPD Committee stresses that in circumstances where best efforts to ascertain the person's 'will and preferences' fail, that the 'best interpretation of will and preferences' should replace the 'best interests' standard. CRPD Committee, GC No. 1 (2014), para 21.

all actions concerning children with disabilities. However, the Committee later endorses the 'will and preferences' standard by stating that compliance with article 12 entails states to 'examine their laws to ensure that the *will and preferences* of children with disabilities are respected on an equal basis with other children'.[273] Hence, the CRPD Committee seems to have 'conflated' both paradigms in respect of children with disabilities.[274] Some scholars have welcomed the replacement of 'best interests' with 'the best interpretation of will and preferences' standard for adults by contending that the former follows a 'paternalistic' approach, leaving room for substitute decision-making[275] and hence failing to confer persons with disabilities the right to equal recognition before the law.[276] In the same vein, another scholar argues that

> the application of the best interests principle brings with it a significant risk of paternalism. It has been underpinned with welfarist discourse in relation to childhood generally. In the disability context, the application of the concept of 'best interests' still leads to the danger of over-reliance on medical opinion and the adoption of an approach that is not rights-based.[277]

Others have cautioned against making comparisons between the two standards, pointing out that despite the challenges posed by the application and determination of the best interests standard, ruling it out or implementing an 'either/or' approach overlooks 'the level of complexity that exists on both sides of the issue'. [278] This is particularly true in the absence of any guidance on the content of the 'best interpretation of will and preferences' standard.[279] This would indicate that the Committee's interpretation, while it is narrated in the context of article 12, may raise questions on whether it may influence its future interpretation of other provisions,

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[273] CRPD Committee, General Comment No. 1. 'Article 12: Equal recognition before the law' (2014) (hereafter CRPD Committee, GC No.1 (2014)), para 36.
[274] Sandland (2017) 99.
[275] Keys M Article 12 [Equal recognition before the law] in Fina VD, Cera R & Palmisano G (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 267.
[276] Keys (2017) 267.
[277] Broderick (2017) 208.
[278] Skowron P 'Giving substance to "the best interpretation of will and preferences"(2019) 62 *International Journal of Law and Psychiatry* 125.
[279] Skowron (2019) 125.

including article 7(2) of the CRPD. This may be problematic as the Committee has not yet provided guidance on what is meant by 'will and preferences'.

Furthermore, article 7(3) requires states to ensure that they accord due weight to the views of children with disabilities in accordance with their age and maturity and on an equal basis with other children.[280] This right is of particular importance to children with disabilities, whose interests and voices often go unnoticed and undervalued.[281] It is notable that unlike the CRC, the CRPD does not limit a child's right to participate with a qualifying phrase, i.e. 'a child who is capable of forming his or her own views',[282] and gives weight to the right by requiring the principle of respect for the evolving capacities to inform the interpretation of rights in the Convention, including article 7(3).[283] Moreover, with regard to facilitating the participation of children with disabilities, the CRPD provides greater protection than article 12 of the CRC by placing an obligation on states to provide assistance that is disability- and age-appropriate.[284] In doing so, the CRPD acknowledges the multiple forms of discrimination that children with disabilities face on the grounds both of childhood and disability.[285] This disability-appropriate assistance can include the use of assistive devices, communication aids and interpreters.[286] In addition, it is noteworthy that the provision does not make participation weighed on the degree of the child's disability but on his or her age and maturity.[287] This means that all children with disabilities must be enabled to participate actively in all matters concerning them by providing them with appropriate assistance, with particular attention paid to those children with severe disabilities.[288] To enhance the direct and indirect participation of children with disabilities in

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[280] CRPD, art 7(3).

[281] Children's Rights International Network (CRIN) 'The UN Committee on the Rights of Persons with Disabilities and children's right: An analysis' (2015) 12; Broderick (2017) 208–9.

[282] CRC, art 12(1); Byrne (2012) 430.

[283] Byrne (2012) 430.

[284] CRPRD, art 7(3).

[285] Byrne (2012) 429.

[286] Broderick (2017) 208.

[287] Broderick (2017) 208.

[288] Broderick (2017) 208.

court proceedings, the CRPD requires that they be provided with 'procedural and age-appropriate accommodations' and that those working in the administration of justice undergo disability-related training.[289]

The rights of children with disabilities provided for under article 7 are to be applied in relation to the other rights and obligations under the CRPD.[290] Thus, when states, in terms of article 23(5), provide alternative care to children with disabilities who are unable to live with their families, they are under an obligation to consider the rights of children with disabilities set out in article 7. Accordingly, states have to provide alternative care to children with disabilities equally with other children and with regard to their best interests as a primary consideration. This entails that children with disabilities are not discriminated against on the basis of disability in the provision of alternative care or the forms of alternative care provided. The application of article 7(3) in the context of alternative care would further entail that the views of children with disabilities to be sought and given due consideration in decisions regarding their placement in alternative care in accordance with their age and maturity and on an equal basis with other children. In addition, children with disabilities should be provided with the assistance they may require to facilitate their effective participation in matters relating to their placement in alternative care.

In addition, the right of children with disabilities to participate is linked to article 3(h) of the CRPD which concerns respect for their evolving capacities.[291] Article 3(h) of the CRPD draws upon article 5 and 23(1) of the CRC,[292] which requires states to 'ensure dignity, promote self-

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[289] See CRPD, art 13(1) and (2).
[290] Broderick (2017) 198.
[291] Broderick (2017) 208.
[292] Byrne (2012) 427. Article 5 of the CRC 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'.

reliance and facilitate the child's active participation in the community'.[293] However, the CRPD elevates the protection of children with disabilities to a higher level than the CRC by not restricting the evolving capacities of children with disabilities in the context of parental direction and guidance, but instead requiring the principle to guide the interpretation of all rights in the Convention.[294] Thus respect for the evolving capacities of children with disabilities in the CRPD has a cross-cutting application throughout the substantive rights and obligations relating to children with disabilities in the Convention and informs the interpretation of those rights, including the alternative care of children with disabilities.

It is noteworthy that the principle of respect for the evolving capacities of the child does not refer to respect for the rights of children with disabilities in the CRPD, as their right should be respected regardless of capacity.[295] Rather it concerns itself with where 'responsibility for the exercise of the rights lies'.[296] It reaffirms the fact that just like children without disabilities, children with disabilities also have inherent capacity as well as the ability to gradually develop that capacity.[297] The principle has utmost relevance to children with disabilities who commonly face many barriers to achieve recognition of their capacity to exercise their rights and are considered as 'incapable of demonstrating any meaningful capacity or competence' to make decisions and participate in society. [298] This often results in undue or excessive restriction of a child's autonomy by parents or others, allegedly in the interest of the child's welfare and undermining their overall independence.[299] Hence, this provision lays a strong foundation to intensify the participation of children with disabilities in decision-making processes that affect

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[293] Fina (2017) 134.
[294] Byrne (2012) 427.
[295] Lansdown G *The Evolving Capacities of the Child* (2005) ix.
[296] Lansdown (2005) ix
[297] Broderick (2017) 198.
[298] Byrne (2012) 427.
[299] Broderick (2017) 208–09.

them.[300] In the context of alternative care, this principle would entail that due regard is given to developing capacities of children with disabilities in the decision-making process regarding measures related to their care, including the determination of the most suitable form of alternative care.

Moreover, the principle of respect for the evolving capacities of children with disabilities is significant as there is a general presumption that children, particularly for children with disabilities, do not have legal capacity, as they are generally regarded as incompetent of making decisions.[301] This misconception has an adverse effect on children with disabilities as it restricts their capacity to gradually become independent members of society.[302] In this instance, it is important to balance the responsibility of parents to protect their children with disabilities in situations where they do not yet possess the legal capacity to make decisions independently with respect for their evolving capacities to exercise their rights.[303] Moreover, article 12 affords an added layer of protection to children with disabilities as it provides for equal legal capacity and recognition before the law for all persons, regardless of age,[304] and requires states to take the necessary measures to ensure that children with disabilities have access to the support they may need in order to exercise this right.[305] In its General Comment No. 1, the CRPD Committee insists that the disability of a person regardless of the severity or type of impairment cannot be used to justify the denial of legal capacity and calls for states to abolish regimes that allow substitute decision-making to ensure that persons with disabilities have legal capacity on an equal basis with others.[306] Although article 12 has attracted a debate on whether the CRPD

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[300] Broderick (2017) 210–11.
[301] Broderick (2017) 208–09.
[302] Broderick (2017) 208–09.
[303] Broderick (2017) 208–09.
[304] CRPD Committee, General Comment No. 1. 'Article 12: Equal recognition before the law' (2014) (hereafter CRPD Committee, GC No.1 (2014) para 36.
[305] CRPD, art 12(3) and (4).
[306] CRPD Committee, GC No. 1 (2014), paras 9 and 28.

allows substitute decision-making, the Committee has made it clear that the 'human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision- making'.[307] The total prohibition of substituted decision-making arguably has implications for children with disabilities, including the elevation of respect for their evolving capacities to exercise their own rights. It also has the potential to strengthen efforts to provide disability- and age-appropriate support to children with disabilities in order to enable them to participate in the decision-making process in matters regarding their placement in alternative care regardless of the nature or severity of their impairment.

3.7 The right to alternative care: Analysis of the CRC, ACRWC and CRPD

Article 20 of the CRC, 25 of the ACRWC and 23(5) of the CRPD are the principal provisions that define and guide the discourse on children with disabilities deprived of a family environment. Article 20 of the CRC and 25 of the ACRWC are similar in formulation and thus discussed jointly.[308] In view of the various ways in which children end up being deprived of their family environment and the diverse forms that 'alternative care' for such children can take, article 20 is a 'particularly far-reaching obligation for States'.[309] The provisions governing

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[307] CRPD Committee, GC No. 1. (2014), para 3.

[308] Article 20 of the CRC provides: '1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child. 3. Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.' Article 25 of the ACRWC 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. State Parties to the present Charter: (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children; (b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters. 3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child ethnic, religious or linguistic background.'

[309] Cantwell & Holzscheiter (2008) 4.

the alternative care of children with disabilities deprived of their family environment contain concepts that need to be unpacked so as to elucidate the respective state's obligations. Thus, the following sections analyse the key elements of articles 20 of the CRC and 25 of the ACRWC.

3.7.1 Children deprived of their family environment

Under the CRC, article 20 applies to children, including children with disabilities, who are 'temporarily or permanently deprived of their family environment' or where 'in their own best interest cannot be allowed to remain in their family environment'.[310] The phrase 'or in whose own best interests cannot be allowed to remain in that environment' under article 20 should be interpreted in the light of article 9, which allows for the removal of a child from his or her parents in cases where abuse or neglect of the child by the parents is involved.[311] It has been noted that although term 'deprived' connotes the removal of the child through the intervention of a third party, the intention of the drafters appears to have been that the provision is applicable to 'any situation where a child is bereft of parental care, for whatever reason'.[312] Thus, in addition to state actions such as deportation and imprisonment, the use of the word 'deprived' in articles 20(1) of the CRC and 25(2)(a) of the ACRWC encompasses other scenarios, such as poverty and illness, that could deprive a child of a meaningful family environment.[313] The scope of term 'children deprived of their family environment' is hence broad and embraces various categories of children who require alternative care, including orphans due to HIV/AIDS and other causes of death[314] as well children who are victims of abandonment and displacement.[315]

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[310] CRC, art 20(1).
[311] CRC, art 9(1). Cantwell & Holzscheiter (2008) 38.
[312] Cantwell & Holzscheiter (2008) 38.
[313] Mezmur (2009) 166.
[314] Assim (2013) 108.
[315] Hodgkin & Newell (2007) 277; Mezmur (2009) 166.

Along the same lines, it is noteworthy that the CPRD clearly stipulates that the disability of either parent or child is not a sufficient reason for removing the child from his or her family.[316] This provision is only qualified with a condition that such separation is deemed to be in the best interests of the child by competent authorities and that it is subject to judicial review and determined in accordance with applicable law and procedures.[317] The provision's explicit statement that no child should be separated from his or her parent on the basis of a disability of the child or either of the parents is important as children with disabilities are often removed from their parents and placed in institutional care.

In addition, the ACRWC in its article 25 includes 'a child who is parentless' in the category of children to whom the state has the obligation to provide alternative care, thereby suggesting a broader scope of children that are entitled to the provision of alternative care.[318] The word 'parentless' has led some to argue that the provision is applicable to children who are deprived of parental care irrespective of the presence of extended families.[319] The mere absence of parental care poses multiple risks to children, such as abuse and maltreatment at the hands of their caregivers.[320] Thus, the ACRWC's approach in placing an obligation on the state to provide special protection and assistance to children who are deprived of parental care and not necessarily receiving care from extended families affords an additional protection over and above what the CRC provides.[321]

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[316] CRPD, art 23(4).
[317] CRPD, art 23(4).
[318] ACRWC, art 25(2)(a).
[319] Lim (2010) 128–29.
[320] Lim (2010) 129.
[321] Lim (2010)104.

3.7.2 Special protection and assistance

Both the CRC and the ACRWC require the provision special protection and assistance to children deprived of their family environment by the state.[322] Thus the duty to provide special protection and assistance requires direct state action, however it may be subject to available resources.[323] However, articles 20(1) of the CRC and 25(1) of the ACRWC do not specify what State Parties need to do to implement the right, thereby leaving what 'special protection and assistance' entails in the context of alternative care open to interpretation. It has been argued that the provision of alternative care could be considered as one form of protection and assistance to be provided by the state.[324] The CRC Committee seems to follow the same approach, as it requires states to provide special protection and assistance to unaccompanied children in the form of alternative care.[325] However, the reporting guidelines suggests that the provision of 'alternative care' and 'special protection and assistance' are not one and the same, as they set out different measures to be adopted to ensure the implementation of those obligations.[326] Whereas there is no elaboration in the CRC and the ACWRC about what is meant by 'special protection and assistance', this duty has been linked to the obligation to periodic review of placement in alternative care, which is provided in article 25 of the CRC (as discussed below).[327]

The provision of special protection and assistance is not unique to the CRC and ACRWC. It is often used in human rights law to offset the special vulnerability of certain groups particularly

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[322] CRC, art 20(1); ACRWC, art 25(1).
[323] Vandenhole W, Türkelli GE & Lembrechts S *Children's Rights: A Commentary on the Rights of the Child and its Protocols* (2019) 225.
[324] Phillips (2011) 46.
[325] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & CRC Committee 'Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the CRC Committee on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (2017) para 11.
[326] CRC Committee, General guidelines for periodic reports: 20/11/96 (1996) (UN Doc CRC/C/58).
[327] See s 3(8) of this chapter for further discussions on the obligation of states to periodically review alternative care placements. Lim (2010) 136.

vulnerable as a result of their circumstances, status or both, such as children with disabilities, and thus to enable the fulfilment of their rights.[328] In this context, it can be argued that 'special protection and assistance' entails taking into account the multiple vulnerabilities of children with disabilities[329] – both on the grounds of their age and disability when determining the form of alternative care as well as in relation to the type of care provided to the child post-placement. It has also been emphasised that the provision of special protection and assistance should follow an individualistic approach that embraces the needs of the child in question and the nature of alternative care selected.[330] For example, a child with a disability in institutional care might need different measures of 'special protection and assistance' than a child with a disability in foster care. For children with disabilities in institutional care, the provision of 'special protection and assistance' will thus entail identifying the specific vulnerabilities they face in any given setting and providing support and protection.

Article 20 requires that the state *provide* special protection and assistance,[331] with the obligation to 'provide' being stronger than the obligation to 'ensure', as indicated above. Thus, the state bears the 'direct, active and absolute responsibility' to afford special protection and assistance to the child, as opposed to overseeing the necessary action.[332] As a rule, this denotes that the state should be the direct service provider[333] and might include alternative care in view of the claim that it is seen as one form of 'special protection and assistance'.[334] At any event, the state remains the primary duty-bearer to determine, make available and oversee 'the

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[328] Cantwell & Holzscheiter (2008) 49–50.
[329] Lim (2010) 132–36.
[330] Lim (2010) 136.
[331] Emphasis added. CRC, art 20(1).
[332] Cantwell & Holzscheiter (2008) 50.
[333] Cantwell & Holzscheiter (2008) 50.
[334] Cantwell & Holzscheiter (2008) 50.

effective use of all necessary resources for guaranteeing that the required services are provided', even in cases where delivery of this is delegated to non-state actors.[335]

The ACRWC does not make it clear who is responsible for the provision of special protection and assistance.[336] This is mainly because it leaves out the term 'provided by the State', unlike the CRC.[337] This omission has been interpreted to mean that the obligation to provide special protection and assistance is obligatory on the state and society in general.[338]

3.7.3 Alternative care under the CRC, ACRWC and UN Guidelines

Articles 20(2) of the CRC and 25(2)(a) of the ACRWC require states to provide alternative care to children who are temporarily or permanently deprived of their family environment or cannot be allowed to remain in that environment. It is to be noted that State Parties' obligation to provide alternative care in both provisions is a strong one. The combination of the words 'shall' and 'ensure' in articles 20(2) of the CRC and 25(2)(a) of the ACRWC creates a high degree of obligation on State Parties to provide alternative care to children deprived of their families.[339] Furthermore, the word 'ensure', as opposed to 'provide', implies that the state does not necessarily have to be the direct service provider but has to take 'active steps to satisfy itself that each child requiring alternative care receives it'.[340] However, even though it is allowed that the state delegate the provision of alternative care services to private sectors, the state remains in charge of ensuring the provision of this care in an effective manner and in accordance with the standards set forth for the public and private sectors.[341]

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[335] Cantwell & Holzscheiter (2008) 50.

[336] Gose (2002) 103.

[337] See CRC, art 20(1) in comparison with art 25(1); Gose (2002) 103.

[338] Gose (2002) 103.

[339] Cohen C & Davidson H *Children's Rights in America: The U.N. Convention on the Rights of the Child Compared with United States Law* (1990) 38 (discussing how the combination of the words 'shall' and 'ensure' impose a higher level of obligation).

[340] Cantwell & Holzscheiter (2008) 51.

[341] Cantwell & Holzscheiter (2008) 51.

Furthermore, states are required to provide alternative in accordance with their national laws.[342] The *Travaux Preparatoires* reveal that the insertion of the phrase 'in accordance with their national laws' and the non-exhaustive nature of the list of alternative care forms provided in article 20 are due to an acknowledgement that different countries employ different forms alternative care for children who cannot be cared for by their own parents.[343] Thus, it indicates an effort to avoid imposing on states fixed forms of alternative care that may not be applicable in their respective legal systems, such as adoption.[344] Thus, the phrase 'in accordance with their national laws' is not meant to limit the State Party's obligation but to give states discretion as to the type of alternative care to be provided.[345]

While determining the most suitable alternative care for children, both the CRC and the ACRWC require states to give fair consideration to the 'desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'.[346] In relation to the phrase 'continuity in a child's upbringing', it is not clear whether the intention of the drafters was to avoid multiple placements or to maintain the child's socio-cultural and educational background by placing him or her in a similar environment.[347] However, there are arguments in support of both positions. It has been argued that this provision aims to uphold the desirability of maintaining contact with the nuclear and extended family, as well as the wider community, and of placing children in foster care or adoptive families from the same

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[342] CRC, art 20(2).

[343] Detrick S *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 336.

[344] Detrick (1999) 336.

[345] Detrick (1999) 336.

[346] See the CRC, art 20(3); ACRWC, art 25(3). This obligation is linked to various provisions of the CRC, ranging from the child's right to know and be cared for by parents to the preservation of the child's identity and the right of children of 'ethnic, religious or linguistic minorities' to enjoy their culture, practice their religion and use their language. Hodgkin & Newell (2007) 288. See CRC, arts 7(1), 8(1) and 30**.**

[347] Vandenhole W 'Children's rights from a legal perspective: Children's rights law' in Vandenhole W, Desmet E, Reynaert D, et al (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 227.

cultural background[348] in order to enable children to form lasting attachments with their caregivers.[349]

In the same vein, the UN Guidelines emphasise that the determination of alternative care options for children should give due regard to the 'desirability' of keeping the child close to his or her familiar surroundings to keep the child's educational, cultural and social life intact and to preserve contact and pursue possible reunification with the family.[350]

Article 25(2)(b) of the ACRWC requires states to take measures to ensure the reunification of children with parents or relatives in the case of internal or external displacement caused by armed conflicts or natural disaster.

The CRC provides a list of possible forms of alternative care that is non-exhaustive and includes foster care, adoption, *kafalah* of Islamic law or, 'if necessary, placement in suitable institutions for the care of children'.[351] This provision is unique in the sense that it lists adoption among the potential alternative care options that should be made available to children deprived of their family environment. According to the UN Guidelines, the process leading to adoption is considered as one form alternative care.[352] Nonetheless once adoption is formalised, it is no longer alternative care and falls under the scope of parental care.[353] Cantwell and Holzscheiter argue in support of this approach, emphasising that adoption is a 'potential outcome to be sought for a child in alternative care than a form of such care *per se*'.[354] They further argue that the distinction between adoption and other forms of alternative care is evident in the way that

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[348] Hodgkin & Newell (2007) 289.

[349] Hodgkin & Newell (2007) 289.

[350] UN Guidelines, para 11**.**

[351] CRC, art 20(3).

[352] UN Guidelines, para 30(b).

[353] UN Guidelines, para 30(b).

[354] Cantwell & Holzscheiter (2008) 52.

alternative care placements are subject to periodic review in accordance with article 25 of the CRC, whereas adoption is not subject to such review once finalised.[355]

It should be noted that the ACRWC does not explicitly mention 'Kafalah of Islamic law' or adoption. Moreover, due to the omission of the commonly used alternative care options for children who are deprived of family environment in Africa such as kinship care, it has been argued that the options mentioned in the ACRWC 'do not reflect the African concepts of alternative care'.[356]

Article 20 lacks clarity with regard to the hierarchy of alternative care options. The vagueness of this provision has proven controversial and drawn criticism from some scholars.[357] Article 20 sets out the order of enumeration, with family-based alternative care options listed first (foster placement, *kafalah* and adoption) and the consideration of institutional care being followed by the phrase 'or, if necessary', implying that institutional care should be treated as a last resort in the placement of children deprived of family environment in alternative care.[358] This phraseology indicates that priority is accorded to family-based alternative care over institutions.[359] However, the CRC has been criticised for failing to explicitly assert State Parties' obligation to ensure the development of family-based care arrangements, which could play a role in ensuring the availability of such care, particularly in countries where institutional care is the dominant form of care available for children deprived of their family environment.[360]

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[355] Cantwell & Holzscheiter (2008) 52.

[356] Gose (2002) 103.

[357] Smolin D 'The two faces of the intercountry adoption: The significance of the Indian adoption scandals' (2005) 35 *Seton Hall Law Review*; Dillon S 'The missing link: A social orphan protocol to the United Nations Convention on the Rights of the Child' (2008) 1 *Human Rights & Globalization Law Review* 9.

[358] Hodgkin & Newell (2007) 282; Detrick S (1999) 336.

[359] Mezmur (2009) 333.

[360] Carlson RR 'A child's right to a family versus a State's discretion to institutionalise the child' (2016) 47 *Georgetown Journal of International Law* 941.

The CRC Committee has explicitly underscored the exceptional and subsidiary nature of measures that imply the institutionalisation of children is only considered appropriate once other family-based alternative care options are exhausted.[361] The Committee strongly advises states not to place young children in institutions.[362] In this regard, it has been argued that it may be crucial to put laws in place that prescribe the minimum age for the institutionalisation of children.[363] In its General Comment No. 9, the CRC Committee acknowledges a large number of children with disabilities are in institutional care as they are routinely placed in such institutions in countries around the world.[364] Moreover, the Committee notes that the services provided in institutions often do not meet minimum standards, leaving children with disabilities susceptible to abuse.[365] To this end, it recommends that states place children in institutions as a last resort in balancing necessity and the best interests of the child.[366] Although the General Comment's consideration of institutions as a measure of 'last resort' may have been progressive at the time it was adopted, it is not cognizant of the higher standard upheld by the CRPD in relation to the alternative care of children with disabilities, which will be discussed in the following section.[367] It has been contended that in practice 'the last resort' standards fails to provide the same level of protection for children with disabilities as other children.[368] This is so because most countries lack service or support systems for families caring for children with disabilities, which in turn leads to placement in institutions, 'family-like' residences or

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[361] CRC Committee, General Comment No. 13 'The right of the child to freedom from all forms of violence' (2011), para 47(d)(iii). CRC Committee, Day of General Discussion 'Children without Parental Care' (2005), paras 654, 665 and 666.

[362] CRC Committee, General Comment No. 7 'Implementing child rights in early childhood' (2005) (hereafter CRC Committee, GC No. 7 (2005) para 36.

[363] Mezmur (2009) 340.

[364] CRC Committee, GC No. 9 (2006) para 47.

[365] CRC Committee, GC No. 9 (2006) para 47.

[366] CRC Committee, GC No. 9 (2006) para 47.

[367] Rosenthal E 'The right to live and grow up in a family for all children' (2018) available at *http://bit.ly/2N2E1YN* (accessed 23 February 2019) 3. For further discussion on the right to alternative care of children with disabilities under the CRPD, see s 3(7)(4) of this chapter.

[368] Rosenthal (2018) 3.

group homes being the only option available and resulting in children with disabilities having access only to 'a second-class system of services'.[369]

Furthermore, General Comment No. 9 calls for the 'transforming of existing institutions' into 'small residential care facilities' to facilitate the enjoyment of the rights of children.[370] However, the call to 'transform existing institutions' could easily be misconstrued to mean that states should embark on 'fixing up' institutions, which may result in diverting much-needed resources from more positive care options.[371] This goes against the CRPD's Committee's position, as residential care, whether small or large, is considered a violation of the right of the child to live in the community.[372] The language of General Comment No. 9 has also been criticised for failing to clearly stipulate that placement in an institution is meant to be temporary once a child is placed in such care as a last resort.[373] In view of this, as well as the fact that article 20 of the CRC lists 'suitable institutions' among the potential forms of alternative care, it has been argued that the CRC Committee's position supports fragmentary institutional reform rather than a transformation of alternative care systems towards the end of achieving full community integration.[374]

However, it becomes clear that the intention of the CRC Committee is not to 'favour long-term institutionalization', given that the General Comment urges states to design programmes for the deinstitutionalisation of children with disabilities.[375] In doing so, it encourages states to pursue the possibility of either reunifying children with disabilities with their families and

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[369] Rosenthal (2018) 3; Rosenthal (2019) 109–10.
[370] CRC Committee, GC No. 9 (2006), para 47.
[371] Rosenthal E 'A mandate to end placement of children in institutions and orphanages: The duty of Governments and donors to prevent segregation and torture' in Protecting Children against Torture in Detention: Global Solutions for a Global Problem (2017) 29.
[372] CRPD Committee, General Comment No.5 'Article 19: Living Independently and being Included in the community' (2017) (hereafter CRPD Committee, GC No. 5 (2017), paras 16(c) and 37.
[373] Rosenthal (2017) 29.
[374] Rosenthal (2017) 29.
[375] CRC Committee, GC No. 9 (2006), para 49.

extended families or considering placement in foster care.[376] States are required to support parents and extended families to prepare for the child's return to their care.[377] In circumstances where foster caregivers are hesitant to take the responsibility for caring for a child with a disability, the CRC Committee recommends that designated organisations be trained and supported towards the provision of appropriate care for a child with a disability.[378]

In this regard, the UN Guidelines acknowledge that effective formal alternative care services require a range of options for emergency, short- and long-term care to ensure that children are provided with suitable alternative care to meet their individual needs.[379] Residential care is recognised as complementary to family-based alternative care and among the alternative care options that should be available.[380] However, its use is subject to strict conditions, including ensuring that such care is used only when it is 'appropriate, necessary and constructive' for the child concerned and considered to be in his or her best interests.[381] In other words, there should be a range of placement options, including family-based and other care settings, to choose from to find the most suitable alternative care for the individual child.[382] This indicates that while suitable care can be provided in certain residential facilities, it is unlikely to be assured in 'institutions'.[383] In respect of children under the age of three, however, it is clearly stated that they should not be placed in residential care but in family-based settings, subject to a number of exceptions.[384]

In addition, the UN Guidelines, in dealing with support for after-care, require states to prevent the unnecessary institutionalisation of children with disabilities through the provision of 'an

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[376] CRC Committee, GC No. 9 (2006), para 49.
[377] CRC Committee, GC No. 9 (2006), para 49.
[378] CRC Committee, GC No. 9 (2006), para 46.
[379] UN Guidelines, para 54.
[380] UN Guidelines, para 23.
[381] UN Guidelines, para 21.
[382] Cantwell (2014) 34.
[383] Cantwell (2014) 34.
[384] UN Guidelines, para 22.

appropriate support system'.[385] States are expected to develop a 'deinstitutionalization strategy, with precise goals and objectives' aimed at gradually eliminating 'large residential care facilities (institutions)',[386] taking into account the needs of children with disabilities.[387]

In respect of the ACRWC, its article 25(2)(a) does not include the phrase 'or, if necessary' in its text. It is noteworthy, however, that this provision refers to 'alternative family care' (as opposed to only 'alternative care' in the CRC). One could argue that the use of the phrase 'alternative family care' means that the state should provide only family-based alternative care solutions to children deprived of their family environment.[388] However, given that institutional care is listed as one form of alternative care in article 25(2), the argument would seem far-fetched.[389] Nonetheless, it is safe to assume from the wording of the article that priority is given to 'family-based' or 'family-like' alternatives for children without parental care over a non-family alternative such as placement in institutions generally.[390]

One area of uncertainty in articles 20 of the CRC and 25 of the ACRWC is that reference is made to 'suitable institutions' without elaboration of what these 'institutions' entail. In Chapter 2 of this thesis, it was said that while the terms 'institution' and 'residential care' have been used interchangeably, the latter is essentially an umbrella term for various non-family-based alternative care settings, among them institutions.[391] In the UN Guidelines, the term 'institutions' is used to refer to 'large residential care facilities'.[392] Chapter 2 of this thesis defined 'institutions' to mean 'residential care settings where children are looked after in any public or private facility, staffed by salaried carers or volunteers working predetermined

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[385] UN Guidelines, para 132.
[386] UN Guidelines, para 23.
[387] Cantwell et al. (2012) 44.
[388] Lim (2010) 136.
[389] Lim (2010) 136.
[390] Cantwell & Holzscheiter (2008) 23.
[391] See s 2(6)(3) of Chapter 2 of this thesis for further discussion on the differences between the terms 'institution' and 'residential care'.
[392] UN Guidelines, para 23.

hours/shifts, and based on collective living arrangements, with a large capacity'.[393] In previous chapters, it was noted that their placement in institutions often has dire effects on children in general and children with disabilities in particular.[394] Given this, the CRC's prescription of institutions as a potential form of alternative care, along with their 'suitability' for any children at all, has been questioned.[395] It has also been contended that the phrase 'suitable institutions' gives State Parties the 'discretion' to place children in institutions, which in turn is likely to result in excessive dependence on this form of care even when family-based alternatives are available.[396]

Others question the role of 'intermediary care options' such as 'group homes' if 'institutions' refers to only to orphanages, arguing that the 'suitable institutions' to which the CRC and ACRWC refer may be 'group homes', given that these types of homes are smaller in size and located in the community.[397] In this regard, it has been argued that although orphanages and small-group homes fall under the category of 'institutions', group homes resembling a family environment 'might withstand a better scrutiny under human rights law'.[398] It has further been contended that small-group homes for certain children could be in their best interests in some circumstances, such as to avoid the separation of siblings who wish to remain together, to protect the rights of adolescents in difficult circumstances, or for a child who has suffered multiple unsuccessful foster placements.[399]

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[393] See s 2(6)(3) of Chapter 2 of this thesis. This definition was proposed by the NGO Working Group on Children without Parental Care to differentiate institutional care from other forms of residential care. Better Care Network, Family for Every Child, International Social Service, et al *Identifying basic characteristics of formal alternative care settings for children* Discussion paper, NGO Working Group on Children without Parental Care in Geneva, (a sub-group of the NGO Group for the Convention) (2013) available at *http://bit.ly/35vS8fg* (accessed 18 March 2017) 15.
[394] See s 1(1) of Chapter 1 of this thesis for further discussion of the negative effects of institutional care on children in general and children with disabilities in particular.
[395] Rosenthal (2017) 22**;** see also generally Carlson (2016).
[396] Carlson (2016) 940.
[397] Mezmur (2009) 331–32.
[398] Mezmur (2009) 332.
[399] Human Rights Watch *Without Dreams: Children in Alternative Care in Japan* (2014) 87–8; Hodgkin & Newell (2007) 282.

Moreover, the recent UN global study on children deprived of liberty maintains that the majority of children with disabilities placed in institutions are deprived of liberty in that they 'cannot leave of their own free will'.[400] Article 37(b) of the CRC provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily', and asserts that 'the arrest, detention or imprisonment of a child shall be in compliance with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.[401] It was also found that children with disabilities face 'unique, disability-specific forms of deprivation of liberty' as they are systematically placed in institutions on the grounds of their disability.[402] Such practices are rooted in the medical model of disability.[403] Hence, the study adopts the approach of the CRC by confirming that the placement of children with disabilities in institutions should be a measure of resort as it results in deprivation of liberty.[404] At the same time, in line with CRPD's Committee's position, the study urges states to 'make every effort to place children in the wider family, and failing that, in the community in a family-type environment'.[405] Thus, the routine placement of children with disabilities in institutions is in violation not only of the rights to live in the community, to be free from discrimination, to survival and development, but also the right not to be deprived of liberty arbitrarily.

3.7.4 Alternative care under the CRPD

The CRPD provides for the alternative care of children in its article 23(5), which declares that 'States Parties shall, where the immediate family is unable to care for a child with disabilities,

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[400] UN General Assembly *Global Study on Children Deprived of Liberty* (2019) (UN Doc A/74/136) (hereafter UNGA *Global Study on Children Deprived of Liberty* (2019)) available at http://bit.ly/37Aua43 (accessed 30 June 2019) para 62.

[401] CRC, art 37(b). The global study adopts the wider definition of deprivation of liberty and places of detention as encompassing all settings where children may be deprived of liberty, including 'orphanages' and children's homes. The study's definition is in accordance with art 11(b) of the Havana Rules of 1990 and art 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 2002. UN General Assembly *Global Study on Children Deprived of Liberty* (2019) para 18.

[402] UNGA *Global Study on Children Deprived of Liberty* (2019) para 33.

[403] UNGA *Global Study on Children Deprived of Liberty* (2019) para 33.

[404] UNGA *Global Study on Children Deprived of Liberty* (2019) para 20.

[405] UNGA *Global Study on Children Deprived of Liberty* (2019) para 20.

undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting'. In other words, if children with disabilities do end up being separated from their parents or deprived of their family environment and in need of alternative care, the first priority should be to arrange for them to live with extended families. If this is not possible, the next priority should be looking for alternative care options which are family-based. Nonetheless, the phrase 'undertake every effort' does not appear to impose a strict obligation on states to 'ensure' the provision of alternative care, as is the case in the CRC and ACRWC. It has been argued that this should not weaken the enforceability of the right and that the provision imposes immediate measures to be taken to ensure the enforcement of the right.[406]

The provision also does not list possible alternative care options for children with disabilities, unlike its counterparts, articles 20 of the CRC and 25 of the ACRWC. It is evident that the provision neither prohibits nor prescribes non-family-based alternative care, particularly institutions as a means to care for children with disabilities who are deprived of their family environment. It has been emphasised that the reason for the inclusion of this provision in article 23 is to prevent the institutionalisation of children with disabilities in all its forms.[407] This indicates an implicit recognition of the negative consequences that long-term institutionalisation have for children with disabilities. Hence, article 23(5) of the CRPD is progressive in that it moves in the direction of deinstitutionalisation of care for children with disabilities, thereby preventing the devastating effect of institutions on the lives of children with disabilities. The CRPD clearly enhances the level of protection offered to children with

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[406] Rosenthal E 'The right to live and grow up in a family for all children' (2019) Disability Rights International European Network on Independent Living Validity and TASH, Position Paper available at *http://bit.ly/2QO1gH4* (accessed 25 August 2019)152.

[407] Fina (2017) 436; Byrne (2012) 432. During the drafting of the CRPD, there was a concern about ending the placement of children with disabilities in institutions, group homes and orphanages. Lord (2017) 17.

disabilities in the context of alternative care through its efforts to prevent the institutionalisation of children with disabilities.

Thus, instead of removing children from the community and relying on institutional care as a common response, it is imperative to shift the focus to training, recruiting and supporting foster families to allow them to appropriately care for children with disabilities and to developing other family- and community-based alternatives where children with disabilities can be looked after as well as fully participate in their own communities.[408] Thus, the likelihood of children with disabilities being cared for in a family-based care is significantly strengthened in the CRPD in comparison with the CRC and ACRWC, which do not put as much emphasis on community- and family-based care as the former.[409]

The CRPD Committee's jurisprudence supports the protection of children with disabilities in the context of alternative care by prohibiting their placement in institutions. This is evident in the Committee's Concluding Observations on State Parties' reports, where it has given extensive attention to the over-representation of children with disabilities in institutional care and the predominance of the medical-based approach to their care.[410] Likewise, for instance in respect of South Africa, the Committee has expressed concern about the large number of children with disabilities 'placed in centres for children or less regulated special service centres, all of which are based on long-term institutionalisation, often located far from their families and communities, isolated and lacking properly trained staff'.[411] Accordingly, it has recommended that the government avoid the institutionalisation of children with disabilities by

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[408] Lansdown G *See me, hear me: A guide to using the UN Convention on the Rights of Persons with Disabilities to promote the rights of children* (2009) 96.

[409] Lansdown (2012) 16.

[410] See CRPD Committee Concluding Observations: Guatemala (UN Doc. CRPD/C/GTM/CO/1, 2016) paras 23 and 24; Kenya (UN Doc. CRPD/C/KEN/CO/1, 2015) paras 13–14; Armenia (UN Doc. CRPD/C/ARM/CO/1, 2017) para 11; Serbia (UN Doc. CRPD/C/SRB/CO/1, 2016) para 13; Slovakia (UN Doc. CRPD/C/SVK/CO/1, 2016) para 23; Thailand (UN Doc. CRPD/C/THA/CO/1, 2016) para17.

[411] CRPD Committee Concluding Observations: South Africa (UN Doc. CRPD/C/ZAF/CO/1, 2018), para 12(c).

ensuring that they are provided with support within family and community settings and that adequate budget is allocated to this end.[412] The Committee also recommends regular training of care workers and parents of children with disabilities and acceleration of awareness-raising programmes that promote the importance of family and community-based support.[413]

Furthermore, the Committee expects states reports to identify the measures taken to ensure that children with disabilities in need of alternative care are not institutionalised and instead 'provided with alternative care from the wider family, or in a family setting in the wider community'.[414] To this end, it encourages states to promote and support family settings, including foster care and adoption.[415] Moreover, it encourages them to provide community-based services for children with disabilities and support for their families.[416] With a view to eliminating the institutionalisation of children with disabilities, the Committee urges states to devise plans for deinstitutionalisation and the engagement of community-based care.[417] In the meantime, it recommends that states provide children with disabilities in institutional care with adequate early childhood intervention and development services[418] and ensure that staff in institutions are trained properly as well as regularly monitored and evaluated. To this end, states are encouraged to develop complaint mechanisms accessible to children with disabilities.[419]

The position of article 23(5) of the CRPD is supported by article 19 of the CRPD, which provides for the right of persons/children with disabilities to live in the community. The provision requires that states 'take effective and appropriate measures to facilitate full

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[412] CRPD Committee Concluding Observations: South Africa (UN Doc. CRPD/C/ZAF/CO/1, 2018), para 13(d).
[413] CRPD Committee Concluding Observations: South Africa (UN Doc. CRPD/C/ZAF/CO/1, 2018), para 13(d).
[414] CRPD Committee, Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedures, (UN Doc. CRPD/C/3, 2016) para 135.
[415] CRPD Committee Concluding Observations: Armenia (UN Doc. CRPD/C/ARM/CO/1, 2017), para 12(a).
[416] CRPD Committee Concluding Observations: Bolivia (UN Doc. CRPD/C/BOL/CO/1, 2016), para 18; Moldova (UN Doc. CRPD/C/MDA/CO/1, 2017) para 17.
[417] CRPD Committee Concluding Observations: Armenia (UN Doc. CRPD/C/ARM/CO/1, 2017), para 12(a); Slovakia (UN Doc. CRPD/C/SVK/CO/1, 2016) para 24.
[418] CRPD Committee Concluding Observations: Serbia (UN Doc. CRPD/C/SRB/CO/1, 2016), para 14.
[419] CRPD Committee Concluding Observations: Tunisia (UN Doc. CRPD/C/TUN/CO/, 2011), para 17.

enjoyment' by persons with disabilities of the right, including their complete inclusion and involvement in the community.[420] The right to live in the community, which predates the CRPD and originated in some of the most fundamental human rights,[421] is founded on the notion that all human beings are born equal in dignity and rights and that all life is of equal worth.[422] In respect of children with disabilities, the CRC was the first binding treaty to reflect the right to community integration of children with disabilities by asserting their right to active involvement in the community under article 23.[423] The right to community living for all children is echoed in the extensive protections that are afforded to the family 'so that it can fully assume its responsibilities within the community'.[424]

Although the CRC recognises the need for community-based support and services for children with disabilities, the CRPD articulates the right to live and be included in the community for children/persons with disabilities comprehensively in international human right instruments under article 19.[425] The provision is unambiguous in asserting that all children/persons with disabilities have the right to live in the community with choices equal to others.[426] This provision is applicable not only to persons with disabilities but to children with disabilities, including those who may require extensive support due to the severity of their impairment.[427]

Arguably, article 19 is also applicable in the context of alternative care of children with disabilities – in the sense that institutional care is used as a form of alternative care for children

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[420] CRPD, art 19.
[421] Rosenthal E *The rights of children with disabilities in Vietnam* (2009) 26; Council of Europe Commissioner for Human Rights *The right of people with disabilities to live independently and be included in the community* (2012) 9.
[422] CRPD Committee, GC No. 5 (2017), para 2.
[423] CRC, art 23(1). In addition to recognising the right to active participation in the community, the CRC obligates State Parties to provide social services including education, training, health-care services, and rehabilitation services necessary for the enforcement of the right.
[424] See the CRC, Preamble.
[425] Council of Europe, Commissioner for Human Rights (2012) 21.
[426] Rosenthal (2009) 27.
[427] Rosenthal (2009) 27.

with disabilities, one that removes them from public view and deprives them of their right to live in the community and thus violates their rights. The CRPD Committee supports this position in its most recent General Comment on article 19, stating that 'being included in the community refers to life settings outside *residential institutions of all kinds*'.[428] The Committee has taken a firm stand in stating that neither small-group homes nor large-scale institutions promote the rights of children to be included in the community in that 'there is no substitute for the need to grow up with a family'.[429] The Committee maintains that "family-like" institutions are still institutions and are no substitute for the need to grow up with a family',[430] and says that '[f]or children, the core of the right to live independently and be included in the community entails a right to grow up in a family'.[431] This is significant as, more often than not, the development of 'group homes' has become 'the default solution that presumes to embody the principles of the right to live in the community'.[432] In this manner, article 19 prohibits the placement of children with disabilities, including those with mental and psychosocial disabilities in institutions and affords them the right to live in the community.[433]

Similarly, the UN Special Rapporteur, in her 2019 report on persons with disabilities, supported the Committee's position by reaffirming that any form of placement in residential setting, whether in a small or large capacity, does not support the rights of children to live in the

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[428] CRPD Committee, GC No. 5 (2017) para 16(c). Emphasis added.

[429] CRPD Committee, GC No. 5 (2017) para 16(c).

[430] CRPD Committee, GC No. 5 (2017) para 16(c).

[431] CRPD Committee, GC No. 5 (2017) para 37.

[432] Council of Europe, Commissioner for Human Rights (2012) 40.

[433] CRPD Committee Concluding Observations: El Salvador (UN Doc. CRPD/C/SLV/CO/1, 2013), para 42; (UN Doc. CRPD/C/CHN/CO/1, 2012), paras 31 and 32; Palmisano G 'Article 19 [Living independently and being included in the community]' in Fina VD, Cera R, Palmisano G (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 366. See also Kamundia E 'Choice, support and inclusion: Implementing article 19 of the CRPD in Kenya' (2013) *African Disability Rights Yearbook* 67; Parker C & Clements L 'The UN Convention on the Rights of Persons with Disabilities: A new right to independent living? (2008) 4 *European Human Rights Law Review* 512; Kayess R & French P 'Out of darkness into light: Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 29 as cited in Chilemba (2014) 120.

community and must be considered as placement in an institution.[434] The report notes that children with disabilities face a high risk of being placed in institutions on the basis of their disability and that many states allow children with disabilities' removal from their family environment and placement in institutions.[435] The harmful effects of institutions on children's development of children are reiterated, and the report reasserts that any residential institution, even small residential homes or 'family-like' institutions, are inherently damaging to children.[436] The report regards any placement of children in a residential setting outside a family as placement in institution and as arbitrary deprivation of liberty, which is in violation of the right to home and family set forth in article 23 of the CRPD.[437] This report goes further than the UN global study by directly opposing article 20 of the CRC which allows for 'suitable institutions' and the provisions of the UN Guidelines that allow for residential placements, explicitly calling for them to be reviewed so as to meet the higher standards of the CRPD.[438] To prevent the institutionalisation of children with disabilities, states are urged set up systems that support the family, the provision of services to children with disabilities within the community, child protection strategies, inclusive education, and family-based alternative care that is 'disability-inclusive', including extended kinship care, foster care and adoption.[439] Furthermore, to sustain the placement of children with disabilities in family-based alternative care options, it is critical that these options be undergirded by the necessary training, support and monitoring.[440] States are urged to end the placement of children under the age of three in institutions, and to take measures to end the deprivation of liberty of children with disabilities

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[434] Human Rights Council (HRC) *Report of the Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas*, *Rights of persons with disabilities* (hereafter HRC, *Report of the Special Rapporteur)* (UN Doc. A/HRC/40/54, 2019) available at *http://bit.ly/2NezySX* (accessed 26 August 2019) para 19.

[435] HRC *Report of the Special Rapporteur* (2019), para. 19.

[436] HRC *Report of the Special Rapporteur* (2019), para. 19.

[437] HRC *Report of the Special Rapporteur* (2019), paras 19, 51 and 77.

[438] HRC *Report of the Special Rapporteur* (2019) para 51.

[439] HRC *Report of the Special Rapporteur* (2019) para 68.

[440] HRC *Report of the Special Rapporteur* (2019) para 68.

through institutions run by private and faith-based organisations, including orphanages and small-group homes.[441]

Furthermore, the report asserts that children with disabilities' access to justice on an equal basis with others is crucial to ensuring that they have the proper channels to challenge their placement in institutions and deprivation of liberty.[442] To this end, states are urged to ensure that children with disabilities have access to 'procedural, age- and gender-appropriate accommodations, including supported decision-making, in all legal proceedings before, during and after trial'.[443] For that purpose, those who work in the field of the administration of justice should be appropriately trained.[444]

This indicates that, in the context of alternative care of children with disabilities, placement in institutions encompasses any placement outside a family or setting that resembles the family environment.[445] Thus, for children with disabilities deprived of their family environment, alternative care within the wider family and within the community in a family setting can include the extended family, foster care, kinship care, substitute family care, or any family environment in which the child can develop stable emotional bond with a particular caregiver.[446]

3.8 The obligation to review placements periodically

Article 25 of the CRC requires states to conduct periodic reviews of placements and the situation of children engaged by the authorities for their care, protection or treatment of their

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[441] HRC *Report of the Special Rapporteur* (2019) paras 68-9.
[442] HRC *Report of the Special Rapporteur* (2019) para 73.
[443] HRC *Report of the Special Rapporteur* (2019) para 73.
[444] HRC *Report of the Special Rapporteur* (2019) para 73.
[445] Rosenthal (2019) 2.
[446] Rosenthal (2019) 2.

physical or mental health.[447] The CRC Committee in its General Comment No. 9 has also stressed the need to periodically review whatever form of alternative care has been selected for a child with a disability by the competent authorities and all other circumstances relevant to his or her placement to ensure that the placement is promoting the child's well-being.[448] The placements envisaged in this provision include placement in foster families or institutions and homes for children with disabilities.[449] The obligation to periodically review placements of children with disabilities deprived of their family environment in alternative care applies not only to state-run institutions but to private institutions, services and facilities.[450]

The importance of article 25 on the periodic review of treatment lies in the fact it protects children from the neglect and mistreatment that are not uncommon in institutional care.[451] This provision serves as a safety net by ensuring that all placements in alternative care are continuously monitored and that the necessary changes are made to promote the child's proper growth.[452] As such, article 25 complements article 19 of the CRC which requires State Parties to take measures to safeguard children from all forms of abuse or neglect in the care of parents, legal guardians or others who are caring for the child.[453] Regulations meant for periodic review of treatment are also useful for developing standards for professionals working and coming into contact with children.[454]

However, article 25 does not impose an obligation to periodically review privately arranged placements such as placements by parents or legal guardians. Thus, private arrangements in

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[447] Article 25 of the CRC reads as follows: 'States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.'

[448] CRC Committee, GC No. 9 (2006) para 50.

[449] Hodgkin & Newell (2007) 379.

[450] Hodgkin & Newell (2007) 379.

[451] Hodgkin & Newell (2007) 379.

[452] Hodgkin & Newell (2007) 282.

[453] See art 19(1) of the CRC.

[454] Detrick (1999) 436.

which relatives or friends care for a child on an ongoing or indefinite basis are not included in the scope of article 25.[455] This is unfortunate, as children who are privately placed in alternative care are often more vulnerable than those who are placed by competent authorities.[456] In addition, this may create a disparity between children placed in institutions by a competent authority and children placed by parents or legal guardians in respect of the level of protection provided.[457] The CRC Committee nonetheless has stressed in its Concluding Observations that the obligation to periodically review placements is applicable as well to placements that are informal in nature.[458]

There is a link between articles 25 and 3(3) of the CRC in that while the former monitors how well the rights and needs of children are protected when they are placed in alternative care, article 3(3) of the CRC aims to ensure that the alternative care system meets the minimum standards applicable to competent authorities, that is, institutions, services and facilities providing care and protection for children.[459] Although this provision is often overlooked as it is grouped with the best interests standard that dominates the discourse of children's rights, it does provide the basis for the state's obligation in relation to the care and protection of children and the state's standard-setting and oversight role in respect of institutions, services and facilities designed to meet that end – obligations that are expanded upon latter in the Convention.[460] To this end, the CRC Committee has urged states to follow up on the protection of the rights of children placed in alternative care including foster care and institutions, which indicates that states need to monitor both the systems and the individual children concerned.[461]

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[455] Hodgkin & Newell (2007) 380.
[456] Hodgkin & Newell (2007*)* 380.
[457] Phillips (2011) 51.
[458] CRC Committee Concluding Observations: Guinea (UN Doc. CRC/C/15/Add.100, 1999), para. 21**.**
[459] See arts 25 and 3(3) of the CRC.
[460] Sutherland (2016) 23.
[461] Hodgkin & Newell (2007) 380.

This provision serves to ensure that institutions and other facilities that provide services for children with disabilities conform to standards and regulations and have the safety, protection and care of children as their primary consideration.[462] Although article 3(3) lists areas of safety and health as well as the number and suitability of staff and competent supervision as among the criteria the state is required to meet, the term 'particularly' in the provision indicates that the list is not exhaustive and that there is room for far-reaching regulation.[463] During the drafting of this article, there was a proposal to make explicit reference to the training and qualifications of those involved in the provision of alternative care.[464] This notion found its way into the UN Guidelines, which require that attention be paid to 'the quality of alternative care provision … in particular with regard to the professional skills, selection, training and supervision of carers'.[465] The obligation in this regard is applicable not only to state-run alternative care settings and services but to those operated by non-state actors.[466]

Although the ACRWC does not have a similar provision regarding the obligation of periodic review of placement of children in alternative care, the ACERWC in its General Comment No. 5 requires states to have legislation providing for the periodic review of any placement of a child in alternative care.[467] Such legislation should specify the relevant role-players and provide for preliminary as well as subsequent judicial review of any placement in alternative care.[468] States are required to legislate screening measures to ensure that persons found to have harmed children are not employed (whether as paid workers or volunteers) in positions where they have access to children, including in institutions and orphanages.[469]

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[462] CRC Committee, GC No. 9 (2006), para 30.
[463] Sutherland (2016) 42–3.
[464] Sutherland (2016) 43.
[465] UN Guidelines, para 71. Sutherland (2016) 43.
[466] CRC Committee, GC No. 7 (2005) para 32; Sutherland (2016) 43.
[467] ACERWC, GC. 5 (2018) 21.
[468]ACERWC, GC No. 5 (2018) 21.
[469] ACERWC, GC No. 5 (2018) 21.

3.9 Conclusion

Using the CRC, ACRWC, CRPD and the UN Guidelines, this chapter has critically analysed the relevant provisions on the rights of children with disabilities generally and their rights to alternative care in particular, noting the synergies, alignments and differences between these instruments. Following the above discussion, it was found that the following provisions are the most conducive for the realisation of the rights of children with disabilities in the context of alternative care.

First, in relation to the obligations arising from general principles, it was established that states should explicitly prohibit discrimination on the basis of disability in national legislation by both state and non-state actors and recognise that the denial of reasonable accommodation constitutes discrimination on the basis of disability. States should further include in their national legislation that the best interests of the child is the primary consideration in all actions concerning children with disabilities. The domestic framework of the two countries should include provisions for the right to life, survival and development of children with disabilities. The framework should also contain a provision which places an obligation on state and non-state actors to ensure that the views of children with disabilities are heard and given due weight in all actions concerning them in accordance with their age and maturity. To this end, there should be an explicit obligation on the state to provide age- and disability-appropriate assistance to children with disabilities to facilitate their participation. In this respect, states should respect the evolving capacities of children with disabilities in considering and giving due weight to their views in relation to the whole process of alternative care, in particular regarding the determination of the most appropriate placement for the child and the planning and review of the placement.

With respect to the obligation imposed on states by provisions dealing directly with the right to alternative care, Ethiopia and South Africa's legislative frameworks are expected to provide for the special protection and assistance to children with disabilities who are temporarily or permanently deprived of their family environment for any reason or cannot be allowed to remain in that environment. In addition to the provision of special protection and assistance, the framework should include provision of alternative care to children with disabilities who are temporarily or permanently deprived of their family environment or who for whatever reason can no longer remain in that environment.

As to the type of alternative care that the two countries should make available for children with disabilities, it has been established that the legislative framework should explicitly enable for children with disabilities to be provided with alternative care within the wider family context, and failing that, within the community in a family setting. Moreover, states should also ensure that a range of family-based alternative options are available. Furthermore, alternative care measures should be geared towards the full participation and inclusion of children with disabilities in society and promote community living. States should further ensure that all alternative care placements are subject to periodic monitoring and evaluation.

It is established that the CRPD provides a higher level of protection to children with disabilities in some respects in the context of alternative care. From the outset, it elevates the rights of children with disabilities by explicitly requiring states to ensure that children with disabilities enjoy all human rights and freedoms equally, along with the provision of disability- and age-appropriate assistance to realise their right to be heard. Most importantly, the CRPD does not leave room for the possibility of placing children with disabilities in institutional care. Rather, the focus is on ensuring that community- and family-based alternative care options are available when children with disabilities find themselves in circumstances where the family is unable to care for them. It is argued that article 23 of the CRPD is conducive to the realisation of the rights of children with disabilities in alternative care. The premise of this position is found in the discussion in Chapter 1 and 2 which established that children with disabilities are over-represented in institutions and that this has a negative impact on their development. Thus, adherence to article 23 of the CRPD as opposed to the CRC (and the ACRWC) in this regard should be considered by states to be more in keeping with the best interests of the child. The rights of children with disabilities to be included in the community are also provided in the CRPD, which supports the argument that alternative care for children with disabilities should be provided in the community and facilitate their integration in society.

In the following chapter the legislative and policy frameworks of Ethiopia and South Africa will be assessed and evaluated vis-à-vis international standards.

Chapter 4:
Ethiopia's and South Africa's Legislative and Policy Frameworks for the Right to Alternative Care of Children with Disabilities

4.1 Introduction

The previous chapter established the legal basis for right to alternative care of children with disabilities from both the international and regional human rights perspective, after which it analysed the obligations imposed on states for realising the rights of children with disabilities temporarily or permanently deprived of family environment. This chapter analyses the laws and policies of Ethiopia and South Africa to determine if the two countries are compliant with international human rights standards for the realisation of the right of children with disabilities in the context of alternative care. The analysis does not purport to be an exhaustive account of domestic laws and policies on alternative care measures and disability rights; rather, focus is given to laws addressing the foster care and institutional care of children with disabilities. The discussion of policy measures extends only so far as to illustrate various points. In addition, the domestic incorporation of international and regional human rights standards in South Africa and Ethiopia forms part of the discussion.

In the following sections, the legislative and policy measures[1] adopted by the two countries will be presented under a selected set of overarching themes covering obligations pertinent to the effective realisation of the rights of children with disabilities in the context of alternative care. These include the principle of non-discrimination; best interests of the child; child participation and the right to life, survival and development; the right to alternative care; and

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[1] For the purpose of this thesis, the obligation to adopt 'administrative and other measures' is interpreted broadly in accordance with article 4 of the CRC as including measures beyond legislative measures. Thus, policy measures are discussed as part of the administrative and other measures – the discussion includes policy documents, guidelines and national plans of actions.

the obligation of periodic review of placement. These obligations will be examined insofar as they mutually reinforce the rights of children with disabilities to appropriate alternative care. Before these concepts are examined, it is necessary to reflect on the domestic incorporation of international human rights standards in the two countries.

4.2 Domestic incorporation of international human rights standards

The role of international human rights law at the domestic level is regulated by a number of provisions in the South African and Ethiopian constitutions.[2] Section 39(1)(b) of the South African Constitution requires that courts 'must consider' international law when interpreting the Bill of Rights. The same approach has been followed by the judiciary through the jurisprudence of the Constitutional Court as early as 1996 in *S v Makwanyane*.[3] The interpretative role of international law is not restricted to that which South Africa has ratified,[4] although it has been argued that ratified instruments have a 'more persuasive force'.[5] Courts are further required to give preference to an interpretation statutory law in a way that is consistent with international law where reasonable over an interpretation that is inconsistent

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[2] Constitution of the Republic of South Africa, 1996 (hereafter South African Constitution). Sections 39(b), 231(4), 232 and 234 of South Africa's Constitution deal with the role of international human rights standards in the domestic context. Articles 9(4) and 13(2) of the Federal Democratic Republic of Ethiopia (FDRE) Constitution Proclamation No. 1/1995 (hereafter Ethiopian Constitution) provide guidance on the domestic incorporation of international standards.

[3] In *S v Makwanyane*, the Constitutional Court declared capital punishment unconstitutional and inconsistent with the commitment expressed in the interim Constitution (Constitution of the Republic of South Africa, Act 9 of 1994). In doing so, it indicated the role of international agreements and customary law in providing guidance for interpreting the Bill of Rights. *S v Makwanyane* 1995 (3) SA 391 (CC) paras 36–7; Sloth-Nielsen J & Mezmur BD '(Illicit) transfer by De Gree' (2007) 11 *Law, Democracy and Development* 84.

[4] Dugard J 'The role of international law in interpreting the Bill of Rights' (1994) 101 *South African Journal of Human Rights Law* 208; Sloth-Nielsen & Mezmur (2007) 84–5; *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 26.

[5] Dugard (1994) 208; Sloth-Nielsen & Mezmur (2007) 84–5. This has been further illustrated in the *Grootboom* case, in respect of the 'applicability or otherwise of the International Covenant on Economic Social and Cultural Rights (ICESCR)', where the court stated that although the weight of particular international law differs, international law which is binding on South Africa 'may be directly applicable'. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 28; Mezmur BD '"Don't try this at home?": Reasonable or moderate chastisement, and the rights of the child in South Africa with *YG v S* in perspective' (2018) 32(2) *Speculum Juris* 79.

with international law.[6] Hence, international treaties serve as a guiding tool in the interpretation of the rights of children in the courts but only have binding effect when passed into legislation under the domestic law.[7] This offers room, though not extensive, for the courts to apply international law where they are of the opinion that it leads to the enjoyment of human rights.

In addition to its interpretative role, international law may also become part of South Africa's domestic law provided that it is first incorporated into national legislation or is self-executing.[8] Therefore, the enactment of an international treaty into domestic legislation is a precondition for an international law to become enforceable in domestic courts. Given the rather timid approach to the implementation of rights and principles under international law, one would argue that it is prudent for South Africa to ratify international instruments that have rights which should be enforced. For instance, the key aspects of the CRC have been incorporated into section 28 of the Constitution which makes those rights justiciable in national courts.[9] Thus, the CRC has achieved 'legal significance' through the Constitution.[10] Nonetheless, although the CRPD has been signed and ratified by the South African government, it has not yet been enacted into domestic law through legislation. Thus, domestic courts may not be able to directly invoke the provisions of the CRPD.[11] In the context of the alternative care of children with disabilities, as argued in the previous chapter, the CRPD contains provisions that provide a higher level of protection than the provisions in the CRC and ACRWC. Hence, to ensure that children with disabilities in South Africa benefit fully from the stronger protection offered by

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[6] Section 233 of the South African Constitution.

[7] See s 39(b) and 231(4) of the South African Constitution.

[8] See s 231(4) of South Africa's Constitution. Nonetheless, for a self-executing provision of a treaty to become domestic law automatically, it must not be in conflict with the Constitution or subsidiary legislation.

[9] Sloth-Nielsen J 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10(2) *International Journal of Children's Rights* 139.

[10] Sloth-Nielsen (2002) 139.

[11] Dugard (1994) 209. Dugard makes this argument not directly in relation to the CRPD but to the application of the Charter of the United Nations (1945) by South African courts.

the CRPD, it is crucial that the government incorporate the provisions of the CRPD into municipal law by statute.

In Ethiopia, article 9(4) of the Constitution of the Federal Democratic Republic of Ethiopia (1995) (Ethiopian Constitution) offers some guidance on the status of international human rights standards by stipulating that international standards rights ratified by Ethiopia 'are an integral part of the law of the land'. Another provision which adds weight to article 9(4) of the Constitution in respect of the place of international standards is article 13(2), which requires the interpretation of the fundamental rights and freedoms recognised under the Constitution to conform to the principles of international human rights standards ratified by Ethiopia. Pursuant to these provisions, it has been argued that international standards ratified by Ethiopia, including the CRC, ACRWC and CRPD, are part and parcel of domestic law in Ethiopia with an equal status with the Constitution.[12]

However, the domestic incorporation of international human rights standards ratified by Ethiopia and their subsequent implementation at all levels is not a settled issue,[13] as some claim that international standards are part of domestic laws and thus can be applied in domestic courts directly,[14] while others insist that mere ratification is not sufficient for international conventions to be invoked in domestic courts.[15] The latter argument is premised partly on the fact that the Federal Negarit Gazette Establishment Proclamation[16] requires that all laws of the

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[12] Yohannes S & Assefa A *Harmonisation of laws relating to children in Ethiopia* (2008) 6.

[13] Bulto TS 'The monist-dualist divide and the supremacy clause: Revisiting the status of human rights treaties in Ethiopia' (2009) 23 *Journal of Ethiopian Law*; Idris I 'The place of international human rights conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution' (2000) 20 *Journal of Ethiopian Law*; Abebe AK 'Human Rights under the Ethiopian Constitution: A descriptive Overview' (2011) 5(1) *Mizan Law Review* 47.

[14] Abebe AK *The Potential Role of Constitutional Review in the Realisation of Human Rights in Ethiopia* (unpublished LLD thesis, University of Pretoria, 2012) 163–64.

[15] Idris (2000) 113; Bulto (2009); Yeshanew SA 'The Justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 285–89.

[16] Federal Democratic Republic of Ethiopia (FDRE), Federal Negarit Gazeta Establishment Proclamation No. 3/1995 (hereafter FDRE Proclamation No.3/1995).

federal government be published in the Federal Negarit Gazette[17] and that all federal and regional legislative, executive and judicial organs take judicial notice of laws published in the Gazette.[18] It has to be noted that the full text of international standards, including the CRC, ACRWC and CRPD, has not yet been published in the Federal Negarit Gazette.[19] It has also been argued that the main reason for the requirement to publish laws is to inform right-holders; thus, the lack thereof should not be used to justify failure to enforce international treaties by courts.[20] In addition, although the general understanding is that the courts are duty-bound to take judicial notice of laws published in the Negarit Gazeta, the validity of international instruments takes effect when the state ratifies the international treaty and is not dependent on its publication.[21]

Judicial practice in Ethiopia indicates that publication is not a precondition to apply international treaties, as there has been some progress recently in which judges are basing their judgments on relevant provisions of the CRC and ACRWC.[22] The debate about this issue has been cleared up to some extent by the Cassation Bench of the Federal Supreme Court's reliance on the CRC to resolve a case related to child custody issues, thereby affirming the argument that international treaties can be invoked in domestic courts despite their status of publication.[23] The Court referred to the principle of the best interests of the child, which is found both in the

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[17] FDRE Proclamation No. 3/1995, art 2(2). The Federal Negarit Gazette is the official gazette used to publicise laws.
[18] FDRE Proclamation No. 3/1995, art 2(3).
[19] Alemu G & Birmeta Y *Handbook on the Rights of the Child in Ethiopia* (2012) 25. In Ethiopia, the full text of ratified human rights standards is not produced in any proclamation. Rather, ratification proclamations are issued that contain three or four provisions specifying the time, implementing body, ratification and effective date. Gebreamanuel AB *The Recognition and Implementation of Children's Socio-economic Rights in Ethiopian law* (unpublished LLM thesis, Potchefstroom Campus of the North-West University, 2014) 31; Yeshanew (2008) 287–88.
[20] Abebe (2012) 166.
[21] Abebe (2012) 165.
[22] Alemu & Birmeta (2012) 25. The debate on the issue is a broad one and cannot be covered here. For further reading, see Yeshanew (2008); Bulto (2009); Idris (2000).
[23] See, for instance, *W/t Tsedale Demissie v Ato Kifle Demisse*, Federal Supreme Court, Cassation Bench, File No. 23632 (6 Nov 2007) Vol 5; Federal Supreme Court, Cassation Bench, File No. 03389; Alemu & Birmeta (2012) 46; Gessesse FM & Aberra RM *Impact assessment report on the draft National Child Policy of Ethiopia* (2014) 23; Abebe (2012) 166.

CRC as well the Constitution, to overrule a lower court's decision made on the basis of the pertinent family law provision.[24] The Federal Supreme Court's reference to international standards is significant in this regard, as the interpretation of laws rendered by the cassation division 'with not less than five judges' has a binding effect on federal as well as state courts.[25] It follows that the recognition of key principles in international law is instructive to their engagement by the Courts, despite the position of domestic incorporation in national legislation. It would seem, however, that this is subject to the nature of the principle. For instance, where the rights or principles included in ratified international treaties are not clearly guaranteed in domestic laws, the issue of justiciability may arise.[26]

4.3 The legislative frameworks of South Africa and Ethiopia

Both South Africa and Ethiopia have undertaken various legislative measures in realising the rights of children with disabilities in general and their right to appropriate alternative care in particular. The South African Constitution is of particular importance to children with disabilities as it contains provisions relevant their right to alternative care. Moreover, the Children's Act 38 of 2005 is South Africa's child-rights-specific legislation which provides the primary legal framework for the realisation of the rights of children recognised in the Constitution, including the right to alternative care.[27] In Ethiopia, the main legislation that

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[24] Gebreamanuel (2014) 40; Ministry of Women Children and Youth Affairs *Combined 4th and 5th Periodic Reports of the Federal Democratic Republic of Ethiopia to the United Nations Committee on the Rights of the Child (2006 – 2011)* (2012), para 18.

[25] Federal Courts Proclamation Reamendment Proclamation No. 454/2005, art 4; Alemu & Birmeta (2012) 26.

[26] Yeshanew (2008) 286.

[27] Children's Act 38 of 2005, s 2(b); Boezaart T & Skelton A 'From pillar to post: Legal solutions for children with debilitating conduct disorder' in Grobbelaar-du Plessis I & Van Reenen T (eds) *Aspects of Disability Law in Africa* (2011) 123; Boezaart T 'The Children's Act: A valuable tool in realising the rights of children with disabilities' (2011) 74(2) *Journal of Contemporary Roman Dutch Law* 271.

contains provisions pertinent to the alternative care of children with disabilities includes the Ethiopian Constitution and the Revised Family Code of Ethiopia (RFC) (2000).[28]

The following discussion includes an analysis of the legislative frameworks of the two countries in the light of the themes identified in the introductory part of this chapter. Thereafter, the chapter examines aspects of South Africa's White Paper on the Rights of Persons with Disabilities (WPRPD) (2015), and Ethiopia's Alternative Care Childcare Guideline on Community-Based Childcare, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Care Service (National Guidelines) (2009) and National Children's Policy (NCP) (2017).

4.3.1 Non-discrimination

The non-discrimination obligation can be found in both South Africa and Ethiopia's constitution, in section 9 and article 25, respectively. Section 9(1) of the South African Constitution provides for the right to equality before the law and for everyone's equal protection under the law.[29] Section 9(2) envisions substantive equality as there is further recognition of positive measures that may be taken to achieve the 'full and equal enjoyment of all freedoms'. Formal equality is concerned with the idea that 'all persons are equal bearers of rights'.[30] This notion of equality does not take into consideration economic and social

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[28] The Revised Family Code Proclamation No. 213/2000 (hereafter the RFC). The RFC was adopted to replace the family law provisions of the Civil Code of 1960. Degol A & Dinku S 'Notes on the principle: 'The best interest of the child' (2011) 5 (2) *Mizan Law Review* 333.

[29] Section 9 of South Africa's Constitution provides: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[30] Currie I & De Waal J *The Bill of Handbook* 6 ed (2013) 213.

inequalities which exist between individuals and groups.[31] Substantive equality entails that the law seeks ‘equality of outcomes’ and ‘equality of opportunity’ by eliminating barriers that perpetuate inequalities.[32] A substantive conception of equality thus envisions material change to rectify various forms of inequality caused by social and economic disparities.[33] In recognition of this, section 9(2) entails that steps, including legislative and other measures, be taken to promote the achievement of equality for categories of persons previously disadvantaged by unfair discrimination.[34] This strengthens the rights of children with disabilities in the context of alternative care and complies with the obligation set out in the CRPD, as it would entail taking positive measures aimed at children with disabilities’ enjoying substantive equality in terms of equal access to family-based alternatives and equal rights to services while they are in alternative care.

Moreover, sections 9(3) and 9(4) include a prohibition of both direct and indirect discrimination on the basis of disability and age, among other grounds, by the state or by ‘any person’.[35] This provision is significant for children with disabilities in the context of alternative care, as it subjects not just the state but also other actors providing alternative care services to the obligation not to discriminate and equality norms in accordance with international standards. Section 9(5) further asserts that discrimination on the basis of disability is unfair except in cases where it is proven to be fair.[36]

In South Africa, the jurisprudence of the Constitutional Court on cases relating to equality is

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[31] Smith A ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* (2014) 611–12; Currie & De Waal (2013) 213.

[32] Smith (2014) 612–13; Currie & De Waal (2013) 213.

[33] Albertyn C ‘Substantive equality and transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 254-58.

[34] Section 9(2) of the South African Constitution.

[35] See s 9(3) and (4) of the South African Constitution.

[36] In 1997 the Constitutional Court developed a test in the *Harksen* case to determine if a person has been subject to unfair discrimination. In brief, it involves answering three questions: ‘Does the differentiation amount to discrimination?; if so, was it unfair?; if so, can it be justified in terms of the limitation clause (sec 36)?’ *Harksen v Lane NO 1998 (1) SA 300 (CC)* para 53; Currie & De Waal *(*2013) 216.

in accordance with the non-discrimination obligation set forth in the CRPD in so far as it supports the need for positive measures to be taken to achieve substantive equality.[37] It is noteworthy that the right to equality is not an absolute right as it is subject to the general limitation clause in section 36 of the Constitution.[38]

In the case of Ethiopia, article 25 of the Constitution provides for equality before the law and entitlement to equal protection of the law.[39] This provision does not explicitly recognise disability as a prohibited ground for discrimination. However, the omission does not necessarily mean that the Constitution permits disability-based discrimination, as the provision considers 'all persons', which includes children with disabilities, as equal before the law and enjoying its equal protection without any discrimination.[40] The obligation to not to discriminate

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[37] See, for instance *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 73; Chilemba E *The National Implementation of International Human Rights Law Pertaining to Children with Disabilities in Selected Jurisdictions in Africa* (unpublished LLD thesis, University of the Western Cape, 2014) 222. Furthermore, in the case of *Khosa and others v Minister of Social Development and others* 2004 (6) BCLR 569 (CC), the constitutionality of certain provisions of the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997, were alleged to infringe children's rights and equality and the non-discrimination obligation in ss 28 and 9 of South Africa's Constitution, respectively. The Constitutional Court extended the right to social security to the children of permanent residents (in terms of the Care Dependency Grant and Child Support Grant). Sloth-Nielsen J & Mezmur BD '2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence (2002-2006)' (2008) 16 *International Journal of Children's Rights* 4–5. As established in the previous chapter, the obligation to ensure non-discrimination entails taking positive measures and the provision of reasonable accommodation which are necessary aspects of achieving substantive equality. See section 3(5)(1) of Chapter 3 of this thesis for further discussion on the obligation to not discriminate in the CRC, ACRWC and CRPD.

[38] Determining the legitimacy of the limitation of rights entails a dual-stage approach. The first stage involves determining whether the conduct or a provision of the law which is the subject of litigation infringes an activity which is covered within the scope of the right. If so, then a second stage of analysis is activated that involves determining whether the infringement of the right is justifiable in accordance with s 36(1) of the Constitution. The limitation must take into account a number of relevant factors, including 'the nature of the right; the importance of the limitation; the relationship between the limitation and its purpose; and less restrictive means to achieve the purpose'. However, once conduct or a provision of the law has been found to constitute an unfair discrimination, it has proven to be difficult to find reasons to apply the limitation clause so as to justify it as 'reasonable' in a society that is open, democratic and based on human dignity, equality and freedom. Currie & De Waal (2013) 217–18. This is evident in the judicial sphere, where the application of the general limitation clause on equality and non-discrimination cases never results in the questioned law being justifiable. See, for instance, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of Republic of South Africa* 2002 (6) SA 1 (cc) para 26; *Mvumvu v Minister for Transport* 2011 (2) SA 473 (CC) paras 35–8; *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198(CC) paras 31–7; Currie & De Waal (2013) 218.

[39] Article 25 reads as follows: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.'

[40] Article 25 of the Ethiopian Constitution.

can also be inferred from the constitutional provision that recognises the right of everyone to equally access publicly funded services.[41] The inclusion of the phrase 'equal access' creates a direct link between the right to equality and non-discrimination set out in article 25 of the Constitution and socio-economic rights.[42]

Following this approach, it has been argued the government is under obligation to ensure that laws and policies that have the potential to result in discriminatory access to publicly funded social services are amended or repealed.[43] The word 'everyone' also indicates that this provision is applicable to children with disabilities. Thus, in the context of alternative care, this indicates that the government is obliged to ensure that children with disabilities have equal access to alternative care services that are funded by the state and to revise laws and policies that could result in, for instance, limited access to family-based alternative care options for children with disabilities. However, this requirement only extends to publicly funded services and leaves out services provided by the private sector.[44] This provision limits the scope of protection of children with disabilities by excluding private sectors with regard to the obligation to not discriminate. This is unfortunate, as the bulk of alternative care services to children in Ethiopia are provided are by NGOs and faith-based organisations.[45] It is submitted that the limited scope of protection may have a negative effect on children with disabilities' access to family-based alternative care services on an equal basis with others as well as their equal

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[41] See art 41(3) of the Ethiopian Constitution. Kedir A, Shiferaw A, Mulatu F et al *Baseline study for a comprehensive child law in Ethiopia* (2013) 93.

[42] Messele R 'Enforcement of human rights in Ethiopia' 32 available at http://bit.ly/2uq39SK (accessed 25 June 2019); Janka DG 'Economic, social and cultural rights and their enforcement under the FDRE Constitution' (2008) 1 *Jimma University Law Journal* 87.

[43] Messele (2002) 32.

[44] Kedir et al. (2013) 93.

[45] Family Health International, UNICEF, Ministry of Women's Affairs, & Child Investment Fund Foundation *Improving care options for children in Ethiopia through understanding institutional care and factors driving institutionalization* (2010) 31.

treatment and enjoyment of rights and freedoms in alternative care settings operated by NGOs and faith-based organisations.

In South Africa's framework, the non-discrimination obligation is also found in subsidiary legislation, including the Children's Act and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). The Children's Act identifies non-discrimination, including the need to ensure protection from disability-based discrimination, as one of its general principles.[46] However, a slight contrast with the obligation to ensure non-discrimination as set out in the CRPD is that, despite making an explicit provision for the protection of children with disabilities from unfair discrimination, the Children's Act does not require the provision of reasonable accommodation and 'special or affirmative-action measures'.[47] The PEPUDA, which was enacted to give effect to the obligation set out in South Africa's Constitution,[48] fills this gap, as it requires the elimination of barriers that unfairly impede persons with disabilities from enjoying equal opportunities or the taking of measures to provide reasonable accommodation for persons with disabilities.[49] The definition of equality for the purpose of the PEPUDA also recognises substantive equality, as it includes both 'de jure and de facto equality and also equality in terms of outcomes'.[50]

In the case of Ethiopia, subsidiary legislation including the RFC does not contain provisions that either prohibit discrimination on the basis of disability or require positive measures and

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[46] See s 6(2)(d) of the Children's Act.

[47] Chilemba (2014) 158–59. In the previous chapter, it was established that the CRPD requires that denial of reasonable accommodation be considered as discrimination on the basis of disability.

[48] According to s 9(4) of the South African Constitution, the government is obligated to adopt legislation to prevent and prohibit unfair discrimination. See s 2(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002 (hereafter the PEPUDA).

[49] Section 9(c) of the PEPUDA. Following the approach of the Constitution, the PEPUDA also prohibits unfair discrimination on the grounds of disability and details what constitutes unfair discrimination on the ground of disability. See ss 6 and 9 of the PEPUDA. Section 9(a) recognises that disability-based discrimination includes the denial or withdrawal/removal of facilities that are necessary for the 'functioning' of persons/children with disabilities.

[50] See s 1 of the PEPUDA; Chilemba (2014) 161.

reasonable accommodation to be provided to children with disabilities. As the constitutional non-discrimination obligation is limited in scope, it may result in gaps in respect of ensuring that alternative care services provided by private actors are bound by the constitutional obligation in respect of non-discrimination.[51] Moreover, under Ethiopia's national law, the denial of reasonable accommodation is not regarded as a form of discrimination, including in alternative care measures,[52] nor as a ground for the use of positive measures to ensure the substantive equality of children with disabilities. This creates a legal obstacle to the realisation of children with disabilities' right to alternative care on an equal basis with other children. The explicit recognition of the need to take positive measures creates a norm for the review and reform of 'textually neutral' laws, policies and programmes to address past discrimination, which could lead to substantive equality.[53] This is also true for children with disabilities, as their needs are invisible in legislation and policies and as they face multiple discrimination on the basis of their age and disability.[54] The provision of positive measures that lead to the substantive equality of children with disabilities, such as repealing potentially discriminatory legislation and policies, is particularly important in the Ethiopian context, as the overall

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[51] Chapter 3 of this thesis indicated that the obligations on states include a general guarantee of equality and prohibition of discrimination by, amongst other things, including disability as a prohibited ground of discrimination in constitutions and legislation.

[52] As established in the previous chapter in s 3(5)(1), the obligation to ensure non-discrimination entails taking positive measures and the provision of reasonable accommodation, which are necessary aspects of achieving substantive equality. Under Ethiopian law, the concept of reasonable accommodation is incorporated in domestic law only in relation to the employment of persons with disabilities through the enactment of the proclamation for the employment rights of persons with disabilities. In this regard, the CRPD Committee in its Concluding Observations on Ethiopia's initial report recommended that the government 'adopt a comprehensive definition of reasonable accommodation in the law which applies to all rights'. The Committee further urged the government to 'recognise the denial of reasonable accommodation in all areas amounts to discrimination as prescribed by article 5, and provide training to the public and private sectors on this obligation'. CRPD Committee Concluding Observation: Ethiopia (UN Doc. CRPD/C/ETH/CO/1, 2016), paras 9–10.

[53] Gessesse & Aberra (2014) 62.

[54] The CRC Committee in its concluding observation to Ethiopia's periodic report expressed concern 'at the continuous discrimination' of children with disabilities. Ministry of Women Children and Youth Affairs *Combined 4th and 5th Periodic Reports of the Federal Democratic Republic of Ethiopia to the United Nations Committee on the Rights of the Child (2006 – 2011)* (2012), para 23.

legislative framework views persons/children with disabilities from a medical approach and uses derogatory terms to refer to persons with disabilities (as examined later in this chapter).[55]

4.3.2 The best interests of the child

The constitutions of both South Africa and Ethiopia dedicate a provision to the rights of children that provides for the best interests of the child, in section 28(2) and article 38(2), respectively.[56] The wording of section 28 of South Africa's Constitution is modelled on the CRC.[57] The section provides for the protection and advancement of children's rights by placing a series of obligations upon the state[58] and defines a child as a person below the age of 18 years.[59] This provision is not subject to the availability of resources, unlike other socio-economic rights set forth in the Constitution.[60]

Section 28(2) deals with the best interests standard and provides that 'a child's best interests are of a paramount importance in every matter concerning the child'.[61] The best interests principle under the Constitution is considered as a right that guides the interpretation of other rights of children in the Constitution and as 'a right in itself'.[62] This provides the child with

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[55] See s 4(3)(7) of this Chapter.
[56] South African Constitution, s 28(2); Ethiopian Constitution, art 36(2).
[57] Sloth-Nielsen & Mezmur (2008) 2.
[58] Section 28 reads as follows: '(1) every child has the right – (a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f), not to be required or permitted to perform work or provide services that – (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the, shortest appropriate period of time, and has the right to be – (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict. (2) A child's best interests are of paramount importance in every matter concerning the child. (3) In this section "child" means a person under the age of 18 years.'
[59] Section 28(2) of the South African Constitution.
[60] Sloth-Nielsen J 'The child's right to social services, the right to social security and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom'* (2001) 17 *South African Journal on Human Rights* 220.
[61] Section 28(2) of the South African Constitution.
[62] Skelton A 'Constitutional protection of children's rights' in Boezaart T (ed) *Child Law in South Africa* (2009) 280. See, for instance, the *Minister for Welfare and Population Development v Fitzpatrick & others* (2000) (7)

two-fold protection – first, it affords the child a right that his or her best interests is considered a priority in every matter affecting him or her and secondly, it entails that principle is applied when any other constitutional right of the child is affected and not only in matters relating to the other rights in section 28.[63]

The wording of this provision is slightly different from that of the provisions in the CRC, ACRWC and CRPD regarding the best interests of the child.[64] Despite the difference in formulation, section 28(2) gives 'wider scope of application [to] the best interests of the child' than provided in the international standards as it is applicable to all matters affecting children.[65] However, section 28(2) is also subject to the general limitation clause in accordance with section 36 and does not have an overriding effect, as it has to be weighed against other rights.[66] The Constitutional Court in *S v M* has held that the approach which should be followed applies 'the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests'.[67] However, jurisprudence shows that the best interests of the child are capable of overriding other interests that conflict with the principle.[68]

BCLR 713 para 17; Visser P 'Some ideas on the "best interests of a child" principle in the context of public schooling' (2007) 70 *Journal for Contemporary Roman-Dutch Law* 460; See Skelton A 'Children' in Currie & De Waal (2013) 619–20; Sloth-Nielsen (2002) 139. It has been argued, however, that the courts are uncertain if the best interests of the child amount to a rule, a principle or a right, which in turn has led to an inconsistent application of the standard. See generally Bonthuys E 'The best interests of children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family*.

[63] Malherbe R 'The impact of Constitutional Rights on Education' in Boezaart T (ed) *Child Law in South Africa* (2009) 440.

[64] It is notable that while section 28(2) uses the phrase 'paramount importance', the CRC and the CRPD, in arts 3(1) and 7(2), respectively, use of the phrase 'a primary consideration', while the ACRWC employs the phrase 'the primary consideration' in art 4(1).

[65] Couzens M 'The best interests of the child and the Constitutional Court: A critical appraisal' (unpublished article, School of Law, University of KwaZulu-Natal, 2018) 3; Skelton in Currie & Dewaal (2013) 619.

[66] Skelton in Boezaart T (ed) (2009) 280; Skelton in Currie & De Waal (2013) 619–20; Mills L 'Failing children: The courts' disregard of the best Interests of the child in Le Roux v Dey' (2014) 131(4) *South African Law Journal* 856; Skelton A 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 486. See, for instance, the *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC) para 20; *Sonderup v Tondelli & Another* 2001 1 SA 1171 (CC) paras 33 and 35; *S v M* (Centre for Child Law as Amicus Curiae) 2008 3 SA 232 (CC) paras 12–27.

[67] *S v M* (2008), para 25.

[68] The Constitutional Court has rendered several decisions declaring provisions in the law unconstitutional on the basis that they are against the best interests of the child. See, for instance, *Du Toit and Another v Minister of*

In respect of the best interests standard in the Ethiopian Constitution, article 36(2) echoes the equivalent of the principle in the ACRWC and attaches a higher standard by regarding it as *'the'* primary consideration as opposed to *'a'* primary consideration.[69] This indicates that the best interests of the child, according to the Ethiopian Constitution, have the effect of overriding other factors, which affords stronger protection to children.[70] This is significant for children with disabilities in the context of alternative care, as it entails a higher level of compliance with international standards.[71] The provision also adopts the wider scope of the standard as provided in the international standards, as it applies to *all matters* affecting children, which includes the alternative care of children with disabilities.[72] Courts have relied on the principle to ascertain the best interests of the child in resolving matters relating to child custody and guardianship on

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Welfare and Population Development and Others, 2002 (10) BCLR 1006 (CC), where the Constitutional Court relied on s 28(2) the Constitutional to overturn the provisions in the legislative framework that restricted same-sex couples from jointly adopting a child, as the provision allowed only married couple to adopt. The Constitutional Court unanimously found that the provisions restricting married couples from jointly adopting a child were unconstitutional in view of the conflict with the best interests principle recognised under s 28(2) of the Constitution. See also the *Minister of Welfare and Population Development v Fitzpatrick & Others* where the Constitutional Court ruled that s 184(f) of the Child Care Act was invalid as it excluded non-citizens from adopting a South African child. *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC); Skelton in Currie & De Waal (2013) 620.

[69] See the discussion in s 3(5)(2) of Chapter 3 of this thesis, where it is argued that the ACRWC elevates the status of the best interests of the child to be at the forefront of all other considerations and does not allow other interests to override the interests of children. Article 36(2) of the FDRE Constitution reads as follows: '2. In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.' The regional constitutions also contain provisions on the rights of children. For instance, the Revised Constitution of the Amhara Regional State (2001), the Revised Constitution of the Oromia Regional State (2001) and the Revised Constitution of the Southern Nations, Nationalities and Peoples' Regional State (2001) provide for the rights of children in their article 36 (the same as the federal Constitution). The wording of these provisions is similar to article 36 of the federal constitution. The regional Constitutions of Tigray and Amhara National Regional State also incorporate the principle of the best interests of the child. See art 37(2) of the Constitution of the Regional State of Tigray and art 36(2) of the Constitution of the Amhara National Regional State. Yohannes & Assefa (2008) 12; Degol & Dinku (2011) 333.

[70] The emphasis placed on the provision of the principle of the best interests of the child in the Constitution is stronger than that of the CRC and CRPD, as the standards require the best interests of the child to be 'a' primary consideration as opposed to 'the' primary consideration. See s 3(5)(2) of Chapter 3 of this thesis for further discussion of this obligation in international standards.

[71] See section 3(5)(2) of Chapter 3 of this thesis where it is discussed that the consideration of the best interests of the child as a primary consideration in relation to the alternative care of children with disabilities entails that their best interests be the overriding factor not only when determining whether to remove a given child out of his or her family environment but in any decision regarding the choice of an alternative placement.

[72] Emphasis added. The international standards discussed in Chapter 3 all adopt the wider scope, as the application of the best interests of the child extends to all actions concerning children. See art 3(1) of the CRC, art (1) of the ACRWC, and art 7(2) of the CRPD.

several occasions.[73] It has to be noted that the obligation to regard the best interests of the child as the primary consideration extends to public and welfare institutions, courts of law, administrative authorities and legislative bodies.[74] Thus, the article also covers the provision of alternative-care services by private organisations in Ethiopia such as NGOS and faith-based organisations, thus further complying to the obligation set out in international standards.[75]

Moreover, the best interests standard is incorporated in subsidiary legislation in both countries. In South Africa, one of the Children's Act objectives is to give effect to section 28(2), that is, 'that a child's best interests are of paramount importance in every matter concerning the child'.[76] The Act provides in a separate section that '*in all matters* concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'.[77] This includes matters affecting the alternative care of children with disabilities. Thus, in all decisions, actions and proceedings regarding the alternative care of children with disabilities, the best interests standard must be applied. The latter is also referred to in the general principles of the Act, which indicate that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the best interests of the child standard as detailed in the Act.[78]

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[73] For instance, the Cassation Bench of Federal Supreme Court overturned the decision of lower courts by basing its decision on the principle of the best interests of the child in the case of *W/t Tsedale Demissie vs Ato Kifle Demisse, Federal Supreme Court, Cassation Bench, File No. 23632 (2007)*. In addition, in the Federal Supreme Court, Cassation Bench, File No. 03389 (5 November 2007), the Cassation Bench of the Federal Supreme Court also made reference to the principle of the best interests of the child in another judgment made involving the guardianship of a child. Furthermore, in *Tilahun H/Mariam and Frehiwot Tsegaye v Matewos Asaye*, the Addis Ababa City First Instance Court followed the approach of the Cassation Bench of the Federal Supreme Court by passing judgment on the grounds of the principle of the best interests of the child in the Constitution and the CRC. *Tilahun H/Mariam and Frehiwot Tsegaye vs. Matewos Asaye,* AA First Instance Court File No. 2608/02 (2010); Degol & Dinku (2011) 336; Gessesse & Aberra (2014) 23; Alemu & Birmeta (2012) 46.

[74] Article 36(2) of the Ethiopian Constitution.

[75] Chapter 3 of this thesis established that both state and non-state actors are bound by the obligation to apply the best interests of the child standards in all actions concerning children, including in alternative care measures.

[76] Section 2(b)(iv) of the Children's Act.

[77] Emphasis added. Section 9 of the Children's Act.

[78] Section 6(2) of the Children's Act.

The Children's Act in its section 7 elaborates on the factors that must be taken into account when applying the standard.[79] These include 'any disability that a child may have'[80] and 'the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment'.[81] As such, the Children's Act imposes a duty on the government to ensure that the application of principle of the best interests should follow an individualised approach that takes the 'disability-specific context' into consideration when taking any action that concerns children with disabilities.[82] This indicates that the best interests of the child are served when he or she is placed in family-based alternative care. Hence, the extensive engagement of the best interests principle in the Constitution and Children's Act indicates consistent compliance with the international human rights standards.[83]

In the Ethiopian framework, in addition to the Constitution, the RFC contains a number of provisions that reflect the best interests standard. However, the RFC's reference to the best interests of the child is confined to certain matters affecting children and silent on other matters affecting them. The RFC, for instance, requires courts of law to verify whether or not adoption is in the best interests of children before approving adoption agreements.[84] In addition to the absence of the best interests of the child standard in subsidiary legislations that applies to *all matters* affecting children, it has been noted that there is lack of adequate 'procedural rules and

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[79] Section 7 of the Children's Act.

[80] See s 7(1)(i) of the Children's Act.

[81] See s 7(1)(k) of the Children's Act.

[82] Chilemba (2014) 229.

[83] The previous chapter in s 3(5)(2) established that the pertinent international standards require that the best interests of the child to be considered in *all actions* concerning children. It further explored the implication of the four general principles of the CRC and ACRWC on the right to alternative care of children with disabilities. It has been observed that the principle of best interests of the child in the ACRWC provides a higher level of protection to children with disabilities compared to the CRC as it provides for the best interests of the child to be the primary consideration in all actions concerning children. The implications of this for the alternative care of children with disabilities is significant as it imposes an obligation on states to consider the best interests of children with disabilities both pre- and post-placement in alternative care.

[84] Article 194(2) of the RFC. The best interests of the child are also mentioned in arts 266(2) and 312(2) of the RFC in relation to the authority of parents and explicit emancipation, respectively.

guidelines' for the application and implementation of the best interests of the child in all sectors,[85] which affects the otherwise high compliance of the standard in the Constitution and international standards. The best interests standard is also not consistently applied in alternative care measures such as the determination of forms of alternative care, family reunification processes and long-term placements in alternative care.[86]

In respect of Ethiopia's judiciary, although the courts have relied on the best interests principle set forth in Constitution, the CRC and ACRWC to resolve a number of cases,[87] there is no indication of a developed jurisprudence on this right, which might be due to the lack of strong adjudication of socio-economic rights cases by the local courts.[88]

The Constitutional Court of South Africa has dealt extensively with children's rights and applied the best interests principle in real situations to uphold the rights of children, albeit that it has not dealt with cases directly related to children with disabilities.[89] The Court, while acknowledging that the 'expansiveness'[90] and 'indeterminate' nature of the principle undoubtedly poses a challenge for the implementing bodies, has held that 'the contextual nature and inherent flexibility of section 28 … constitutes the source of its strength'.[91] The jurisprudence shows that the application of the best interests standard should not follow a

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[85] Emphasis added. Gessesse & Aberra (2014) 23; Kedir et al. (2013) 95.

[86] CRC Committee, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Ethiopia, CRC/ETH/CO/4–5 (2015), para 25.

[87] See, for instance, *W/t Tsedale Demissie v Ato Kifle Demisse*, Federal Supreme Court, Cassation Bench, File No. 23632 (6 November 2007) Vol 5; Federal Supreme Court, Cassation Bench, File No. 03389; Alemu & Birmeta (2012) 46; Gessesse & Aberra (2014) 23; Abebe (2012) 166.

[88] Mayessa AD 'Derivation of rights: Affording protection to latent socio-economic rights in the FDRE Constitution' (2013) 2 *Oromia Law Journal* 60.

[89] Chilemba (2014) 229–30. See, for instance, *Du Toit and Another v Minister of Welfare and Population Development and Others*, 2002 (10) BCLR 1006 (CC); *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC); S v M (2008) (3) SA 232 (CC).

[90] The Constitutional Court referred to s 28(2) as 'an expansive guarantee' that a child's best interests will be paramount in every matter concerning the child. *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) para 29.

[91] *S v M* (2008), paras 23 and 24.

‘predetermined formula’.[92] Rather, its proper application entails flexibility and ‘individualised examination of the precise real-life situation of the particular child involved’.[93]

This is also the approach followed by international monitoring bodies in their effort to give meaning to the concept and provide guidance to states on the application of the best interests standard. This is indicative of the fact that in the context of alternative care of children with disabilities, there cannot be a perfect solution or one form of alternative care that is always in the best interests of every child with a disability. Hence, when determining the best interests of a child with a disability deprived of his or family environment, one has to consider the individual circumstances of the given child, the disability of the child, the child’s need to be cared for in a family-based environment, and all the options available to arrive at the placement or form of alternative care that in the short and long term would serve the child’s best interests to the maximum. However, it is safe to argue that there is a general consensus that placement in institutional care is not in the best interests of children in general and specifically children under the age of three years.

4.3.3 Child participation

Neither the South African nor Ethiopian Constitution have a provision on child participation. In the case of South Africa, despite the Constitution’s silence, section 10 of the Children’s Act fills this gap, as it provides for the right of the child to participate in all matters that affect him or her in accordance with his or her ‘age, maturity and stage of development’ and for his or her views to be given due regard.[94] The term ‘in all matters’ recognises the obligation in international standards and implies that decisions, proceedings and actions regarding the

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[92] *S v M* (2008), para 24.

[93] *S v M* (2008), para 24.

[94] Section 10 of the Children’s Act reads as follows: ‘Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.’

removal of children with disabilities from their family environment and the determination of the form of alternative care for them should involve their participation and see their views being given due consideration in accordance with their age, maturity and level of development.[95]

Furthermore, the Children's Act makes it mandatory for the court to take cognizance of the views of the children in determining whether to extend a placement order.[96] The Act also ensures that children with disabilities have the opportunity to express their views in children's courts proceedings by requiring the court to 'allow a child to his or her views and preferences in accordance with the child's age, maturity and stage of development and any special needs that he or she may have'.[97] In view of this, it has been noted that 'the solicitation of children's views runs like a golden thread through the Children's Act, thereby rendering the Act a thoroughly modern text'.[98]

However, there is no explicit obligation in the Children's Act that requires children with disabilities be provided with age- and disability-appropriate assistance in accordance with the CRPD.[99] This may pose a barrier for children with disabilities to be able to participate in matters affecting them, including in proceedings regarding their placement in alternative care, as the court is given discretion to decide whether to allow the participation of a child after having considered any special needs the child may have.[100] An explicit obligation to this effect

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[95] The previous chapter, in s 3(5)(4) established that states are required to ensure that the views of children are sought and given due regard in decisions relating to their placement, development and review of care plans, and visits with parents and family. In addition, children's views should be solicited and considered in all alternative care settings.

[96] Section 159(2)(a) of the Children's Act.

[97] Section 61(1)(a) of the Children's Act.

[98] Sloth-Nielsen J 'Seen and heard? New frontiers in child participation in family law proceedings in South Africa' (2009) 23 (2) *Speculum Juris* 5.

[99] Chapter 3 of this thesis in ss 3(6)(3) and 3(5)(4) argued that the CRPD provides a higher level of protection to children with disabilities and that, in doing so, the CRPD acknowledges the multiple discrimination that children with disabilities face on the grounds of both childhood and disability.

[100] Section 61(1)(a) of the Children's Act reads: '(1) The presiding officer in a matter before a children's court must (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so.'

in the Children's Act would have ensured that children with disabilities are not excluded from participating in court proceedings on the basis of their disability and are provided with appropriate modes of communication to be able to weigh in on their preferences when it comes to their placement in alternative care and on their circumstances post-placement.[101]

In respect of Ethiopia's legislative framework, the RFC gives recognition to the obligation of child participation in a number of issues relating to children.[102] While these provisions entitle the child to be consulted in certain matters affecting him or her, the provisions are restricted to specific aspects of the rights of the child and do not extend to all matters affecting him or her in accordance with international standards.[103] It is also notable that the RFC gives the courts discretion over consulting a child before reaching a decision on the appointment and removal of guardians and tutors of a minor.[104] This indicates that consulting the child is a matter of choice rather than obligation, which is not consistent with international standards, which require states to ensure that the views of children with disabilities are heard and given due weight in *all matters* concerning them in accordance with their age and maturity. In the light of the CRPD and the obligation on the government to provide children with disabilities with

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[101] The CRPD in its art 7(3) requires State Parties to ensure that children with disabilities 'have the right to express their views freely on *all matters* affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right' (emphasis added).

[102] For instance, in relation to the adoption of a minor, the RFC mandates that the courts *shall* take into consideration the child's opinion before the approval of an adoption agreement. Furthermore, it provides that where one of the parents is not willing to give his or her consent to the adoption of a child, the court may approve the adoption after hearing the opinion of the child and the other parent, provided that the child is above 10 years old. The RFC also requires tutors to consult the child on serious matters affecting his or her property if the child is 14 years of age. See arts 194(3)(a), 291(1) and 191(3) of the RFC.

[103] Chapter 3 of this thesis in s 3(5)(4) established that the CRC requires that all children capable of forming views have the right to express their views freely on all matters affecting them, whereas art 4(2) of the ACRWC requires states to provide a child 'who is capable of communicating his or her own views' the 'opportunity' to do 'in all judicial or administrative proceedings affecting a child'. Article 7(3) of the CRPD requires children with disabilities' views to be heard on all matters affecting them on an equal basis with others in accordance with their age and maturity.

[104] Article 249(2) of the RFC of Ethiopia. See also Kedir et al. (2013) 96.

age- and disability-appropriate assistance to facilitate their effective participation, the provisions of the RFC dent its compliance with the international standards.[105]

Access to justice is another right fundamental to child participation in the context of the alternative care of children with disabilities. This right is a necessary component for the effective implementation of basic rights and freedoms guaranteed in international and domestic frameworks,[106] including the right to alternative care. When children with disabilities have access to justice on an equal basis with others they are assured an equal opportunity to assert their rights, including their right not to be discriminated against in alternative care measures. In this regard, South Africa's Constitution affords everyone the right of access to court.[107] Through the establishment of the children's court and a provision allowing children to bring matters to court, the Children's Act enhances children with disabilities' access to justice.[108] In terms of the Children's Act, children are allowed to bring a matter to court and to be assisted to this end on condition that the matter falls within the jurisdiction of that court.[109] By virtue of the phrase 'every child', this section can be seen as inclusive of children with disabilities' right to access the courts.[110] This is further supported in that the Children's Act requires the children's court to be accessible to children with disabilities.[111] Unlike the provision on child participation, which has a number of qualifiers pertaining to, inter alia, the level of

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[105] CRPD, art 7(3). The CRPD places a stricter obligation on states by requiring that children with disabilities' views be heard on an equal basis with others in accordance with their age and maturity and that they be provided with age- and disability-appropriate assistance in order to realise the right. The CRPD further provides for the full and effective inclusion of children with disabilities in society and for respect for their evolving capacities. These principles, together with that of non-discrimination, guide the interpretation and implementation of the right to alternative care of children with disabilities.

[106] Beqiraj J, McNamara L & Wicks V *Access to Justice for Persons with Disabilities: From International Principles to Practice* (2017) 15.

[107] Section 34 of the South African Constitution reads: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[108] Sections 42(1) and 53(2)(a) of the Children's Act; Carter EI *Access to Justice for Children with Disabilities: The South African Context* (unpublished LLD thesis, University of Pretoria, 2015) 118.

[109] Section 14 of the Children's Act.

[110] Carter (2015) 118.

[111] Section 42(8)(d) of the Children's Act.

development, age and maturity of the child, the provision relating to the right of a child to bring a matter to court is not restricted except for the question of jurisdiction.[112] However, South Africa's legislative framework does not address supported decision-making as it relates to children with disabilities and measures to enable them to make decisions and participate in decision-making.[113] Another necessary component of access to justice of children with disabilities, as discussed in the previous chapter, is the training of those involved in the field of administration of justice.[114] This is one area of disparity in respect of the Children's Act and the CRPD, as the former does not require that judicial officials be trained on issues related to children's rights.[115] Unless magistrates are properly trained in children's rights, it would be unrealistic to expect them to ensure that the rights of the child to participate are realised in a manner envisaged by the Children's Act.[116]

In the case of Ethiopia, there is no law that explicitly provides for the right of access to justice of persons with disabilities or children with disabilities. Nonetheless, the Constitution provides for the right of *everyone* 'to bring justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power'.[117] Thus, given the phrase 'everyone', it could be said that children with disabilities too are holders of this right. There is also no explicit law that requires that persons with disabilities or children with disabilities to be provided with procedural and age-appropriate assistance in order to facilitate the realisation of the right. There is also no obligation for the training of those working in the justice sector.[118]

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[112] Carter (2015) 118–19.
[113] Carter (2015) 108–9.
[114] See Chapter 3 of s 3(7)(4) this thesis for discussion of the right to access justice in the context of the alternative care of children with disabilities.
[115] Jamieson L 'Children and young people's right to participate in residential care in South Africa' (2017) 21(1) *The International Journal of Human Rights* 93.
[116] Zaal FN *Court Services for the Child in Need of Alternative Care: A Critical Evaluation of Selected Aspects of the South African System* (unpublished PhD thesis, University of the Witwatersrand, 2008), Chapter 8; Jamieson (2017) 93.
[117] Emphasis added. Ethiopia's Constitution, art 37(1).
[118] See CRPD, art 13(1)–(2).

The government, however, claims, in its reply to the list of issues to the initial report of Ethiopia to the CRPD Committee that support is provided to persons with disabilities at various stages of legal procedure.[119] It is further claimed that the government has been providing regular training to those working in the administration of justice to ensure the promotion of the CRPD and to facilitate reasonable – and procedural – accommodation in the justice sector at the federal and regional levels.[120] This omission would create a much wider gap in relation to realising the rights children with disabilities to participate, as such children require additional support. Thus, the actors involved need specific skills to be able to ensure that children with disabilities are provided with the necessary assistance to participate in all areas including in court proceedings affecting them; this would require, among other things, that clerks and magistrates be trained on children rights in general and issues related to disability in particular.

4.3.4 The right to life, survival and development

The right to life of 'everyone' is provided for in section 11 of the South African Constitution, while Ethiopia's Constitution explicitly provides for the right to life of the child in its child-specific provision.[121] Neither constitution, however, contains an explicit provision on the right of the child to survival and development. Aspects of the survival and development of the child are implied through an interpretation of other rights in both cases.[122] The survival and development aspects of the right can be gleaned from an array of rights in South Africa's Constitution, including the right of a child to basic nutrition, shelter, basic health-care services and social services (section 28(1)(c);[123] the socio-economic rights afforded to 'everyone'

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[119] CRPD Committee, Replies of Ethiopia to the List of Issues of Initial Report (UN Doc. CRPD/C/ETH/Q/1/Add.1, 2016) (hereafter CRPD Committee**,** Replies of Ethiopia to the List of Issues of Initial Report (2016)) para 37.

[120] CRPD Committee, Replies of Ethiopia to the List of Issues of Initial Report (2016) para 38.

[121] Ethiopia's Constitution, art 36(1)(a).

[122] Dutschke M & Abrahams K 'Children's right to maximum survival and development' Child Survival Project: Rights in Brief (2006) 3 available at *http://bit.ly/2s4ZnNQf*; Kedir et al. (2013) 96.

[123] Section 28(1)(c) of the South African Constitution.

including the right to access to adequate housing (section 26); the right to have access to health-care services, sufficient food and water and social security, including – if they are unable to support themselves and their dependants – appropriate social assistance (section 27); and the right to basic education and further education (section 29).[124] Similarly, Ethiopia's Constitution indirectly protects the right to survival and development of the child by requiring that the government allocate resources to provide for public health, education and other social services.[125] The right to life, survival and development can also be inferred from the obligation to protect the child from harm, abuse and exploitation in the Constitution.[126] However, there is no provision that explicitly affords the right to survival and development to children, including children with disabilities in all settings.

Like the Constitution, the Children's Act of South Africa also does not contain an explicit right to survival and development of the child. However, the Act recognises critical aspects of the right to life, survival and development of a child by incorporating a range of rights pertinent to realising the right.[127] The Children's Act makes reference to the development of the child in its preamble, which states that 'the child should grow up in a family environment and in an atmosphere of love, happiness and understanding' to ensure the 'full and harmonious development of his or her personality'.[128] This indicates that the development of the child is best secured in a family environment, which may in turn indicate that the full and harmonious development of children with disabilities deprived of their family is better realised in family-based alternative care.

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[124] Dutschke & Abrahams (2006) 3.

[125] Article 41(4) of the Ethiopian Constitution reads as follows: 'The State has the obligation to allocate an ever increasing resources to provide to the public health, education and other social services.'

[126] FDRE Constitution, art 36(1)(d) and (e); Kedir et al. (2013) 96.

[127] Sloth-Nielsen & Mezmur (2008) 9.

[128] Children's Act, Preamble.

In Chapter 3 it was argued that the right to life, survival and development of children in relation to alternative care would require providing family-based alternative care.[129] In this regard the Constitution provides for the right to 'appropriate' alternative care.[130] The Children's Act, on the other hand, requires that in any matter concerning children with disabilities due consideration must be given to providing the child with parental, family or special care whenever appropriate.[131] It further provides for a range of rights which are relevant to the survival and development of children with disabilities who are deprived of their family environment, including the provision of alternative care in the form of foster care, cluster foster care, CYCCs and temporary safe care.[132] Moreover, one of the factors which has to be taken into account when applying the best interests standard is the holistic development of the child, including his or her emotional, social and cultural development and physical and emotional security.[133]

The RFC of Ethiopia also contains provisions that serve to protect the right to life, survival and development of the child.[134] For instance, it requires the 'guardian to look after the health of the child, to educate and oversee the social development and relationships of the child'.[135] In addition, the right to life, survival and development is indirectly protected, as the Code places an obligation on the parents to ensure the proper upbringing of the child.[136]

From the above discussion it is established that, apart from the right to life of the child which is explicitly provided in general terms in the South African Constitution and explicitly provided

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[129] See s 3(5)(3) of Chapter 3 of this thesis for further discussions on the right to life, survival and development of children with disabilities in the context of the alternative care.

[130] Section 28(1)(b) of the South African Constitution reads as follows: 'Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.'

[131] Section 11(1)(a) of the Children's Act.

[132] Section 156(1)(e)(i)–(v) of the Children's Act.

[133] Section 7(1)(h) of the Children's Act.

[134] Kedir et al. (2013) 96.

[135] The RFC of Ethiopia, arts 257–260; Kedir et al. (2013) 96.

[136] The RFC of Ethiopia, arts 219 and 220; Kedir et al. (2013) 96.

in the Ethiopian Constitution, the frameworks do not explicitly provide for the survival and development aspect of this principle. One can argue that the lack of explicit provision for a right to survival and development that is cross-cutting under the national law may weaken its application in all areas, particularly in relation to vulnerable children such as children with disabilities who are in alternative care in general and institutional care in particular.[137] The lack of specificity presents an unclear position that may be used to the detriment of children in general and in particular children with disabilities in need of alternative or already in alternative care. Moreover, the inclusion of a provision to promote the holistic development and survival of all children including children with disabilities in all settings would have been indispensable in particular to children with disabilities in institutional care.[138]

4.3.5 Alternative care

The South African Constitution expressly provides for the right of a child to 'family care or parental care, and to appropriate alternative care when removed from the family environment'.[139] This section serves to protect children from being unnecessarily separated from their families except on legitimate grounds and when such separation is in the best interests of the child.[140] It further serves to ensure that when the separation of the child from

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[137] The right to life, survival and development, which is derived from article 6 of the CRC, is one of the four general principles and therefore informs the interpretation of all the articles in the Convention. Its counterpart can be found in article 5 of ACRWC, which also provides that every child has an inherent right to life that must be protected by law and which obligates states to ensure the survival, protection and development of the child. See discussion in s 3(5)(3) of Chapter 3 of this thesis for further discussion on the right to life, survival and development of the child in the CRC and ACRWC and how the right informs their right to alternative care.

[138] Chapter 3 of this thesis in s 3(5)(3) established that the 'development' aspect of the right requires states to interpret the term broadly to include the 'physical, mental, psychological and social development' of the child.

[139] The South African Constitution, s 28(1)(b). See, for instance, the case of *V v V* 1998 (4) SA 169 (C) involving the custody of the child upon divorce, in which the father denied an application of joint custody by a mother on the basis that she was involved in a sexual relationship with another woman. The father restricted the mother's access to the child for fear that the child would be negatively influenced by the mother's sexual orientation. The court granted joint custody on the basis of the child's right to parental care in terms of s 28(1)(b); Sloth-Nielsen (2002) 142.

[140] For instance, in the case of *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC), the court declared ss 151 and 152 of the Children's Act, which allowed the removal of the child from family care by state officials and placement in temporary safe care, unconstitutional owing to the absence of a procedure for automatic review of the decision to remove the child; Skelton (2013) 605.

his or her family environment becomes unavoidable, alternative care is provided that is appropriate to him or her. Section 28(1)(b) of the Children's Act and section 9(2) of the Constitution obligate the government to provide appropriate alternative care to children with disabilities deprived of their family environment and to take steps to ensure that they are not discriminated against in alternative care measures.

It is notable that the Constitution of South Africa requires that the form of alternative care selected for a specific child removed from the family environment must be appropriate alternative care.[141] Although no elaboration is provided of the meaning of 'appropriate alternative care',[142] it has been interpreted to mean care of such a nature and quality that it resembles family or parental care and can provide for the protection, development and well-being of children with disabilities in the absence of family or parental care.[143] This obligation is not subject to progressive realisation and is restricted only by the limitation clause.[144] This means that South Africa has an immediate obligation to provide alternative care to children with disabilities unless it is a justifiable limitation saved by the Bill of the Rights.[145]

The Ethiopian Constitution requires special protection to be accorded to orphans and for the establishment of institutions for their adoption, well-being and education.[146] However, the provision's reach is confined to 'orphans' despite the various circumstances, apart from the death of parents, in which a child might end up being without parental care and in need of

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[141] Section 28(1)(b) of South Africa's Constitution.

[142] Nonyana-Mokabane M *Children in Need of Care and Protection and Their Right to Family Life* (unpublished PhD thesis, University of Pretoria, 2012) 911.

[143] Bekink B & Brand D 'Constitutional protection of children' in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000) 184.

[144] See Jamieson (2014) 220

[145] Jamieson (2014) 220.

[146] Article 36(5) of the Ethiopian Constitution. In respect of family laws in regional states, the Constitution gives regional states the power to enact their own family codes. Thus, each regional state is allowed to enact its own laws on family and alternative care issues. Accordingly, various regional states have enacted family laws which bear a strong resemblance to the Federal Family Code. Kedir et al. (2013) 153; Yohannes & Assefa (2008) 13–4. It is beyond the scope of this thesis to give a detailed analysis of the compatibility of each of these regional family laws, but it has to be noted that they are bound to adhere to the federal constitution.

alternative care.[147] Moreover, apart from institutional care and adoption, the Constitution makes no reference to other forms of alternative care for orphaned children.[148] This indicates non-compliance with international standards, in particular the CRPD which does not support the institutionalisation of orphaned children with disabilities.[149] It is submitted that the non-compliance of the provision may result in excessive dependence on institutions as a means to care for children deprived of parental care.

The Ethiopian Constitution further requires the state to allocate resources and provide rehabilitation and assistance to children without parents or guardians.[150] The scope of this provision is wider than that of article 36(5) of the Constitution, as it extends not just to orphans but children without guardians. However, this entitlement is made subject to the availability of resources.[151] It has been argued that this dependence on assistance should be cause for concern, considering that '[a] guarantee that suitable assistance will be provided cannot be given under such conditions'.[152] This reflects the obligations in international standards that subject socio-economic rights to the availability of resources and to progressive realisation.[153] This provision does not bestow rights on children deprived of parental care or guardians, but merely speaks to the duty-bearer and is further qualified by the availability of resources, which indicates that the state is obligated to provide rehabilitation and assistance to children deprived of their family

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[147] Yohannes and Assefa (2008) 26.

[148] See also Phillips C *Child-Headed Households: A Feasible Way Forward, or an Infringement of Children's Right to Alternative Care?* (2011) 173.

[149] See art 23(5) of the CRPD; see also s 3(7)(4) of Chapter 3 of this thesis where it is demonstrated that the CRPD provides a higher level of protection to children with disabilities by requiring children with disabilities who are unable to live with their families to be to be provided with alternative care that is family-based and by further supporting this right by explicitly according children with disabilities with the right to live in the community on an equal basis with others.

[150] Article 41(5) of the Ethiopian Constitution reads as follows: 'The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.'

[151] See art 41(5) of the Constitution.

[152] Article 41(5). See also Phillips (2011) 173.

[153] In s 3(4) of Chapter 3 it was established that in respect of the nature of states' obligations under the CRC and the CRPD, socio-economic rights are subject to progressive realisation to the maximum extent of states' available resources.

environment only when resources allow. This entitlement is thus riddled with qualifications and is weak in nature, as it does not afford children deprived of their family a right to rehabilitation and assistance that can be claimed from the state.

In respect of South Africa, the judiciary has dealt with section 28(1)(b) of the Constitution in *Centre for Child Law v MEC for Education.*[154] The Court in its ruling reaffirmed that the children's rights under section 28 were not subject to the availability of resources, but rather immediately realisable and without qualification.[155] The Court reiterated the state's obligation to bear the primary responsibility for providing for the needs of children,[156] which has been interpreted to include adequate funding of CYCCs with regard to the effective provision of nutritious food, health-care services, shelter and social services.[157] As such, the order of the Court entitled the children who were placed in a parlous conditions in a school of industry to the provision of their basic needs[158] as well as psychological and therapeutic needs.[159] It underlined that the equality argument is an implausible defence, especially where it perpetuates an infringement on grounds of a significant cost to the state.[160]

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[154] 2008 SA 223 (T). The case involved children who were placed in a school of industry in terms of s 15(1)(d) of the Child Care Act 74 of 1983, which allowed a children's court to place a child in a school of industry if after review it was found that the child was in need of care. The first applicant, the Centre for Child Law, sought orders that the respondents be compelled to provide sleeping bags to each child and to establish a 'proper access control and psychological support structures, and to make immediate arrangements for the school to be subject to a developmental quality-assurance process'. It also claimed that the parlous conditions to which children in a certain school of industry were subjected violated their constitutional rights under ss 10, 12 and 28(b) and (c) of the Constitution with regard to the right to dignity, the right to not be subjected to cruel, inhuman or degrading treatment, and the rights of children, respectively. Sloth-Nielsen & Mezmur (2008) 10–11.

[155] *Centre for Child Law v MEC for Education and Others*, 227 I–J.

[156] *Centre for Child Law v MEC for Education and Others*, 228 F–G.

[157] Proudlock P 'Children's socio-economic rights' in Boezaart T (ed) *Child Law in South Africa* (2009) 222.

[158] *Centre for Child Law v MEC for Education and Others*, 228 F-G.

[159] *Centre for Child Law v MEC for Education and Others*, 231 D–F.

[160] The MEC for education in the province counter argued that the provision of sleeping bags for such children would be contrary to the constitutional obligation of the equality principle in that children who are in a similar circumstance would pursue the same remedy 'at a very significant cost to the State'. The defendant proposed seeking assistance from the Red Cross and other donors in the provision of sleeping bags for the children. *Centre for Child Law v MEC for Education and Others,* 228 C–G.

Alternative care is dealt with in subsidiary legislation in South Africa and Ethiopia's legislative frameworks. However, while the Children's Act contains extensive provisions for children in the context of alternative care, in Ethiopia the RFC offers a more generic provision in this regard. Moreover, unlike South Africa's rich jurisprudence on socio-economic rights in general and children's rights in particular, Ethiopia lacks strong adjudication of socio-economic rights cases in the local courts.[161]

The RFC of Ethiopia covers various issues including provisions for the health, education and upbringing of a child[162] and adoption.[163] It is noteworthy that provisions allowing intercountry adoption in the RFC were recently amended to ban intercountry adoptions.[164] Parents bear the primary responsibility for the care and support of their child.[165] In the absence of parents, the RFC lists the extended family responsible for providing care and support of a child without parental care.[166] In doing so, it requires that responsibility be transferred to the following family members: grandparents, siblings who have attained majority and the aunt or uncle of the child, respectively.[167] It mandates the court to appoint a guardian for the child in cases where, after exploring the abovementioned care options, the child is still found to be without any guardianship.[168] From this provision it is evident that the RFC provides for alternative means of care in the absence of parents and the extended family. However, there is non-compliance where there is no explicit provision for the court to prioritise family-based alternative means

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[161] Mayessa (2013) 60.

[162] The RFC, arts 257, 258 and 260.

[163] The RFC, arts 180–96.

[164] Goitom H 'Ethiopia: Federal Family Code amended, ending intercountry adoption' (2018) Law Library of Congress Official Blog available at *http://bit.ly/35wq1wL* (accessed 12 February 2018).

[165] Article 216(1) of the RFC reads as follows: 'A minor, as regards the proper care of his person, shall be placed under the authority of a guardian.'

[166] Article 225 of the RFC reads as follows: 'Where the child no longer has his father and mother, and in default of a valid appointment made by the survivor, the functions of guardian or tutor of the child shall devolve, by virtue of the law, on the following persons: (a) ascendants of the child; (b) in their default, the brothers or sisters of the child who have attained majority; (c) in their default, the uncle or aunt of the child.'

[167] Article 225 of the RFC.

[168] Article 227(1) of the RFC reads as follows: 'There by applying the preceding Articles, a child remains without a guardian or tutor, the functions may be entrusted to such person as may be appointed by the court.'

of care and for institutional care to be a measure of last resort.[169] The RFC also does not require special protection and assistance to be provided for children deprived of their family environment in accordance with the international obligations.[170]

In terms of the Children's Act, there are various circumstances in which a child may be categorised as being in need of care or protection, which is subject to a decision by court.[171] The groups of children categorised as in need of care and protection are comparable to vulnerable children recognised in the UN Guidelines.[172] In circumstances where a child is found to be in need of care and protection, a legal intervention may be required by means of placement in alternative care.[173] The Children's Act does not define 'alternative care' but describes when a child is said to be in alternative care.[174] Accordingly, for the purposes of the Children's Act, a child is in alternative care if he or she has been placed in foster care, in a CYCC or in temporary safe care.[175] To this end, the Children's Act offers a range of alternative care options for children considered to be in need of care and protection, including alternative care consisting of foster care, cluster foster care, temporary safe care and CYCCs.[176] There are also orders that the court can make as part of the effort to secure stability in the life of a child

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[169] While the CRC and the ACRWC allow for institutional care as a measure of last resort, the CRPD insists that alternative care for children with disabilities deprived of their family environment be provided within the extended family and, when that is not possible, within the community in a family setting. See art 20(3) of the CRC, art 25(2)(a) of the ACRWC and art 23(5) of the CRPD. See also s 3(7)(4) of Chapter 3 of this thesis for an analysis of the right to alternative care of children with disabilities in the CRPD.

[170] Article 20(1) of the CRC and art 25(1) of the ACRWC entail that children deprived of their family environment are provided with special protection and assistance. In s 3(7)(2) of Chapter 3, it was argued that 'special protection and assistance' are not synonymous with the provision of alternative care, and that it requires that additional measures be taken. In relation to children with disabilities, the provision of 'special protection and assistance' entails being cognizant of their particular vulnerabilities, such as disability, when determining alternative care placements.

[171] In terms of s s150 and 156 of the Children's Act.

[172] See UN Guidelines, para 9(b).

[173] Matthias C & Zaal N 'The child in need of care and protection' in Boezaart T (ed) *Child Law in South Africa* (2009)163–64. In terms of the Children's Act, any decision which would result in the removal of child from the family must be made through a court. In an emergency where children are considered to be in immediate danger, the decision to remove a child should at least be confirmed by a court. This requirement for an automatic review to the Act was added by the Constitutional Court within the judgment in *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC). Jamieson (2014) 225

[174] Section 167(1) of the Children's Act.

[175] Section 167(1)(a)–(c) of the Children's Act.

[176] Section 156(1)(e)(i)–(v) of the Children's Act

found to be in need of care and protection.[177] To this end, the Children's Act stipulates that very young orphaned and abandoned children must be made available for adoption, unless adoption is not in their best interests.[178] In the interim, South Africa's legislation is in compliance with international standards which recognise the importance of placement of very young children in a family-based care.[179] The subsection below discusses the concepts of foster care, cluster foster care and CYCCs.

4.3.5.1 Foster care

Foster care is a favourable option for children where remaining in parental care, reunification and adoption are not possible.[180] According to the Children's Act of South Africa, foster care is the placement of a child in the care of a person other than a parent or guardian.[181] The court may place a child in the care of a non-relative, a relative other than the child's parent or guardian or in a registered cluster foster care scheme.[182] The maximum number of children that can be placed in the care of a single foster parent or two people sharing a household is six, unless the intention is to keep siblings or blood relatives together or if a court considers it to be in the best interests of the children.[183]

A crucial protective measure with regard to the rights of children placed in foster care is that the Children's Act specifies a number of conditions to be met by a foster parent to care for

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[177] Section 157 of the Children's Act.

[178] Section 157(3) of the Children's Act.

[179] See s 3(7)(3) of Chapter 3, where it is demonstrated that the CRC Committee on various occasions explicitly underscored the exceptional and subsidiary nature of measures that imply the institutionalisation of children when the implementation of any other type of special measure of protection is impossible or inappropriate. The CRC Committee's General Comment No. 7 strongly advises states not to place young children in institutions. CRC Committee, GC No. 7 (2005), para 36(b) and (d). The UN Guidelines also clearly state that they should be placed not in residential care but in family-based settings, subject to a number of exceptions. UN Guidelines, para 22.

[180] South African Law Commission (Project 110) *Report on the Review of the Child Care Act* (2002) 215; Gallinetti J & Loffell J 'Foster care' in Davel C & Skelton A (eds) *Commentary on the Children's Act* (2010) 9.

[181] Section 180(3) of the Children's Act. In South African law, foster care is commonly considered a temporary alternative care arrangement and does not necessarily involve the transfer of parental responsibility or terminate the rights of biological parents. Foster care placements trigger gradual efforts towards reuniting a child with his or her family or lead to a process of adoption where it is in the best interests of the child. Skelton (2013) 608.

[182] Section 180(3).

[183] Section 185(1)(a) and (b).

children.[184] One of these conditions is that the prospective foster parent should be 'a fit and proper person'.[185] However, there is no definition of 'fit and proper' in the Act. It has been argued that 'fit and proper' refers to a person who can provide care for a child that will meet the purposes of foster care as set out in section 181.[186] It may be argued that the lack of definition of the 'fit and proper' creates a gap in ensuring that foster parents are qualified and have the necessary requirements to care for children including children with disabilities. An explicit recognition of this is necessary, as there is no further reference in the Act to the needs of children with disabilities in relation to foster care that would ensure that prospective foster parents have the proper training and preparation to respond and cater to the needs of such children. This gap may result in multiple placements of children with disabilities that in turn may put them at risk of neglect and maltreatment. Moreover, the lack of available trained foster carers also increases the likelihood of children with disabilities' ultimately being placed in institutional care as a 'measure of last resort', since due to their lack of training and preparation foster families may be reluctant to take in children with disabilities on account of the latter's physical, sensory, psychological, or mental status.[187] Thus, in circumstances like these, a child with a disability's placement in institutional care cannot be justified under the guise of a 'measure of last resort'. Therefore, if family-based alternative care options such as foster care are to be available in a non-discriminatory manner and to be inclusive of children with disabilities, then there is a need to clearly provide for the identification of accredited foster carers who can avail children with disabilities with such care.

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[184] Section 182 (2)(a)–(d).

[185] Section 182(2)(a).

[186] Gallinetti J & Loffell J 'Foster care' in Davel CJ & Skelton A (eds) *Commentary on the Children's Act* (2010) 13.

[187] In this regard, the CRC Committee recommends that organisations in charge of the foster placement of children conduct the necessary training of potentially suitable families to ensure the provision of proper care for children with disabilities. CRC Committee, GC No. 9 (2006), para 46.

Despite South Africa's relatively advanced provisions aimed at regulating foster care, the country has faced significant challenges due to the unprecedented increase in children placed in foster care over the years as a result of high levels of HIV AIDS and the subsequent rise in the number of orphaned children.[188] The increase in the number of children in foster care and the added stress on the care and protection system are also attributable to discrepancies between the Foster Care Grant (FCG) and Child Support Grant (CSG), with the former being the more favoured grant due to its higher monetary value.[189] This has resulted in an overloaded foster care system: in 2010, 123,000 foster care orders lapsed partly due to the substantial number of extension applications.[190] A court order allowing the reinstatement of the lapsed orders was obtained by the Centre for Child Law from the North Gauteng High Court.[191]

Since then, the government has taken some positive steps to divert foster carers who are relatives of the child from entering the formal care system, steps that include increasing the amount of the CSG.[192] It has been argued that it is crucial to increase the value of the 'top up' to further divert relatives caring for a child from the formal foster system.[193] There has also been a push for the government to amend the Children's Act to differentiate between foster care and kinship care to ensure that the foster care system is not overloaded by relatives seeking the FCG.[194] These initiatives are crucial for ensuring that the most vulnerable children including children with disabilities who are genuinely deprived of their family environment

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[188] Skelton A 'Kinship care and cash grants – South Africa' in Atkin B *The International Survey of Family Law* (2012) 336.
[189] Skelton (2012) 336.
[190] Skelton (2013) 609.
[191] This order allowed for the administrative extension of foster care orders until the end of 2014, or the amendment of the Children's Act. *Centre for Child Law v Minister of Social Development* (North Gauteng High Court) unreported case no 21726/11 (order granted 7 April 2011 as cited in Skelton in Currie (2013) 609.
[192] Alternate Report Coalition – Children's Rights South Africa 'Supplementary submissions to the United Nations Committee on the Rights of the Child following the Government of South Africa's written replies to the list of issues' (2016), para 35 available at http://bit.ly/2T2OQ0z (accessed 24 March 2018) (hereafter ARC-CRSA (2016))
[193] ARC-CRSA (2016) para 65.
[194] ARC-CRSA (2016) para 67.

and without any existing or willing extended family to care for them are provided with alternative care and additional support for their foster caregivers in the form of a grant.

In addition, cluster foster care has been introduced in the Children's Act as one form of alternative care and is envisaged as a means towards deinstitutionalisation, as it would allow more children to be cared in their communities.[195] The Children's Act states that more than six children can be placed in foster care in terms of a registered cluster foster care scheme.[196] As discussed in Chapter 3, the insertion of the phrase 'in accordance with their national laws' and the non-exhaustive nature of the list of alternative care forms provided in article 20 of the CRC reflect the acknowledgement that countries the world over employ different forms alternative care for children who cannot be cared for by their own parents.[197] The introduction of a new kind of alternative care in the form of cluster care is thus commendable; nonetheless, it has been reported that cluster foster care schemes are being manipulated to bypass the required registration process applicable to CYCCs.[198] The lack of provision in either the Children's Act or the regulations specifying how such schemes should operate may open the door for them to 'operate as unregistered CYCCs without having to meet the norms and standards required for CYCCs'.[199] It has been pointed out that the provisions pertaining to cluster foster care as they stand in the Children's Act 'adapt foster care from being conceptualised as a family- or

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[195] Cluster foster care was introduced to respond to the growing number of children in need of alternative care in South Africa. Skelton (2013) 608; Jamieson (2014) 228.

[196] Section 185(2) of the Children's Act.

[197] Article 20(2) of the CRC reads as follows: 'States Parties shall in accordance with their national laws ensure alternative care for such a child'. See s 3(7)(3) of Chapter 3.

[198] Gallinetti & Loffell (2010) 17.

[199] Alternate Report Coalition – Child Rights South Africa 'Alternate report to the UN Committee on the Rights of the Child in response to South Africa's combined 2nd, 3rd and 4th periodic country report on the UN Convention on the Rights of the Child' (2015) available at *http://bit.ly/36vbRgJ* (accessed 11 June 2017), para 133.

household-based intervention, to one which more closely approximates a residential care-type setting'.[200]

Moreover there have been concerns regarding the fact that under the cluster foster care scheme, caregivers are paid to provide care for children, which raises the question of whether this aspect of the arrangement would change the nature of care from 'parental or family care' towards institutional care. It has been argued too that this setup is not in the best interests of the child because it does not promote the continuity of care that foster care is supposed to provide.[201]

4.3.5.2 Child and Youth Care Centre

A Child and Youth Care Centre (CYCC) is another alternative care option provided in the Children's Act for children considered to be in need of care and protection.[202] It is a new form of residential care introduced by the Act.[203] A CYYC is defined as 'a facility for the provision of residential care to more than six children outside of the family environment'.[204] The term CYCC is used to avoid labelling facilities and thus to prevent 'stigmatisation' of children placed in certain facilities.[205]

Different forms of placement in CYCCs for children considered to be in need of care and protection are envisaged.[206] Each placement centre may be registered to provide specific

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[200] Meintjes H, Moses S, Berry L, et al. *Home Truths: The Phenomenon of Residential Care for Children in a Time of AIDs* (2007) 14; Gallinetti & Loffell (2009) 18.

[201] Proudlock P, Mentjies H, & Moses S *Children's Institute submission on the draft Regulations to the Children's Act 38 of 2005* (2008)14–5.

[202] See Chapter 13 of the Children's Act. CYCC is the umbrella term for all children's homes, places of safety, schools of industry, reform schools and secure-care facilities. CYCCs do not include facilities where children are cared for with the consent of their parents, such as partial care facilities, drop-in centres, boarding schools or other residential facilities attached to schools. Similarly, children in correctional facilities and prisons managed by the Department of Correctional Services are not legally regarded as CYCCs. Section 191(a)–(e). Proudlock P & Jamieson L *Guide to the Children's Act no 38 of 2005* (2008).

[203] Skelton A 'Child and youth care centres' in Davel C & Skelton A (eds) *Commentary on the Children's Act* (2010) 7.

[204] Section 191(1).

[205] Boezaart T & Skelton A 'From pillar to post: Legal solutions for children with debilitating conduct disorder' in Grobbelaar-du Plessis I & Van Reenen T (eds) *Aspects of Disability Law in Africa* (2011) 125; Matthias & Zaal (2009) 28–9.

[206] Section 156 of Children's Act.

programmes.[207] In addition to the residential care programmes, CYCCS *may* also provide the 'appropriate care and development' of children with disabilities and therapeutic programmes appropriate to children's developmental and other needs.[208] This indicates that CYCCs are envisaged to provide for more than children's basic physical needs. However, the choice of wording in this regard, that is, 'may' in lieu of 'should', is permissive and does not impose a strong obligation on the government to ensure that children with disabilities are provided with appropriate care and therapeutic and developmental services.

The court is allowed to order the placement of a child in a 'facility' for the care of children with disabilities if it finds that a child who is in need of care and protection has a physical or mental disability or that it is in the best interests of the child to be cared for in such a facility.[209] It has been argued that the aim of this sub-section is to ensure the availability of 'facilities' that are equipped to provide 'appropriate therapeutic programmes designed to meet the special needs' of children.[210] However, this provision in its present condition suggests that CYCCs for children with disabilities are separate from CYCCs for other children. In this regard, the Act shows elements of the medical model of disability, a model that relies on an isolated approach in providing services to children with disabilities rather than providing a range of level of support and services within an inclusive system as envisaged in the CRPD.[211]

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[207] Skelton A 'Child and youth care centres' in Davel C & Skelton A (eds) *Commentary on the Children's Act* (2010) 7. In terms of section 191(3), these programmes include '(a) the provision of appropriate care and development of children with disabilities or chronic illnesses; (b) therapeutic and developmental programme; (c) the treatment of children for addiction to dependence-producing substances; (d) a programme for the treatment of children with a psychiatric condition; (e) a programme to assist a person with the transition when leaving a child and youth care centre after reaching the age of 18; or (f) any other service that may be prescribed'.

[208] Emphasis added. Section 191(3)(a) and (b) of the Children's Act.

[209] Section 156(g)(i) of the Children's Act.

[210] Boezaart (2011) 276.

[211] While the CRC and the ACRWC allow for institutional care to be provided as a measure of last resort, the CRPD requires that alternative care for children with disabilities deprived of their family environment be provided within the extended family or, when that is not possible, within the community in a family setting. See art 20(3) of the CRC, art 25(2)(a) of the ACRWC and art 23(5) of the CRPD. See also s 3(7)(4) of Chapter 3 for a detailed analysis of the right to alternative care of children with disabilities in the CRPD. The placement of children with disabilities in special service centres is also one of the concerns raised by the CRPD Committee's Concluding Observations to South Africa's initial state report, on the ground that it is based on long-term institutionalisation.

In respect of the relative desirability of the alternative care options in the standards, in particular the CRC and ACRWC, priority is given to 'family-based' or 'family-like' alternatives for children without their family environment, with institutional care being considered only as a measure of last resort.[212] This obligation is more clearly stated in the Children's Act, where the court may consider and order the placement in a CYCC of a child in need of care and protection only if another option is not appropriate.[213] This provision is particularly significant for children with disabilities, who are prone to being routinely placed in institutional care, in that it promotes their placement in a family environment in accordance with the obligations set out in international standards.[214] The Children's Act further mandates that a child not remain in a registered CYCC for a period longer than six months without an order from the court.[215] This denotes that placement in a CYCC is envisaged as a short-term placement pending a better and longer-term care option for a particular child.[216] It is possible, however, that such placement could be a long-term arrangement and that a court order to this effect could be made. In addition to requiring that a child be placed in alternative care for as short a period as possible, the Act requires that efforts be made to reunify the child and parent or caregiver.[217] This serves as a strong accountability tool to ensure that children for whom reunification with the family is

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The Committee expressed concern that such special service centres lacked adequately trained personnel and are located in areas remote from families and communities. CRPD Committee Concluding Observations: South Africa (UN Doc. CRPD/C/ZAF/CO/1, 2018), para 12(c).

[212] See s 3(7)(3) of Chapter 3.

[213] Section 158(1) of the Children's Act.

[214] The CRC and ACRWC require that institutional care be a measure of last resort for children who are temporarily or permanently deprived of their family environment. The CRPD strengthens the protection of children with disabilities in alternative care measures by requiring that alternative care that is family-based be provided to children with disabilities who cannot live with their families. While the CRC and ACRWC allow for institutional care to be provided as a measure of last resort, the CRPD insists that alternative care for children with disabilities deprived of their family environment be provided within the extended family or, when that is not possible, within the community in a family setting. See art 20(3) of the CRC, art 25(2)(a) of the ACRWC and art 23(5) of the CRPD. See also s 3(7)(4) of Chapter 3, for a detailed analysis of the right to alternative care of children with disabilities in the CRPD.

[215] Section 167(2) of the Children's Act.

[216] Zaal N & Matthias C 'Alternative care' in Davel CJ & Skelton A (eds) *Commentary on the Children's Act* (2010) 11–4.

[217] Section 157(1)(b)(ii).

possible and appropriate are provided with such services.[218] One potential departure from the requirement of the UN Guidelines is that the Children's Act does not include a provision that requires the gradual elimination of such institutions.

The adequacy of CYCCs in meeting the needs of children with disabilities was put to test in *Centre for Child Law v MEC Health and Social Development, Gauteng,*[219] where the applicant had to apply for a *curator ad litem* in a case of two boys with a debilitating conduct disorder for whom suitable accommodation could not be found after multiple placements in CYCCs as well as in mental health care. A curators' report was submitted to the North Gauteng High Court, describing how the children were failed by the state after having been removed from their families and placed in CYCCs.[220] The case of A and G was handled by the same curator and revealed that CYCCs are ill-equipped to provide appropriate care to children with conduct disorder.[221] The curator concluded that the system violated a number of constitutional rights of A and G, including the right to equality (section 9); the right to dignity (section 10); the right to appropriate alternative care (section 28(1)(b); the right to social services (section 28(1)(c); and the best interests of the child (section 28(2).[222] A similar trend can be observed in a case lodged by the Centre for Child Law in 2010 against the departments of Social Development, Health and Education involving a 10-year-old girl in similar circumstances.[223]

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[218] Jamieson (2014) 226.

[219] *Centre for Child Law v MEC Health and Social Development*, *Gauteng* North Gauteng High Court unreported case no 37850/2010. An elaborate discussion of the two cases can be found in Boezaart & Skelton in Grobbelaar-du Plessis & Van Reenen (eds) (2011) 107–11.

[220] Boezaart & Skelton (2011) 107–11.

[221] Boezaart & Skelton (2011) 107–11.

[222] Hansungule Z *A Case for for the Socio-Economic Rights of Children with Disabilities in South Africa: Protection of the Right to Basic Education and the Right to Social Services* (unpublished LLM thesis, University of Pretoria, 2016) 125.

[223] The Centre for Child Law and Departments of Social Development, Education and Health reached a settlement in 2018 which entailed that the respondents would develop an intersectoral policy and implementation plan, costed and budgeted for, and with the final phase of the settlement entailing the delivery of a final report for submission to the cabinet. In addition, the settlement entails the implementation of interim measures to ensure that children with severe disruptive behaviour disorder are provided with appropriate services. *Centre for Child Law v MEC for Social Development and Others,* unreported, GP case no 73662/16 (4 October 2016) *(*Centre for Child Law

These cases indicate that while in the interim there is compliance with international obligations, there is a lack of due diligence in South Africa in that the state does not address all the specific needs of children who are placed in CYCCs. It is also notable that there was no effort on the part of the state to explore family-based alternative care options for any of the children in the above cases. In fact, it has been argued in relation to the case of A and G that there is a need to expand 'specialised' facilities to provide care for children with conduct disorder.[224] Thus, practice shows a clear deviation from the obligations set out in international as well as national standards, which will be discussed in the following sections.[225]

4.3.6 The obligation to undertake periodic review of placement in alternative care

The Children's Act requires regular review of alternative care placements. Generally, a court order placing the child in alternative care expires after two years (or earlier) and has to be reviewed with the possibility of extension for another two years.[226] However, placement of children with disabilities in CYCCs in terms of section 156(1)(g) is not made subject to supervision and reunification services. This lack of specificity goes against the obligation placed upon the state under the CRC to ensure that the placement of children, including children with disabilities, in alternative care is regularly reviewed.[227] Notwithstanding these provisions aimed at ensuring the short-term placement of children in CYCCs, some children remain in care for a long time.[228] Lack of monitoring of placements and of necessary intervention may

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Supplementary Founding Affidavit - redacted) Boezaart T 'General Principles' in Davel C & Skelton A (eds) *Commentary on the Children's Act* (2010) 25–6.

[224] Boezaart & Skelton in Grobbelaar-du Plessis & Van Reenen (eds) (2011) 111.

[225] See ss 5(2)(1) – 5(2)(5) of Chapter five of this thesis for further discussions on the challenges in relation to the implementation of the rights of children with disabilities in the context of alternative care in South Africa.

[226] Section 159(1)(a) & (b); Jamieson L *Children's Act Guide for Child and Youth Care Workers* 2 ed (2013) 98.

[227] In s 3(8) of Chapter 3 of this thesis it was established that article 25 of the CRC requires states to carry out periodic review of the placement and situation of children so placed by the authorities for their care, protection or treatment of their physical or mental health. The CRC Committee in its GC No. 9 has reiterated the need for competent authorities to periodically review the alternative care selected for children with disabilities to ensure that the placement is promoting their well-being. CRC Committee, GC No. 9 (2006), para 50.

[228] CRC Committee, Consideration of Reports Submitted by States parties under article 44 of the Convention, Second periodic reports of States parties due in 2002, South Africa (UN Doc. CRC/C/ZAF/2, 2015), para 197.

put children with disabilities in CYCCs at risk of neglect and maltreatment, which are not uncommon in institutional care settings.

The Ethiopian legislative framework does not include an obligation to periodically review the placement of children in alternative care. However, there are provisions to this effect in the National Guidelines, which will be discussed in the following sections.[229]

4.3.7 Provisions dedicated to the rights of children with disabilities

An assessment of the adequacy of the legislative frameworks of South Africa and Ethiopia in relation to the right to alternative care of children with disabilities would not be complete without examining how the frameworks provide for the rights of children with disabilities specifically. The South African Constitution is silent on the rights of persons/children with disabilities. Although the Constitution provides for the rights of children in section 28, no explicit reference to children with disabilities is made in this section.[230] It has been argued that the lack of any substantive constitutional provision on the rights of persons/children with disabilities reflects the position in international law that presumes the adequacy of the enforcement of non-discrimination with regard to disability issues.[231] It is also noteworthy that South Africa does not have separate disability legislation.

In the case of Ethiopia, the Constitution, although not referring directly to children with disabilities, imposes a duty on the state to allocate, within its available means, resources to provide rehabilitation and assistance to persons with disabilities.[232] The entitlement to assistance is subject to the availability of resources, which raises the question of whether

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[229] See s 4(4)(2) of this Chapter.

[230] Chilemba (2014) 198.

[231] Chilemba (2014)198–99.

[232] Article 41(5) the Ethiopian Constitution reads as follows: 'The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.'

suitable assistance can be given under such limitations.[233] Moreover, this provision speaks only of the duty-bearer, not the rights-holder, which is poor crafting in that it does not give rise to a right and undermines the provision's justiciability.[234]

In respect of South Africa, despite the Constitution's lack of a substantive provision on the rights of children with disabilities, the Children's Act makes several reference to children with disabilities. From the outset, the Children's Act, as one of its key principles, makes it mandatory that 'all proceedings, actions or decisions in a matter concerning a child *must* 'recognise a child's disability and create an enabling environment' to respond to the special needs of children with disabilities.[235] The Act's emphasis on creating an enabling environment is commendable, and is a recognition of the external barriers that children with disabilities face in society.

The Children's Act goes a step further to protect children with disabilities by dedicating section 11 to their rights. This section requires that, in any matter concerning children with disabilities, due consideration be given to providing the child with parental, family or special care whenever appropriate;[236] to facilitating the participation of the child in social, cultural, religious and educational activities, considering any special needs the child may have;[237] to providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community;[238] and to providing the child and the child's caregiver with the necessary support services.[239]

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[233] Article 41(5) of the Ethiopian Constitution. See also Phillips (2011) 173.

[234] Mayessa (2013) 55.

[235] Section 6(2)(f) of the Children's Act. References to equality for children with disabilities are found in ss 2, 6, 7, 11 and 42 and in most of the provisioning and strategy clauses in each of the service chapters. Proudlock P & Jamieson L 'The Children's Act: providing a strong legislative foundation for a developmental approach to child care and protection' in Proudlock P, Dutschke M, Jamieson L, et al (eds) *South African Child Gauge 2007/2008* (2008) 38.

[236] Children's Act, s 11(a).

[237] Children's Act, s 11(b).

[238] Children's Act, s 11(c).

[239] Children's Act, s 11(d).

These rights are particularly relevant to the alternative care of children with disabilities. The obligation to facilitate conditions that allow children with disabilities to live in dignity, become self-reliant and actively participate in the community is in line with the approach taken by the provisions dedicated to the rights of children with disabilities in the CRC and ACRWC.[240] As has been argued in Chapter 3, in the context of alternative care this obligation entails the provision of family-based alternative care, as institutional care more often than not does not afford an enabling environment in which a child with a disability can be self-reliant and live in dignity.[241] Moreover, as stated by the CRPD Committee, the concept of the right to live in the community is violated when a child with a disability is placed in institutional care, since this in effect removes him or her from the community.[242] Thus, this subsection is significant in ensuring that children with disabilities are not removed from the community under the guise of providing them with alternative care.

The last paragraph offers an added layer of protection to children with disabilities by requiring the state to provide support to the child as well as the child's caregivers.[243] Some have interpreted these 'support services' as a reference to the Care Dependency Grant (CDG),[244] although the terminology suggests that it is not limited to grants.[245] However, the phrase 'due consideration must be given to' in section 11 does not impose a strong obligation on the state, which hence weakens the weight attached to the rights of children with disabilities.

Section 11(1)(a) is more relevant to the subject at hand, as it deals with the care of children with disabilities. The section entails that due consideration be given to providing a child with

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[240] See arts 23(1) of the CRC and 13(1) of the ACRWC.

[241] See s 3(6) of Chapter 3 this thesis for a discussion of the provisions that are solely dedicated to the rights of children with disabilities in the CRC, CRPD and ACRWC in the context of the alternative care of children with disabilities.

[242] CRPD Committee, GC No. 5 (2017), paras 16(c) and 37.

[243] Children's Act, s 11(d).

[244] Boezaart (2011) 273.

[245] Philpott (2013) 186.

a disability with parental care, family care and special care as and when appropriate. However, a difference between section 28(1)(b) of the Constitution and the Children's Act is that the latter uses the phrase 'special care' in this section rather than 'appropriate alternative care', which is the phrase in the Constitution. It has been argued that the Children's Act contains elements of the medical model of disability in that it uses phrases such as 'special care' and 'special needs' instead of requiring that 'measures of support' be provided to children with disabilities.[246] In the context of alternative care, it may be argued that the obligation to provide 'special care' could encourage the institutionalisation of children with disabilities when deprived of their family environment. As discussed in Chapter 3, this is due mainly to the fact that keeping children with disabilities in separate facilities in the name of 'special care' follows the approach of the medical model of disability, a model that reinforces systems of segregation under the guise of providing services considered 'special' to their needs.[247] Despite the use of phrases that may indicate the medical model of disability, for the most part the Act endorses the human rights model of disability.[248]

Under Ethiopian law, the rights of children with disabilities are not explicitly provided in subsidiary legislation. The medical-based approach is evident in laws such as the Civil Code and the RFC.[249] The RFC contains provisions that allow discrimination on the basis of disability regarding the family's rights and undermine the rights of persons with disabilities

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[246] Chilemba (2014) 193. See, for instance, ss 11(1)(a), 11(1)(b) and 2(h) of the Children's Act.

[247] Section 3(6)(1) of Chapter 3 revealed that art 23 of the CRC largely views children with disabilities through the lens of the medical model of disability, one in which they are regarded as subjects of protection requiring 'special care', 'treatment' and 'rehabilitation' – this leads to a tendency to characterise children with disabilities as persons in need of protection rather as than active holders of rights. The medical model of disability has been used to justify the institutionalisation of persons with disabilities.

[248] Chilemba (2014) 194.

[249] The use of derogatory terms to refer to persons with disabilities in legislation and policies in Ethiopia is one area of concern raised by the CRPD Committee when reviewing the country's initial report. The Committee urged the government of Ethiopia to abolish the use of all derogatory terms to refer persons with disabilities and for new legislation and policies to be grounded on the human rights-based model of disability in line with the CPRPD. CRPD Committee Concluding Observation: Ethiopia (UN Doc. CRPD/C/ETH/CO/1, 2016), paras 5, 6 and 49 and 50.

within the family.[250] Similarly, the Civil Code was enacted six decades ago and has not been harmonised with current notions of the rights of persons with disabilities; as such, it contains provisions that lack compliance with relevant international standards, which has a negative impact on the protection of the rights of persons with disabilities.[251] For instance, the Code limits the legal capacity of persons with disabilities by including minority, notorious insanity, apparent infirmity and judicial interdiction as grounds for incapacity. It makes reference to insanity as a ground to limit legal capacity where the mental health of a person is questioned by the society in which he lives or where a court has passed a judgment of judicial interdiction. The law defines an insane person as 'one who cannot understand the importance of his actions as a result of being insufficiently developed, mental disease or senility'.[252] In turn, it defines infirm persons as '[d]eaf-mute, blind persons, and other persons' who are incapable of looking after themselves or managing their property as a result of a 'permanent infirmity', and goes on to state that such persons 'may invoke in their favour the provisions of the law which afford protection to those who are insane'.[253] It has been argued that the aim of the provision is to protect persons with disabilities from others; however, the terminology as well the limitation of capacity diverge significantly from the purpose and provisions of the CRPD and the human rights model of disability on which it is founded. It should, however, be acknowledged that at the time the Code was drafted, critical concepts related to disability issues had not yet fully emerged. Thus, the fact that the Code pre-dates the CRPD could justify why it does not portray persons with disabilities in accordance with the human rights model of disability nor reflect the current understanding of disability. Nonetheless, this does not alleviate the state of its

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[250] See, for instance, arts 34, 51 and 220 of the RFC.

[251] See, for instance, the Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960 (hereafter Civil Code of Ethiopia), art 339(1).

[252] Article 339(1) of the Civil Code of Ethiopia.

[253] Article 340 of the Civil Code of Ethiopia.

obligation to take measures to harmonise its laws and policies with prevailing international standards.

The effect of the non-compliance of the medical-based approach to disability is evident in the negative attitudes towards disability that are prevalent in Ethiopian society,[254] attitudes that compound the vulnerabilities children with disabilities face, in particular discrimination on the basis of both age and disability. The stigmatisation of children with disabilities, coupled with a medical-based approach evident in the framework, makes it highly likely that children with disabilities deprived of their family environment will be exposed to the same prejudices and approach when it comes to their placement and treatment in alternative care. This leads to discrimination due to lack of respect and dignity while in alternative care and to over-reliance on institutional care as means to care for children with disabilities.

In view of this, it can be argued that the country's constitutional provisions and subsidiary legislation do not reflect the human-rights-based approach and ensure that children with disabilities enjoy human rights and freedoms on an equal basis with other children.[255] The provision in the Constitution does not bestow rights that children with disabilities can claim directly, and reflects the medical-based model of disability. The overall legislative framework views persons with disabilities from a medical perspective, which is in direct contrast with the

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[254] The abandonment of children with disabilities by parents is often linked to negative societal attitudes towards children with disabilities. Myths abound about the causes of disability, among them being the idea that it is the result of 'supernatural wrath'. Family Health International/Ethiopia & Children's Investment Fund Foundation (CIFF) 'Improving care options for children in Ethiopia through understanding and preventing institutionalisation' (copy on file with author; unpublished draft report, 2008) 67.

[255] The previous chapter in s 3(6) examined provisions dealing solely with the rights of children with disabilities in the CRPD, CRC and ACRWC. These provisions require the state to ensure that children with disabilities have the right to special measures of protection and enjoy a 'full and decent life' and 'in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'. The CRPD explicitly requires the state to 'take all the necessary measures to ensure' that children with disabilities fully enjoy 'all human rights and freedoms on an equal basis with other children'. For further discussion, see s 3(6)(3)of Chapter 3 of this thesis.

CRPD. In this regard, the Constitution's approach to addressing the rights of persons with disabilities may stem from fact that the Constitution predates the CRPD.

4.4 Other measures

As mentioned, the discussion of legislative measures is accompanied by an examination of 'other measures' undertaken by South Africa and Ethiopia – for the purpose of this thesis, these are defined as non-legislative measures in accordance with article 4 of the CRC. Of the non-legislative instruments adopted by the South African government, the one most relevant to the alternative care of children with disabilities is the White Paper on the Rights of Persons with Disabilities (WPRPD) (2015). In respect of Ethiopia, the National Child Policy (NCP)[256] and the National Guidelines will be discussed, as they have provisions with direct implications for the alternative care of children in general and children with disabilities in particular.[257]

4.4.1 South Africa's White Paper on the Rights of Persons with Disabilities

In relation to policy measures, the WPRPD is South Africa's disability-specific policy which updates the Integrated National Disability Strategy but maintains the same policy direction, namely mainstreaming disability.[258] The WPRPD contains nine 'strategic pillars', each with a distinct directive that assigns duty-bearers with the task of eliminating enduring institutionalised discrimination and exclusion of persons with disabilities.[259] Most notably, the

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[256] Ministry Women, Children and Youth Affairs *National Children's Policy* (2017) (hereafter NCP). As stated in Chapter 1 of this thesis, the discussion of policy measures is not exhaustive, as the focus of the thesis is on legislative measures. Hence, instruments such as the National Plan of Action of Persons with Disabilities (NPA) (2012–2021) do not form part of the discussion as they do address issues relevant to the alternative care of children with disabilities.

[257] The National Guidelines were developed by the Ministry of Women, now reconstituted as the Ministry of Women, Children and Youth Affairs (MOWCYA), by revising the 2001 Alternative Childcare Guidelines.

[258] Department of Social Development *White Paper on the Rights of Persons with Disabilities* (2015) (hereafter WPRPD) 38. Prior to the adoption of the WPRPD, the Integrated National Disability Strategy served as the main policy document on disability related matters. Government of the Republic of South Africa Integrated National Disability Strategy (1997).

[259] These strategic pillars include removing barriers to access and participation; protecting the rights of persons at risk of compounded marginalisation; supporting sustainable integrated community life; promoting and supporting empowerment of persons with disabilities; reducing economic vulnerability and releasing human capital;

WPRPD incorporates the rights of persons/children with disabilities to live in the community, which is an element missing in the Children's Act.

It recognises that persons with disabilities 'have an equal right to live in the community, with choices equal to others' and that measures need to be taken to realise this right.[260] It also recognises the particular vulnerabilities of children with disabilities deprived of family life due to lack of community-based support services, lack of access to education, and negative beliefs that children with disabilities are 'better off in segregated facilities'.[261] In accordance with the CRPD, the WPRPD requires that community-based services be available to persons with disabilities on an equal basis with others and that services be responsive to their needs in accordance with the obligations set forth under the CRPD.[262] The WPRPD also recognises the importance of providing children with disabilities with procedural and age-appropriate to facilitate their right to access to justice.[263] It further reiterates article 7(3) of the CRPD which requires children with disabilities to be provided with disability and age-appropriate assistance in order to ensure their right to participate in matters affecting them.[264]

It can be observed that the WPRPD fills the gaps in the legislative framework to some extent. However, the implication of this is that the provisions in respect of children with disabilities are scattered across a range of legislative and policy documents.[265] Moreover, although the

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strengthening the representative voice of persons with disabilities; building a disability-equitable state machinery; promoting international co-operation; and monitoring and evaluation. See WPRPD Part 6, 48–123.

[260] WPRPD s 6(3) 70.

[261] To this end, as part of its directives, it requires that information on available services be provided to all parents and caregivers of children with disabilities, including 'information on parental counselling and peer support services, respite care services, therapeutic, educational and economic programmes, as well as the establishment of a disability service and information portal that provides access to the information'. WPRPD, s 6(3)(1)(2), 74–76.

[262] The directives require the development of a 'sustainable community-based system for personal assistance to support independent living within the community for persons with disabilities'. WPRPD, section 6(3)(1)(4) 77.

[263] WPRPD, s 6(2)(1)(3) 65.

[264] WPRPD, s 6(2) 61.

[265] Alternate Report Coalition – Child Rights South Africa 'Complementary report to the African Committee of Experts: A response to South Africa's Second Country Report to the African Committee of Experts on the Rights and Welfare of the Child' (2017) (hereafter ARC – CRSA (2017)) available at *http://bit.ly/36yl73I* (accessed 3 April 2018), para 67.

adoption of the WPRPD is a step in the right direction in promoting and protecting the rights of children with disabilities, it does not adequately address all aspects of the rights of children with disabilities. More often than not policies are restricted to the educational rights of children with disabilities, thus neglecting other equally important rights recognised in the CRPD, CRC and ACRWC, such as the rights of children with disabilities not to be separated from their families on the basis of disability and the right to be provided with alternative care within the community in a family setting. Moreover, although the WPRPD recognises that children with disabilities are vulnerable to being deprived of their family environment and that there are prevention strategies to this end,[266] it does not address provisioning in relation to children with disabilities who are already deprived of their family environment.

Another problem with providing for the rights of children with disabilities in policies is that policies are non-binding in nature and cannot be relied on to hold the government accountable in its implementation measures and allocation of resources in effectuating them.[267] Some scholars have expressed concern that the lack of legislation that specifically addresses the rights of persons/children with disabilities has hindered the realisation of the rights of persons with disabilities and children with disabilities.[268] Conversely, some cite the Children's Act's provisions on children with disabilities as a good example of how the rights of a particular group (in this case children with disabilities) can be incorporated in legislation successfully without the need for separate legislation.[269] It has also been pointed out that having separate legislation on disability does not necessarily mean it would cover the rights guaranteed in the

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[266] See s 6(3)(1)(2) 74 of the WPRPD.

[267] ARC – CRSA (2017), para 67.

[268] Heap M Lorenzo T & Thomas J 'We've moved away from disability as a health issue, it's a human rights issue': reflecting on 10 years of the right to equality in South Africa (2009) 24(7) *Disability and Society* 857–868 as cited in Philpott SC *Realising the Right of Children with Disabilities to Early Childhood Development in South Africa* (unpublished LLD thesis, University of the Western Cape, 2013) 177.

[269] Philpott (2013) 177.

CRPD.[270] In the same vein, it has been argued that separate legislation for persons/children with disabilities would reinforce their marginalisation and the perception that they constitute separate groups in society.[271] These opposing views reflect the fact that there is no one single method for ensuring that the rights of children with disabilities are fully recognised at the national level. However, the goal should be ensuring that all the rights of children with disabilities, including the right to be provided with alternative care within the wider family or within the community in a family setting and the right to live in the community, as guaranteed in the CRPD, are incorporated into national laws and are enforceable.

4.4.2 The National Alternative Care Guidelines of Ethiopia

The National Alternative Care Guidelines of Ethiopia (2009) have particular importance to the alternative care of children with disabilities as they establish minimum standards for the provision of alternative care services by both the state and NGOs in Ethiopia.[272] The Guidelines are instructive as they cover issues pertaining to eligibility, recruitment, placement, assessment, and training, monitoring and reporting.[273] The National Guidelines will be discussed to show the value that they add in meeting the need for the national legislative and policy position to comply with international standards.

The National Guidelines recognise a range of alternative care options for orphans and vulnerable children (OVC) in the continuum of care including community-based child care, reunification and reintegration, foster placement,[274] adoption[275] and institutional care.[276] The

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[270] Chilemba (2014) 211.

[271] Philpott (2013) 177.

[272] National Guidelines, 6; UNICEF 'Alternative childcare' Thematic Briefing Note (2013) 3 available at *https://uni.cf/2MYtA8s* (accessed 02 May 2015).

[273] See generally the National Guidelines.

[274] National Guidelines, 28–38.

[275] National Guidelines, 38–47.

[276] National Guidelines, 47–64.

part dealing with intercountry adoption has become inapplicable, however, following the ban on intercountry adoption with the enactment of Proclamation No. 1070/2018.[277]

The National Guidelines present community-based child care as a form of alternative care that provides the necessary care and support to children in their own community in an environment which is familiar to them.[278] Children with disabilities are among the groups of children who are considered to be eligible to be cared for in a community-based child care programme.[279] This is in line with obligations set out in the CRPD which require the state to provide alternative care for children with disabilities within the community, in a family setting.[280]

Foster family care is defined in the National Guidelines as

> a planned, goal directed alternative family care where an unaccompanied child is temporarily placed and gets adequate physical, emotional and psycho-social care and protection until he/she is either reunified with his/her biological parent/s or placed within another type of permanent care or institution.[281]

Foster care is considered in National Guidelines as a preferred alternative care option for children and one that offers the necessary attention, care and continuity as well as one that provides a better opportunity than institutional care for the child's subsequent integration into the community.[282] From the definition of foster family care in the National Alternative Care Guidelines, it is not clear whether foster care has to be ordered by a competent administrative

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[277] Assefa M *The Ban on Intercountry Adoption in Ethiopia* (unpublished LLM thesis, Addis Ababa University, 2018) 38.

[278] See National Guidelines, 14.

[279] National Guidelines, 15.

[280] Section 3(7)(4) of Chapter 3 established that the CRPD requires alternative care for children with disabilities deprived of their family environment to be provided within the extended family or, when that is not possible, within the community in a family setting. Kinship care, sponsored care, child-headed households, group homes, and foster family care are alternatives placed under the community-based care. Even though the recognition of child-headed households is in conformity with UN Guidelines for the Alternative Care of Children, it is in contradiction to the RFC, which does not consider the minor qualified to hold guardianship over another child. A group home is described as the placement of OVCs in a community-based group home, whereby a group of six to eight children is placed under one roof with a surrogate mother assigned to it as caretaker. National Guidelines, 19.

[281] National Guidelines, 10.

[282] National Guidelines, 28.

or judicial authority in accordance with the UN Guidelines.[283] What is known is that the foster family care organisation, described as an 'organisation which is registered and licensed by the accredited governmental body to implement foster family care placement', is responsible for conducting an assessment and screening of the potential foster family before placing the child in such care.[284] As noted in Chapter 2, although the 'competent authority' is usually the state, it could also be NGO in cases where the formal child protection system is at an early stage of development.[285] In terms of the National Guidelines, the 'competent authority' responsible for the assessment and screening as well as the placement of children with disabilities in foster care appears to be the foster family organisation. Hence, it appears that in relation to family-based alternative care such as foster care, neither the National Guidelines nor any law explicitly requires the determination of the placement of a child with a disability to be preceded by judicial or government authority.[286] Given that the majority of alternative care services including foster care services are not operated or funded by the government, this raises the question of the extent to which foster family organisations can be entrusted with ensuring that the rights of children with disabilities are protected in foster care placement measures as well as assessment and screening processes.

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[283] According to the UN Guidelines, para 29(c)(ii), foster care is defined as including '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'.

[284] See National Guidelines, 33–4.

[285] See s 2(5)(1) of Chapter 2 of this thesis. Petrowski N, Cappa C & Gross P 'Estimating the number of children in informal alternative care: challenges and results' (2017) 83 *Child and Abuse Neglect, The International Journal* 390.

[286] The National Guidelines do not contain provisions that require the determination of form alternative care for children and their subsequent placement to be done by a judicial or government administrative body. Rather, the Guidelines require that in respect of foster care, foster family care organisations are allowed to recruit children to be placed in foster care; the assessment and screening before the placement are also to be done by the same organisation. See National Guidelines, 39 and 33–4. However, the National Guidelines prohibit placing children in a foster family against the relevant authority's regulation, although it is not clear to which regulation the reference is made. National Guidelines, 31.

On a positive note, the National Guidelines expressly recognise children with disabilities among the categories of children who are considered eligible for foster care placement.[287] This is significant for children with disabilities in need of alternative care as it gives them the opportunity to be cared for in a family-based alternative care rather than institutional care which is in line with the standards discussed in Chapter 3.[288] Foster family care organisations are required to conduct the appropriate training of foster families on issues pertaining to the care and development of children.[289] However, there is no requirement to ensure that caregivers are trained to respond to children with disabilities, including children with intellectual disabilities.[290] The eligibility criteria and the conditions for matching a child with potential foster parents fall short of specifying any training or skills that the foster carers should possess to care for children.

Again on a positive note, in accordance with the UN Guidelines, the National Guidelines require counselling services to be provided to the child and potential foster carers to prepare both parties psychologically and ensure a positive placement outcome is provided by the National Guidelines.[291] However, there is no emphasis on the importance of such counselling to be carried out on an ongoing basis. The Guidelines are also silent on the requirements of international standards in respect of the pre-identification of potential foster carers in each community, which could minimise the possibility of children with disabilities finding potential foster families in the absence of such system of preparation.[292]

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[287] National Guidelines, 32.

[288] See s 3(7)(4) of Chapter 3 of this thesis.

[289] See National Guidelines, 36.

[290] The UN Guidelines require alternative care providers to ensure that caregivers of children with disabilities are equipped to respond to their needs. UN Guidelines, para 117.

[291] National Guidelines, 36. The UN Guidelines require 'special preparation, support and counselling services for foster carers should be developed and made available to carers at regular intervals, before, during and after the placement'. UN Guidelines, para 120.

[292] The UN Guidelines emphasise the need to identify potential foster carers in each community. UN Guidelines, para 119.

Furthermore, in respect of institutional care in the National Guidelines, it is required that such placement be considered only as a last and short-term alternative once all other family-based options are exhausted.[293] In pursuit of the objective of ensuring that the child is institutionalised for the shortest time, the National Guidelines place responsibility on orphanages to seek other child-care alternatives such as community-based child care, reunification, reintegration, foster care and adoption.[294]

Under the National Guidelines, a child can be placed in institutional care only once his or her eligibility is approved and the 'relevant authority' requests the admission of such a child.[295] The 'relevant authority' is described as a government institution 'legally mandated to facilitate, certify, monitor and evaluate child-care programs'.[296] This provision is important since, unlike the provisions regarding foster care, where the involvement of the government is minimal, it serves as a gatekeeping mechanism to ensure that children are not placed in institutions unnecessarily. One shortcoming could be that the Guidelines do not stress the need for an adequate number of carers to ensure individualised attention to children and the formation of lasting attachments with caregivers.[297]

The National Guidelines require the 'relevant Regional authority' to 'follow-up, monitor and evaluate the care offered to a child placed in institutional care'.[298] However, they do not specify the frequency with which such follow-up and monitoring ought to occur.[299] Such specificity is

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[293] National Guidelines, 47.

[294] National Guidelines, 49.

[295] National Guidelines, 49.

[296] National Guidelines, 10.

[297] One of the requirements of the UN Guidelines is for states to 'ensure that there are sufficient carers in residential care settings to allow individualised attention and to give the child, where appropriate, the opportunity to bond with a specific carer. Carers should also be deployed within the care setting in such a way as to implement effectively its aims and objectives and ensure child protection.' UN Guidelines, para 126.

[298] National Guidelines, 50.

[299] The UN Guidelines require the placement of a child in alternative care to be subject 'regular and thorough review', and encourage the review to take place, if possible, every three months to ensure the appropriateness of the care and treatment provided to the child and the necessity of placement under such circumstances. UN Guidelines, para 67.

necessary to ensure that the placement of a child as well as the setting in which the child is placed are assessed against the best interests of each child on a regular basis to ensure that the placement remains suitable to the individual child.

The National Guidelines also adopt the four general principles of the CRC, including child participation, as among their guiding principles.[300] Child-care institutions are expected to ensure that the participation of children is given due regard in accordance with their 'age, mental and physical levels of maturity' in all matters affecting them and to design ways to enhance their participation within the community.[301] In the previous chapter, it was established that these requirements should not be used to side-line children with disabilities who cannot communicate in conventional ways but only through other means such as body language; such children may need further support to be able to express their views effectively.[302] The Guidelines also require that the child be consulted and involved in the process of foster care placement in a manner appropriate to his or her age and degree of maturity.[303] However, the Guidelines do not make reference to the needs of children with disabilities in relation to participation, nor do they require them to be equipped with the necessary communication modes to facilitate expression of their views in accordance with the CRPD.[304] The National Guidelines are also silent on the need to consult the child at every stage of the determination of alternative care placement in accordance with international standards.[305]

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[300] National Guidelines, 7.

[301] National Guidelines, 50 and 63.

[302] Section 3(5)(4) of Chapter 3 noted that the phrase 'who is capable of communicating his or her views' in article 4(2) of the ACRWC is limiting in that this ability may relate to the ability to communicate in conventional ways such as writing and speaking and be used to marginalise children who cannot communicate in these ways.

[303] National Guidelines, 29. Section 3(5)(4) of Chapter 3 established that respect for the principle of child participation is crucial at every stages of a child's involvement with the care system, in particular regarding the determination of the most appropriate placement for the child and the planning and review of the placement.

[304] See section 3(6)(3) of Chapter 3 of this thesis, where it is argued that article 7(3) of the CRPD places a stricter obligation on states than other instruments by requiring the views of children with disabilities to be heard on an equal basis with others in accordance with their age and maturity and for them to be provided with age- and disability-appropriate assistance in order to realise the right.

[305] The UN Guidelines require the child to be consulted during the decision-making process of the determination of the most appropriate form of alternative care. UN Guidelines, para 57; see also ss 3(5)(4) and 3(6)(3) of Chapter

4.4.3 Ethiopia's National Children's Policy

In addition to the National Guidelines, the NCP (2017) contains provisions relevant to the alternative care of children with disabilities. From the outset, the NCP places emphasis on strengthening domestic initiatives to respond to the situation of orphaned and vulnerable children and children who are not living with their parents.[306] The Policy does not endorse intercountry adoption as a potential form of alternative care for children deprived of their family environment, which in any case has been banned in 2018. To harmonise the NCP with the RFC, Proclamation No. 1070/2018 was enacted following the ban on intercountry adoption and repealed certain provisions of the RFC.[307] The ban has drawn criticism from scholars in view of the availability and sufficiency of domestic alternatives to tackle the challenges that OVC face.[308] The impact of the ban on children who are less likely to find family-based alternatives domestically, including children with disabilities and children with developmental delays and nutritional deficiencies, is one area of concern where the need for further scrutiny has been underlined.[309]

Moreover, the NCP does not endorse institutional care, and pledges to facilitate a favourable environment for the 'reintegration and reunification of children in institutional care' with their parents, extended family and community.[310] This complies with the obligations under the CRPD, which also does not prescribe institutional care as a potential alternative means of care

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3 of this thesis for detailed discussion of the provision of child participation in the context of alternative care in the CRC, ACRWC and CRPD.

[306] The NCP provides domestic family-based alternatives to children such as domestic adoption, foster care, community-based programmes, and reunification and reintegration alternative care programmes as part of the specific objectives and major issues of the policy. See NCP, 13 and 19–20.

[307] The RFC, 2000, arts 210, 222 and 227, Chapter 10, Proclamation No. 213/2000, Neg. Gaz. 6th year, extraordinary issue no. 1, as amended, RFC (amendment) proclamation, 2018, Preamble. In order to harmonise the NCP with the RFC, the Proclamation No. 1070/2018 was enacted following the ban of intercountry adoption as a form of alternative care for children. The Policy further refers to intercountry adoption as having various drawbacks, among them being that it fails to provide children with the necessary care and that it exposes them to psychological and social problems that result in identity crisis. NCP, 7 and 19–20.

[308] Assefa (2018) 6–7.

[309] Assefa (2018) 6–7.

[310] See NCP, 19.

for children with disabilities.[311] However, the policy is silent on children for whom reintegration and reunification with family is not feasible, hence overlooking a particular subgroup of children with disabilities who are already in institutional care. It is submitted that this omission, coupled with the ban on intercountry adoption, may mean there is one less family-based alternative care option for children with disabilities – given the stigma attached to them, and the discrimination they experience, in the Ethiopian context, domestic adoption might not be a realistic alternative care option for this group of children. This has been exacerbated by the restriction on CSOs seeking to obtain funds from abroad to provide quality care for children in institutional care.[312] It is anticipated, however, that this issue will improve with the newly adopted CSO proclamation that lifts the financing restriction.[313]

From the discussion above, it can be observed that most of the provisions for the alternative care of children in general and children with disabilities in particular are found in the National Guidelines and NCP. Although these instruments for the most part comply with international standards, they are not comprehensive enough to ensure quality and set standards of alternative care services.[314] It has also been argued that, because the National Guidelines do not have the force of law, they lack the legal authority to ensure compliance and accountability.[315]

4.4.4 General Observations

From the foregoing discussions, it can be observed that the policy framework contains more detailed provisions than the provisions in the legislative framework, albeit that the provisions in the National Guidelines could have been formulated to take into account the specific

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[311] CRPD, art 23(5).

[312] Assefa (2018) 59.

[313] FDRE, Organizations of Civil Societies Proclamation No. 1113/2019, art 63(1)(c) reads as follows: ‘Any organization shall have the right to solicit, receive and utilise funds from any legal source to attain its objective.’ In terms of the former CSO Proclamation, resident charities and societies and foreign charities were restricted from taking part in activities pertaining to children’s rights and disability rights, among other things. This restriction extended to local NGOs if they received more than 10 per cent of their funding from foreign sources.

[314] UNICEF ‘Alternative childcare’ Thematic Briefing Note (2013) 3.

[315] UNICEF ‘Alternative childcare’ Thematic Briefing Note (2013) 3.

vulnerabilities of children with disabilities. However, as noted already, the main shortcoming in providing for the rights of children through policies and guidelines is that these instruments do not impose any legal obligations on the state due to their non-binding nature. This poses a challenge for their enforcement and raises the issue of lack of accountability as the state is not legally obligated to comply with them. Thus, it is submitted that the provisions in National Guidelines, although relatively robust and comprehensive, lack the legal basis needed for their proper enforcement. Although these provisions aid recognition of international human rights obligations in regard to children with disabilities in alternative care, they lack the legal authority to ensure enforcement and governmental accountability for their implementation.

4.5 Conclusion

The chapter has analysed the extent to which the legislative, policy and institutional frameworks of Ethiopia and South Africa pertaining to the right to alternative care of children with disabilities comply with international human rights standards. In respect of the four general principles, the chapter has observed that the principles are not adequately incorporated in the Ethiopia's legislative framework. Although the Constitution provides for equality and non-discrimination in general terms, there is no explicit prohibition of discrimination on the basis of disability. There is also no obligation to take positive measures and provide reasonable accommodation in the framework. The Constitution's provision on the best interests of the child principle complies with international standards. However, the provision of the RFC on the best interests of the child does not extend to all matters affecting children. This impedes its proper implementation and falls short of ensuring that the rights of children with disabilities are protected in measures involving their alternative care. A similar observation has been made in relation to child participation where the scope of this right in the RFC is restricted to certain issues in the Code. The chapter has found, too, that there is a lack of reference to the needs of children with disabilities in relation to participation in the Ethiopian legislative and policy framework, which further dents its compliance with international standards. The chapter has observed that there is a lack of an explicit provision for survival and development of children. This omission may weaken its application in all areas, particularly so in the case of vulnerable children including children with disabilities who are in alternative care in general and institutional care in particular.

In relation to the rights of children with disabilities under Ethiopian law, the provision in the Constitution does not bestow rights that children with disabilities can directly claim, and it reflects the medical-based approach. The overall legislative framework views persons with disabilities from a medical perspective, which is in direct contrast with the stance of the CRPD.

In respect of the right to alternative care of children with disabilities in Ethiopia, there is no obligation in domestic laws to consider institutional care only as a measure of last resort. This is not in line with the requirements of the CRPD which outlaws the institutionalisation of children with disabilities deprived of their family environment. There is no provision in subsidiary legislation that places an explicit obligation on the government to provide alternative care and special protection and assistance to children including children with disabilities who are temporarily or permanently deprived of their family environment.

The National Guidelines are, for the most part, in line with both the CRC and the UN Guidelines to the extent that its provisions indicate a preference for family-based alternative care options for children deprived of their family environment rather than institutional care. The National Guidelines further require alternative care placements to be regularly reviewed, which in line with the requirements of CRC. Nonetheless, the Guidelines are not comprehensive enough to ensure quality and set standards of alternative care services.

Moreover, as merely ‘guidelines’, they do not have the force of law and lack the legal authority to ensure compliance with their prescripts and enable relevant actors to be held accountable.

In the case of the South African legislative and policy framework, it was submitted that the rule of non-discrimination is in compliance with international standards. The framework clearly prohibits discrimination on the basis of disability and requires taking positive measures to achieve substantive quality. In respect of the best interests principle, both the Constitution and the Children’s Act contain provisions requiring that the standard to be of ‘paramount importance’ in all matters concerning children in accordance with international standards. As for the participation of children with disabilities, the Constitution does not explicitly give children the right to participate in decisions affecting them. However, the Children’s Act allows for the child’s opinion to be heard and taken into account in all matters that affect him or her – the Act is thus in line with the relevant international standards.

With regard to the rights of children with disabilities, South Africa’s legislative framework is for the most part consistent with international standards as children with disabilities are recognised as active holders of rights and accordingly entitled to have their dignity, self-reliance and participation respected. The Children’s Act also requires that children with disabilities be provided with family care, which suggests that the Act recognises the rights of children with disabilities to grow up in a family environment. The obligations are compatible with those established by international standards. However, section 11 contains features that reflect the medical model of disability inasmuch as children with disabilities are required to be provided with ‘special care’ instead of appropriate alternative care.

In respect of the right to alternative care of children with disabilities, the South African Constitution expressly provides for the right of a child to family care or parental care and to appropriate alternative care when removed from the family environment. Furthermore, the

Children's Act offers a range of alternative care options for children considered to be in need of care and protection, including alternative care consisting of foster care, cluster foster care and CYCCs. It is submitted that the Act's introduction of a new alternative care option in the form of cluster care is commendable. More importantly, in respect of the relative desirability of the alternative care options, the Act promotes placement in a family environment and expressly recognises institutional care as a measure of last resort. However, at the same time the Act seems to rely on CYCCs for the care of children with disabilities, which may encourage the use of institutional care as a means to care for such children.

The following chapter will discuss the administrative and institutional framework for the upholding of the right to alternative care of children with disabilities in Ethiopia and South Africa.

Chapter 5:
Institutional and Administrative Measures for the Upholding of the Right to Alternative Care of Children with Disabilities in Ethiopia and South Africa

5.1 Introduction

The previous chapter explored the legislative and policy measures Ethiopia and South Africa have taken in relation to the right to alternative care of children with disabilities. This chapter tackles the third sub-question of the study[1] and critically assesses whether the two countries' institutional and administrative measures are adequate for ensuring that children with disabilities receive suitable alternative care in line with international standards.[2]

In respect of the suitability of alternative care under the CRC and ACRWC, it is implied that priority is given to family-based alternative care for children with disabilities who are temporarily or permanently deprived of their family environment.[3] However, 'suitable institutions' are allowed in the CRC and ACRWC provided they are used only 'if necessary'.[4] The UN Guidelines regard residential care facilities as one of the alternative care options considered potentially suitable for children deprived of their 'parental care'.[5] However, clear

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[1] The sub-question is: 'What are the administrative and institutional measures that Ethiopia and South Africa have taken to uphold the right to suitable alternative care for children with disabilities?' Under the CRC, ACRWC and CRPD, Ethiopia and South Africa are under an obligation to take measures beyond legislative measures, including administrative and other measures, to implement the rights recognised in the respective treaties. See art 4 of the CRC, art 1(1) of the ACRWC and art 4(1)(a) of the CRPD.

[2] As mentioned in s 1(6) of Chapter 1, the scope of this thesis is limited to investigating the adequacy of the measures put in place to ensure that children with disabilities have access to suitable alternative care, as opposed to issues related to the prevention of alternative care in the two selected jurisdictions.

[3] This is indicated as family-based alternative care options such as foster care are listed first in the possible forms of alternative care options provided by the two instruments. CRC, art 20(3) and ACRWC, art 25(2)(a).

[4] This indicated in the relevant provisions dealing with alternative care, with the CRC using the qualifying phrase 'if necessary' before prescribing placement of children in 'suitable institution' as a potential form of alternative care; the ACRWC places 'alternative family care' before the placement of children in 'suitable institutions'. CRC, art 20(3) and ACRWC, art 25(2)(a).

[5] UN Guidelines, paras 23 and 29(c)(iv). The UN Guidelines seek to clarify the obligations arising from art 20 of the CRC on alternative care; it is argued that ensuring that alternative care is suitable is also an obligation implicitly imposed on states.

priority is given to family-based forms of alternative care.[6] Nonetheless, the term ‘institutions’, as discussed in previous chapters,[7] is not synonymous with ‘residential care’; the former is used in the UN Guidelines to refer to ‘large residential facilities, which are subject to ‘progressive elimination’.[8] Therefore, the suitability principle is reinforced by the shift towards deinstitutionalising the alternative care system and fostering family-based or family-type settings.[9] In the CRPD, suitable alternative care relates to the provision of alternative care within the wider family or a family-based alternative care within the community.[10] Thus, the provision of alternative care that is outside the family is not considered as suitable for children with disabilities in terms of the CRPD.[11] As established in the previous chapter, the CRPD and its jurisprudence provide a higher level of protection to children with disabilities in the context of alternative care.

In the light of this, it is argued that, over and above taking legislative measures, providing suitable alternative care to children with disabilities entails putting in place institutional and administrative frameworks to ensure that they are not routinely placed in institutions and have equal access to family-based alternative care when deprived of their family environment. This necessitates that a range of alternative care options are available and that priority is given to developing family-based alternative care options.[12] An integral component of ensuring the suitability of alternative care is setting up a strong system of gatekeeping through the establishment of a regulatory framework to ensure a standard procedure for determining the

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[6] UN Guidelines, para 53.

[7] See s 2(6)(3) of Chapter 2 of this thesis, where the meaning of the term ‘institution’ has been unpacked.

[8] UN Guidelines, para 23.

[9] Cantwell N ‘The human rights of children in the context of formal alternative care’ in Vandenhole W, Desmet E, Reynaert D, et al (eds) *Routledge International Handbook of Children’s Rights Studies* (2015) 261.

[10] CRPD, art 23(5).

[11] CRPD, art 23(5); CRPD Committee, GC No. 5 (2017), para 16(c).

[12] Cantwell N, Davidson J, Elsley S, et al. *Moving Forward: Implementing the ‘Guidelines for the Alternative Care of Children* (2012) 22.

admission of a child into alternative care and the most appropriate form of care.[13] The decision-making in the latter regard has to be made by the competent authority following thorough assessment, planning and review through established structures and on a case-by-case basis.[14] Rigorous screening measures by competent authorities are also crucial to ensure that children with disabilities are placed in residential care only when it is appropriate.[15] Some of these measures are crucial not only to ensure that alternative care is suitable but to ensure that it is necessary.[16] It is also important to establish a mechanism and process for the registration and authorisation of alternative care providers on the basis of criteria set by the government, and to subject this to inspection and monitoring.[17] The government's role extends to regularly reviewing the placement of children through its competent authorities to ensure the safety and well-being of the child and the appropriateness of the placement.[18]

Furthermore, it is necessary to ensure that forms of financing of alternative care do not encourage the unnecessary and prolonged placement of children with disabilities in alternative care and advantage organisations working mainly for profit-based purposes.[19] It is also necessary to eliminate administrative hindrances that impede the reunification of children with family; to adequately resource alternative care (both in financial and human-resource terms); and to establish organisational routines in care settings that serve the developmental and protection needs of children.[20]

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[13] UN Guidelines, para 74; Cantwell et al. (2012) 22.

[14] UN Guidelines, para 57; Cantwell et al. (2012) 68.

[15] UN Guidelines, para 125; Cantwell et al. (2012) 104.

[16] Some of measures that will be discussed relate to both the suitability as well as the necessity principle set forth in the UN Guidelines. However, as noted in Chapter 1, the scope of this thesis is limited to assessing the provision of alternative care rather than the prevention of the need for it, which relates to the necessity principle.

[17] UN Guidelines, para 55 and 105; Cantwell (2012) 22.

[18] UN Guidelines, para 5; Davidson J, Milligan I, Quinn N, et al 'Developing family-based care: Complexities in implementing the UN Guidelines for the Alternative Care of Children' (2016) 20 *European Journal of Social Work* 5.

[19] UN Guidelines, paras 108, 20 and 127.

[20] Davidson et al. (2016) 5.

Thus, the following sections evaluate the institutional and administrative measures the two countries have taken to implement children with disabilities' right to alternative care and determine whether they are in line with international standards and adequate to ensure children with disabilities are provided with suitable alternative care. Thus, the discussion includes examining institutional frameworks in terms of their monitoring and oversight capacity and coordinating mechanisms; data collection; financial and human resources allocation; and the role of civil society and independent monitoring mechanisms. In doing so, the chapter highlights the challenges as well as opportunities that arise in upholding the right to suitable alternative care for children with disabilities in the selected jurisdictions.

5.2 Ethiopia's and South Africa's institutional and administrative framework

5.2.1 Monitoring mandate and coordinating mechanisms

Children in alternative care are at risk of a range of violations of rights in all forms of alternative care, including abuse, neglect, violence and exploitation.[21] Studies show that monitoring alternative care placement is a necessary component of ensuring that children receive quality services and that they are protected from abuse, neglect and maltreatment.[22] This is particularly true for children with disabilities placed in institutional care.[23] A strong institutional framework is also necessary to ensure that there is a centralised system to accredit, monitor, regulate and oversee private entities involved in the provision of alternative care services to ensure

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[21] Pinheiro P *World Report on Violence against Children* (2006) 87 and 176; Family for Every Child 'Strategies for delivering safe and effective foster care: A review of the evidence for those designing and delivering foster care programmes' (2015) 26 available at http://bit.ly/37BVSxg (accessed 29 September 2016).

[22] Family for Every Child (2015) 26.

[23] Pinheiro (2006) 176.

'accountability and transparency in service provision'.[24] To this end, the CRC Committee in its General Comment No. 5 emphasises the importance of setting up a monitoring and coordinating body (both governmental and independent) for the implementation of the rights of children.[25] The Committee also underlines the importance of effective coordination and monitoring of implementation of the CRC among the various governmental bodies concerned, at all administrative levels, and between the government and the private sector.[26]

Research shows that more often than not the lack of effective centralised organisation of alternative care provision has opened doors for private alternative care service providers to operate in accordance with their own agendas and criteria, resulting in inconsistent standards of admission of children, inconsistent review process across various alternative care settings, as well as gaps in the range of alternative care placements available, particularly for children with disabilities.[27] The establishment of a monitoring mechanism is thus key to ensure that financial resourcing and allocation reflect the best interests of each child concerned, benefit its intended targets, and are used to provide quality care for children, and that children are not placed in alternative care unnecessarily or kept in care for longer than necessary for purposes that are profit-driven.[28] Under the CRC, states are under obligation to ensure that non-state service providers operate in compliance with the Convention by putting in place a regular

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[24] Family for Every Child (2015) 28. For instance, in Togo, institutions run by private organisations were strongly relied on as a means to care for children deprived of their family environment. However, the government was able to reduce reliance on institutions and improve the development of family-based alternatives for children without parental care such as foster care by taking a leadership role in establishing a centralised system for referral and monitoring of out-of-home placement of children. Cantwell et al. (2012) 93.
[25] CRC Committee GC No. 5 (2003), paras 9 and 27.
[26] CRC Committee, GC No. 5 (2003), paras 9, 27 and 37–9.
[27] Chiwaula L, Dobson R, Elsley S, *Drumming together for change: A child's right to quality care in Sub-Saharan Africa* (2014) 53–4. The study assessed the status of a child's right to quality care in sub-Saharan African and focused on specific countries, including Benin, Kenya, Zambia, Zimbabwe, Gambia, Malawi and Tanzania.
[28] Cantwell et al. (2012) 106.

monitoring mechanism aimed at ensuring that all state and non-state service providers respect the Convention.[29]

Moreover, governments are increasingly reliant on faith-based organisations and private enterprises to provide the bulk of public services, including formal alternative care. Thus, it becomes even more important that systems are in place to guard against discrimination on the basis of disability within alternative care services, including those run by the non-state sector, and to ensure that they are subject to both non-discrimination and equality norms in relation to children with disabilities as well as registration, regular inspection and monitoring. To this end, the CRPD requires that states take additional measures towards abolishing discriminatory conduct on the basis of disability by persons, organisations, or private enterprises.[30]

In South Africa, the Department for Social Development (DSD) is the lead department vested with the mandate to monitor the rights of children and persons/children with disabilities.[31] The core mandate of the DSD includes monitoring facilities, resources and service provision to children in alternative care facilities, a mandate that stems from the Constitution as well as legislation and policies.[32] In addition to the DSD, the Department of Justice and Constitutional Development (DJCD) ensures that children are placed appropriately through the court system. This mandate extends to the regular reviews of placements.[33] Alternative care service providers

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[29] CRC Committee, GC No. 5 (2003) paras 42–4.

[30] CRPD, art 4(1)(e).

[31] However, prior to 2009 issues relating to persons with disabilities were under the mandate of the Office on the Status of Disabled Persons (OSDP) – its location in the Presidency gave it prominence and a degree of political influence. The OSDP was absorbed into the Department of Women, Children and People with Disabilities (hereafter DWCPD) in May 2009 with the intention of strengthening the monitoring of the rights of persons with disabilities and improving coordination among various stakeholders. CRC Committee, Consideration of Reports Submitted by States parties under article 44 of the Convention, Second periodic reports of States parties due in 2002, South Africa (UN Doc. CRC/C/ZAF/2, 2015), para 406.

[32] The responsibility to monitor alternative care settings and service provided in such settings was placed on the DWCPD prior to the transfer of responsibilities of children and persons with disabilities to the DSD. DWCPD *National Plan of Action for Children in South Africa* (2012) 86.

[33] DWCPD (2012) 86.

are subject to registration and approval and have to conform to the minimum standards established by the Children's Act.[34]

The transfer of issues related to children and persons with disabilities from the Department of Women, Children and People with Disabilities (DWCPD) to the DSD in 2014 was criticised given that the former had played the role of monitoring and coordinating the rights of children and persons/children with disabilities at national level despite its shortcomings.[35] Its dissolution was regarded as contrary to international obligations because the transfer of issues relating to vulnerable groups from a dedicated department within the Presidency effectively removed those issues from the centre of political decision-making and led to a considerable decrease in systemic investment.[36] The DWCPD was dissolved due its capacity constraints and lack of authority over implementing departments, but these problems have not been fully addressed by moving its the mandate to DSD.[37] This is especially true with regard to the DSD's relatively weak political authority over the range of implementing departments.[38]

The inadequacy of South Africa's institutional framework to monitor and coordinate and ensure the suitability of alternative care for children with disabilities is evident in the fact that most children placed in either registered or unregistered alternative care settings do not have a

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[34] In terms of s 197 of the Children's Act, CYYCs (both governmental and private) are subject to registration with the relevant provincial DSD and are required to operate in line with the standards set out in the Act.

[35] The 2009 national elections saw the establishment of a number of ministries including the DWCPD. The DWCPD replaced the previous national 'multi-agency structures' in the Presidency and was a product of a collective effort by civil society groups in the field of children's right to improve the monitoring and coordination of the rights of women, children and persons with disabilities. The Department of Women was relocated to the Presidency in 2014, replacing the DWCPD, with its focus falling on the empowerment of women and on gender equality. As a result, the additional responsibilities of children and persons with disabilities were transferred to the DSD. Martin P *Analysis of the children's sector in South Africa (*2015) 81; ACPF *Children with disabilities in South* Africa: *The hidden reality* (2011e) 29; Parliamentary Monitoring Group 'Department of Women, Children and People with Disabilities budgetary review and recommendations report' (2013) available at *http://bit.ly/2rZzuyM* (accessed 21 September 2017); Alternate Report Coalition – Child Rights South Africa (ARC-CRSA) 'Alternate report to the UN Committee on the Rights of the Child in response to South Africa's combined 2nd, 3rd and 4th periodic country report on the UN Convention on the Rights of the Child' (2015) available at *http://bit.ly/36vbRgJ* (accessed 11 June 2017), para 8.

[36] Martin (2015) 81.

[37] ARC-CRSA (2015) para 8.

[38] ARC-CRSA (2015) para 8.

court order for their placement.[39] Similarly, alternative care is envisaged as a temporary arrangement, but because court orders are not reviewed regularly and timeously, children stay in alternative care for longer than necessary[40] in terms of lapsed court orders and with placements sometimes going unreviewed for as long as seven years.[41]

Countrywide, the majority of CYCCs are operated by NGOs,[42] and there are concerns about unregistered CYCCs and the placement of children in them without court orders.[43] The growing number of unregistered CYCCs in South Africa raises concerns about services provided in these facilities as the services are neither monitored to ensure they meet minimum standards nor supported financially or otherwise by the government.[44] It has been revealed that most of these unregistered facilities do not meet the norms and standards of the Children's Act.[45] This indicates that the monitoring of placements of children with disabilities in CYCCs is limited. This presents a great danger to children's rights, since the non-registration of these facilities

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[39] In the Community Agency for Social Enquiry (CASE) survey, it was revealed that more than half of the children placed in unregistered CYCCs (56 per cent) did not have a court order for their placement, whereas the percentage is lower in registered CYCCs (16 per cent). CASE *Unregistered Child and Youth Care Centres and Temporary Safe Care* (2012) (hereafter CASE (2012) 38.

[40] Jamieson L 'Children's rights to appropriate alternative care when removed from the family environment: A review of South Africa's child and youth care centres' in Proudlcok P (ed) S*outh Africa's Progress in Realising Children's Rights: A Law Review* (2014) 233.

[41] It was found that in 2010 there were significant number of children (43 per cent) in registered CYCCCs with lapsed court orders or extensions, with some orders (9 per cent) dating as far back as 2003. *Baseline Study on Registered Child and Youth Care Centres* (2010) (hereafter CASE (2010)) 61. Jamieson (2014) 233.

[42] Meintjes et al. (2007).

[43] Department of Social Development (DSD) *South Africa's Second Country Report to the African Committee of Experts on the Rights and Welfare of the Child on the African Charter on the Rights of and Welfare of the Child (Reporting Period: May 2013 to May 2016)* para 250.

[44] Meintjes-van der Walt M, Barratt A, Chinnian K, et al *Introduction to South African Law: Fresh Perspectives* 3 ed (2019); Bower C (ed) 'Initial complementary report to the African Committee of Experts in response to South Africa's initial country report on the African Charter on the Rights and Welfare of the Child' (2014) paras 119–20 available at *http://bit.ly/2sKUqds* (accessed 27 May 2018); The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Concluding Observations: South Africa (2014) para 40. UNICEF *Alternative Care for Children in Southern Africa: Progress, Challenges and Future Directions* (2018) 10. In 2010 the CASE was commissioned by the DSD and UNICEF to conduct an audit of registered facilities in South Africa and found that there are 345 such facilities in the country. Two years later in 2012 another audit revealed that there were 115 unregistered facilities in South Africa. However, it is acknowledged that there may be unregistered facilities that would not been captured by the survey. CASE (2012); CASE (2010); Bower (2014) para 120; Jamieson L 'Children and young people's right to participate in residential care in South Africa' (2017) 21(1) *The International Journal of Human Rights* 95.

[45] Bower (2014) para 120.

effectively exempts them from complying with minimum requirements and state oversight as they operate in the shadows. In such circumstances, it is difficult, if not impossible, to ensure that the rights of children with disabilities are protected and that the placement of each child is in keeping with the principle of suitability.

The lack of regular review of placements in alternative care has been partly attributed to the shortage[46] and high workload of social workers, who rarely have time to conduct the necessary assessment of foster parents, a situation that results in unsuccessful foster placement outcomes.[47] The drive to place children in family-based settings is not matched by the capacity of social services to process, monitor or support placements adequately.[48] This also has an impact on social workers' role in supervising foster placements and maintaining contact with children in foster care and their caregivers, with visits to foster care homes happening on average only once a year.[49] The shortage has also meant that not enough emphasis is given to the provision of family reunification services for children placed in CYCCs and other forms of alternative care – services that are further weakened by insufficient funding, lack of training, and weak enforcement of laws, policies and standards.[50] As a result, children remain in alternative care for longer than necessary,[51] and there are, overall, negative impacts on their well-being and the stability of their lives.[52]

In Ethiopia, the Ministry of Women, Children and Youth Affairs (MOWCYA) is responsible for facilitating care and support programmes for children without parental care and exercising

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[46] DSD *Situational Analysis Report on the Social Service Workforce Servicing Children* (2012) 60; CASE (2010) 53.
[47] Van der Walt G 'Alternative care in South Africa' (2018) 39(3) *Obite*r 638.
[48] Meintjes H, Moses S, Berry L, et al *Home Truths: The Phenomenon of Residential Care for Children in a Time of AIDs* (2007) iii.
[49] Van der Walt (2018) 638.
[50] ACERWC Concluding Observations: South Africa (2014) paras 39–40.
[51] ACERWC Concluding Observations: South Africa (2014) para 39.
[52] Van der Walt (2018) 638.

oversight in ensuring that quality alternative care is provided.[53] Secondly, monitoring and evaluation are prescribed in the National Guidelines, which require that the 'relevant Regional authority' has to 'follow-up, monitor and evaluate the care offered to a child placed in institutional care'.[54] To this end, the MOLSA has been vested with the responsibility to supervise and monitor child-care institutions.[55] Furthermore, the Ministry of Justice (MOJ) is mandated to register and approve alternative care services.[56] The institutional structure thus reveals that the mandate to monitor the rights of children with disabilities in alternative care lies with the MOWCYA, MOLSA and the MOJ.[57]

Nevertheless, Ethiopia's systems for the inspection and monitoring of alternative care have not been effective.[58] There is a lack of uniform application of standards in relation to the admission of children into alternative care, to the monitoring and evaluation their placement as well as to the provision of appropriate care on a case-by-case basis.[59] Furthermore, the current monitoring system emphasises meeting basic physical needs while neglecting the psychosocial well-being of children in institutional care.[60] This has negative implications for children with disabilities, given that they require targeted psychosocial support services due to the vulnerabilities

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[53] The MOWCYA has established a Bureau of Women, Children and Youth Affairs (BOWCYA) in each region with a mandate to follow up, monitor and evaluate the operation of institutions providing care to children deprived of their family environment. Ministry of Women Children and Youth Affairs *Combined 4th and 5th Periodic Reports of the Federal Democratic Republic of Ethiopia to the United Nations Committee on the Rights of the Child (2006 – 2011)* (2012) ss 6(6) and 19; National Guidelines, 10.

[54] National Guidelines, 50.

[55] National Guidelines, 10. FHI et al. (2010) 22.

[56] National Guidelines, 64.

[57] While MOWCYA and MOLSA are responsible for overseeing, supervising and monitoring children placed in alternative care to ensure they receive quality care and that alternative care settings meet minimum standards, the MOJ is responsible for ensuring that alternative care providers are registered and licensed and meet the eligibility criteria before embarking on the provision of such services to children. Within MOLSA, the Department of Rehabilitation Affairs is responsible for coordinating disability issues at the federal level and providing policy guidance and technical support to other organs of state. In respect of alternative care, MOWCYA, as noted, has the mandate to coordinate efforts and collaboration by all stakeholders to effectuate the rights of children. Sida 'Disability rights in Ethiopia' (2014) 2 available at *http://bit.ly/2Fqw9vJ* (accessed 12 July 2015).

[58] Family Health International/Ethiopia & Children's Investment Fund Foundation (CIFF) 'Improving care options for children in Ethiopia through understanding and preventing institutionalisation' (unpublished draft report, 2008) 200.

[59] FHI/Ethiopia & (CIFF) (2008) 16.

[60] FHI/Ethiopia & (CIFF) (2008) 204.

associated with their particular ages, developmental needs and disabilities.[61] Agencies providing alternative care services are not always licensed and approved; the placement of children in alternative care is not always regularly reviewed; and existing institutions operate with little to no oversight.[62] Most agencies' contact with the responsible body to monitor and oversee such settings is limited to reporting and registration, which does not necessarily reflect a regular supervisory role.[63] For children including children with disabilities placed in alternative care, particularly in institutions, the lack of effective state oversight and monitoring has meant that other family-based alternative care options are not always explored and that children stay in institutional care for longer than necessary.[64] This has been attributed mainly to the assigning of the responsibility of monitoring and oversight of alternative care to different ministries and departments.[65] As such, the need to designate an institutional reform to better coordinate and monitor the rights of children has been emphasised.[66]

In an effort to improve the coordination of stakeholders in the field of alternative care provision and to strengthen the development of appropriate alternative care programmes and policies for children deprived of their family environment as well as to facilitate support to families, the Ethiopian Alternative Childcare Network was launched in 2012. The Network consisted of MOWCYA, MOJ, Ministry of Health Ministry of Education, the police, bilateral organisations, donors, and NGOs (both international and local). The Network facilitated the implementation

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[61] Hanass-Hancock J 'Psychosocial support for children with disability and their carers' (2014) available at http://bit.ly/2urFd1l 9–10 (accessed 10 September 2016).

[62] FHI/Ethiopia & (CIFF) (2008) 200.

[63] FHI et al. (2010) 35–6. The monitoring of alternative care with BOLSA have been limited to reporting after having registered with the BOJ. A study found that only 19 institutions contacted for the purpose of the research identified MOWCYA as the governmental institution mandated to oversee child-care institutions. The majority of the institutions (60 institutions) indicated they are accountable to the BOJ. However, the BOJ is mandated with the registration and accreditation of child-care institutions. This indicates that contact with BOJ was only for the purpose of registration and accreditation, which happens in the initial stages.

[64] FHI/Ethiopia & (CIFF) (2008) 200.

[65] FHI/Ethiopia & (CIFF) (2008) 16.

[66] Teka B *Child Rights Protection in Ethiopia and Kenya: a Comparative Analysis* (unpublished LLM thesis, Addis Ababa University, 2015) 67–8; Kedir A, Shiferaw A, Mulatu F et al *Baseline study for a comprehensive child law in Ethiopia* (2013) 32.

of the various alternative options by establishing a system of coordination. The Network is no longer operational owing to the high workload of experts, among other unknown factors.[67]

Moreover, existing monitoring activities of Ethiopia also indicate that children including children with disabilities placed in family-based alternative care settings face a greater risk of not having their placement regularly reviewed.[68] This indicates that formal oversight and monitoring of children including children with disabilities placed in family-based alternative care is lacking. This poses a challenge, as other countries' experiences show that continuous monitoring of foster care placement is crucial to ensuring positive outcomes of placement of children with disabilities in such care and to identifying the needs of caregivers of those children.[69]

From the foregoing discussion, it is observed that both countries frameworks reflect a worrying trend for the rights of children with disabilities in alternative care. In South Africa, the gap in implementation is evident in the failure to register institutions and the inadequate monitoring, which pose risks of human rights violations for children with disabilities in such settings. Strengthening the institutional framework as well as the capacity of those involved in the role of supervision would fill some of these gaps in implementation. In this regard, in South Africa the need for the government to assign a new implementing body to ensure the implementation, realisation and monitoring of the rights of children has been also emphasised.[70] In Ethiopia, too, the role of ensuring the suitability of alternative care options for children with disabilities and the ongoing suitability of such placement to a particular child is stifled by logistical

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[67] Jima E *Ensuring a Better Protection for Children Deprived of Family Environment: The Application of Subsidiarity Principle in Ethiopia* (unpublished LLM thesis, Addis Ababa University, 2016) 52.

[68] As institutional care placement is carried out by governmental institutions and subject to registration and licensing, one would assume that monitoring the operation of such care settings and the circumstances of children placed in such care would be less challenging than in other placements such as foster care. There is also no information on the circumstances and the number of children with disabilities placed in foster care. Also absent are details on accredited foster carers and vetting processes of foster carers in relation to children with disabilities.

[69] Family for Every Child (2015) 33.

[70] ACERWC Concluding Observations: South Africa (2014) para 12.

limitations. The coordinating conundrum is shown in the failure to improve the competence and quality of service in child-care institutions. This is concerning as coordination among the relevant government institutions as well as between the government and private agencies is necessary for the effective provision of alternative care services.

In both countries, there is a need for governmental cooperation with CSOs in the facilitation and monitoring and coordination of alternative care.[71] The monitoring comes through ensuring that accountability and transparency by the government in matters concerning children with disabilities. Coordination is the overarching benefit that draws on the strengths of both the government and CSOs as private players in matters that concern children with disabilities.

5.2.2. Independent monitoring mechanisms

As part of their obligation to monitor the implementation of the CRC, ACRWC and the CRPD, states are encouraged to establish independent national human rights institutions (NHRIs).[72] These institutions should also 'proactively' offer assistance to children, paying particular attention to the most vulnerable and disadvantaged groups such as children with disabilities.[73] Irrespective of the shape or form this institution takes, it should be independent and adequately supplied with the necessary human and financial resources.[74] It must be geographically and physically accessible and well known to children with disabilities and their caregivers.[75]

The role of independent monitoring mechanisms in the context of the provision of alternative care of children is clearly outlined in the UN Guidelines.[76] First, states are urged to establish

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[71] See s 5(2)(5) of this chapter for a further discussion on the role of CSOs in the realisation of the right to alternative care of children with disabilities in South Africa and Ethiopia.
[72] CRC Committee, GC No. 5 (2003), paras 9, 27, 46 and 65.
[73] CRC Committee, General Comment No.2 'The role of independent national human rights institutions in the promotion and protection of the rights of the child' (2002) (hereafter CRC Committee, GC No. 2 (2002)) para 15; ACERWC General Comment No. 5 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection' (2018) 48–50.
[74] CRC Committee, GC No. 9 (2006) para 24(a).
[75] CRC Committee, GC No. 2 (2002) para 15; CRC Committee, GC No. 9 (2006) para 24(b) and (c).
[76] UN Guidelines, para 130(a)–(d).

an independent monitoring mechanism which is in alignment with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).[77] These institutions are expected to be easily accessible by children themselves and those caring for them.[78] The mandate of such mechanism should include seeking the views of and offering advice to children in all forms of alternative care;[79] confidentially visiting alternative care settings and looking into any alleged violations of the rights of children in such settings on complaint or on own initiative;[80] advocating for the necessary policies to relevant bodies to enhance the protection of children in alternative care in line with accepted standards on child protection, health, development and care;[81] and offering guidance on proposals and draft legislation and submitting independent reports to the CRC Committee on the implementation of the UN Guidelines.[82]

The constitutions of South Africa and Ethiopia provide the legal ground for the establishment of such independent monitoring mechanisms:[83] in South Africa, the South African Human Rights Commission (SAHRC);[84] in Ethiopia, the Ethiopian Human Rights Commission (EHRC) and Ethiopian Institution of the Ombudsman (EIO).[85] In both countries, the mechanisms are vested with the mandate to protect, promote and respect human rights, which includes children as well as children with disabilities.[86] Both countries have organs assigned to

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[77] UN Guidelines, para 30.
[78] UN Guidelines, para 30.
[79] UN Guidelines, para 130(a).
[80] UN Guidelines, para 130(a).
[81] UN Guidelines, para 130(b).
[82] UN Guidelines, para 130(c)–(d).
[83] The Ethiopian Constitution offers the legal ground for the establishment of NHRIs in arts 55(14) and (15); ss 181(1)(b) and 184 of the South African Constitution provide for the establishment of the SAHRC.
[84] In addition to its constitutional mandate, the SAHRC also has a statutory mandate which stems from the enabling legislation, the South African Human Rights Commission Act 40 of 2013 ((hereafter SAHRC Act).
[85] Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 (hereafter EHRC Establishment Proclamation (2000)) and Institution of the Ombudsman Establishment Proclamation No. 211/2000 (hereafter the EIO Establishment Proclamation (2000))
[86] Both the EHRC and EIO have the mandate to promote and protect the rights of children including children with disabilities by, among other things, conducting research and studies towards the effective implementation on the rights of children with disabilities. EHRC Establishment Proclamation (2000) and EIO Establishment Proclamation (2000). In the same vein, the SAHRC is vested with the mandate to promote human rights and a

deal with children's rights within the commissions – in South Africa, the Children's Rights portfolio of the SAHRC;[87] the EHRC and the EIO have commissioners heading Children and Women Affairs.[88] Under Children and Women Affairs, both institutions have a Children, Women and persons with disabilities directorate responsible for promoting and protecting the rights of these vulnerable segments.[89]

However, the bodies assigned to deal with children's rights in both countries have not fully discharged their mandates mainly due to inadequate allocation of resources.[90] The establishment of an independent child-rights monitoring body with adequate financial resources has been a recommendation given by the respective international and regional child-rights monitoring bodies to ensure the effective implementation of its international child-rights law obligations.[91] In the case of South Africa, although it is agreed by interested parties that an independent monitoring mechanism is needed, the exact form it should take has been a subject of debate.[92] Some are of the view that there is a need to establish a constitutionally entrenched, impartial and adequately resourced children's ombudsperson who would serve as a complaints mechanism dedicated to children's rights.[93] The other position is that the SAHRC's capacity should be strengthened and a dedicated Children's Rights Commissioner be appointed within

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culture of human rights and to monitor the observance of human rights in South Africa. South Africa Constitution, ss 181 and 184(1)(a) – (c).

[87] SAHRC 'Children's rights' available at http://bit.ly/2QtyoVm (accessed 4 November 2019).

[88] Alemu G & Birmeta Y *Handbook on the Rights of the Child in Ethiopia* (2012) 33.

[89] Alemu & Birmeta (2012) 33; The Ombudsman 'EIO resolved more than 80 % complaints lodged' (2017) 1(3) available at http://bit.ly/35wy909 (accessed July 2019).

[90] Birhane *Ensuring the Rights of "Little Anglels": Implementation of Socio-Economic Rights of Children with Disabilities in Ethiopia* (unpublished LL.M thesis, Addis Ababa University, 2012) 98; ARC-CRSA 'Supplementary submissions to the United Nations Committee on the Rights of the Child following the Government of South Africa's written replies to the list of issues' (2016) available at http://bit.ly/2T2OQ0z (accessed 24 March 2018), paras 14 and 5. The budget allocated to the SAHRC was R189.7 million for 2019/20. Of this amount, only 7 per cent, that is, R13.2 million, is earmarked for core operations distributed to seven different human rights portfolios, including the children's rights portfolio. Dengler J 'Western Cape Children's Commissioner under the spotlight' *Go South* 26 August 2019 available at http://bit.ly/2rZQOnh (accessed 4 November 2019).

[91] ARC-CRSA (2017) para 45.

[92] ARC-CRSA (2017) para 46.

[93] ARC-CRSA (2016) para 13.

the Commission with greater resources.[94] The downside of incorporating child-rights issues into the broad mandate of the SAHRC is the risk of the side-lining of such issues.[95] However, there is agreement on the need for the establishment of an independent child-rights monitoring body which has adequate capacity, the necessary independence and authority, and involves all stakeholders including CSOs and the general public.[96] The latter position has been supported in the context of alternative care as it would serve as an independent body to carry out regular oversight and monitoring of CYCCs, which would fall within the mandate of such institution.[97]

Although, the scope of this study is limited to national laws and policies, it is important to highlight that the provincial parliament of the Western Cape has recently enacted the Western Cape Commissioner for Children Act (the Act).[98] This statute establishes a Children's Commissioner in the province of the Western Cape. The mandate of the Commissioner includes monitoring the 'rights, needs and interests of children in home care, foster care, temporary safe care and child and youth care centres'.[99] The specificity of the Commissioner's mandate is commendable and necessary to ensure that the mandate of the Commissioner extends to monitoring the suitability of alternative care for children with disabilities.

In the case of Ethiopia, in addition to the inadequate allocation of resources towards the protection of children's rights within the independent mechanisms, there is a general lack of knowledge of the activities of the EHRC and EIO in relation to their mandated responsibilities towards children[100] including children with disabilities. Moreover, the EHRC has not yet mainstreamed issues that are specific to children with disabilities in its undertakings and does

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[94] ARC-CRSA (2017) para 46; ARC-CRSA (2016) para 12.
[95] ARC-CRSA (2017) para 47.
[96] ARC-CRSA (2017) para 47.
[97] Hansungule Z *Questionable correction: Independent oversight of child and youth Care centres in South Africa* (2018) 11–12.
[98] Western Cape Commissioner for Children Act, 2019.
[99] Western Cape Commissioner for Children Act, s 7(4)(iii).
[100] Alemu & Birmeta (2012) 34.

not have a focal point assigned to address concerns specific to such children.[101] It is further incapacitated by lack of experts familiar with issues related to children with disabilities.[102] Moreover, the now-repealed CSO proclamation has had an impact on CSO's capacity to work in cooperation with the EHRC.[103] Hence, the EHRC has not been involved in any significant activity that could have an effect on the rights of children with disabilities, apart from minor awareness-raising activities mainly in the area of education of children with disabilities.[104] The EHRC has also been found to be inaccessible to children with disabilities, especially those located in rural areas.[105] Moreover, there have been concerns about its effectiveness as the EHRC does not comply with the principles relating to the status of national institutions for the protection and promotion of human rights (the Paris Principles).[106] As such, one of the recommendations given to the government by the CRPD Committee involves ensuring the monitoring and implementation of the Convention, particularly 'through systematic consultation with the Human Rights Commission and the Ethiopian Institution of the Ombudsman', persons with disabilities and CSOs.[107]

In conclusion, it is highlighted that states are expected to establish national human rights institutions that should be independent, accessible and aligned to the UN Guidelines. Both countries' constitutions provide for the establishment of independent monitoring mechanisms, that is, the SAHRC the EIO. It is not in doubt that the mechanisms have the mandate to protect, promote and respect the human rights of persons including children with disabilities. However,

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[101] Birhane (2012) 96–7.

[102] Degol A *The Role of the Ethiopian Human Rights Commission in the Protection of the Rights of Vulnerable Groups: The Case of Children, Women and Persons with Disabilities* (unpublished LLM thesis, Addis Ababa University, 2009) 123.

[103] Teka (2015) 84.

[104] Birhane (2012) 98.

[105] Degol (2009) 122–23.

[106] CRPD Committee Concluding Observation: Ethiopia (UN Doc. CRPD/C/ETH/CO/1, 2016), para 69.

[107] CRPD Committee Concluding Observation: Ethiopia (UN Doc. CRPD/C/ETH/CO/1, 2016), para 70.

these organisations have not fully executed their mandates notwithstanding that their establishment is a step in the right direction.

5.2.3 Data collection

Ethiopia and South Africa are required to undertake data collection and analysis and develop indicators for the measurement of the implementation of the rights of children with disabilities.[108] The data collected should be detailed, reliable and disaggregated in order, inter alia, to identify discrimination in the realisation of rights.[109] The CRC Committee has noted that data collection in relation to children with disabilities is an issue often overlooked and not given priority.[110] To this end, the Committee urges states to put in place systems for collecting accurate, standardised and disaggregated data that reflect the lived realities of children with disabilities.[111]

Obtaining accurate, reliable and up-to-date data on the nature and prevalence of disability presents various challenges worldwide mainly due to lack of a uniform definition of disability applicable across a wide range of sectors and services.[112] In South Africa, various definitions of disability have been employed for different purposes and contexts – for instance, the definition used to establish eligibility for social assistance differs from the definition used in population censuses.[113] In respect of a legal definitions of disability employed in legislations such as the Social Assistance Act, it has been pointed out that they fall short of reflecting conceptualising disability in accordance with the human rights model of disability.[114] However,

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[108] CRC Committee, GC No. 9 (2006) para 19.

[109] CRC Committee GC No. 5 (2003) 48.

[110] CRC Committee, GC No. 9 (2006) para 19.

[111] CRC Committee, GC No. 9 (2006) 19.

[112] Department of Social Development *Draft White Paper on a National Disability Rights Policy* (2014) 21 as cited in Wiid Y *The Right to Social Security of Persons with Disabilities in South Africa* (unpublished LLD thesis, University of the Western Cape, 2015) 51.

[113] Wiid (2015) 51.

[114] For instance, the medical model of disability is evident in the definition of persons with disabilities in the Social Assistance Act. This is indicated through the reading of ss 9(b) and 1 of the Act, which defines persons with disabilities as persons who 'owing to a physical or mental disability, [are] unfit to obtain by virtue of any service,

there exists a definition of disability that is in compliance with the CRPD at a policy level as the WPRPD adopts the CRPD's description of disability.[115] Thus, South Africa lacks a legal definition that is in alignment with article 1 of the CRPD.[116] The lack of a legal definition of disability may have affected the availability of accurate and reliable data on exact numbers of children with disabilities in the country.

In respect of existing data on the prevalence of disability in South Africa, the 2001 general population census estimated the number of people who have disabilities at five per cent of the population.[117] The latest data on the prevalence of disability from Statistics South Africa is the 2011 population census, which estimated the number of people with 'impairments' at 7.5 per cent of the total population,[118] which translates to 3.8 million persons.[119] According to the 2011 General Household Survey (GHS), persons with disabilities accounted for 5.2 per cent of the total population, which equates to 45,345,000 persons with disabilities in South Africa. On the other hand, in 2011 the World Bank estimated that 18 per cent of the total population lives with some form of disability in South Africa.[120] The above figures demonstrate how the differing approaches to disability may influence the results obtained in a particular study.[121]

As can be observed, in the South African context data on disability is primarily drawn from the national census and household surveys (Statistics South Africa).[122] This has its own limitations and often is unable to give a true reflection of actual prevalence.[123] First, the results emanating

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employment or profession the means needed to enable him or her to provide for his or her maintenance.' In this manner, the Act puts emphasis on the impairment of the individual and fails to acknowledge the external barriers that persons with disabilities face in their daily lives. Chilemba (2014) 190.

[115] WPRPD (2015) 16–17.

[116] Chilemba (2014) 253.

[117] Statistics South Africa (Stats SA) *Census 2001 Prevalence of Disability in South Africa* (2005) 1.

[118] Stats SA *Census 2011 Statistical Released P0301.4* (2012) 46.

[119] Wiid (2015) 53.

[120] WHO & World Bank *World Report on Disability* (2011) Technical Appendix A.

[121] Wiid (2015) 53.

[122] WPRPD, 23.

[123] WPRPD, 23.

from these difference sources are not comparable since different techniques and criteria are used to establish disability prevalence. This in turn makes it hard to get an accurate picture of the number and type of children with disabilities in South Africa or to monitor variations in a given period of time.[124] Secondly, the reliability of the findings of the census and GHS have been questioned because self-reporting methods were used to classify disability. This may thus be affected by factors such as social and cultural understanding of disability for a given age category. This can be attributed to the restrictions on the number and type of questions that can be asked; language and other barriers such as traditional beliefs attached to disability; and the fact that these surveys are often carried out through substitute responses, where one family member may have to respond on behalf of the entire family.[125] A case in point is the 2011 national census, where there were concerns that psychosocial, neurological or emotional impairments were not recognised.[126] In addition, the data collected on disability from the census showed that questions relating to 'general health and functioning' were posed to households, while persons in institutional care and boarding facilities were excluded.[127] The data collected by Statistics South Africa does not include children below the age of five.[128] This is an indication that where data are available, they are not comprehensive as they do not include all children with disabilities.[129] Similar weaknesses were highlighted in relation to the set of questions used for the 2011 GHS[130] which did not provide child-specific prevalence rates for reported disability.[131] In addition, the GHS were based on a specific sample sizes which is

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[124] ACPF *Children with disabilities in South Africa: The hidden reality* (2011e) 12.

[125] WPRPD, 23.

[126] The Washington Group set of questions were used in 2011 National census (paras 7–4).

[127] Stats SA *Census 2011: Profile of Persons with Disabilities in South Africa* 24; The Right to Education for Children with Disabilities Alliance 'Alternative report to the UN Committee on the Rights of Persons with Disabilities in response to South Africa's baseline country report of March 2013 on the UN Convention on the Rights of Persons with Disabilities, with particular reference to the provisions of article 24' (2017) available at *http://bit.ly/36xsisJ* (accessed 15 August 2016), para 74(c).

[128] ARC – CRSA (2017) para 69.

[129] ARC – CRSA (2017) para 69.

[130] The Washington Group set of questions were used for the 2011 GHS, with the same shortcomings mentioned above. Stats SA *General Household Survey 2011* (paragraphs 15–19).

[131] The Right to Education for Children with Disabilities Alliance (2016) 18.

too small to adequately measure disability and excluded children who are below the age of five years.[132] As such, the disability data in these surveys should be treated with caution.[133]

In Ethiopia, the overall availability of reliable and disaggregated data on disability in Ethiopia indicates that the most recent available data in relation to the number of persons/children with disabilities in the country is the 2007 Population and Housing Census. The census found that there are only 805,492 persons with disabilities in Ethiopia (1.17 per cent of the population).[134] The children's share of this figure is 283,606.467.[135] The estimate of the Census has, however, been questioned by commentators in the field of disability who argue that the number of persons with disabilities in the country is much higher.[136] The reason for the underestimation of the number persons with disabilities by the national census lies in the general lack of awareness of disability-related issues among those involved in the census data collection and analysis, the narrow definition of disability employed in the census, and the way the census questions were framed.[137] In this respect, it is appropriate to point out that except for the term 'persons with disabilities' in the 2008 employment legislation,[138] there is no legal definition of disability which is applicable to children with disabilities. Similar to the case in South Africa, a definition of disability is found in the policy framework, whereby the CRPD's description

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[132] CRC Committee, List of issues in relation to the second periodic report of South Africa, Addendum, Replies of South Africa to the list of issues* (UN Doc CRC/C/ZAF/Q/2/Add.1, 2018), para 185

[133] CRPD Committee, Consideration of Reports Submitted by States parties under article 35 of the Convention, Initial reports of State parties due in 2009, South Africa (2015) (CRPD/C/ZAF/1), para 1.

[134] Central Statistics Agency (CSA) *The 2007 Population and Housing Census of Ethiopia: Statistical Report at Country Level* (2008) 169-237.

[135] CSA (2008)169–237.

[136] Sida (2014) 1; ILO, OHCHR, WHO, et al. 'Promoting social inclusion of persons with disabilities in Ethiopia' (undated) 2 available at *http://bit.ly/2s198wt* (accessed 14 November 2018).

[137] The definition used to describe persons with disabilities in the 2007 Census excluded some category of persons with disabilities as its scope of identification was limited to physical and mental disabilities. The question used in the Census reads as follows: 'Does (name) have a problem of seeing, hearing, speaking and/or standing/walking/seating, body parts movement, functioning of hands/legs or mental retardation or mental problem or other mental or physical damage?' ILO, OHCHR, WHO, et al. 'Promoting social inclusion of persons with disabilities in Ethiopia' (undated) 2 available at *http://bit.ly/2s198wt* (accessed 14 November 2018).

[138] Article 2 (1) of the employment Right proclamation no. 568/2008 reads as follows: 'Person with disability means an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discrimination'.

of disability is adopted in National Plan of Action for Persons with Disabilities (2012-2021).[139] Compared to the 1995 national census report, the 2007 data indicate a decrease in the number of persons with disabilities in the country.[140] On the other hand, in 2011, the World Report on Disability estimated that 17.6 per cent of the total population of Ethiopia, or more than 14.4 million people, had some form of disability.[141] A recent report estimates that 7.8 million of people live with some form of disability in Ethiopia of which 30 per cent are estimated to represent children and youth under the age of 25.[142] Conflicting reports seem to be evident at on the international scene. Since various sources cite different figures for the number of population with a disability even within similar time frames, it is unlikely that any statistics can be treated with certainty.

In relation to data in the context of alternative care, the Guidelines for Periodic Reports require states to report on the number and percentage of children separated from their parents who are living in institutions or in foster homes as well as the duration of placement and frequency of its review;[143] children reunited with their parents after a placement;[144] and children in domestic, intercountry and *kafala* adoption programmes disaggregated by age and, where relevant, information on the country of origin and country of adoption of the children concerned.[145] In reporting on article 23 of the CRC, states have to specify the number and percentage of children with disabilities who are living in institutions or outside their families, disaggregated by age or

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[139] Ministry of Labour and Affairs (MOLSA) *National Plan of Action of Persons with Disabilities (2012-2021)* (2012) 1.

[140] MOLSA *Developmental Social Welfare Policy* (1996) 59.

[141] WHO & World Bank (2011) Technical Appendix A.

[142] CSA Household Consumption and Expenditure Survey 2015/16 and Ethiopian Socio-Economic Survey (ESS) 2015/16 (2019) as cited in UNICEF & Ministry of Finance *National Situation Analysis of Children and Women in Ethiopia* (2019) v.

[143] 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 (UN Doc. CRC/C/58/Rev.3, 2015) (hereafter *Treaty-specific guidelines* (2015) annex, para 13(d).

[144] CRC Committee *Treaty-specific guidelines* (2015) annex, para 13(e).

[145] CRC Committee *Treaty-specific guidelines* (2015) annex, para 13(f).

age group, sex, location (rural or urban area), minority or indigenous group, ethnicity, religion, nature of disability and any other category considered appropriate.[146]

Data comprehensive and disaggregated enough to capture not only the 'stock' but also the 'flow' of the children from and to the alternative care system over the whole period of childhood and into adulthood is necessary.[147] As widely observed, disaggregated data on children in alternative care is prerequisite for informing government policy and practice in support of family strengthening and de-institutionalisation.[148] This also speaks to the suitability principle that informs the subsequent de-institutionalisation of children; effective provision of alternative care for children deprived of their family environment; and provision of reunification services where appropriate.[149] The reason for capturing the early indicators of risks faced by vulnerable groups of children including children with disabilities is to enhance service provision, establish and improve monitoring mechanisms, and systematically address the root causes of the separation from family and placement in alternative care.[150]

In South Africa, the data necessary to inform policy and practice in relation to children in alternative care is lacking.[151] Even though some data exist on the number of children in some forms of alternative care, it is not disaggregated and does not give a complete picture of the situation of children.[152] Across all sectors of government institutions, there are challenges with

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[146] CRC Committee *Treaty-specific guidelines* (2015) annex, paras 1 and 17(b).

[147] Moestue H *Data collection on children in alternative Care in Eastern Europe and Central Asia Summary* Report of TransMonEE 2014 Country Analytical Reports on Children in Alternative Care (2016) available at *http://bit.ly/39NZz4Q* (accessed 6 February 2018) 16.

[148] Petrowski N, Cappa C & Gross P 'Estimating the number of children in informal alternative care: challenges and results' (2017) 83 *Child and Abuse Neglect, The International Journal* 389; Arisi C & Christensen Z *The Care of children in data: Evidence, gaps and opportunities for change in the SDGs* (2017) 6.

[149] Petrowski et al. (2017) 389; Arisi & Christensen (2017) 6.

[150] Petrowski et al. (2017) 389; Moestue (2016) 16–7.

[151] ARC-CRSA (2015) para 132. This is also a concern raised by the ACERWC in its Concluding Observation on the second periodic report of South Africa. The ACERWC expressed its concern on the unavailability of disaggregated data on family environment and alternative care measures.

[152] ARC-CRSA (2017) para 208; ARC-CRSA (2016) para 71–3; Van der Walt G (2018) 628–29.

lack of disaggregation of data and statistics pertaining to disability.[153] This is also evident in relation to data in respect of the number and circumstances of children with disabilities in alternative care, where little is known about patterns of admissions or the characteristics of the children with disabilities before, during or after placement in institutions, and even less is known about those in other settings.[154]

In Ethiopia, too, statistics are hindered by various factors. For instance, there is a paucity of data on the circumstances and living arrangements of vulnerable children such as children with disabilities.[155] Various sources give conflicting estimates on the number of children placed in alternative care.[156] The uncertainty about the number of children deprived of their family environment – and disaggregated by age, sex, type and severity of disability, among other things – is unfortunate. The latest periodic report of Ethiopia to the CRC Committee claims that the number of orphaned children with disabilities is 232,585.[157]

Moreover, in Ethiopia the number, location and type of child-care providers in the country is unknown,[158] as is the status of agencies providing a range of community and family-based alternative care services.[159] A major challenge that has been cited as hindering informed

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[153] DWCPD Department of Women, Children and People with Disabilities *Baseline Country Report to the UN on the Implementation of the Convention on the Rights of Persons with Disabilities: First report to the United Nations* – Final Draft (unedited version) (2013), para 391.

[154] The data also do not give a clear picture of the number of children with disabilities as well as the nature of their disability in institutional care as the data are not disaggregated by disability, age, sex, and geographical location. CRC Committee, List of issues in relation to the second periodic report of South Africa, Addendum, Replies of South Africa to the list of issues* (UN Doc CRC/C/ZAF/Q/2/Add.1, 2018), paras 148–52; ARC-CRSA (2016) para 72.

[155] National Guidelines, 5–6.

[156] Based on UNICEF's 2013 report, an estimated 8,620 children find themselves in 225 child-care institutions. UNICEF's report states that 1,529 children were deinstitutionalised in 2011, of whom 326 were reunified with their birth parents or extended family, 272 were placed in foster care, and 795 benefited from domestic adoptions. International Social Service (ISS) 'Country factsheet for the CRC: Ethiopia' (2014) 2 available at *http://bit.ly/2tCfGSq* (accessed 23 July 2016). The government's periodic report to the CRC, on the other hand, states that there are 149 child-care institutions accommodating 11,920 children and that 8,735,467 children had benefited from community-based child care programmes in the last five years. MOWCYA (2012) 19.

[157] MOWCYA (2012) 52.

[158] FHI/Ethiopia & CIFF (2008) 3.

[159] Tadele G, Ayode D, Kifle W *Assessment of community and family-based alternative child-Care services in Ethiopia* (2013) 7 available at *http://bit.ly/2N05cmV* (accessed 26 April 2015).

intervention is the absence of information on the work of agencies (private and governmental) providing alternative care services in the country.[160] In the absence of such data, very little is known about the scale and characteristics of these agencies and the quality and type of services they provide.[161] There is also a lack of comprehensive data on best practices as well as challenges faced by these agencies.[162]

In view of the above, it is evident that there are gaps in the data on the number of children with disabilities in general and children with disabilities in alternative care in particular in South Africa and Ethiopia. A look at the census results in both countries indicates that there are definitional problems due to the lack of a uniform definition of disability and uniform criteria to establish disability prevalence. Hence, data on disability is limited in their reliability in giving a true depiction of the number of children with disabilities in the country. Furthermore, statistics on children with disabilities in alternative care in the two countries do not give the full picture as they are not disaggregated by disability, gender, age, sex, reasons for placement, and length of stay. The provision of tainted data does not offer a good platform on which to engage the principles of necessity and suitability – in practice, these statistics impede efforts to ensure the suitability of alternative care for children with disabilities. In respect of Ethiopia, positive steps are being made in setting up an information management system (IMS) that allows data to be disaggregated using nationally applicable indicators covering all rights guaranteed by the CRC;[163] the IMS includes a database on children in alternative care.[164]

Moreover, although the Sustainable Development Goals (SDGs) do not have a specific goal or target that deals with children deprived of their family environment or alternative care, the

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[160] Tadele et al. (2013) 7.
[161] Tadele et al. (2013) 7.
[162] Tadele et al. (2013) 80.
[163] Teka et al. (2015) 85.
[164] ISS (2014) 2.

process of gathering data for some of the goals, such as Goal 10 (reduced equality) and Goal 1 (no poverty), can potentially assist in having disaggregated data on children with disabilities and alternative care. For instance, the process of gathering data on the implementation of Goal 1 could play a role in identifying the number of children with disabilities who are at risk of losing parental care.

5.2.4 Financial and human resources

Recognising that states differ in economic conditions, the UN Guidelines expect states to allocate financial resources to alternative care to the 'maximum extent' of their available resources.[165] States are further bound to implement the right to alternative care of children including children with disabilities to 'the maximum extent of their available resources'.[166] The Committee expressed its concerns when reviewing states' report over the inadequacy of budget allocated to children's rights and emphasised that giving priority to the rights of children in budgets at all levels of government ensures the realisation of those rights and contributes to 'long-lasting positive impacts on future economic growth, sustainable and inclusive development, and social cohesion'.[167] In its General Comment No. 19, the Committee offers guidance on budgeting for children's rights in each of the four stages of the public budget process: planning, enacting, executing, and following-up.[168] Moreover, it has emphasised on the need for a continuous assessment of the effects of public budgets on different groups of children and to make sure that 'budget decisions lead to the best possible outcomes for the largest number of children, paying special attention to children in vulnerable situations'.[169]

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[165] UN Guidelines, para 24.

[166] CRC, arts 4 of the CRC and 4(2) of the CRPD. See also s 3(4) of Chapter 3 of this thesis for discussion of the state's obligations in respect of the right to alternative care of children.

[167] CRC Committee, General Comment No.19 'Public budgeting for the realization of children's rights' (2016) (hereafter CRC, Committee, GC No. 19 (2016) para 12.

[168] CRC, Committee, GC No. 19 (2016), paras 64–111.

[169] CRC Committee, GC No. 19 (2016) 59.

Additionally, in relation to budgeting and the rights of children with disabilities, the CRC Committee in its General Comment 9 further recommends that states pay particular attention to children with disabilities and their survival and development by allocating budget earmarked for programmes tailored to their needs and promoting their inclusion in society through the framework of international cooperation.[170]

Ensuring that there are adequate available financial resources to support the provision of alternative care would necessitate ensuring that national policies and programmes on alternative care are costed and resources are allocated to their effective implementation.[171] In addition, priority has to be given to funding new models of family-based alternative care to support the gradual elimination of large-scale institutions as well as ensuring that family-based care providers such as foster parents have access to financial assistance, support and training to care for children with disabilities.[172] In circumstance where separation is warranted and placement in alternative care becomes unavoidable, ensuring the suitability of alternative care in respect of financing of alternative care necessitates that financial resources are allocated to ensure that not just the physical needs of children with disabilities are met but also their psychosocial well-being.[173]

Furthermore, the CRC Committee has emphasised in cases of decentralisation and privatisation of services, the State Party remains the primary duty bearer to ensure that there is sufficient allocation of resources to children with disabilities and strict standards in place for service delivery.[174] The implication of this in the context of alternative care is that states have to ensure that private institutions and other forms of alternative care settings run by private organisations

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[170] CRC Committee GC No. 9 (2006) para 16.
[171] Cantwell et al. (2012) 106.
[172] Cantwell et al. (2012) 106.
[173] Cantwell et al. (2012) 104.
[174] CRC Committee GC No. 9 (2006) para 20.

conform to the standards of the CRC. This is important for the alternative care of children with disabilities, mainly because in most Africa countries, often the state is not the main source of financing in relation to alternative care.[175] The way that alternative care is financed has implications for the type and quality of alternative care provided to children. This is mainly because funders have the upper hand in choosing what form of alternative care provision to make available (family-based or residential) and the quality of care provided.[176] Funders also determine the number of children admitted into institutions, including those who are unnecessarily placed.[177] For instance, it has been noted that in economically disadvantaged countries, there is major reliance on institutions to care for children and these institutions are fully or partially financed from private sources abroad.[178] Therefore, given that the state is the primary duty-bearer in ensuring the implementation of the rights set forth in the Convention, it is important that the states take responsibility and be accountable for alternative care for children who need it and also take measures to reinforce their authority and oversight over the alternative care system.[179]

In addition to the obligation in international standards, the government is, according the section 7(2) of the South African Constitution, required to give effect to all the rights in the Bill of Rights including children’s rights to alternative care. One of the measures that the government is expected to undertake to fulfil its obligations under the Constitution and international standards is to allocate adequate budgets so that the required conditions and services to fulfil these rights are available. The Children’s Act further states that the provincial Members of the Executive Council (MECs) for social development ‘must’ provide and fund child protection

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[175] Chaitkin S, Cantwell N, Gale C, et al. *Towards the right care for children: Orientations for reforming alternative care systems Africa, Asia, Latin America* (2017) 19.
[176] Chaitkin et al. (2017) 25.
[177] Chaitkin et al. (2017) 25.
[178] Cantwell (2015) 272–73.
[179] Chaitkin (2017) 25.

services (including foster care placement and supervision, and adoption)[180] and CYCCs.[181] Section 4(2) of the Act further obligates organs of state in all spheres of government to take reasonable measures to the maximum extent of their available resources to realise the objectives of the Act. Moreover, the Children's Act requires national and provincial ministers of social development to ensure that children with disabilities have equal access to these services.

However, in South Africa one of the challenges pertaining to the alternative care system is the poor financing of various forms of alternative care including foster care, cluster foster care and CYCCS.[182] There is a general lack of information and monitoring on financial resource allocation for services to children with disabilities, which poses a major problem for the monitoring and protection of the rights of children with disabilities.[183] Moreover, in practice the government has not been meetings its legal obligations as there is inadequate costing and allocation of child care and protection services.[184] Generally, state subsidies are also said to be insufficient to meet the Children's Act norms and standards.[185] Moreover, subsidies paid by the government to registered CYCCs vary from province to province, which violates section 4(1) of the Act which requires uniformity in implementation of the Act.[186]

In the same vein, in the Ethiopian context there is a dearth of information and data relating to the budget allocated to children in the most vulnerable groups of society, including children

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[180] Children's Act, s 105.

[181] Children's Act, s 193(1).

[182] Van der Walt (2018) 622.

[183] DSD, DWCPD and UNICEF C*hildren with Disabilities in South Africa: A Situation Analysis: 2001-2011* (2012) 76.

[184] ARC-CRSA (2015) paras 15-8; Jamieson (2014) 238; Bower (2014) para 121.

[185] Jamieson (2014) 238.

[186] Jamieson (2014) 238; Bower (2014) para 121; Budlender D and Proudlock P *Are children's rights prioritised at a time of budget cuts? Assessing the adequacy of the 2013/14 social development budgets for funding of Children's Act services* (2013) Cape Town: Children's Institute, University of Cape Town available at *http://bit.ly/2T1TzPZ* (accessed 13 November 2018) 20.

with disabilities.[187] To this end, the need to establish a well-defined, comprehensive and participatory budgeting process with specific indicators to better monitor and evaluate the sufficiency and efficacy of the allocation process has been stressed.[188] In respect of financing of alternative care, the government is not the main source of funding of alternative care provision.[189] In fact, the government is in charge of running only 3 per cent of 85 institutions in the country, with NGOs running 80 per cent and faith-based organisation operating 16 per cent.[190] Prior to the recent banning of adoption, it has been noted child-care institutions were heavily dependent on funds from adoption agencies, with half of the institution not having proper and accessible financial accounting systems in place. The decline in donor funding may have a negative impact on alternative care provision in the absence of sufficient state funding. Inadequate financing of alternative care has also impacted the quality of care provided to children with disabilities in alternative care settings, where the majority of institutions do not have services that meet the needs of children with disabilities placed in their care. Moreover, only basic services are provided for children placed in those settings, while the psychological and emotional needs and special services for the care of children with disabilities are side-lined.[191] The failure to adequately finance alternative care provision has meant that institutions providing alternative care do not always apply the principle of the best interests of the child consistently when making decisions affecting children.[192]

In respect of financial support to caregivers of children with disabilities, in South Africa the government provides financial assistance to foster parents caring for children with disabilities

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[187] To this end, the CRC Committee urged the government of Ethiopia to allocate adequate resources (human, technical and financial) in all areas concerning children, and to pay particular attention to the most vulnerable children. CRC Committee Concluding Observations: Ethiopia (UN Doc. CRC/C/ETH/CO/4-5, 2015), paras 12 and 13(a).

[188] CRC Committee Concluding Observations: Ethiopia (UN Doc. CRC/C/ETH/CO/4-5, 2015), para 13(b).

[189] FHI et al. (2010) 31.

[190] FHI et al. (2010) 31.

[191] FHI/Ethiopia & CIFF (2008) 205.

[192] Lemma M 'Ethiopia: at what level is child protection services' (2012) available at *http://bit.ly/2NhEiHt* (accessed July 2015).

in the form of the Care Dependency Grant (CDG).[193] A child with a disability who is cared for in a state-funded institution on a 24-hour basis for a more than six months is not eligible for the CDG.[194] However, despite a steady growth in access to the CDG for children with disabilities, considerable numbers of children who are eligible for the grant are not receiving it.[195] This is mainly due to the non-alignment of the Social Assistance Act with its accompanying regulations[196] and practical challenges in its implementation.[197] According to section 7(a) of the Social Assistance Act 13 of 2004, a child is eligible for the CDG if he or she requires permanent care or support services, whereas regulation 8 defines an eligible child as a 'care-dependent child'.[198] This is problematic in so far as 'care-dependent child' is defined in the Act as a one 'who requires and receives permanent care due to his or her severe mental or physical disability'.[199] In doing so, regulation 8 reinstates the severity requirement although this requirement was removed from the eligibility criteria in the principal Act.[200] Thus, the inconsistency between the Social Assistance Act and the regulation[201] creates another challenge

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[193] Section 7(a) of the Social Assistance Ac 13 of 2004 (hereafter Social Assistance Act). See also Martin P, Proudlock P & Berry L 'The rights of children with disabilities to social assistance: A review of South Africa's Care Dependency Grant' Proudlock P (ed) *South Africa's Progress in Realising Children's Rights: A Law Review (ed)* (2014) 87–8; See also *Khosa and others v Minister of Social Development and others*, where the constitutionality of certain provisions of the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997, were alleged to constitute an infringement of the children's rights and equality and non-discrimination obligation set forth in ss 28 and 9 of the Constitution, respectively. The Constitutional Court extended the right to social security to the children of permanent residents (in terms of the Care Dependency Grant and Child Support Grant). *Khosa and others v Minister of Social Development and others* (2004) (6) BCLR 569 (CC). The responsibility of payment of grants lies on the DSD. However, the DSD has delegated this responsibility to the South African Social Security Agency (SASSA). Skelton A 'Children' in Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 609.

[194] Social Assistance Act, s 7(b).

[195] ARC-CRSA (2015) para 161.

[196] Social Assistance Act 13 of 2004: Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance. Government Gazette 31356, Notice R. 898 (22 August 2008).

[197] ARC-CRSA (2015) para 161.

[198] Martin et al. (2014) 90

[199] Social Assistance Act, s 1.

[200] Martin et al. (2014) 90.

[201] The South African Social Security Agency (SASSA) qualification states that 'the caregiver must submit a medical/assessment report confirming that the child is severely disabled and receives permanent care or support services …' Therefore, it is clear that the phrase 'permanent care' is used as a requirement to be eligible for CDG rather than as an alternative to 'support services'. This interpretation excludes children with moderate to mild disabilities and children who do not require permanent care but do require support services from qualifying for the CDG. CDG criteria booklet (SASSA 2015). Martin et al. (2014) 91.

in complying with the suitability principle, as the level of support given to foster carers in their caregiving role to children with disabilities may have an a direct impact on the sufficient availability of foster carers for such children.

In respect of Ethiopia, the Growth and Transformation Plan 2015/2016–2019/2020 (GTP II)[202] identifies persons with disabilities as one of the focus groups who are eligible for special support in the form of social protection.[203] Additionally, the National Social Protection Policy recognises the need to strengthen services for persons with disabilities.[204] Ethiopia also has a National Action Plan for persons with disabilities 2012–2021. However, despite containing a number of action priorities in respect of various sectors, the action plan's provisions targeting children with disabilities are inadequate, with the exception of those to do with education.[205] Despite these advances, the social protection of children with disabilities or those caring for them in Ethiopia is limited,[206] and there is no indication that the government offers any specific support services for foster carers of such children. The CRPD Committee has expressed concern about the limited programmes aimed to offset disability-related expenses and about the fact that the disability assessment for eligibility of receiving financial assistance is based on the medical approach.[207]

The foregoing discussion has established that states have a duty to allocate resources to provide for alternative care in accordance with the available resources. It is argued that the governments of South Africa and Ethiopia are not meeting their international child-rights obligations in that

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[202] The Growth and Transformation Plan II (GTP), Ethiopia's second five-year development plan, aims to aid the transformation of the economic structure and maintain enhanced growth to reach the national vision of becoming a low-middle-income country by 2025.
[203] UNICEF & Ministry of Finance (2019) 14.
[204] UNICEF & Ministry of Finance (2019) 14.
[205] UNICEF & Ministry of Finance (2019) 14.
[206] UNICEF & Ministry of Finance *(*2019) 14.
[207] CRPD Committee Concluding Observation: Ethiopia (UN Doc. CRPD/C/ETH/CO/1, 2016), para 61.

they are failing to adequately finance the provision of alternative care services to the 'maximum extent' possible. Current funding arrangements for alternative care provision in the countries indicate inadequacy to ensure the suitability of alternative care. In respect of South Africa, although the government is the main source of funding of alternative care provision in the country, the funding is inadequate to ensure the suitability of alternative care and the safety, development and well-being of children in general and children with disabilities placed in alternative care in particular.

Even though there is an additional layer of protection to children with disabilities in the context of alternative care in South Africa through the provision of financial assistance to foster carers of children with disabilities, there are challenges with the disability assessment, which is based on the medical approach to disability. This concern has also been raised in relation to Ethiopia by the CRPD Committee. Hence, a disability assessment which is based on the human rights model of disability that allows children with disabilities to qualify for the CDG regardless of the severity of their disability is a necessary step toward ensuring the availability and inclusivity of suitable family-based alternative care options such as foster care in a non-discriminatory manner.

Ethiopia faces further challenges in regard to the government's lack of power to shape the quality and quantity of services provided to children in institutions, as it is not the main source of funding of alternative care provision in the country. This has in turn undermined its ability to develop effective interventions by way of redirecting financial sources to the development of family-based alternatives. The lack of government control of financing alternative care in respect of Ethiopia may further result in the over-investment of already scarce resources in establishment and maintenance of institutions. This impacts on the quality of care provided in community-based care due to lack of financial and material resources, which results in shortages of qualified personnel and insufficient provision of basic services to children who are placed in such settings.[208] As the primary duty-bearer, the government needs to take over responsibility and accountability for the provision of alternative care for children and take concrete measures to reinforce its authority and oversight over the alternative care system. The need to improve the social protection available to caregivers of children with disabilities to avoid their institutionalisation and promote the availability of potential caregivers is also notable. This is particularly important as the experience of other countries shows that enhancing the capacity of foster care families and services available to them to effectively care for children with disabilities is crucial to ensure that such children receive appropriate care.[209] It is further recommended that governments avail resources to offset disability-related costs such as medical care, wheelchairs and day-care services to increase the availability of foster care services for children with disabilities as well as to facilitate their independence.[210]

In respect of South Africa's human resources, the CRPD requires states to promote training on the Convention for those working with children with disabilities.[211] This is important for the alternative care of children in general and children with disabilities in particular, as it places an obligation on states to ensure that individuals responsible for the care of children with disabilities in alternative care settings run by private organisations including NGOs and faith-based organisations are given adequate training that will allow them to appropriately care for them and be aware of their rights.

In respect of South Africa, the government has also acknowledged in its baseline country report to the CRPD Committee on the implementation of the Convention that the training of

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[208] Assefa M *The Ban on Intercountry Adoption in Ethiopia* (unpublished LLM thesis, Addis Ababa University, 2018) 55–56.

[209] A study has revealed that in countries such as Georgia, Moldova and Serbia, efforts to avoid the institutionalisation of children with disabilities have been successful due to increased support for the development of family-based care including foster care and through building the capacity of services and caregivers. Family for Every Child (2015) 33.

[210] Family for Every Child (2015) 33.

[211] CRPD, art 4(1)(i).

caregivers of children with moderate to severe intellectual or physical disabilities is lacking.[212] As noted in the previous chapter, the system is ill-equipped to provide alternative care to children with behavioural disorders due to a lack of trained caregivers in CYCCs. This is exacerbated by the dearth of skilled practitioners including social workers, social auxiliary workers and child and youth care workers, which poses a challenge to the effective implementation of the right to alternative care.[213] The shortfall in qualified social service professionals plays a significant role in creating implementation gaps.[214]

The National Guidelines do not specify the level of training that caregivers are expected to have to work in institutions or to become foster carers, and do not specifically require child-care organisations to ensure that caregivers have the necessary capacity and training to respond to the needs of children with disabilities. This is one area of non-alignment with international guidelines related to the requirement to devise 'appropriate criteria for assessing the professional and ethical fitness of care providers for their accreditation, monitoring and supervision'.[215]

Furthermore, there is a lack of expert staff working in the field of alternative care in Ethiopia.[216] The problem is compounded by the high workload and turnover of staff and low personnel quality in child-care agencies.[217] Capacity shortages restrict agencies' ability to perform their supervisory and post-placement follow-up role.[218] There is general unfamiliarity with the

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[212] DWCPD (2013) para 375.

[213] Loffell J, Allsopp M & Atmore E 'Human resources needed to give effect to children's rights to social services' in Proudlock P, Dutschke M, Jamieson L, et al (eds) *South African Child Gauge 2007/2008* (2008) 48. DSD *Situational Analysis Report on the Social Service Workforce Servicing Children* (2012) 60. The 2010 CASE survey found that more than a third of CYCCs had an insufficient number of child and youth care workers. CASE (2010) 53.

[214] Bower (2014) para 10. One of the reasons for the shortage of social workers is the increase in the number of foster care placements, which has had an impact on the workload of already scarce social workers, who now spend the majority of their time attending to foster placements with relatives, which is part of the formal care system. Loffell et al. (2008) 51; Van der Walt (2018) 622.

[215] UN Guidelines, para 55.

[216] Tadele et al. (2013) 80.

[217] Tadele et al. (2013) 80.

[218] Tadele et al. (2013) 81.

National Guidelines on Alternative Care and the principles of necessity and suitability.[219] Organisations providing community-based alternative child care also suffer from shortages of qualified caregivers and staff.[220] This has been due in part to the restriction in the now-repealed CSO law that required agencies to spend only 30 per cent of their total income for operational/administration purposes which restricted the ability of the agencies to attract skilled personnel.[221] This has been cited as one of the barriers restricting the agencies' ability to improve their human resources capacity[222] and limiting the geographical reach of local CSOs and NGOS, particularly in the rural areas, where substantial numbers of children with disabilities are located.[223]

In view of the above, it can be observed that both countries face challenges in respect of human resources in the context of alternative care. Research shows that robust and holistic capacity-building of the child welfare workforce through training, provision of technical assistance and practical support as well as supervision aimed at enhancing skills and changing attitudes and behaviours facilitates successful domestic, family-based solutions for the care of children with disabilities deprived of family environment.[224] Therefore, investing in building the human resources of the wider community by developing skills at all levels is a necessary component of an effective foster care process.[225] It is crucial to provide the appropriate training to foster carers of children with disabilities, including in child development and attachment, children's rights and child well-being, and to provide necessary support services such as day care and respite care to meet the needs of children with disabilities.[226] This process will ensure that the

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[219] Assefa (2018) 55.
[220] Assefa (2018) 55.
[221] See section 5(2)(5) of this chapter for discussion of the proclamation.
[222] Tadele et al. (2013) 80.
[223] Birhane (2012) 100.
[224] Family for Every Child (2015) 34.
[225] Family for Every Child (2015) 20.
[226] Cantwell et al. (2012) 92.

lack of expertise and technical and practical support does not lead to the unnecessary institutionalisation of children with disabilities deprived of their family environment.

5.2.5 The role of civil society organisations (CSOs)

Although the primary responsibility to ensure that the rights of children with disabilities in alternative care are protected is on the state, the effective implementation of such right in accordance with international standards requires a concerted effort towards a common goal among all stakeholders involved in alternative-care service provision.[227] It is important to foster cooperation between and among government and private institutions to enhance information-sharing and networking to offer optimal protection and the most appropriate alternative care for every child in accordance with international standards. This entails that the state establish effective working partnerships with public providers of services as well as NGOs and private providers including CSOs and faith-based organisations. To this end, states are required to cooperate with the civil society in realising children's rights and create an enabling environment for CSOs to assist in the provision of services for children with disabilities in accordance with the standards and principles of the Convention.[228]

In South Africa, provincial DSDs assign the delivery of the majority of services to children mandated by the Children's Act to non-profit organisations (NPOs).[229] It is commendable that the South African government funds NPOs, as this gives the state greater ownership and control of the problems and the services. In Ethiopia where alternative care provision is primarily externally funded, problems arising as a result of outsourcing services are perceived to be beyond the reach of government. Although the South African government pays subsidies to NPOs for the delivery of such services, the amount is inadequate to cover the actual cost of

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[227] UN Guidelines, para 5.
[228] CRC Committee GC No. 9 (2006) para 25.
[229] 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* 654.

services.[230] Thus, NPOs face challenges in respect of inadequate funding and delays in payment of funding that had been allocated to them to deliver child welfare and protection services.[231] Hence, the NPOs are expected to secure the rest of the funding from non-government sources to cover the additional cost of running alternative care facilities.[232] In this regard, the need for the government to cover the full cost of CSOs providing services to children to enable them to pay reasonable salaries and to direct resources into maintaining and improving services has been emphasised.[233]

There are also many NPOs that do not receive subsidies from the government for delivering child welfare and protection services.[234] This has led to weak sustainability of services, as NPOs face challenges to secure funding from non-government sources.[235] In respect of CSOs working in the disability sector in South Africa, there have been challenges in relation to the extent of funding and funding procedures.[236] In a recent report, the department acknowledged that NGOs working with children with disabilities receive limited support from government and collaboration is poor.[237] Moreover, there is a lack of knowledge about the type of services to be provided for children with disabilities.[238] NGO service provision to children with disabilities has also been affected by factors such as global recession, which has led to a significant decline in international funding.[239]

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[230] Bower (2014) para 26. A CASE survey in 2010 found that more than 90 per cent of registered CYCCs were run by non-profit organisations (NPOs). Similarly, the 2012 CASE survey of unregistered CYCCs found that most were run by NPOs. Jamieson (2014) 216.

[231] ARC-CRSA (2015) para 20; DSD, DWCPD and UNICEF (2012) 77.

[232] Jamieson (2014) 216. In addition to subsidy allocations from the DSD, NPOs sources of funding include philanthropic donor funding and private sector support. ARC-CRSA (2016) para 20.

[233] Loffell et al. (2008) 51.

[234] Loffell et al. (2008) 51; ARC-CRSA (2015) 7.

[235] Loffell et al. (2008) 51; ARC-CRSA (2015) 7.

[236] DSD, DWCPD & UNICEF (2012) 77.

[237] ACPF (2011e) 32–3.

[238] DSD, DWCPD & UNICEF (2012) 77.

[239] ACPF (2011e) 32.

In respect of South Africa, apart from the above challenges, the role of NPOs in the protection and provision of alternative care services is further hampered by the exceptionally high staff turnover rate, which stems from the fact that the government pays higher salaries to social services practitioners in the public service than NPOs can afford to pay their practitioners.[240] High staff turnover leads to weak sustainability and unreliable delivery of social services, which negatively impacts children. NPOs in particular struggle to retain social workers trained to work with children with disabilities (for instance, a social worker working with deaf children needs to be trained in sign language to give counsel without requiring the presence of an interpreter).[241] The struggle to secure funding impedes organisations ability to extend the reach of their services or forces them to cutback funding for projects.[242]

To illustrate the inconsistencies in the government's attitude to children with disabilities, in 2010 a case was lodged against the Free State provincial DSD by the National Association of Welfare Organisations and Non-Governmental Organisations (NAWONGO) on the unfairness of the province's funding policy for NPOs and delays in transferring funding allocated to them.[243] There was a great disparity between the amount allocated per month per child by the government to state-run CYCCs and those run by NPOs (R6,750 and R2,000 per month per child respectively).[244] The application sought a review of the government funding policy to NPOs in addition to the immediate payment of funding that had been allocated to them. The Free State High Court ruled in favour of the NPOs and confirmed the unfairness and unreasonableness of the government funding policy for service provision by CSOs.[245] The

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[240] Loffell et al. (2008) 51.

[241] DSD, DWCPD & UNICEF (2012) 80.

[242] Proudlock P & Jamieson L *Guide to the Children's Act no 38 of 2005* (2008).

[243] *National Association of Welfare Organisations and Non-Governmental Organisations and Others v the Member of the Executive Council for Social Development, Free State and Others*. Free State High Court, 1719/2010 [2010] ZAFSHC 73 (5 August 2010) (hereafter *NAWONGO and Others v MEC for Social Development and Others*, (2010).

[244] *NAWONGO and Others v MEC for Social Development and Others* (2010); Jamieson L (2014) 238.

[245] *NAWONGO and Others v MEC for Social Development and Others* (2010), para 56; Jamieson (2014) 238.

Court further noted in its ruling that the delegation of delivery of services to NPOs does not alleviate the state of its constitutional and statutory obligations to provide care for vulnerable children.[246] Between 2011 and 2014, three further judgements were delivered on this case.[247] In each of the subsequent judgements, the Court reviewed the revised drafts of the policy submitted to it by the department and finally upheld the policy as constitutional in 2014.[248]

In the case of Ethiopia, various CSOs including international and national NGOs have an extensive record of supporting and providing services to children deprived of their family environment.[249] CSOs have been directly involved in supporting families towards preventing family break-up, supporting child headed households and providing foster care and institutional care to children.[250] CSOs play a major role in strengthening family-based alternative care by working together with the relevant government institutions such as MOWCYA in promoting 'foster care, recruitment of families, assessment of families and children, training of key actors including foster families, and the matching process is an important element of a comprehensive foster care system'.[251] The role of CSOs in Ethiopia is, however, characterised by limited outreach capacities and limited funding.[252] Unlike NPOs in South Africa, child welfare NGOs

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[246] *NAWONGO and Others v MEC for Social Development and Others* (2010), para 47.

[247] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011); *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* (1719/2010) [2013] ZAFSHC 49 (28 March 2013) ; and *National Association of Welfare Organisations and Non- Governmental Organisations v Member of the Executive Council for Social Development, Free State* (1719/2010) [2014] ZAFSHC 127 (28 August 2014).

[248] *National Association of Welfare Organisations and Non- Governmental Organisations v Member of the Executive Council for Social Development, Free State* (1719/2010) [2014] ZAFSHC 127 (28 August 2014).

[249] Save the Children International 'Summary report on the need to strengthen foster care in Ethiopia' (unpublished draft report; copy on file with author) (undated) 4.

[250] Save the Children International 'Summary report on the need to strengthen foster care in Ethiopia' (unpublished draft report; copy on file with author) (undated) 4.

[251] Save the Children International 'Summary report on the need to strengthen foster care in Ethiopia' (unpublished draft report; copy on file with author) (undated) 4.

[252] Gilbert A 'Community-based child care in Ethiopia vs. the individual centered model in the United States: A closer examination of family group decision making in child placement' (2013) 33 *Children's Legal Rights Journal* 359.

do not receive organisational support and assistance from the government in the care of children deprived of their family environment.[253]

Additionally, the major challenge that hampered CSOs was the now-repealed Charities and Societies Proclamation No. 621/2009 (the Proclamation) in 2009. The Proclamation governed the registration and regulation of non-governmental organisations and was regarded as one of the most restrictive law of its kind in sub-Saharan Africa.[254] As per the CSO Proclamation, Ethiopian resident charities and societies and foreign charities were restricted from taking part in activities pertaining to children's rights and disability rights, among other things.[255] This restriction extended to local NGOs (Ethiopian Charities or Societies)[256] if they received more than 10 per cent of their funding from foreign sources.[257] This is mainly due to reasons related to foreign funding and nationality[258] and is especially concerning in the economic context of Ethiopia, where domestic funding is limited and NGOs are often dependent on foreign funding.[259] These funding restrictions resulted in the involuntary closure of many CSOs operating in the country or to refrain from engaging in human rights and disability rights advocacy by adjusting the scope of their work.[260] The role of CSOs in monitoring and advocating for the advancement of disability rights was limited by the Proclamation.[261] The

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[253] Gilbert (2013) 359.

[254] Mulat Y, Hopkins C & Liane N 'Sounding the horn: Ethiopia's civil society Law threatens human rights defenders' (2009) Centre for International Human Rights, Northwestern University School of Law available at *http://bit.ly/2SZoPzm* (accessed 14 June 2018) 4.

[255] Charities and Societies Proclamation No. 621/2009 of Ethiopia, art 14(5).

[256] Charities and Societies Proclamation No. 621/2009 of Ethiopia, art 2(2) of the Proclamation defines Ethiopian Charities or Societies as 'Charities and Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they use *not* more than 10 per cent of their funds which is received from foreign sources'. Emphasis added.

[257] Charities and Societies Proclamation No. 621/2009 of Ethiopia arts 14(5) and 2(2).

[258] Save the Children Sweden *Desk review and analysis of literature on child protection systems in the Eastern Africa region: (Ethiopia, Kenya, South Sudan, Sudan, Rwanda, Tanzania and Uganda)* (2012) 43–4.

[259] Gilbert (2013) 359; Hailegebriel D 'Restrictions on foreign funding of civil society: Ethiopia' (2010) 12(3) *International Journal of Not-for-Profit Law* 21.

[260] Gilbert (2013) 360; Save the Children Sweden (2012) 43–4; Abiye Y 'Will Ethiopia's civil society heal soon?' *The Reporter* 19 January 2019 available at *http://bit.ly/2ZYy5Fl* (accessed 17 October 2019).

[261] Sida (2014) 3.

financial restriction contributed to the suspension of research and advocacy projects that could have driven change in seeking the repeal of biased laws and enactment of new laws.[262] The budgetary constraints forced CSOs that worked in the rights of children and socio-economic rights to shift to new areas or close down.[263]

The Proclamation has had a grave impact on the viability of organisations providing services to children in general and children with disabilities in particular as these organisations found it challenging to meet the requirements of the Proclamation and register and operate as Ethiopian Charities and Societies.[264] Given the poor economic circumstances of Ethiopia, adequate funding from local sources could not be secured, negatively impacting the enjoyment the socio-economic rights of children with disabilities.[265] As a result of the restriction on soliciting funding from foreign sources, numerous projects on the rights of children and persons with disabilities had dwindled over the last decade.[266]

Moreover, as previously mentioned, the former CSO law prohibited CSOs from spending more than 30 per cent of their total budget on 'administrative costs'. The lack of definition for term 'administrative cost' in the Proclamation meant that the term could be construed to include costs relating to the investigation and documentation of 'human rights abuses, the provision of free legal aid, advocacy, and other essential activities in the promotion and protection of rights and freedom'.[267]

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[262] Abiye (2019).
[263] Abiye (2019).
[264] Save the Children Sweden (2012) 43–4.
[265] Birhane (2012) 100.
[266] Abiye (2019).
[267] Abiye (2019).

On a positive note, a new law governing CSOs has been adopted by the Ethiopian parliament in 2019[268] which lifts the financing restriction placed on CSOs by the previous proclamation[269] and the associated status of CSOs as resident or foreign charities.[270] The new Proclamation deviates from the previous categorisation system, referring only to indigenous (local) and foreign CSOs.[271] Under the new law, CSOs are allowed to freely engage in advocacy and human rights work.[272] Moreover, the new Proclamation emboldens CSOs to engage in advocacy and lobbying in regard to laws and policies which relate to their activities.[273] The new CSO law also decreases the administrative cost of CSOs from 30 per cent to 20 per cent of their total income.[274] The administrative costs are, however, more clearly defined in the current CSO law and include salaries of administrative employees, rent, bank fees, and attorney fees, among other things.[275] Hence, through the revocation of the restrictive rules imposed by the former proclamation, it is anticipated that the new CSO law will create a conducive environment for organisations working in the field of human rights to discharge their critical role of ensuring the promotion and protection of human rights.[276]

It is thus evident in both countries that stakeholders, including the state, NGOs and private organisations, need to cooperate to ensure that children with disabilities receive alternative care in accordance with the standards and principles of international standards.

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[268] Townsend D 'Ethiopia's new civil society law' *Include: Knowledge Platform on Inclusive Development Policies* 11 March 2019 available at *http://bit.ly/36C0HH6* (accessed 5 May 2019).

[269] Organizations of Civil Societies Proclamation No. 1113/2019, art 63(1)(c) reads as follows: 'Any organization shall have the right to solicit, receive and utilize funds from any legal source to attain its objective.'

[270] Hailou S 'A Dawn of hope for resuscitated CSOs' *The Reporter* 28 September 2019 available at *http://bit.ly/2Qx0RK5* (accessed 17 October 2019).

[271] Organizations of Civil Societies Proclamation No. 1113/2019, art 2(2) and (3). Townsend (2019).

[272] Organizations of Civil Societies Proclamation No. 1113/2019, art 62(1) reads 'An organization shall have the right to engage in any lawful activity to accomplish its objectives.'

[273] Organizations of Civil Societies Proclamation No. 1113/2019, art 62(4).

[274] Organizations of Civil Societies Proclamation No. 1113/2019, art 63(2).

[275] Organizations of Civil Societies Proclamation No. 1113/2019, art 63(2).

[276] Anonymous 'Does the revised Ethiopian Civil Society Proclamation deliver the promise of reform?' *The Reporter* 16 February 2019 available at *http://bit.ly/2Qup6bJ* (accessed 17 October 2019)

5.3 Conclusion

The chapter has critically assessed the administrative measures that have been undertaken by South Africa and Ethiopia to implement the right to alternative care of children with disabilities. The chapter has assessed whether those administrative measures are in keeping with international standards as well as the UN Guidelines' principle of 'suitability'. It has further observed that although both countries have taken administrative measures to ensure the suitability of alternative care, these measures are, however, inadequate to ensure the effective implementation of the right to alternative care of children with disabilities.

In South Africa, what has impeded the implementation of the right to alternative care of children with disabilities and compliance with the 'necessity' and 'suitability' principle is the DSD's limited capacity to monitor facilities, resources and service provision to alternative care facilities; the failure to timeously and regularly review and extend court orders; the lack of coordination amongst stakeholders; the absence of up-to-date, reliable and disaggregated data on disability as well as on children with disabilities in alternative care; the lack of a uniform definition of disability; the shortage and high workload of social workers to conduct necessary assessment of placements; inadequate allocation of funds to the provision of alternative care as well as to CSOs who are providing the majority of alternative care services in the country; and the lack of an independent child-rights monitoring body.

In respect of Ethiopia, the challenges hindering the effective implementation of the right to alternative care of children with disabilities and ensuring the suitability of alternative care to children with disabilities include the failure of the MOWCYA and MOLSA as well as their regional counterparts to execute their monitoring and oversight role, which has resulted in most child-care institutions' contact with the relevant body being limited to reporting; lack of coordination between relevant government institutions as well as between CSOs and government institutions responsible for the provision of alternative care services; absence of up-to-date, reliable and disaggregated data on disability as well as on children with disabilities in alternative care; the lack of a uniform definition of disability; lack of government control of financing alternative care; lack of training of staff providing care for children in alternative care settings on the rights of children and unfamiliarity with the National Alternative Care Guidelines; and the lack of any significant activity pertaining to the rights of children with disabilities in general and alternative care in particular by the EHRC.

Where there is no robust institutional framework to monitor and oversee the placement of children with disabilities in alternative care, it becomes difficult if not impossible to ensure that alternative care is done in keeping with the principle of suitability; that the principle of the best interests of the child is applied consistently; and that the views of children with disabilities are sought and given due regard or that they are supported with proper modes of communication to express their views. The absence of proper oversight, supervision and monitoring of alternative care settings also means that there is no process to ensure that private alternative care providers are bound by the principle of non-discrimination.

Chapter 6:
Conclusion and Recommendations

6.1 Introduction

Chapter 1 gave a general overview of the study. It offered the contextual background, problem statement and research questions. In addition, it unpacked the methodology, significance and scope of the study. The background to the study demonstrated that, in principle, institutional care is the most common form of alternative care provided to children with disabilities. The chapter discussed the limited access to family-based alternative care for children with disabilities in need of alternative care and the root causes for the excessive dependence on institutional care as a means to care for children with disabilities. In connection with this, the overwhelming evidence on the negative impact of institutionalisation on children's survival and development was presented. It was also established that children fare much better when they are placed in a family-based alternative care setting and are as close to their own community as possible. This preference for family-based alternative care for children with disabilities deprived of their family environment is articulated in international and regional human rights standards. In view of this, some reflections on the situation in Ethiopia and South Africa were presented.

In determining whether the current international and domestic provisions for the alternative care of children with disabilities meet the needs of these children in the selected countries of study, a primary research question and a number of auxiliary research questions were generated. In answering these research questions, the point of departure was to establish the scope and content of concepts surrounding the topic. Chapter two offered a conceptual framework of alternative care of children with disabilities through the contextualisation of the terms 'disability', 'alternative care', and 'family environment'. This informed the evaluation of both the family and non-family based alternative care settings, as well as evaluation of the principles of necessity and suitability. The purpose of such a discussion was to establish the scope and a content of concepts used in this study.

Consequently, in Chapter 3 the legal basis for the right to alternative care of children with disabilities was established by reviewing international and regional human rights instruments, including the CRC, ACRWC and CRPD. In addition, provisions in the UN Guidelines were analysed. Chapter 3 further explored how the general principles of the above-mentioned instruments inform the right to alternative care of children with disabilities. In Chapter 4, the status of domestic incorporation of international conventions in the two selected countries was explored. The national legislative and policy measures undertaken by Ethiopia and South Africa were then discussed and evaluated in relation to international standards. The assessment in Chapter 5 has dealt with the institutional and administrative measures for the upholding of the right to alternative care of children with disabilities in Ethiopia and South Africa.

The entirety of this study has led to the production of answers to the research questions, which will now be presented below.

6.2 Conclusions

Following the discussion of the conceptual framework for the alternative care of children with disabilities, Chapter 2 answered the first auxiliary research question in part[277] as far as it reiterated the need for a pragmatic approach that informs the distinction between 'residential care' and 'institutions'. In addition, it established that the principles of necessity and suitability

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[277] The first sub-question states: 'What are the obligations imposed on states by the international standards (the CRC, ACRWC and CRPD) in relation to the right to alternative care of children with disabilities, what are the implications of discrepancies or synergies across these instruments, and what minimum standards can be derived?'

entail that children are placed in alternative care upon genuine evidence that warrants the former as the most appropriate action other than family support. The chapter has further emphasised that the suitability principle is underpinned by the shift towards de-institutionalising the alternative care system and the preference for family-based or family-type settings.

The discussion in Chapter 3 also dealt with the first auxiliary research question as far as it established the legal basis for the right to alternative care of children with disabilities in international and regional standards. With an emphasis on three human rights instruments, that is the CRC, ACRWC and the CRPD, it was indicated that they jointly impose slightly different obligations on states in providing for the rights of children with disabilities in general, and the right to alternative care of children and children with disabilities in particular. A great similarity is evident between the ACRWC and the CRC. As a point of departure, the fewer similarities in the CRPD present a higher level of protection to children with disabilities in the context of alternative care than the CRC and ACRWC. For instance, the CRPD focuses on the use of community and family-based care options rather than the consideration of institutional care offered by the CRC and the ACRWC. Furthermore, the CRPD fortified the recognition of children with disabilities' right to live in the community. Consequently, the CRPD elevates the level of protection for children with disabilities deprived of their family environment to enable them to be provided with alternative care in a setting that facilitates their right to live in the community and be integrated into society.

It has been observed that the provisions under CRC and the ACRWC dealing specifically with the rights of children with disabilities show elements of the medical approach to disability, which in the context of alternative care may validate the institutionalisation of children with disabilities. The CRPD, however, diverges from the medical model of disability and strengthens the rights of children with disabilities in the context of alternative care by requiring states to ensure that children with disabilities enjoy all human rights and freedoms ‘on an equal basis with others’. This includes the right to be provided with alternative care within the wider family, or when that is not possible, within the community in a family setting.

The general principles in the pertinent standards impose more or less the same obligations on states, but with varying degrees of protection. In relation to the best interests principle in the context of alternative care, the ACRWC provides stronger protection to children with disabilities as it requires the principle to be considered not only in the decision to take the child out of his or her family environment but also in any decision regarding the choice of an alternative placement. Although both the CRC and the CRPD explicitly prohibit discrimination on the basis of disability, the latter goes further in requiring the taking of positive measures, as well as the provision of reasonable accommodation to achieve the substantive equality of children with disabilities. In doing so, the CRPD elevates the obligation to take positive measures to ensure that children with disabilities are not discriminated against in alternative care measures and that they are provided with reasonable accommodation in order to exercise their rights on an equal basis with others.

It was also established that while the CRC and ACRWC afford children with disabilities the right to express their views freely and for those views to be given due regard in accordance with their age and maturity, the potentially restrictive phrases serve as barriers to the children with disabilities’ right to participation in decision-making. Cases in point are phrases such as ‘capable of forming his or her own views’ in the CRC and ‘capable of communicating his/her own views’ in the ACRWC. This is particularly concerning as children with disabilities are commonly excluded from exercising this right as they are wrongly perceived to be incapable of and/or incompetent to form views and make decisions. The chapter established that, the CRPD provides a higher level of protection to children with disabilities in respect of the principle of child participation, as it requires children with disabilities’ views be heard on an equal basis with others in accordance with their age and maturity and for them to be provided with age- and disability-appropriate assistance to realise this right. Moreover, the CRPD adopts respect for the evolving capacities of children with disabilities as one of its general principles thereby requiring the principle to inform the interpretation of all rights in the Convention including the rights of children with disabilities to participate in matters affecting them.

The assessment in Chapter 4 answered the second auxiliary question[278] on the compliance of national legislation with the current human rights standards on the realisation of the rights of children with disabilities. It was observed that the frameworks in Ethiopia and South Africa have positive aspects as well as shortcomings that result in both compliance and non-compliance to certain obligations in international standards.

With regards to provisions relevant to the alternative care of children with disabilities in the South African Constitution, there is an explicit prohibition of discrimination on the basis of disability and a requirement that special measures be taken to achieve substantive equality, hence complying with the CRPD's stipulations. The Constitution further contains a provision solely dedicated to the rights of children. Section 28 of the Constitution affords children with disabilities who are removed from their family environment the right to be provided with 'appropriate alternative care'. In line with international standards, section 28 also requires that the best interests of the child be of 'paramount importance'. However, there is no reference to children with disabilities in section 28 and there is no provision that deals with the substantive rights of persons/children with disabilities.

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[278] The second auxiliary research question states: 'To what extent are the national legislative frameworks of Ethiopia and South Africa in compliance with current international human rights standards for the realisation of the rights of children with disabilities in the context of alternative care?'

With regards to the Ethiopia's Constitution, the study has observed that it complies with international standards in so far as it affords orphaned children the right to special assistance. However, the constitutional obligation is limited in scope as it discounts other children who may be deprived of their family environments due to factors other than the death of parents. In offering care solutions for orphaned children, the Constitution further singles out institutional care and adoption but makes no reference to other forms of alternative care. This is in contradiction to the CRPD, where institutional care is not considered a form of alternative care for children with disabilities and the focus is on enabling children with disabilities to live in the community in a family setting when they are deprived of their family environment.

The provision dealing with the rights of children in Ethiopia's Constitution also affords strong protection to children by requiring that their best interests be the primary consideration in all actions affecting them, which is in compliance with the ACRWC. Similar to South Africa's section 28, the child-specific provision of Ethiopia's Constitution also does not make reference to children with disabilities. It does, however, contain a provision that makes reference to persons with disabilities which provides for 'rehabilitation and assistance' of the 'physically and mentally disabled'. This study has established in Chapter 2 that the mere provision of 'rehabilitation' and 'assistance' is not grounded on the human rights-based model of disability as reflected in the CRPD which considers children with disabilities as active holders of rights who are entitled to enjoy their fundamental human rights and freedoms 'on an equal basis with others'.

South Africa's Children's Act contains a provision solely devoted to the rights of children with disabilities. This provision regards children with disabilities as active holders of rights who are entitled to respect for their dignity, self-reliance and participation. Moreover, one of the general principles of the Children's Act is the requirement to create an enabling environment for children with disabilities, which is consistent with the human rights model of disability reflected in the CRPD. However, a notable departure from the CRPD is the requirement that children with disabilities have to be provided with 'special care', as opposed to appropriate alternative care in accordance with the Constitution and international standards. This is a reflection of the medical model of disability, which encourages and justifies the placement of children with disabilities in institutions under the guise of providing them with 'specialised care'.

Chapter 4 raises the point that the Children's Act of South Africa offers a range of alternative care options for children in the provision of foster care, cluster foster care and CYCCs. At its core, the introduction of a new means of alternative care (in the form of cluster care) ensures that there are 'family-like' options available for the care of children, including children with disabilities. In principle, the relative desirability of alternative care options in the Children's Act demonstrates compliance with the CRC and ACRWC, as it promotes placement in a family environment and expressly recognises institutional care as a measure of last resort. However, at the same time, the Act relies on the placement of children with disabilities in a 'facility' when they are found to be in need of care provided that it is in their best interests. This contradicts the CRPD position that children with disabilities should be cared for in a family-based alternative care setting. It further creates room for the institutionalisation of children with disabilities and the non-compliance with the CRPD, which does not consider institutional care as a potential form of alternative care for children with disabilities deprived of their family environment. Moreover, South Africa's framework does not comply with the CRPD in that it does not explicitly provide for the rights of children with disabilities to live in the community.

Further compliance with international standards is evident in the Children's Act's identification of non-discrimination, including the need to ensure protection from disability-based discrimination, as one of its general principles. It should be recalled that South Africa's framework is also in compliance with obligations in the CRPD related to non-discrimination, as the PEPUDA clearly prohibits unfair discrimination on the grounds of disability and deems the failure to provide reasonable accommodation as discrimination on the basis of disability.

With regards to the obligation of child participation, South Africa's Children's Act complies with international standards to the extent that it requires the child's opinion to be heard and taken into account in all matters that affect him or her. Nonetheless, the Children's Act falls short of fully complying with the obligation in the CRPD as there is no explicit provision that requires children with disabilities to be provided with age- and disability-appropriate assistance.

The requirement of periodic review of placements under the Children's Act subjects the placement of a child in alternative care to a court order, which will subsequently be supervised by a designated social worker and subject to reunification services. However, the same requirement is not extended for a court order placing children with disabilities who are found to be in need of care in a 'facility'. This is contrary to the obligation placed on the state under the CRC to ensure that the placements of children with disabilities in alternative care are regularly reviewed. Lack of monitoring of placements and the necessary interventions may put children with disabilities who are placed in CYCCs at risk of neglect and maltreatment.

Unlike the position in South Africa, the RFC of Ethiopia does not place an explicit obligation on the government to provide alternative care for children including children with disabilities deprived of their family environment. There is no law that obligates the government to provide alternative care within the wider family or in the community. The categories of children with disabilities that are affected include those who are temporarily or permanently deprived of their family environment or those whose best interests cannot be served by remaining in such an environment. This gap extends to the lack of laws obligating the government to monitor and review the placement of children, including children with disabilities, in alternative care or to provide institutional care only as a measure of last resort. The Ethiopian legislative framework also does not contain a provision that affords children with disabilities the right to to live in the community.

In addition, the best interest standard has not been effected in legislation. First, this standard as expressed in the RFC is limited in scope and it is not applicable in 'all actions concerning children' in accordance with the country's Constitution and international standards. Secondly, the cumulative effect has been the creation of a gap in the existing legal framework due to the failure to incorporate these principles into domestic laws. One may argue that the there is no legal basis to ensure that the best interests of children with disabilities are given primary consideration in alternative care measures in accordance with international standards. The absence of adequate laws in relation to the principle of the best interests of the child impedes its implementation.

A similar observation has been made in relation to the obligation of child participation, where the scope of the provision is limited to only certain issues in the RFC and is not a requirement in others, such as alternative care. Furthermore, the Ethiopian legislative framework does not comply with the requirement to provide children with disabilities with disability- and age-appropriate assistance, as established by the CRPD, as there is no provision to this effect in the RFC or anywhere else. Thus, the provisions in the RFC in relation to the principle of child participation are not adequate to ensure the participation of children with disabilities in matters affecting them, including their participation in alternative care measures on an equal basis with other children.

Another shortcoming in Ethiopia's legal framework has to do with the non-discrimination obligation set forth in the CRPD. It has been established that there is no law in the country that prohibits discrimination on the basis of disability. The provision of reasonable accommodation is incorporated in domestic law only in relation to the employment of persons with disabilities, while the denial of reasonable accommodation is not regarded as a form of discrimination in all areas. There is therefore no law that ensures the substantive equality of children with disabilities in all measures, including alternative care measures. This does not comply with the obligation to ensure non-discrimination in the CRPD, which states that the denial of discrimination on the basis of disability in national legislation should be considered as discrimination.

It has been noted that Ethiopia's provisions on alternative care of children are found in the policy framework. This was evident in the National Guidelines that have detailed provisions on alternative care. In addition, the NCP also contains provisions that promote the provision of family-based care to children deprived of their family. The Guidelines do not take into account the specific vulnerabilities of children with disabilities. The shortcoming of the policies and guidelines lies in their failure to attach legal obligations to the state; their non-binding nature therefore presents challenges to enforcement, and accountability.

The assessment in Chapter 5 has dealt with the institutional and administrative measures in the upholding of the right of children with disabilities in the context of alternative care in Ethiopia and South Africa. Following this assessment, it was found that there are various challenges beyond the legislative and policy framework that impede the effective implementation of the right to alternative care of children with disabilities in both countries. For instance, in South Africa, despite the existence of adequate standards and mechanisms, these are poorly enforced. The weak capacity of the DSD affects the application of the suitability principle in the realisation of the rights of children with disabilities in alternative care measures. In Ethiopia, the role of MOWCYA and MOLSA in ensuring that the suitability of alternative care options for children with disabilities are found and that such placements remain suitable is stifled by logistical limitations. In both countries, there is a low level of monitoring and oversight of alternative care placements. In Ethiopia, there is a low centralisation of alternative care and the subsequent emergence of various private players. This presents a challenge in ensuring the suitability of alternative care for children with disabilities and in maintaining the requisite standards set forth in international instruments, such as of non-discrimination, the best interests of the child, and regular review of placement.

In addition to these challenges, some data gaps are evident in both countries in terms of the number of children with disabilities in general and the number of children with disabilities in alternative care in particular. The lack of a legal definition of disability that reflects the human rights model of disability creates a perspective of tainted data that affects any engagements with the suitability principle. The cumulative effect of this has been the lack of disaggregated data on the number of children with disabilities in alternative care that is necessary to ensure the suitability of such care.

It has been further established that current funding arrangements for alternative care in both countries are inadequate. Although in South Africa the government is the main source of funding for alternative care, the funding is insufficient to ensure the suitability of alternative care and the safety, development and well-being of children with disabilities. In contrast, Ethiopia's challenges are distinctively different from South Africa's inasmuch as the government is not the main source of funding and hence lacks the power to shape the quality and quantity of services provided to children in alternative care. This has, in turn, undermined its ability to develop effective interventions by way of redirecting financial resources to the development of family-based alternatives. Another challenge in both countries relates to shortages of skilled personnel and a lack of training of those involved in the provision of alternative care services. This makes it difficult to ensure the suitability of alternative care to children with disabilities.

Furthermore, CSOs and NPOs in both countries face challenges due to the nature of the legal regimes. It has been shown that in South Africa, the DSD assigns the provision of the majority of alternative care services to NPOs. This assignment is tagged to funding from the South African government, a missing link in the government-CSO relationship in Ethiopia. The stakeholders still face the challenge of inadequate funding to cover costs, which raises sustainability and quality of service issues. The compromised quality of care in Ethiopia was due to the now repealed CSO law which restricted the terms of registration, amount of funds that CSOs received from external sources, and restriction on the activities that the CSOs were able to be involved in. The adoption of a new CSO law in Ethiopia is certainly a move in the right direction to ensure the implementation of the rights guaranteed in international standards, as well as domestic laws, and will undoubtedly improve the quality and widen the scope of services to children with disabilities, including alternative care.

With regards to independent human rights mechanisms in the two countries, while South Africa has gone ahead to provide for the appointment of office-bearers on a national and provincial level, Ethiopia suffers from a lack of knowledge about the duties and obligations of these mechanisms. In South Africa, there have been positive steps at the provincial level with the enactment of the Western Cape Commission of Children's Act, which presents an opportunity to ensure that children's issues are not side-lined. The specificity of the Commissioner's mandate in the Act is commendable and necessary to ensure that the mandate of the Commissioner extends to monitoring the suitability of alternative care placements for children with disabilities.

Finally, on a broader level, there is uncertainty in relation to the domestic incorporation of international treaties ratified by Ethiopia and their subsequent implementation. There is no consensus on whether international treaties can be applied directly by domestic courts or if publication in the official Negarit Gazette is a precondition. Furthermore, it has been emphasised that the failure to translate, publish and disseminate international treaties is a major challenge, which negatively impacts the implementation of the right to alternative care of children with disabilities set forth in international and regional standards.

6.3 Recommendations

6.3.1 Ethiopia

As shown above, there are several gaps in the Ethiopian legislative framework that may impede the realisation of the rights of children with disabilities to obtain suitable alternative care. One way to address such gaps could be by making several amendments to existing legislation which would include key provisions to protect the rights of children with disabilities in the context of alternative care. These provisions are found in international standards, but are missing in the national legislative framework.

In order to remedy the lack of explicit and comprehensive provisions on the alternative care of children with disabilities, an amendment to the RFC has to be made. The content of the amendment should speak to the placing of an obligation on the government to ensure that children, including children with disabilities who are temporarily or permanently deprived of their family environment, are provided with alternative care within the community in a family setting, and given special protection and assistance.

Moreover, the lack of domestic law placing an obligation on the government to regularly review the placement of children including children with disabilities in alternative care, should be remedied. The RFC should be amended as to include a provision to this effect which should extend to both state-run and private care settings, services and facilities. Thus, the placements of children with disabilities in foster families or institutions (regardless of whether this care is provided by a competent state authority or by a private body) should be periodically reviewed to monitor each child's well-being and protection from all forms of abuse or neglect.

Furthermore, it is recommended that the government should consider amending the RFC in order to revoke the ban on intercountry adoption to ensure the availability of a range of family-based alternatives for children including children with disabilities deprived of their family environment. It is recommended that the government instead reform the current system and create the necessary infrastructure for the system to function efficiently.

In respect of provisions on the four General Principles in the Ethiopian legislative framework, first, it is recommended that a non-discrimination clause be included that explicitly prohibits discrimination on the basis of disability and recognises that special measures may be needed to achieve the substantive equality of children with disabilities. To further enhance this right, there should be explicit recognition in the overall legislative framework that failure to provide reasonable accommodation for children with disabilities amounts to discrimination on the basis of disability. This move will address the other significant gaps that exist in the RFC in relation to various provisions, such as the right to participate and to consider the children's best interests as the primary consideration.

Secondly, the lack of an explicit and comprehensive provision that requires the government and private actors to consider the best interests of the child in all actions affecting them in subsequent legislation creates a major gap in the law. Thus, it is recommended that the RFC be revised to explicitly provide for the best interests of the child, including children with disabilities, to be the primary consideration in all actions concerning them. This will inform the practical inculcation of the best interests of children in all matters that affect them, including alternative care measures.

Thirdly, the limited scope of the RFC's provision concerning child participation should be addressed by including a provision that requires that the views of children, including children with disabilities, to be heard and given due consideration in accordance with their age and maturity in all matters concerning them. On the same note, it is further important to explicitly include a requirement to provide age- and disability-appropriate assistance to children with disabilities in order for them to express their views on an equal basis with other children and participate in the decision-making processes regarding their care.

Fourthly, the lack of an explicit right of children in general and children with disabilities in particular to life, survival and development should be remedied by amending the RFC in order to include a provision to that effect.

Another approach to redress the gaps in the Ethiopian legislative framework beyond the amendment of the RFC could be through the adoption of a comprehensive children's code that incorporates the provisions of the CRC, ACRWC and the child-specific provisions in the CRPD. This study has established that the CRPD affords children with disabilities with a number of rights concerning their alternative care. However, the majority of these rights are not incorporated into the RFC or are not part of Ethiopia's overall legislative framework. More importantly, there is no provision that requires for children including children with disabilities to be provided with alternative care within the community in a family setting. Thus, the adoption of a children's code is more appealing and crucial considering that the RFC barely provides for the rights of children with disabilities in general and their right to alternative care in particular. The drafting of such a code should further be informed by the provisions of the CRPD as well as the UN Guidelines. Such a code should further incorporate the provisions in the National Guidelines that are conducive to the rights of children with disabilities in the context of alternative care.

Furthermore, this study has shown that a medical-based approach to disability is evident in Ethiopia's legislative framework. A comprehensive revision of the overall legislative framework is recommended to bring it in alignment with the current notion of the rights of persons with disabilities and to reflect the human rights-based model of disability. This could be remedied by adopting a disability legislation which incorporates the CRPD's provisions dealing with the rights of children with disabilities. Nonetheless, regardless of the approach taken to provide for the rights of children with disabilities, i.e. through the adoption of a separate disability legislation, a children's code or amending existing legislation, such as the RFC, it is important to ensure that their rights are not ignored.

With regards to implementation challenges, it is recommended that mutual consultation, collaboration and coordination among the ministries and government organisations working with children's and disability issues be enhanced. The establishment of coordinating mechanisms are instructive to the success of obtaining suitable care options for children with disabilities deprived of their family environment and to ensure that institutions are not identified as a common recourse for such children. The current alternative care system demands the re-establishment of a system resembling the now inoperative Ethiopian Alternative Childcare Network to address the overall lack of coordination, information-sharing and synergy among the various actors working to improve alternative care for such children. This study has also highlighted the importance of governmental cooperation with CSOs in the facilitation, and monitoring and coordination of alternative care through ensuring that there is accountability and transparency in measures concerning the alternative care of children with disabilities.

It is further recommended that the government consider devising a system to strengthen standards for the regulation of alternative care settings that are both state-run and privately operated. The MOWCYA should take measures to effectively fulfil its responsibilities by, inter alia, raising awareness of its mandate among agencies providing alternative care services in the country. To this end, it is proposed that MOWCYA devise a system of coordination among all levels of government to strengthen standards for the regulation of alternative care settings and to ensure adherence to the requirements of the necessity and suitability of these placements.

The government should consider the recommendations of the CRC Committee and ensure that the MOWCYA is sufficiently resourced, both in human capital and financial terms, so that it can better discharge its duties. It is recommended that the government, as the primary duty-bearer, reinforce its authority and oversight over the alternative care system.

It is further recommended that the government ensure that private alternative care service providers exercise non-discrimination and equality norms in relation to children with disabilities. There need to be a mechanism in place to guard against discrimination on the basis of disability within alternative care services, including those run by the non-state sector. It is further recommended that the government raise awareness among funders, including faith-based organisations, about the consequences of their practices that are detrimental to children.

Furthermore, it is proposed that the government ensure that effective systems of data collection are available for children, including children with disabilities, deprived of their family environment or at risk of losing it. The government should put in place a system to collect disaggregated data on the number of children, including children with disabilities in alternative care settings (including child and youth care centres), as well as on the duration of placement and the frequency of its review. Data should not just include information on the number of children living in different forms of alternative care at a given time but also the pattern of their movement into and out of such care settings. The data should be disaggregated by the nature and type of impairment, age, sex, and any other category considered appropriate. In this respect, it is proposed that the government adopt a legal definition of disability that is in line with the human-rights model of disability.

It is further recommended that information on the work of agencies (both private and governmental) providing alternative care services in the country be gathered and made available.

It is recommended that disability issues are mainstreamed into the work of the EHRC and that and a focal point is assigned to address concerns specific to children with disabilities. The training of experts on disability issues is crucial to ensure that they have the necessary skills to investigate rights violations, and to advocate for law, policy and programme reforms to enhance the protection of children in alternative care in line with international accepted standards.

It is further recommended that an independent children's commissioner with a specific mandate to monitor children's rights, including the rights of children with disabilities in alternative care, be assigned. Such commissioner would have a mandate to raise awareness on disability issues to curb the stigmatisation of children with disabilities and to advocate for a review of discriminatory laws. These initiatives are particularly important in Ethiopia where a negative attitude towards children with disabilities is prevalent, which in turn may lead to them being separated from parents and placed in alternative care. Moreover, by advocating and making recommendations for the review of discriminatory laws, such a commission would have the ability to ensure that children with disabilities are not discriminated against, are not routinely placed in institutional care, and have equal access to family-based alternative care.

6.3.2 South Africa

In respect of South Africa, the study has found that the legislative framework contains extensive provisions for the protection of the rights of children with disabilities in the context of alternative care and complies with international standards to a large extent. However, there are a number of gaps which need to addressed to ensure full compliance with international standards. First, the Children's Act, in providing specifically for the rights of children with disabilities in section 11(1)(a), reveals some elements of the medical model of disability by including the phrase 'special care' in the list of alternative care options that may be appropriate for children with disabilities. It is recommended that the disability-specific provision in the Children's Act be revised to incorporate the language of the CRPD, which requires that children with disabilities be provided with alternative care within the wider family or within the community in a family setting. In this regard, the term ‘special care’ should be replaced with a term that emphasises the rights of children with disabilities to be cared for in the community in a family setting.

Secondly, the Children’s Act allows the court to order the placement of children with disabilities in a ‘facility’ if it finds that a child who is in need of care and protection has a physical or mental disability and if it is in the best interests of the child to be cared for in such a setting. However, this is contrary to the CRPD, which has at its core the promotion of community living and inclusion of children with disabilities. The CRPD further requires that the alternative care of children with disabilities be provided in a family setting and not in a ‘facility’. This sub-section as it currently stands runs the risk of encouraging the institutionalisation of children with disabilities. Thus, it is recommended that this provision be revised not to give discretion to the court to place children with disabilities in institutional care and rather to shift the focus to providing children with disabilities with family-based alternative care.

Thirdly, in respect of the provision on child participation, it is recommended that section 10 of the Children’s Act be amended to expressly require age- and disability-appropriate assistance for children with disabilities to facilitate their participation in all actions concerning them in accordance with their age and maturity. Such a provision would serve to facilitate their participation in the decision-making process relating to their care.

In addition to the gaps in the legislative framework, there are several implementation challenges hindering the realisation of the rights of children with disabilities in the context of alternative care in South Africa. To address such challenges, it is recommended that the government create a system for the collection of up-to-date, accurate and reliable disaggregated data on children with disabilities to, inter alia, identify discrimination or disparities in the realisation of their rights. Accurate and up-to-date disaggregated data are also useful to enable the government to formulate and implement policies to give effect to the obligations set forth in the CRC, ACRWC and the CRPD in relation to the rights of children with disabilities, in particular their right to suitable alternative care. It is further recommended that the government devise a system to collect disaggregated data on the number and percentage of children, including children with disabilities, in alternative care settings, as well as on the duration of their placement and the frequency of its review. Data should include information on children, including children with disabilities, reunited with their parents after placement in alternative care. The data should be disaggregated by the nature and type of impairment, age, sex, and any other category considered appropriate.

It is recommended that the South African government put in place an appropriate multi-sectoral coordinating mechanism involving both private and state-run organisations to ensure that available resources are effectively used for the implementation of the rights of children in general and children with disabilities in particular.

It is further recommended that the government take the necessary measures to build the capacity of the relevant professionals to enable them to be better equipped to provide care that meets the needs of children including children with disabilities deprived of their family environment. It is suggested that the government follow the recommendations of the CRC Committee and ensure that organisations in charge of the foster placement of children avail the necessary training and support to potentially suitable families to ensure that they can provide proper care for children with disabilities.

Finally, it is recommended that the government assigns a national children's commissioner who is adequately resourced with an explicit mandate that corresponds to the UN Guidelines and monitors the suitability and necessity of the placement of children, including children with disabilities at the national level to strengthen and complement the work being done at a provincial level in South Africa.

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