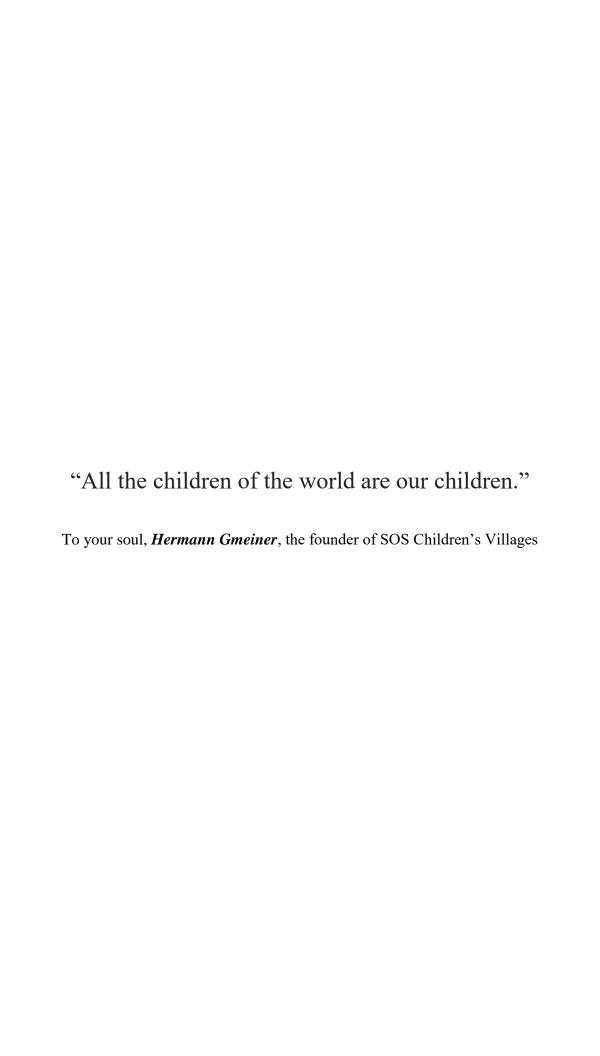Ca' Foscari University of Venice

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Deinstitutionalization of the child as an approach to secure a family life: Is it the placement?

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"All the children of the world are our children."

To your soul, *Hermann Gmeiner*, the founder of SOS Children's Villages

ACKNOWLEDGEMENT

CONTENT TABLE

ACRONYMS

AC: Alternative Care
ACRWC: The African Charter on the Rights and Welfare of the Child
CWPC: Children without Parental Care
CDEF: Children Deprived of their Family Environment
CRC: (United Nations) Convention on the Rights of the Child
DI: Deinstitutionalization
UNAG: the Guidelines for the Alternative Care of Children
NGO: non-governmental organization
UN: United Nations
UNGA: United Nations General Assembly

ABSTRACT

Deinstitutionalization of the child stems from the importance of a family life for every child, in particular, those who have lost or are at risk of losing their parental care. The process of DI mainly seeks to prevent the need for AC, but it is uncertain. There are many circumstances under which AC is seen as necessary. The following thesis examines the legal status of institutional care (residential care) for children, as an alternative, in international law. To achieve this, the author follows a comprehensive interdisciplinary approach including a case study on the family-like model of SOS Children's Villages, to understand the rationale behind the process of DI. This thesis concludes that the need for AC, within the process of DI, should be perceived as *the process to secure a quality, suitable alternative care placement in the best interests of the child*, and should not merely be based on the availability of one placement or another. Thus, international law shall better articulate the parameters of what constitutes quality of care criteria within each AC placement, to make the process of DI consistent and thereby reduce risk for vulnerable children.

GLOSSARY

Term	Definition	source
Adoption	The legal transfer of parental rights and responsibilities for a child which is permanent.	Better Care Network Toolkit Glossary (BCN Toolkit).
A family, family life and family environment	There are no rigid definitions due to the variations in their understanding and practice all over the world. The term 'family environment' is a new concept introduced by the CRC and it has been suggested that these terms are overlapping concepts that are generally used interchangeably. Thus, "any non-institutional living arrangement in which the education and other nurturing and training activities of children takes place under the responsibility of one or more adults would amount to a family environment."	J. Doek, H. Loon, P. Vlaardingerbroek, *Children on the move: How to Implement their right to Family life*, Martinus Nijhoff, 1996, at 22; *See also* G. Van Bueren, *The international law on the rights of the child*, The Hague: Martinus Nijhoff Publishers, at 69.
Alternative Care	A formal or informal arrangement whereby a child is looked after at least overnight outside the parental home, either by decision of a judicial or administrative authority or duly accredited body, or at the initiative of the child, his/her parent(s) or primary caregivers, or spontaneously by a care provider in the absence of parents.	BCN Toolkit
Biological parents	The birth family into which the child is born. It can mean both parents if they are together, or the mother, or the father.	BCN Toolkit
Caregiver/ carer	A person with whom the child lives who provides daily care to the child, and who acts as the child's 'parent' whether they are biological parents or not. A caregiver can be the mother or father, or another family member such as a grandparent or older sibling. It includes informal arrangements in which the caregiver does not have legal responsibility.	BCN Toolkit
Care leaver	A young person, typically over the age of 16 who is leaving or has left a formal alternative care placement. Depending on each country's laws and policies, he or she may be entitled to assistance with education, finances, psychosocial support, and accommodation in preparation for independent living.	BCN Toolkit
Care System	The legal and policy framework, structures and resources that determine and deliver alternative care.	BCN Toolkit
Care option	A particular setting in which a child receives care.	SOS Care Promise
Children deprived of family care	All children not living with at least one of their parents, for whatever reason and under whatever circumstances. Children without parental care who are outside their country of habitual residence or victims	BCN Toolkit

	of emergency situations may be designated as unaccompanied or separated.	
Children without parental care	All children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances.	Guidelines for the Alternative Care of Children, para. 28 (a) (hereafter referred to simply as 'UNAG')
Children are at risk of losing their parental care	Children who do not have adequate parental care "Where a child's basic physical, emotional, intellectual and social needs are met by his or her caregivers and the child is developing according to his or her potential."	BCN Toolkit
Community Based Care	Care that is as close as possible to family based care and where the community is involved in the process of a child's recovery. Foster and extended families are examples of community-based care.	BCN Toolkit
Family-based care	The short-term or long-term placement of a child into a family environment, with at least one consistent parental caregiver, a nurturing family environment where children are part of supportive kin and community.	BCN Toolkit
Family of origin	The family into which a child is born, including the immediate family and the extended family.	SOS Care Promise
Formal alternative care	All care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures.	UNAG, para. 28 (b)(ii)
Foster family care, foster care	situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care.	UNAG, para. 28 (c)(ii)
Family-like care	family-like care can be defined as an alternative care setting, which is specifically created for the purpose of providing alternative care, where one or two care professional(s) take on a consistent parental role, offering care in a largely autonomous small group resembling a family environment as much as possible, and where specific support is available when needed.	SOS Children's Villages International , Family-like Care: A nurturing care setting in a supportive environment, a discussion paper, 2019, at 4.
Gatekeeping	The process of referring children and families to appropriate services or care arrangements with the aim of preventing unnecessary alternative care and finding the most suitable alternative care option when needed.	SOS Care Promise
Informal alternative care	Any private arrangement provided in a family environment, whereby the child is looked after on an on-going or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an	UNAG, para. 29 (b)(i)

	administrative or judicial authority or a duly accredited body.	
Institutional care	large residential care facilities.	UNAG, para. 23
Kafalah	A form of family based care used in Islamic societies that does not involve a change in kinship status, but does allow an unrelated child, or a child of unknown parentage, to receive care, legal protection and inheritance.	BCN Toolkit
Kinship Care	family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature.	UNAG, para. 28 (c)(i)
Placement	A social work term for the arranged out of home accommodation provided for a child or young person on a short- or long-term basis.	BCN Toolkit
Residential care	care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes.	UNAG, para. 29 (b)(iv)
Vulnerable child	A vulnerable child is defined as being under the age of 18 years and currently at high risk of lacking adequate care and protection. Accordingly, all children are vulnerable by nature compared to adults, but some are more critically vulnerable than others. "Child vulnerability is a downward spiral where each shock leads to a new level of vulnerability, and each new level opens up for a host of new risks. In other words, the probability of a child experiencing a negative outcome rises with each shock."	World Bank OVC Toolkit

1. INTRODUCTION

1.1 Background

The ongoing focus on the needs of children and the implementation of their rights in practice are of great importance due to the particular vulnerability of children. Their need for protection and right care is the rationale behind the adoption of international instruments dedicated to children's rights. Prior to the United Nations Convention on the Rights of the Child (CRC) in 1989, children without prenatal care (CWPC) were, although by non-binding declarations[1], a subject of international concern. Article 20 of the CRC has developed the child's right to alternative care (AC), and legal framework for the development of landmark instruments to protect children without parental care (CWPC). The CRC stipulates that children deprived of their family environment (CDFE) "shall be entitled to special protection and assistance provided by the State" and that this special protection and assistance will constitute AC. This article, however, has given the state - the leading actor of the public social system - wide discretion to standardize its AC system, including recognizing institutional care, if necessary, as a substitute placement of a child's family of origin. Academically, it is well-proven that the current "binding" international law provisions have contributed to institutionalizing children by legalizing, or at least, allowing the placement of those in an institutional environment which is, in principle, inconsistent with the child's primary right to live in a family life.

Despite universal developments introduced by the CRC, the question of the right AC for those children still problematic and an argumentative topic of many legal, psychological, sociological, public policy, and other studies. More concern was expressed for CWPC and, in particular, for children who live in poor quality care. The question of the alternative placement of CWPC has been at all levels examined. Internationally, the international child protection community has attempted to fill up the gaps by developing exceptional "non-binding" standards and policies. The aim is to guide the establishment and reform of states and other stakeholders AC systems to guarantee a suitable alternative family - in the best interest of the child - as an ideal placement for

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[1] *See* the Geneva Declaration on the Rights of the Child in 1924; the Declaration on the Rights of the Child in 1959, and 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 in 1986.

every CWPC or are "at risk" of being so. In this regard, the 2005 Day of General Discussion of the Committee on the Rights of the Child was based on the theme, "Children Without Parental Care" (CWPC), and resulted in the adoption of the Guidelines for the AC of Children (UNAG) in 2009.[2] Additionally, the UN Sustainable Development Goals are another important framework for this, since vulnerable children and families are most often the first ones to be left behind. As a consequence, regionally and nationally, many legal and policy instruments have emerged.

Nowadays, some potential reform in policy is also expected as an ongoing UN Global Study on Children Deprived of Liberty and will be published later this year. However, the UNAG have already been instrumental alongside other developments in promoting the process of deinstitutionalization (DI) of the child and reshaping domestic legislation and policy. Practically, there are many factors which could make the process very complex, risky, challenging, and might lead to jeopardizing the vulnerable child - the subject of the process.

1.2 Brief history of institutional care

Prior to the development of public social systems, taking care of children was shouldered mainly by their families and communities without supervision. However, as the State began to take responsibility, they began to provide shelter, food, clothing and treatment for various categories of individuals as proof that society cares about not leaving vulnerable persons without assistance. Residential facilities (institutions) were established for different categories of vulnerable groups[3] including CWPC. Parents' shortcomings to care for children was perceived as an individual fail which should be addressed through the state. This intervention was seen as a "positive" intervention by public authorities. Since States think administratively, notably, admitting children to institutional care has proliferated as the easiest, most supervised, and less expensive solution for "all" — meeting the needs of many social issues such as poverty, disability, social exclusion, and lack of services in the community.

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[2] UNGA, *Guidelines for the Alternative Care of Children : resolution / adopted by the General Assembly*, 24 February 2010, A/RES/64/142, para. 18.
[3] Such as persons with mental health problems, persons with disabilities and elderly people.

The dilemma, moreover, is that in some countries - mostly developing countries - even institutional care lacks the support of the administrative authority. The Author noted in a previous study that many developing and economically weak states have depended on third-parties (NGO's) to provide such care. This indicates that institutional care as a potential alternative may result in distorting the national alternative system as a whole.[4]

1.3 Children without parental care: where are they placed?

Estimating the size of the world proportion of CWPC is an almost impossible task, even when data exist "the indicators used are only rarely comparable across different national contexts, thereby reducing significantly the possibility of making inferences about the broader, 'global' dimension of children living outside their family environment." [5] In many cases, a child without parental care may still live with primary or extended family. The UNAG acknowledges the fact that "in most countries, the majority of children without parental care are looked after informally by relatives or others."[6] This indicates that the international, regional, and national stakeholders do not have access nor supervision to most of the children of this discussion, and gives an impression that the child and family protection is a global dilemma. Globally, however, it is estimated that there are approximately 153 million children who have lost a mother or a father; 17.8 million of them have lost both parents.[7]

According to UNICEF, at least 2.7 million children in the world live in institutions. Institutions, in this case, include all types of residential care, from small to large-scale institutions.[8] Studies and reports regarding institutions in various nations have illustrated that the majority are still vast in scale. In Rwanda, for example, 28 out of 30 institutions were found to have between 16 and 566

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[4] R. Zahda, *The alternative care for children who lost the family life in international law*, Masters thesis, Masters of Public Law, Al-Quds University, Palestine, 2018, at 94. Retrievable at <https://dspace.alquds.edu/bitstream/handle/20.500.12213/2702/MT_2018_21610069_8050.pdf?sequence=1&isAllowed=y> (accessed 7 March 2019).

[5] A. Holzscheiter, N. Cantwell, *Children deprived of their family environment a commentary on the United Nations Convention on the Rights of the Child*, Martins Nijhos Publishers, Boston, 2008, at 3.

[6] UNGA, *supra* note 2, para. 18.

[7] United States Government, *Fifth Annual Report to Congress on PL 109-95*, World's Vulnerable Children, 2010, at 1. Retrievable at <http://pdf.usaid.gov/pdf_docs/PDACU307.pdf> (accessed 11 March 2019).

[8] UNICEF, *Estimating the Number of Children in Formal Alternative care: Challenges and results*, journal articles, *June 2017*. Retrievable at <http://pdf.usaid.gov/pdf_docs/PDACU307.pdf> (accessed 11 March 2019).

children in care.[9] While the number of children living in institutions appears to be rising, this increase contradicts with the global movement, stated policies of many governments directing the scaling down of institutions.

1.2 Purpose and research question

The problem of this study is the uncertainty of DI process and the risk combined with it. The purpose of this study is thus to analyze the exciting legal and policy regulation based on interdisciplinary theoretical and empirical basis to finally propose a new understanding for DI of the child. In doing so, the following research question is drawn from the research problem, purpose, and was chosen to guide the study: *What is the legal status of Institutional Care for CWPC in International Law?*

Following sub-questions were formulated to guide the centric question:

- How is the right to alternative care articulated in international and regional laws?
- What is the criteria of quality residential care?
- What is the motivation for the transition to community-based care?
- How can residential care improve and be an ideal alternative placement in practice?

1.3 Motivation of the study

The *personal* motivation for conducting this study is based on the fact that the author had lived experience at an alternative arrangement under SOS Family Care (SOS Children's Village-Bethlehem, Palestine). While the *academic* motivation is inherited from the problematic of this study since effective DI requires a comprehensive understanding of the status of residential care within the process.

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[9] Ministry of Gender and Family Promotion, Republic of Rwanda, *National Survey of Institutions for Children in Rwanda*, November 2012, at 31.

1.4 Scope of the study

This study is conducted to determine the legal status of residential care as a form of AC for CWPC or those in power. Therefore, the scope of this study will focus on the AC as a need, and will not address the preventive side of DI. The study will relatively concentrate on the legal status of residential care within the UN Guideline on alternative care for children 2009, as it is the most recent international instrument and legislation but not exclusively. Many other regional and relevant documents are also examined. In the context of enrolment in institutional care, the most frequent reasons of separation of children from parental care in general and institutionalize the child in particular are, among other things, poverty, lack of access to basic services, abuse, neglect, disease, disabilities, and emergencies. Addressing each of these causes of vulnerability in detail is beyond the scope of this study, but more information can be found in most of the references of this study. Challenges of DI are also not categorized within this study while the author refers to them on some occasions. They are, nevertheless, well-articulated in many given references.

1.5 Methodology: socio-legal study

This study is cross-disciplinary and interdisciplinary, aims to analyze the law, legal phenomenon, and relationships between these and wider society. Therefore, there is a need to employ a wide variety of methods. Following this introductory chapter, the study will be divided into four chapters. The legal side of this study, will be mainly represented by chapter 2 and 3, where the Human Rights framework of both international and regional perspectives will be elaborated based on the analytical and comparative approach. This will be helpful to understand the state of residential care in international law based on complimentary basis. Then, in chapter 4, some psychology and child development studies will be analyzed. Based on the outcomes of chapter 4, an empirical qualitative case study on SOS Children's Villages will take place in chapter 5. This case will be a useful method to understand and complement a particular problem in great depth, and thereby a well-suited research approach for the purpose of this study. Finally, in all chapters, the legal discussion will be presented and linked with the problem of this study. All chapters are carefully balanced.

1.5.1 Sampling Strategies

After contacting and sending the questions that have derived from the official publications of the organization, SOS Children's Villages International, the research department introduced two different respondents. The first represents a respondent who has worked as Strategic Programme Development Advisor. While the second a respondent with research and learning experience who contributed in a discussion paper on SOS family-like model. Additionally, one written answer was received by email.

1.5.2 Interviews

DI as a subject and process is complex. The interviews are thus semi-structured as they are suitable for gaining knowledge of how people interpret the situation. Unfortunately, in-person interviews were not conducted, but via Skype due to time and travel constraints. A total of 2 interviews were conducted, one of these were semi-structured interviews, and one unstructured interview (conversation) was conducted. The semi-structured interview was built on themes in questions[10], and lasted typically one hour. The author posed probing questions to encourage the respondents to further elaborate on points requiring more clarification. All interviews were recorded from both sides. The respondents have been interviewed as representatives of their organization or work area so that the general conception of their professional identity should be taken into account. All interviews were manually transcribed.

1.5.3 Data Analysis

A number of procedures have been taken to ensure that the study is credible and precise. Transcripts were checked for mistakes by listening through interviews and comparing them with the transcribed material. The use of various information sources for triangulation was accomplished (documents and interviews). Regarding the generalization, this study has a qualitative significance. Consequently, the study should not be generalized on other forms of residential care. However, it can guide any similar contextual research.

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[10] Annex 1

1.6 Literature Review

There is extensive research on the effects of institutional care on children. Recent research on DI focuses on the effective implementation and what the common obstacles to DI are. Most of the studies refer to the practical obstacles. There is a presumption that DI of child care is well-articulated in theory. Additionally, there are various studies surrounding the topic of DI of children and it can be noticed that there is a lack of common understanding of DI. Nonetheless, most of the concerned studies urge to conduct more case studies and fieldwork to accumulate empirical experience of DI.

1.6.1 Best Practice

Existing research recommendations focus on two main aspects of how to tackle children's institutionalization, namely, preventive measures and child care DI. These aim to address the root causes of children being enrolled in institutions, and thereby stop the enrollment in institutions and the demand for their services by minimizing them. Social support services are, undoubtedly, crucial to prevent family separation.[11] Additionally, to achieve provision of community/family-based care in areas where there are no alternatives to institutions successfully, extensive capacity building on multiple levels is required. [12] Children's DI and care services look at approaches where institutionalized children can be moved from institutional care to other AC forms or reintegrated into their communities or family of origin. Using staff and facilities is another important aspect of care transition policy discussions.[13]

1.6.2 Policy Implementation

Theoretically, some argue that there are relatively clear provisions on how to stop depending on institutions. Research and policies indicate the importance of a gradual transition. This means that while it is important to ensure that children are removed from institutions and placed in alternative

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[11] D. McArthur, A. Khadka, C. Khatiwada, *10 Steps Forward to Deinstitutionalisation,* Pokhara: Terre des hommes Foundation and Hope for Himalayan Kids, 2011, at 37-53; See also C. Csáky, *Keeping children out of harmful institutions: Why we should be investing in family-based care.* London, Save the Children, 2009; Also J. Waldfogel, Prevention and the child protection system. *The Future of Children, 19*(2) ,2009, at 195-210.

[12] C. Csáky, *Id.*

[13] UNGA, *supra* note 2, para. 29.

family care, it is equally important to build a national infrastructure for child welfare.[14] Despite this, the process includes some potential risks, as well as challenges and barriers, to developing high-quality services in the community.[15] When it comes to the preventive measures, although it is not within the scope of this study, some scholars argue that international law does not allow the *voluntary* relinquishment of the child which is incompatible with the child's best interests and can be humiliating for parents.[16] Practically, the implementation is entirely complex. Challenges in the DI process are many, including, cultural and economic factors, resistance from the staff at institutions, and the scope of alternative placements.[17] Furthermore, research in the area demonstrates that the process of DI is, in practice, risky and could lead to unanticipated consequences and adverse results for vulnerable children.[18]

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[14] D. McArthur, A. Khadka, C. Khatiwada, *supra* note 11; *Read Generally* F. Martin, D. Pop, S. Lupan, *De-institutionalising the alternative care system for children: Implications for the social service workforce with learning from Rwanda and Moldova,* Global Social Workforce Alliance, 2013

[15] European Expert Group on Transition from Institutional to Community-based Care, *Common European Guidelines on the Transition from Institutional to Community-based Care,* November 2012, at 17.

[16] Richard R. Carlson, *A Child's Right to a Family versus the State's Discretion to Institutionalize the Child*, 47 Georgetown Journal of International Law 937, 2016, at 41.

[17] M. Dozier, C. Zeanah, A. Wallin, C. Shauffer, Institutional care for young children: a Review of literature and policy implications, *Social Issues and Policy Review, 1*(6), 2012, at 1-25; D. Tobis, *Moving from residential institutions to community-based social services in Central and Eastern Europe and the former Soviet Union,* Washington DC, World Bank, 2000.

[18] A. Nordin, *Towards a Brighter Future for Institutionalised Children? A Case Study of De-Institutionalisation of Childcare in Kyrgyzstan*, Masters thesis, Lund University, Master of Science in International Development and Management, May 2015, at 8.

2. INTERNATIONAL PERSPECTIVE

The CRC the key framework to guide programme and policy interventions with and for CWPC or those in power. The preamble of the CRC emphasizes the importance of family life while article 20 states a legal obligation on states to create AC system. The United Nation Guidelines for the Alternative Care of Children (UNAG) represents the most recent international policy instrument on the subject, in which policy framework provides more detailed non-binding standards to strengthen the existing binding legal framework as to the practical implementation of international law in the context of the right to AC.

2.1 The Convention on the Rights of the Child (CRC)

The CRC is the only existing internationally binding instrument which provides a broad legal framework for the protection of children deprived of their family environment (CDFE). It is inspired and derived from the 1986 UN Declaration[19] which lays down for the first time internationally agreed standards of care for children whose parents are "unavailable" or "inappropriate."[20] Further, article 20 of the CRC provides legal ground for the protection of CDFE, but it should not be interpreted or implemented in isolation from other concomitant provisions of the CRC including article 2 (Non-discrimination), article 3 (Best interests of the child) , article 7 (The child's right to know and be cared parents), article 8 (Preservation of identity), article 9 (Separation from parents), article 12 (Respect for the views of the child), article 16 (Non-interference in the family), article 18 (Parental responsibilities; state assistance), article 25 (Review of treatment in care). However, article 20 implicitly prioritizes the family-based alternative over other placements where a child is deprived of her or his family environment, pointing out the superiority of the family life as a concept and setting. [21]

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[19] UNGA, *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*, United Nations, A/RES/41/85, 3 December 1986.

[20] *Id,* art. 4; *See also* A. Holzscheiter, N. Cantwell, *supra* note 5, at 16.

[21] "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." UNGA, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, art. 25 (3).

2.1.1 The importance of a Family Life

The opportunity to grow up in a family life is a universally recognized prerequisite for the full realization of children's rights. The family life is a cornerstone of the CRC. The preamble asserts that a family environment is in a child's best interests since a good family provides "an atmosphere of happiness, love and understanding."[22] For a child, a functional family is the "natural environment for the growth and well-being"[23] and considered to be the best placement to nurture the child's "full and harmonious development of his or her personality." [24]

Family, besides, is a social institution of the "fundamental group of society"[25] upon which the state is based. Family life is the first incubator for childhood. Childhood is the future and hope. The child of the present is a leader of the future, the wealth of the nation, and the building blocks of the Society of Tomorrow. It can be said that the future of any society and state depends to a large extent on providing the right care for children by creating opportunities that allow them to enjoy a happy life, effective development, and reach the stage of maturity smoothly. Thus, protective and supportive families are the core for both an effective society and state; they are the main path through which social services such as nutrition, housing, health, and education are delivered to children. The emphasis on family life in the CRC's Preamble demonstrates the leading role of family in achieving the aim behind many of the CRC's provisions.

Many articles of the CRC confirm the idea that a family life is a key actor in which the state guarantees to promote and protect the rights the CRC stipulates. Whereas state is a social entity and contains communities, families, and individuals. The family as an inner component of the state "should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community." [26] Other provisions express specific rights of children which are based on family, or at least, best fulfilled by a child living in a family surrounding. For

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[22] *Id* , Preamble.
[23] *Id*
[24] *Id*
[25] *Id*
[26] *Id*

instance, the child shall be registered within the state after her or his birth to have "the right from birth to a name, the right to acquire a nationality."[27] The child also has a right, "as far as possible", "to know and be cared for by his or her parents."[28] Family relations are also a part of the child's identity, and the state undertakes "to respect the right of the child to preserve his or her identity… without unlawful interference."[29] The state is also obliged to "ensure that a child shall not be separated from his or her parents against their will" unless that would be necessary for the best interests of the child to as when parents or those in power (such as legal guardians or *de facto* caregivers) lack the minimal and essential elements of parenting.[30] This shows the interlaced nature of the concept of family life.

The CRC considers families headed by parents as the related link of children's rights implementation. Naturally, "parents" bear the "the primary responsibility for the upbringing and development of the child"[31], but not often the "best interests" of the child will be their foremost concern. Hence, parental rights are not absolute. There are exceptions to parental scope in providing care for children. In practice, what determines both parents' and state's relation to children is the principle of the child's best interests.[32] This principle is flexible more than any other principle in the CRC, and a subject of many analytical studies and debates. This is due to its non-specific and subjective nature.[33] It often contains different and sometimes contradictory meanings, all depending on who analyzes it and what the circumstances of its analysis.[34] However, this concept emerged in the early 19th century, when parents began to be seen not as "owners" of children but as "caregivers" of them.[35] Biological caregivers, as previously discussed, afford the

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[27] *Id art.* 7 (1).

[28] *Id*

[29] CRC, *supra* note 21, art. 8 (1).

[30] *Id,* art. 9.

[31] *Id,* art. 18.

[32] UN Committee on the CRC, *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, par. 13. Retrievable at <https://www.refworld.org/docid/460bc5a62.html> (accessed 30 March 2019).

[33] S. Vite, H. Boechat, *A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption* , BRILL, 2008, at 23.

[34] R. Greeff, *Fostering Kinship: An International Perspective on Kinship Foster Care*, University of Michigan, Ashgate, Arena, 1999, at 109.

[35] *Id*

"natural" responsibility to guarantee a child's right to a family life (family environment) and "conditions of living necessary for the child's development."[36] Nonetheless, not all families are eligible to achieve "happiness, love and understanding" for their children, or to provide a protective environment. A child might receive inadequate care or no parental care, from capable or willing parents or even extended family. Some families might even be a dangerous option for a child. Thus, the gap caused by families — voluntary or involuntary — to provide the right care to their children requires the state's positive intervention[37], that is, the child's right to "AC." [38]

2.1.2 The right to Alternative Care

Better understanding for a child's right to live in a family life requires more legal analysis of the right to AC, namely, article 20, a right primarily made to secure an alternative family life for those who lost one or are "at risk" of being so. The contemporary sense of the family goes beyond the traditional understanding of it.[39] What is essential is the existence of a "primary living unit in which the care and upbringing of children take place."[40]

Article 20 refers to a child deprived of "his or her" family environment and not of "a" or "the" family environment as a recognition of the diverse forms of family environments in existence, and it mentions "family" instead of "parents" as family environment goes beyond the mere existence of parents.[41]The importance of a family environment is also not premised on the simple presence of the material structure (material element) but on the psychological elements [42] (moral element) it represents. Thus, a functional family is both an intimate relations placement and a "social

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[36] CRC, *supra* note 21, art. 8, 9, 18 & 27.

[37] The stipulation on special protection and assistance represents a state positive intervention. CRC, *supra* note 21, art. 20 (2).

[38] Alternative care is a form of special protection and assistance that a state should provide to CDEF. CRC, *supra* note 21, art. 20 (1).

[39] Family includes parent families and other co-habiting individuals (de facto relationship), married or not, whether of the same or opposite sex who acquire parental rights. *See* South African Law Commission, project 10, *review of the child care act*, report, at 65.

[40] J. Doek, H. Loon, P. Vlaardingerbroek, *Children on the move: How to Implement their right to Family life*, Martinus Nijhoff, 1996, at 22.

[41] CRC, *supra* note 21, art. 20 (1); *Also* UNICEF, Implementation Handbook for the Convention on the *Rights of the Child*, 2007, at 278.

[42] CRC, *supra* note 21, art. 20 (3).

institution" upon which society is built. The role of a family environment also interacts with a child's right to life, survival, and development.[43] This illustrates the comprehensive approach which requires a "quality" of life to the child in many aspects, physically, psychologically, socially and so on. The scope of article 20, however, refers to a non-exhaustive list of children who have either lost or become separated from their families for several reasons either temporarily or permanently. [44] Children within the juvenile justice system are excluded from the list.[45] Perhaps the expected framework of the current UN Global Study on Children Deprived of Liberty would contain a separate regulation for this issue.[46]

Furthermore, article 20 contains the term "deprivation" which indicates any reason or circumstance — justified and lawful or not — where a child is found being lost parental or family care.[47] "Deprived" also draws attention to the child's disadvantaged position (vulnerability). Article 20, as well, re-centralizing the best interests principle which highlights the importance of the best interests principle in the context of AC. The need for affection, security, and continuing care are principally some elements of a child's best interest.[48] By looking at article 20 (3), it can be realized that the insistence is on the *moral* element more than the *material* one. For example, in providing AC "continuity in a child's upbringing, the child's ethnic, religious, cultural and linguistic background"[49] are conditional to some extent. The concept of continuity in upbringing directly connect the AC to a particular child's background, it focuses on the need for "continuity in

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[43] M. Nowak, *A Commentary on the United Nations Convention on the Rights of the Child, Article 6: The right to life, survival and development*, Brill Academic Pub, 2005, at 2.

[44] Reasons of loss or separation are many including; the death of parents, poverty, HIV/AIDS, discrimination, abuse, neglect, exploitation, disability, armed conflict, internal displacement, temporary or permanent incapacity of parents and many causes. *See* UN Committee on the CRC, General Comment 6, *Treatment of unaccompanied and separated children outside their country of origin*, 17 May – 3 June 2005, para. 7, 8, 39; *See Also* A. Holzscheiter, N. Cantwell, *supra* note 5, at 3.

[45] "Persons under the age of 18 years who are deprived of their liberty by decision of a judicial or administrative authority as a result of being alleged as, accused of or recognized as having infringed the law, and whose situation is covered by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty." UNGA, *supra* note 2, para. 30 (a).

[46] The NGO Panel for the Global Study on Children Deprived of Liberty, Goal of the Study. Retrievable at <https://childrendeprivedofliberty.info/about/goal-of-the-study/> (accessed 31 March 2019).

[47] A. Holzscheiter, N. Cantwell, *supra* note 5, at 38.

[48] CRC, *supra* note 21, *art. 5*.

[49] CRC, *supra* note 21, art. 20 (3).

childhood care" with "due regard" to the components of their background,[50] as much as it would be consistent with the best interests of the child. [51] "Continuity of upbringing" also implies the need to assure a stable and constant alternative option with a *moral* element represented by, inter alia, love, understanding and harmonious development.[52]

Continuity of upbringing also means that stakeholders should avoid "multiple or new placements"[53] of children in their care. In the context of alternatives, as recognized in the CRC, the foster placement, kafalah, adoption, and "if necessary" the placement in "suitable" institutions are recognized.[54] This illustrates that the state as an administrative entity cannot guarantee "the" family life (in its narrow conception), but could facilitate the creation of "a" family life or environment (as a broad conception) for children who lost, or (at risk) of losing their original family life. In theory, this hierarchical order demonstrates the priority of the family / family-like placement, and presumes that "unsuitable" institutions as a "last resort" option might be a form of family deprivation.

In practice, however, some argue that a state can make institutionalization "necessary" by not "allowing, encouraging or facilitating substitute family placement."[55] Yes, a state might adopt the institutionalization approach because "states" may be restricted by their socio-cultural and economic circumstances. Consequently, AC — as a subject and right — is complex, interrelated, and requires more consideration and guidance.

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[50] Whether ethnic, religious, cultural or linguistic. *Id.*

[51] UNICEF, *supra* note 41, 2007, at 289.

[52] *Id*

[53] "When children have suffered the trauma of losing their family they may present behavioural problems that could result in them being passed from one foster home to another, or in their spiralling downwards, through increasingly restrictive institutions, which could then lead to further behavioural problems. Care must be taken to avoid such disruption in children's lives." *Id,* at 280, 289.

[54] CRC, *supra* note 21, art. 20 (3).

[55] Richard R. Carlson, *supra* note 16, at 16.

2.2 The United Nation Guidelines for the Alternative Care of Children (UNAG)

The relationship between parents and children, AC objectives, standards, decision criteria, and many other matters are not well-articulated in the CRC or relevant provisions of other international instruments. The UNAG aims to fill the gap between state obligations under the CRC and the practical implementation of AC or family protection, by guiding policies and practices of all the involved parties.[56] The guidelines are therefore made "to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so."[57] The UN Committee on the Rights of the Child spent five years working on the UNAG with governments, UNICEF, experts, and young people who have experienced living away from their families. The "quality" of care, on top of that, is a goal while the ultimate aim is to avoid the need to AC through comprehensive preventive measures to lastly achieve DI.[58] The UNAG approach is based on two main fundamental principles. Firstly, the "necessity principle", involves "preventing situations and conditions", and to ensure that placement in an AC care setting is only used where it is necessary (gatekeeping).[59] Secondly, the "suitability principle" whereby, if such AC is indeed deemed to be necessary, the solution is constructive and appropriate for each individual child concerned. [60]

2.2.1 UNAG VS. CRC

When speaking out of the UNAG, it is essential to keep in mind that the principles therein do not create new rights nor commitments of a legally binding nature; they are intended to be suggestions for the formulation of agreed policies for the development of concepts and experience based on the CRC. It is an important document, but it is not necessarily final as is the "CRC," which is

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[56] UNGA, *supra* note 2 , Purpose, para. 1, 2.

[57] *Id*, para. 1.

[58] *Id*, para. 23. *See Also* ChildONEurope: *Alternative forms of care for children without adequate family support: sharing good practices and positive experiences*, *UN Guidelines on alternative care for children. The challenges of out-of-home care: is it the only solution?*, N. Cantwell, 4 Oct 2012, at 13.

[59] N. Cantwell, J. Davidson, S. Elsley, I. Milligan, N. Quinn, *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*. UK: Centre for Excellence for Looked After Children in Scotland, 2012, at 50.

[60] *Id*

considered as the definitive text at all times and underlying reference. [61] However, paragraph 5 of the UNAG restates generally the position of article 20 CRC on the need for AC for CDFE but further determines the manner in which this is to be done practically, with regard to the implementing authority and supervision of the process.[62] The CRC, as mentioned above, refers to CDFE while the guidelines refer to CWPC.[63] The difference is not conceptual but in the scope. The guidelines wanted to use the concept of parental care to expand the scope of AC. An example is, "kinship care" (care by extended family members). For the first time in an international instrument, the UNAG contains an explicit reference to the important role of the extended family (kinship care) in providing informal care for children who could not grow up in the arms of their parents. [64] Moreover, the CRC states that all CDFE have the right to "special protection and assistance provided by the State." This provision refers mainly to the obligations imposed on States to establish a "formal system of alternative care" to respond to the needs of CDFE.

The guidelines, on the other side, seek to provide practical guidance — guidelines — for States on how to "design and implement" their officially recognized AC system. It restates the best interests principle but more directly emphasizes the "individualized responses" for each child of this discussion. Here it is worth quoting paragraph 6 of the guideline: "All decisions, initiatives and approaches falling within the scope of the present Guidelines should be made on a case-by-case basis, with a view, notably, to ensuring the child's safety and security, and must be grounded in the best interests and rights of the child concerned, in conformity with the principle of non-discrimination and taking due account of the gender perspective … Every effort should be made

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[61] ChildONEurope, *supra* note 58, at 13.

[62] "Where the child's own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care, with or through competent local authorities and duly authorized civil society organizations. It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided.." UNGA, *supra* note 2, Purpose, para. 5.

[63] CRC, *supra note 21*, art. 20 (1). UNGA, *supra* note 2, Purpose, para. 5, 29 "Children without parental care: all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances. Children without parental care who are outside their country of habitual residence or victims of emergency situations..."

[64] "Kinship care: family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature." UNGA, *supra* note 2 , Purpose, para. 5, 29.

to enable such consultation and information provision to be carried out in the child's preferred language." This confirms that children have the right to express their views on all matters affecting them. In the context of the right to AC, it generally involves placing the child in a different environment from his or her original family.

The child's right to participate is vital at every stage of the process: from identifying the most appropriate form of AC to the actual placement in out-of-home care, and what follows such as monitoring and evaluation. While the guidelines affirms the CRC principle of continuity of upbringing but in various wording, paragraph 12 states that "All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life." When it comes to alternatives, the guidelines divide them into formal and informal.[65] An additional significance of the UNAG is its recognition of Kafalah as a permanent and appropriate AC of more or less the same weight as adoption.[66] Moreover, the UNAG explicitly kept the scope opened to all forms of AC that considered family-based care or similar to family care (family-like). This shows the importance of the *moral* element of a family life placement as an explicit condition of AC in the UNAG. More significantly, it provides for an after care policy framework to govern the period between when CWPC in AC become adults (18 years) and progress to independence.[67] For instance, moving from care to after-care should take into consideration children's particular circumstances to guarantee their safety.[68] Additionally, care-leavers should be "encouraged to take part in the planning of after-care life. Children with special needs … Both the public and the private sectors should be encouraged, including through incentives, to employ children from different care services, particularly children with special needs." Although UNAG is a non-binding instrument, it is considered to be a useful guide for standard setting in the field of AC for CWPC, and an advocacy tool for both AC and DI.

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[65] UNGA, *supra* note 2, para 29.
[66] *Id*, para 2 (a).
[67] *Id*, para. 132-136.
[68] *Id*, para. 133.

2.2.2 Deinstitutionalization

The UNAG, wherever possible, avoids using the concept DI, since it is generally understood as merely the closure of institutions. However, whenever the term is used within the guidelines, it refers to the transitional process of developing alternatives and services in the community, including preventive measures, to ideally "eliminate" the need for institutional care. Here it is worth quoting paragraph 23:

"While recognizing that residential care facilities and family-based care complement each other in meeting the needs of children, where large residential care facilities (institutions) remain, alternatives should be developed in the context of an overall deinstitutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination. To this end, states should establish care standards to ensure the quality and conditions that are conducive to the child's development, such as individualized and small-group care, and should evaluate existing facilities against these standards. Decisions regarding the establishment of, or permission to establish, new residential care facilities, whether public or private, should take full account of this deinstitutionalization objective and strategy."

According to the UNAG, size is a significant factor. This is, however, to a great extent a result of the now very much reported adverse effect that large-scale group care has on the well-being and development of children, and on the capacity to safeguard and promote their rights.[69] Most importantly, children under the age of 3 years should be provided care in family-based settings although some temporary exceptions can be found, especially when it comes to preventing the separation of siblings and in cases of emergencies.[70] "Institutions" as a term is not defined in the text of UNAG, but it is equated with "large residential facilities" who are to be targeted throughout the process of DI. In other words, the UNAG requires a degree of pragmatism to assess whether or not a particular facility should be considered as an "institution."[71] However, what large

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[69] N. Cantwell, J. Davidson, S. Elsley, I. Milligan, N. Quinn, *supra* note 59, at 43.
[70] *Id*; *See Also* UNGA, *supra* note 2 , para. 22.
[71] N. Cantwell, J. Davidson, S. Elsley, I. Milligan, N. Quinn, *supra* note 59, at 34.

residential facilities are, or what distinguishes them from the small ones? The UNAG does not give a specific, coherent, nor standardized definition. Notably, no solid distinction can be found between both large residential and small facilities. At first glance, what can be understood is that the main concern for the implementation of the Guidelines is the extent to which any AC form, regardless of how it is defined, provides "quality" care necessary and "individualized" in accordance with international standards, and respects the child's overall rights.[72] There are, however, other countries where the AC system is almost entirely based on "institutions" for various reasons and it is therefore a considerable challenge to phase them out.

Phasing out of institutions worldwide is complicated due to the fact that many States still do not believe that a full move towards DI is justified. In a small number of cases, in addition, large facilities can manage to avoid the harmful practices and inadequacies described above. However, none of this should stand in the way of the overall objective of "phasing out institutions" as a care option set out in the UNAG.[73] Thus, the elimination of institutional care - as an AC option - is a goal of the guidelines. Undoubtedly, leaving what constitutes a large or small institution - an important logistic issue within a complicated and sensitive process - to the involved parties might lead to confusion in practice. The UNAG also mentions "supervised independent living arrangements." These are designed for the transition from formal care setting to independent community life for children and young people.[74] The variety of recognized care settings that exist in practice do not always correspond perfectly to generic descriptions; some have been called hybrid. For example, an institution "may be both 'family-like' and smaller than certain family-based settings, and a 'family-type home' may not only look after children but also young people who having been placed there as children, remain there while they set out on the path to achieving an independent life."[75] Rather than proposing an outright ban on institutions, the UNAG permits a

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[72] *Id See Also* UNGA, *supra* note 2 , para. 23.

[73] N. Cantwell, J. Davidson, S. Elsley, I. Milligan, N. Quinn, *Id* , at 43.

[74] UNGA, *supra* note 2, para. 29

[75] N. Cantwell, J. Davidson, S. Elsley, I. Milligan, N. Quinn, *supra* note 59 , at 43.

state to deinstitutionalize its AC system gradually. In doing so, it recommends that in the context of the relevant strategy, any initiative to establish a new institution should be critically examined.[76] Further, particular attention should be given, among other matters, to securing broad support from institutional staff at all levels and ensuring that those with appropriate skills and expertise can be retained in other roles within the new system wherever possible. This is intended to address the resistance by managers and staff of institutions, who feel threatened by the possibility of losing their jobs. However, one might argue that the current policy will likely lead to reducing the "family-atmosphere" within some of those qualified large institutions — although it is not completely clear what large or small residential care is. This is a reasonable argument since the staff (including caregivers) would probably feel threatened. Thereby, the negative atmosphere might exist in the environment and subsequently result in adverse effects for children under their care. The author invites other concerned researchers to seriously investigate this matter in depth. The UNAG orientations do not take into account the availability of full implementation resources in any given country.[77] The UNAG encourages the allocation of resources (paragraphs 24 - 25), the primary role of which is to establish a path to follow.[78] When economically weak countries seek assistance from foreign entities, they should abstain from any initiative inconsistent with the UNAG to receive the foreign support.[79]

Lastly and interestingly, the Guidelines within the UNGA, should not be construed as encouraging or condoning lower standards than those that may exist in particular States, including their legislation. Likewise, competent authorities, professional organizations, and others are encouraged to develop specific regional, national, or professional guidelines based on the spirit of these guidelines as minimum standards.[80] The regional and national systems are therefore entitled to improve these provisions and policies as long as the enhancement is compatible with, or higher than, the UNAG.

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[76] UNGA, *supra* note 2, para. 23.
[77] UNGA, *supra* note 2, para. 25; N. Cantwell, J. Davidson, S. Elsley, I. Milligan, N. Quinn, *supra* note 59, at 21.
[78] UNGA, *supra* note 2, para. 25, 26.
[79] *Id*
[80] *Id*

3. REGIONAL PERSPECTIVE

Regional human rights instruments and developments, play an important role in the promotion and protection of human rights. They help to localize international human rights norms and standards, reflecting the particular human rights concerns of the region. The regional human rights perspective will, therefore, help us to understand more specific issues on AC and DI. This chapter will examine the ACRWC which is a very similar instrument to the CRC in terms of drafting and contextualization. Then, the discussion will move to the alternative care policy in Africa. Finally, some of the relevant developments in the European region will be analyzed.

3.1 The African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC was drafted in part in response to African states' "under-representation" in the CRC drafting process and the need to address specific issues that are particular to the rights of children in Africa beyond those covered by the CRC.[81] The ACRWC draws inspiration from the CRC as evidenced by the fact that the provisions of the former are framed similarly to the latter. In its preamble, the ACRWC makes direct reference to the CRC, and the ACRWC is equally based on the same basic principles of children's rights that the CRC has established.[82] In Africa, children are affected by various kinds of abuse, including economic and sexual exploitation, gender discrimination and access to health and participation in armed conflicts.[83] For example, in Sub-Saharan Africa, as of 2014, an estimated 13.3 million (11.1 – 18.0 million) children worldwide had lost one or both parents to AIDS. More than 80 per cent of these children (11.0 million) live in Sub-Saharan Africa. All these factors and figures show the importance of an AC policy in Africa.[84] Thus, the complementary role that the ACRWC plays to the CRC in the rights of children is quite established by being region-specific in several areas.

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[81] A. Holzscheiter, N. Cantwell, *supra* note 5, at 22.

[82] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49, preamble; The four academically well-known fundamental principles of children's rights are the right to life, survival and development, the child's best interest, non - discrimination, and child involvement.

[83] Other factors affecting African children include migration, early marriage, urban or rural differences, children's homes, street children and poverty.

[84] UNICEF, *Global and regional trends, July 2018*. Retrievable at <https://data.unicef.org/topic/hivaids/global-regional-trends/> (accessed 19 april 2019).

3.1.1 ACRWC VS. CRC

Article 25 of the ACRWC is the African regional equivalent of article 20 of the CRC regarding AC, notably, both provisions' text are similar. The wording of article 25, however, stipulates that AC should be made available to CDFE "for any reason" as opposed to article 20 CRC from which that emphasis is explicitly lacking. This might be due to some particularities in Africa when it comes to the reasons of family deprivation. [85] The ACRWC also re-states the importance of the best interests and continuity in upbringing concepts in the context of AC, and gives almost the same legal considerations to both of the principles as previously discussed. However, extra emphasis on the best interests principle can be found in the ACRWC. To illustrate, the mentioned principle must be considered not only in terms of family deprivation but also when it comes to AC decisions, a point, the CRC lacks.[86] This again shows the importance of the principle throughout the process as the UNAG similarly affirms. The ACRWC also reaffirms the importance of a family environment for the child's harmonious development.[87] Children of imprisoned mothers, a new and positive dimension is introduced by the ACRWC, special treatment rights such as the priority of non-custodial sentences and alternative holding institutions in case of custodial sentences shall apply to expectant mothers, mothers of children, and young children.[88] This shows the superiority of the family life as a right and need. In addition, article 25 of the ACRWC compared to article 20 of the CRC, refers to the "alternative family care" and not merely "alternative care" which suggests the priority of "family-based" or "family-like" alternatives for CDFE over a non-family-centric care, such as institutional ones.[89] One other regional instrument, the Arab Charter on the Rights of the Child is more explicit than both the CRC and ACRWC regarding the terminology. This is because the charter refers directly to alternative family (عائلة بديلة) rather than a mere alternative care or alternative family care. In the context of alternatives, article 25 of the ACRWC does not

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[85] ACRWC, *supra* note 82, art. 22 (the prohibition of the use of children as soldiers), art. 23/4 (special protection for internally displaced children), art. 11/3/e (special measures for the right to education of the girlchild), art. 21 (the prohibition of harmful traditional practices).

[86] ACRWC, *supra* note 82, art. 22

[87] *Id*, preamble.

[88] *Id*, art. 30.

[89] This includes the placement in "suitable institutions" as an alternative care form. *See both* ACRWC, *Id*, art. 22 & CRC, *supra* note 21, art. 20 (1).

explicitly mention kafalah but foster placement and adoption (article 24) as one of the AC options.[90] Both articles, however, suggest that the AC options listed are non-exhaustive.[91] Consequently, the options mentioned under article 20 of the CRC, are recognized under article 25 of the ACRWC, as they are "family-type" AC forms.

Strikingly, "culture" has been excluded from the list of the elements that constitute a child's background with regard to continuity in upbringing.[92] This is indeed not an omission, but a piece of evidence showing that culture - as an element of the African children's background - might be an obstacle affecting the right to AC. As previously mentioned in the introductory chapter, culture is also a practical challenge to DI. However, from the author's perspective, excluding culture, in this context, is not a solution but detraction and travesty of reality. In this case, some might argue that the supremacy of children's rights must be over any inconsistent custom, tradition, cultural or religious practice. Of course, children's rights should be legally weightier than any influential factor, but this should not be achieved by ignoring, excluding, or erasing the cultural aspect of the child's background. The CRC, as already discussed, has recognized the cultural background of a child when it comes to solutions to out-of-home children, and has given culture "due regard" in relation to their consideration. Therefore, the rights of children in general and of CWPC in particular should not be tackled by escaping reality but instead facing it. In all cases, however, the principle of the best interests of the child is a key, and the exclusion of "culture" from the background of a child is, in principal, inconsistent with the best interest of the child. The ACRWC as well as CRC expressly do not provide for kinship care as an AC option, although it is the reality of many CDFE, especially in Africa. It is spontaneously practiced informally or at the request of the parents, and does not impose "legal" responsibilities on the caregivers.[93] As mentioned in the UNGA, most of CWPC are taken care of them informally by their relatives (kinship care) or "others." It can be said that there is no specific state obligation towards CWPC that are taken up

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[90] ACRWC, *supra* note 82, art. 25; CRC, supra note 21, art. 20 (3).
[91] *Id*
[92] "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 up-bringing and to the child's ethnic, religious or linguistic background."
ACRWC, *supra* note 82, art. 25 (3).
[93] N. Cantwell, *supra* note 5, at 19.

as the most common and important form of AC, as both CRC and ACRWC do not specifically regulate its role and status. This is a more curious situation in Africa, as the ACRWC acknowledges the role of "parents or other responsible persons" in the child upbringing.[94] Suitable institutional care, as the CRC, is recognized as an AC option.

In 2009, a conference on family-based care in Africa, reflected a widespread recognition across the continent of the need to shift towards ensuring that children have family care. This was a landmark forum to address these issues affecting the continent and what needs to be done for key actors in child care and protection. It encouraged several countries in the region to undertake policy reforms at the regional and national level.

3.1.2 Alternative care policy

Most African nations have made legislative attempts to ratify the international human rights and children's rights instruments to make their legislation in accordance with the principles laid down especially in the CRC and ACRWC. However, like most CRC signatories, many African countries fall short of the spirit of CRC. Another influential factor in shaping the legal framework of many African countries is the colonial origins. In one study, the authors found "a consistent gap at the highest policy levels in terms of an overarching framework that defines the State's relationship to families and communities and the rationale for state action in relation to child protection."[95]

The model reflected the State's view as providing welfare and care to children and families in need in the former colonies of France (e.g. in Côte d'Ivoire, Niger, and Senegal), and a state's responsibility for the protection of a child was limited to situations where it was at risk or had suffered significant damage in former colonial countries (e.g. Ghana and Sierra Leone). Furthermore, in South Africa, tensions appear between protecting children and child welfare

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[94] "Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty." *See* ACRWC, *supra* note 81, art. 20 (1).

[95] Child Frontiers, *Mapping and assessing child protection systems in West and Central Africa: a five-country analysis paper*, 2011, at iv. *Cited in*, I. Milligan, R. Withington, G. Connelly, C. Gale, Alternative Child Care and Deinstitutionalisation in Sub-Saharan Africa, Findings of a desk review, November 2016, at 44.

policies, which threatens the transition to a more holistic approach to child welfare.[96] Child protection and welfare responses have often been developed in the form of a national action plan by ministries and are often developed with other agencies such as NGOs, INGOs, and international donors.[97] For example, in Kenya, the policy landscape includes a National Children's Policy (2008), which provides the framework for implementing the Children's Act (2001), a National Action Plan for Children to address each policy area with relevant child welfare interventions, and an Action Plan for Orphans and Vulnerable Children. This framework is designed to strengthen planning and coordination among the various system stakeholders and to build their capacity.[98] Besides developing a broader legal and policy framework for child welfare and protection, many African nations have developed specific AC policies as a response to the UNAG. For instance, in Ethiopia, the National Guidelines on Alternative Child Care (2009) have been developed, in cooperation with the Ministry of Women and the Italian Development Cooperation, to bring them up to standard internationally. In Zanzibar, the International Guidelines for the Alternative Care of Children are also a tool to improve existing legislation, policies, and guidelines. In Kenya, the Guidelines for Alternative Child Care 2011 are intended to improve current legal and child care practice, and the Guidelines for Alternative Care for Children and Minimum Standards for Charitable Child Institutions (CCIs) as well as to outline best practice on admission, placement, and review processes.

While governments are legally committed to helping vulnerable children, they rely on NGOs, the private sector, and international donors for the provision of services and assistance to children in need of care and protection. Even when it comes to institutionalization, in most cases, it is not provided by states. In other words, in Africa, most of the services of institutions and institutions providing services to children, are not provided by the State but NGOs or individuals (informal

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[96] J. Schmid, *Quo vadis? Trends in South African child welfare policies*, International Social Work. 50 (4), no year, at 500-514.

[97] A. Rosenberg, K. Hartwig, M. Merson, *Government–NGO collaboration and sustainability of orphans and vulnerable children projects in southern Africa*, Evaluation and Program Planning, 2008, at 51–60.

[98] I. Milligan, R. Withington, G. Connelly, C. Gale, Alternative Child Care and Deinstitutionalisation in Sub-Saharan Africa, Findings of a desk review, November 2016, at 44.

care).[99] On the other side, in western Africa for example, child protection strategies have come in specific child categories and types of abuse, largely reflecting international donor trends such as HIV or AIDS vulnerable children or orphans, children trafficked, children on the street, and victims of sexual violence.[100] The result was ineffective protection, proliferation of residential care, and the absence of practical guidelines and international standards to guide donors and NGOs.[101] Inconsistency of implementation despite significant legal and policy development is another dilemma.[102] Perhaps this was because residential providers were not registered as child-care facilities which made the implementation of the guidelines difficult in practice.[103]

In a previous study, the author argued that potential challenges in implementation might be found due to the fact that the current international legal and policy framework examines the right to AC from the ideal and developed countries' perspective.[104] Further, although some households have internally developed standards and guidelines, while others (such as SOS Children's Villages) have used international guidelines, the difficulties of implementing the guidelines in practice remain problematic.[105] Other practical obstacles for AC and DI include, inter alia, an effective gatekeeping based on individual assessment of children's needs and control over admissions to an AC home. In most of the African states, social workers are few and have limited training and little authority over the provision of NGOs, and actual gatekeeping will be almost impossible. Nevertheless, as some countries, such as Rwanda, have moved to DI and built community-based support, a gatekeeping process has, therefore, emerged to ideally achieve the so-called orphanage-free.[106]

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[99] U. Assim, *In the best interest of children deprived of a family environment: A focus on Islamic Kafalah as an alternative care option*, LLM degree (Human rights and democratisation in Africa), Faculty of law, University of Pretoria, 2009, at 97.

[100] Child Frontiers, *supra* note 95, at iv.

[101] I. Milligan, R. Withington, G. Connelly, C. Gale, *supra* note 98, at 45.

[102] *Id*

[103] *Id*

[104] R. Zahda, *supra* note 4, at 94.

[105] *Id*

[106] *See generally* Better Care Network, UNICEF, *An Analysis of Child-Care Reform in Three African Countries; Ghana, Rawanda, and Liberia*, March 2015; *See Also* Apolitical, *Rwanda wants to become Africa's first orphanage-free country — here's how*, May 24, 2018. Retrievable at <https://apolitical.co/solution_article/rwanda-wants-to-become-africas-first-orphanage-free-country-heres-how/> (accessed 19 april 2019).

3.2 The European Development

Despite the apparent lack of strong human rights legislation regarding the care and the rights of children without parental care in the European region,[107] many recent developments are crucial in understanding the quality required for CWPC. Therefore, this section will analyze some of these relevant developments. Firstly, the rights of Children Living in Residential Institutions and, secondly, the Transition from Institutional to Community-based Care.

3.2.1 The rights of Children Living in Residential Institutions

The European region contains many legal and policy references that could help in the interpretation of the right to AC. The Recommendation of the Committee of Ministers of the Council of Europe 2005 (5) on the rights of children living in residential institutions, is one important document although the UNAG prevails on it.

The Recommendation states that institutional care should be the last resort by means of preventive measures. It also indicates that despite preventive measures, some children still have to be placed away from their families.[108] In the context of residential care, it requires that children outside their families and especially those registered in institutions should grow dignified in the best possible condition, without being marginalized in childhood or adulthood, and should not encounter any obstacle to be full citizens in European societies.[109]

"Institution" as a term is not defined therein, but subsumes a range of various forms of facilities. However, qualified facilities are best described as "a small family-style living unit."[110] The Council of Europe's Recommendation is based on basic principles. For instance, it reaffirms the importance of the family life as the natural environment for the growth and well-being of the child

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[107] A. Holzscheiter, N. Cantwell, *supra* note 5, at 23.

[108] Council of Europe, Committee of Ministers, *Recommendation Rec(2005)5 of the Committee of Ministers to Member States on the Rights of Children Living in Residential Institutions*, 16 March 2005, preamble.

[109] *Id*

[110] *Id*, Guidelines and quality standards.

and the parents' primary responsibility for the upbringing and development of their child. Then, it emphasizes many points that are either part of the "necessity" or "suitability" principle. For example, institutionalization should be the "exception", as soon as possible, aim at "successful social integration or reintegration" of the child, and must guarantee "the full enjoyment of the child's fundamental rights."[111]

These rights are primarily the child's best interests of the child, non-discrimination, participation, and the right to development.[112] An example, children who have experienced living in residential care are entitled to a "leaving care"[113] policy which evaluates their needs in accordance with the objective of reintegrating into family or society, and provides adequate support for them in which reflects their right to development. One other interesting principle is that "measures of control and discipline which may be used in residential institutions … should be based on public regulations and approved standards."[114]

Moreover, the Council of Europe's Recommendation adds specific rights of children in residential institutions in order to ensure respect for the mentioned basic principles and fundamental rights of the child. Such rights include, inter alia, a child who lives in residential care has the right to good quality health care; to respect her or his human dignity and physical integrity; to equal opportunities; to have access to all types of education, vocational guidance and training, under the same conditions as for all other children; participation in decision-making processes concerning the child and the living conditions in the institution; and the right to make complaints to an identifiable, impartial and independent body in order to assert children's fundamental rights.[115]

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[111] *Id*, basic principles.
[112] *Id*
[113] *Id*
[114] *Id*
[115] *Id*, Specific rights for children living in residential institutions.

To ensure the implementation of these principles and rights, it can be noticed that the standards of the Recommendation insist more on the *moral* element than the material one. For example, the placement should be close to the social environment of the child to allow parents to exercise their responsibility and to have regular parent-child contact. An individual care plan based both on developing the children's skills and capacity with respecting their autonomy should be developed. Such planning should give priority to the physical and mental health of the child. Conditions for continuity in education and emotional attachment between the staff and the children are preferable, in particular through staff stability.

It can be said that many of these principles are built on the wide understanding of continuity of upbringing. More attention is also given to the *moral* element within a facility and can be realized, especially when it comes to the internal organization of an institution required by the Recommendation. In this sense, according to the Recommendation, any institution should be based on the "quality" and "stability" standard of living units. These two standards require many internal elements such as institutions being mixed living units (in the best interests of the child), with high professional standards of the staff with adequate salaries, stability of staff, and a sufficient number of staff members.[116]

The Council of Europe's Recommendation is important in the context of DI although it deals with the quality of care in an institutional environment. It is an advocacy tool to inspire improvement on child care systems. However, the standards therein can inspire us to assess the suitability of any other alternative option. In other words, it deals more with the quality of care which is a conditional matter for any AC form, and necessary for the preparation to the transition from institutional to community-based care.

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[116] *Id*, Guidelines and quality standards.

3.2.2 The Transition from Institutional to Community-based Care

Moving to Community-based Care is essential because the negative results of poor institutional care are not restricted to the long-term adverse effects on child development. Human rights violations can also be found in such an arrangement. In several circumstances the European Court of Human rights examined cases where some institutional care facilities violate rights enshrined in the ECHR, namely, prohibition of torture (article 3)[117], the Right to liberty and security (article 5)[118], and the Right to respect for private and family life (article 8). [119]

Violating the child's rights in institutional care is, of course, a serious and unacceptable breach of the *moral* element of a family life. However, research has shown that the current DI process has positively led to changing people's attitude towards institutional childcare (less human rights violations and more community contribution).[120] Another important factor of the transition from institutional to community-based care is the use of resources in communities.[121]

Some argue that "poor quality institutional care can be cheaper than high quality family and community-based care but is likely to be more costly to public authorities in the long-term due to social welfare, health and public security costs."[122] Despite the rationale behind this argument, it

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[117] In violation of article 3, the Court found that the applicant was subjected to degrading treatment in which he was forced to live in unsanitary and unsuitable conditions for more than seven years. *See* ECHR 36760/06, 2012.

[118] Regarding persons with disabilities in relation to institutional care, the Court found - in violation of article 5 - that the applicant (mental illness and declared officially disable) was detained, considering that he was "confined to hospital for several months, he was not free to leave and his contacts with the world were seriously restricted." *See Shtukaturov v Russia*, ECHR 36760/06, 2012.

[119] In violation of article 8, interference in the rights contained in article 8 must be deemed "necessary in a democratic society" or meet one of the exceptions listed in the scope of the article. A decision to remove a child from a family must therefore be justified accordingly. *See Havelka and others v. Czech Republic*, ECHR 23499/06, 2007; In case of removing children from their family environment, the State is obliged to ensure that the intervention are both "necessary" and "proportionate". An action may be necessary when the child is at risk; the action taken must be proportionate to the situation. Thus, placing children in institutions solely on social grounds is a violation of the right to family life. *See Wallova and Walla v. The Czech Republic* ECHR 23848/04, 2006.

[120] A. Nordin, *supra* note 18, at 35-38.

[121] "assessment of the situation; developing a strategy and an action plan; establishing the legal framework for community-based services; developing a range of services in the community; allocating financial, material and human resources; developing individual plans; supporting individuals and communities during transition; defining, monitoring and evaluating the quality of services; and lastly developing the workforce." *See* European Expert Group on Transition from Institutional to Community-based Care, *supra* note 15, at 11.

[122] Eurochild, *Deinstitutionalisation and quality alternative care for children in Europe; Lessons learned and the way forward Working paper*, October 2012, updated September 2014, at 20.

is essential to bear in mind that the principle of the best interests of the child is not merely an idea of comfort for the parties involved, or economic gains. Moreover, the transition to community-based system is a substantially difficult task. The Common European Guidelines on the Transition from Institutional to Community-based Care 2012 is a significant document in this regard. The guidelines show the complexity of the process which requires[123] reforming the entire child welfare and protection system of a state which can be challenging for the most developed countries. Thus, such reform will likely be problematic, especially in developing countries where the socio-cultural and economic factors are influential, and requires first opening the gate of community before closing the doors of residential care.

Nevertheless, it is also well-known that traditional community-based alternatives, if they exist, might be negative on children's development or violate the child's rights similar to institutional care. An extensive 2017 study conducted for the European Union on reforming AC systems on the three continents of Africa, Asia, and Latin America, affirms that "while the negative effects of institutional placements are well-known, the serious risks associated with all family-based forms of AC, both informal and formal, are often underestimated or even ignored".[124] For more explanation, Foster Care, can be profoundly injurious to a child's mental health, and children who live in "stranger" foster care "have more compromised developmental outcomes than children who do not experience placement in foster care ... children in foster care are more likely to develop behavioral, educational, and emotional problems than children who are raised by abusive and high-risk parents."[125] Children in foster care, additionally, might face many challenges, such as abuse and neglect, exposure to violence and substance abuse, placement instability, and a lack of access

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[123] *Id*

[124] European Union, SOS Children's Villages International, *Towards the right care for children: Orientations for reforming alternative care systems Africa, Asia, Latin America*, Luxembourg, Publications Office of the European Union, 2017, at 9. Retrievable at <https://ec.europa.eu/europeaid/sites/devco/files/rightcareforchildren-sos-ec-jan2017.pd_.pdf> (accessed 12 March 2019).

[125] Children Screaming To Be Heard, R. Joseph, *Negative effects of foster care on emotional, intellectual & Psychological development*, December 3, 2012. Retrievable at <https://www.childrenscreamingtobeheard.com/negative-effects-of-foster-care-on-emotional-intellectual-psychological-development/ > (accessed 25 April 2019).

to supportive services.[126]Also, one might argue that a foster family can be a form of materialistic relationship since fosters receive financial support from governments to take care of those children. In addition, when we speak out of communities, it is important to mention that many communities do not consider CWPC as rights bearers but instead charity receivers, which, in turn, makes the idea of DI very linked to the cultural attitude of a society.

Moreover, lately, the trend has turned to placing these children in kinship foster care – the home of a family member or family friend instead of a stranger. In this aspect, a recent Australian report, *'It's been an absolute nightmare': Family violence in kinship care* investigates the types, frequency and impacts of family violence in kinship care arrangements among a cohort of carers in Victoria during November 2016 – May 2017. The report highlights the varied nature of family violence in kinship care arrangements and the extensive negative impacts on carers and children in their care.[127] Assuming that the community or family-based alternatives are available, some conservative societies are gender-based discriminatory. This affirms that none of the alternatives is totally safe for the child. In theory, as shown, legal and policy presume that community-based alternative is the key to good AC. In practice, however, quality care is not simply guaranteed by the nature of the arrangement[128] but by the *moral* element it represents. Therefore, one might argue that any form of AC which violates children's rights and lacks quality is institutionalizing children. This argument can also be implemented on any *dysfunctional* biological family. All this discussion proves that the right to AC is not merely a question of placement but mainly family elements. This should be a core reason for the stakeholders to work and invest all the possible efforts on creating innovative solutions which promote and protect the right of CWPC to securing an effective alternative family life in which guarantees quality of care.

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[126] N. Williams-Mbengue, *The Social and Emotional Well-Being of Children in Foster Care*, at 3. Retrievable at <http://www.ncsl.org/Portals/1/Documents/cyf/Social_Emotional_WellBeing_Newsletter.pdf> (accessed 25 April 2019); *See also* B. Troutman, S. Ryan, M. Cardi, *The Effects of Foster Care Placement on Young Children's Mental Health*, 2019; *Also* T. McDonald, R. Allen, A. Westerfelt, I. Piliavin, *Assessing the Long-Term Effects of Foster Care: A Research Synthesis.*

[127] R. Breman, A. MacRae, Baptcare, *It's been an absolute nightmare' Family violence in kinship care*, August 2017. *Watch* the stories of some kinship carers of the study <https://www.youtube.com/watch?v=8vdec2JvY_c> (accessed 25 April 2019).

[128] European Union, SOS Children's Villages International, *supra* note 123, at 27.

4. Quality Care in the context of Residential Care

As many of us know, life is not static. We move, change accommodation or jobs, get sick, separate from partners, and might lose people we love. For CWPC, change is a frequent and even defining feature of their lives and future. This change defines the environmental factors of a family life, the quality of a child's home is typically the main influential aspect. Recent research suggests that there are associations between the degree of environmental quality and good development outcomes. Therefore, understanding the missing links in poor residential care would enable us to investigate the possibility of improving the care in this form of AC.

4.1 The missing links

Children in poor residential care lack links to a quality family life and community. This section will, thus, analyze some of the most well-known and common negative impacts of institutional care by firstly addressing the lack of individuality that institutional care has on children. Secondly, the risks that institutional care has on later life.

4.1.1 Lack of Individual Care

Childhood is the time to sow the seeds of a future health and well-being. It ideally takes place in a family life which offers individual care in an environment that is safe, loving, enriching and happy. Evidence indicates that most institutions, especially for infants and young children, do not promote the ideal development of quality care for a child compared to an effective home care family environment. Placing at institutions can in many cases have long and sometimes permanent effects on the brains of children and their physical, intellectual and social-emotional development. In large-scale institutions, children often have prevalent growth challenges, including stunting, and impairments of fine and gross motor skills and coordination.[129] The UNAG mentions large institutions.

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[129]A. Levin, C. Zeanah, N. Fox, C. Nelson, *Motor Outcomes in Children Exposed to Early Psychosocial Deprivation*, The Journal of Pediatrics , Vol. 164, No. 1, 2014, at 123-130. *See* also B. Roeber, M. Gunnar, S. Pollak, *Early Deprivation Impairs the Development of Balance and Bilateral Coordination*, 2013, at 1-9.

This is because the larger institutions are, the lower the chance that children will be cared for by a consistent carer who focuses on the individual needs of a child. Children are usually fed on a timetable rather than on demand, diapers are changed on a timetable rather than as necessary, and less attention is paid to the individual growth, social and emotional development of the children.[130] Such an arrangement may not only lead to health problems and development but also isolation and lack of identity.[131]

The findings in two various studies on the ratio of caregiver-child in institutions were included in Ethiopia and Rwanda. In the Ethiopian study, three orphans reported having administrative staff but no care caregivers.[132] The rest included between 33 and 125 children per caregiver.[133] In Rwanda, the study found that the average ratio was one caregiver to 13 children.[134] Moreover, evidence from Eastern Europe shows that more children leave large-scale institutions with disabilities than enter them, suggesting that orphanage care can actually cause disability in children.[135]

As previously mentioned, in many environments including families, abuse and neglect are documented. However, many institutions utilize volunteers to augment caregiving functions or to fill a human resource gap. Such practices, although often well-intentioned, can be detrimental to children's social and emotional development and result in long-term attachment issues.[136]

The longer a child is in large-scale residential care, the more severe and adverse consequences associated with institutions are more sensitive for young children, particularly those under the age of three years. Dixon and Misca maintain that "Research shows that the first three years of life are

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[130] The Faith To Action Initiative, *Children,Orphanages, and Families: A Summary of Research To Help Guide Faith-Based Action*, 2014, at 15.

[131] *Id*

[132] *Id*

[133] *Id*

[134] Ministry of Gender and Family Promotion, *Republic of Rwanda (MIGEPROF) and Hope and Homes for Children,* National Survey of Institutions for Children in Rwanda, 2012. review

[135] *See generally* K. Browne, *The Risk of Harm to Young Children in Institutional Care*, Institute of Work, Health & Organisations, University of Nottingham, UK, 2009. Retrievable at <http://unitingforchildren.org/wp-content/uploads/2013/03/harm-the-risk-of-harm.pdf> (accessed 15 May 2019).

[136] The Faith To Action Initiative, *supra* note 130, at 16.

critical for health and development. Young children (0 to 3 years) placed in residential care institutions without parents are at risk of harm in terms of attachment disorder, developmental delay and neural atrophy in the developing brain."[137] Therefore, some researchers recommend that even if the institution supports a high level of care, no children under 5 years of age must principally be placed within a residential institution. In circumstances when infants would require temporary placement in out-of-home care and there is no ready access to foster care, emergency placements should not exceed 3 months and should take place under a high-level care set-up.[138]

Some research in the area indicates that even good high-quality residential care, especially within the first 3 to 5 years of life, is detrimental in terms of attachment and socio-behavioral development. To this end, paragraph 22 of the UNAG affirms that "in accordance with the predominant opinion of experts, AC for young children, especially those under the age of 3 years, should be provided in family-based settings. Exceptions to this principle may be warranted in order to prevent the separation of siblings and in cases where the placement is of an emergency nature or is for a predetermined and very limited duration, with planned family reintegration or other appropriate long-term care solution as its outcome."[139]

Notably, one of the exceptions for placing children under the age of 3 in institutional care is in order to prevent the separation of siblings, an issue, family-based alternatives do not normally guarantee.[140] However, the same paragraph suggests that stakeholders should seek "other appropriate long-term care solution" than institutional care. This is because institutional care is often temporary and can be risky for children's later life.

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[137] L. Dixon, G. Misca, *Mapping the number and characteristics of children under 3 in institutions across Europe at risk of harm: EU Daphne Programme 2002- 2003*, Copenhagen: World Health Organisation, 2004, at 1.

[138] *See* K. Browne, C. Hamilton-Giachritsis, *Identifying good practices in the deinstitutionalisation of children under 5 years from European institutions*. Daphne Project Report, University of Birmingham, 2005.

[139] UNGA, *supra* note 2, para 22.

[140] A. Holzscheiter, N. Cantwell, *supra* note 5, at 25.

4.1.2 Risks on later life

In functional families, children do not "leave" from care unless they are prepared. They remain connected and have a social support network with their parents, siblings and the community. This is rarely the case for institutional-type care. Children, usually 18 years old, are asked to leave the institutional care when they reach adulthood age which constitutes a second abandonment. These care-leavers are frequently unprepared for independent life. After their departure from institutional care, they often struggle to find accommodation, often leading to frequent modifications in living conditions.[141] They could also not rely on a constant source of income and thus have to work different jobs to survive. This situation will likely lead them to live on the margins of society, in poverty.[142]

Further, female care-leavers often turn into parents at a very young age which is a seemingly unconscious compensation for their childhood suffering.[143] Then, pregnancy, soon after care emerges as a salient issue in a number of studies.[144] Females leaving their homes are a very vulnerable subset which requires special attention in relationship skills and personal identity development. The UNAG affirms these needs by stating that "the process of transition from care to aftercare should take into consideration children's gender, age, maturity and particular circumstances and include counselling and support, notably to avoid exploitation."[145]

Moreover, one study found that none of the participants (care-leavers) were able to continue post secondary education on a full-time basis. The study attributes this to some influential factors, such as previous negative experiences of schooling, lack of motivation, and leaving care so early.[146] Care-leavers also lack sustainable relationships. This is because some of them might grow up alone or witness violence which impacts their ability to be empathic. For example, in the same study, a

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[141] Child Family Community Australia, M. Campo, J. Commerford, *Supporting young people leaving out-of-home care*, CFCA PAPER NO. 41 2016, at 7.

[142] *Id*, at 8.

[143] *Id*

[144] *Id*

[145] UNGA, *supra* note 2, para 123.

[146] A.Angela, A. Nadya, A. Claire, C. Juan, M. Daniel & M. Graziella, Study 3: Exploring the Long-Term Outcomes of Children in Residential Out-of-Home Care, 2012, at 145.

care-leaver described how she was looking for a relationship and how challenging she found it. [147] Post-institutionalized children, in most cases, leave care early. It is rarely possible for most proper parents to ask their child who is adequately adapted to leave home when they are teenagers. Taking account of the Western trend of an increasingly delayed readiness to enter the adult life, the impact of leaving home care at such a young age is even more striking. For example, the average age at which parenting is taken out is 23 in UK and 29 in Spain which is significantly older than institutional care.[148] Thus, research stresses on the importance of making residential homes continue caring for children beyond the age of sixteen.[149] In this context, the UNAG mentions the importance of such process by asserting that all stakeholders should have an after-care policy.[150] On the other side, leaving care is not in itself problematic, but it can be, if it has been taken without preparation. Good preparation requires time and patience. For instance, Ethiopian young people who have left care have said that they feel their orphanage would "be their home forever."[151] If the orphanage (institution) is not a permanent home, then, teaching the prospective care-leavers how to create a new home is necessary. Such a step, requires firstly practical skills and support through money management, job finding or renting a house, typically learned in family life.[152] Planning and preparation for leaving-care is an important step recognized by the UNGA. [153]

During planning for leaving care, accommodation can be the biggest challenge. This is because a care leaver has to invest a considerable part of her/his salary - in case of employment - on accommodation, hindering the possibility of having a decent life especially for those care-leavers who do not receive state assistance. This care-leaver might, therefore, end up in an unstable life

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[147] "spoke about how after care she looked for a relationship that would compensate for the pain she endured in her childhood. She sought to meet her relational and contact seeking needs through any available relationship. Not surprisingly this led to further pain and disappointment." *Id*, at 146.

[148] D. Valle, J.F., A. Bravo ,E. Alvarez & A. Fernanz, *Adult self-sufficiency and social adjustment in care leavers from children's homes: a long-term assessment*, Child and Family Social Work, 13(1), 2008, at 12-22.

[149] A.Angela, A. Nadya, A. Claire, C. Juan, M. Daniel & M. Graziella, *supra* note 145, at 150.

[150] "Agencies and facilities should have a clear policy and should carry out agreed procedures relating to the planned and unplanned conclusion of their work with children to ensure appropriate aftercare and/or follow-up." UNGA, *supra* note 2, para 131.

[151] SOS Children's Villages, Ageing Out of Care, From care to adulthood in European and Central Asian societies, 2010. Cited in, The Faith To Action Initiative, *supra* note 130, at 17.

[152] The Faith To Action Initiative, *supra* note 130, at 17.

[153] "...Children leaving care should be encouraged to take part in the planning of aftercare life. Children with special needs, such as disabilities, should benefit from an appropriate support system, ensuring, inter alia, avoidance of unnecessary institutionalization..." UNGA, *supra* note 2, para 132.

with no one to resort to, while other adults who have an effective parental care can, in all cases, rely on their parents to at least accommodate them. In this context, the UNAG does not directly refer to accommodation.[154] However, as some studies argue, leaving care without policy and preparation might lead to a "chaotic way of life", which certainly delayed the possibility of a stable decent life.[155] Stable placement is essential for quality life, some studies demonstrate that young people with stable care positions are more likely to be educationally successful.[156] Thus, reducing these risks should be by creating aftercare policy involves working with children to plan for life after care and adulthood – including helping them to determine the most appropriate living environment, develop necessary life, financial management and job skills, and ensure that they have reliable support.

Once children leave care, they should be encouraged to maintain contact with their previous caregiver and friends, have access to basic services and quality housing with financial assistance, and be supported to follow educational, vocational and employment opportunities. The aftercare policy within the UNAG urges stakeholders to encourage both the public and private sectors, to employ children from various care services, especially children with special needs.[157] Examples of DI efforts have shown that a minimum package of support is needed for successful transition.[158] This is true for children being reintegrated into families and care-leavers who are transitioning to independent living situations. Support should include material or financial assistance to the family or youth as well as a preparation period.[159] This is to ensure that the child and the family are both ready for reunification or that the youth is helped to be self-supporting in the community, such considerations might result in improving the outcomes of the AC options including institutional care. [160]

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[154] The UNAG directly refers to many influential factors such as education but not accommodation. UNGA, *supra* note 2, para 132-136.

[155] The Faith To Action Initiative, *supra* note 129, at 104.

[156] P.J. Pecora, ,J. Williams, ,R.C. Kessler, , A.C. Downs, , K. O'Brien, , E. Hiripi, & S. Morello, *Assessing the Effects of Foster Care: Early results from the Casey National Alumni Study*, The Foster Care Alumni Studies, December 10, 2003, at 26-35.

[157] UNGA, *supra* note 2, para 132.

[158] *Id*, para 132-136.

[159] The aftercare policy within the UNAG does not address institutional care exclusively. UNGA, *supra* note 2, para 131.

[160] *Id*

4.2 Can Residential Care Improve?

Some evidence and best practice demonstrate that the better models of residential care offer small environments with qualified and consistent caregiving. This section will, firstly, examine the possibility of improving institutional care through existing research. Secondly, demonstrating the paradox of residential care from a legal perspective.

4.2.1 Evidence of improvement

Comparisons of children randomly enrolled to foster care versus institutionalization propose that the delayed development and long-term deficiencies and problems of institutionalized children are more likely to be connected with the environment of caregiving.[161] This general proposal could be partially tested through an intervention in a facility which has improved the caregiving environment but has not adjusted any of these potential confounds. The relationship within a family is the most important aspect. Many studies have affirmed that children develop within a placement of relationship.[162] In this sense, the St. Petersburg-USA Orphanage Research Team[163] has tested such an intervention. The study was based on two major components. Firstly, training and encouraging caregivers to act in a more typical *parental style* with the children. Secondly, changing the institutional environment and employment patterns to promote more positive interactions between carers and children by transferring the institution to a more *family-like* placement. *Training* included providing caregivers with knowledge of early childhood development of typically developing children and children with disabilities. It encouraged caregivers to interact with children in developmentally appropriate, warm, caring, sensitive,

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[161] J. McCall, *Research on the psychological effects of orphanage care: A critical review. In: McKenzie RB*, editor. Rethinking orphanages for the 21st century, Newbury Park, CA: Sage Publications, 1999.

[162] "Children develop within an environment of relationships that begins in the family but also involves other adults who play important roles in their lives. This can include extended family members, providers of early care and education, nurses, social workers, coaches, and neighbors. These relationships affect virtually all aspects of development – intellectual, social, emotional, physical, and behavioral – and their quality and stability in the early years lay the foundation that supports a wide range of later outcomes." Center on the Developing Child, *From Best Practices to Breakthrough Impacts: A Science-Based Approach to Building a More Promising Future for Young Children and Families*, Harvard University, 2016, at 8.

[163] St. Petersburg-USA Orphanage Research Team, *Characteristics of children, caregivers, and orphanages for young children in St. Petersburg, Russian Federation* Journal of Applied Developmental Psychology: Special Issue on Child Abandonment 26, 2005, at 477–506; *See Also* St. Petersburg-USA Orphanage Research Team, *The effects of early social-emotional and relationship experience on the development of young children*, 3 Monographs of the Society for Research in Child Development 72, Serial Number 291, 2008.

responsive ways, especially while performing routine caregiving duties and during play periods. *Structural changes* consisted of a set of physical, employment, and procedural changes designed to provide an environment more conducive to developing caregiver–child relationships by reducing group size and having fewer caregivers resulting in greater consistency in children's lives. In order to understand such an intervention, it is essential to understand the different elements in both environments — a traditional family structure and an institutional one. The table below[164] presents the main elements of a traditional family life structure, which could contribute to the family as an ideal placement for children and young children to be brought up. It also compares these elements with the characteristics of many institutions to understand the difference between both settings.

Comparison of major characteristics of typical families and orphanages

Characteristic	Families	Orphanages
Children per group	Few	Many
Ages, developmental status	Mixed	Not Mixed
Children: caregiver ratio	Low	High
Number of caregivers	Few	Many
Consistency of caregivers	High	Low
Warm, sensitive, responsive caregiving	High	Low

By looking at the given table, it can be noticed that 4 out of 7 elements are based on caregiving which demonstrates the importance of the *moral* element of a family life. It is well-known that institutional care is not the only alternative which may provide unstable care. Foster care as a

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[164] R. McCall, *The consequences of early institutionalization: can institutions be improved? – should they?*, 18 Child Adolesc Ment Health 4, 2013. Retrievable at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3833822/> (accessed 15 May 2019).

family-based alternative, can be unstable since caregivers could end their provided care unexpectedly. Stable and good caregiving is a need for all children whether they are enrolled in institutional care or not. [165] For example, around 50% of children in the SOS Children's Village families in the United States had been in four to five previous foster placements where DI is in place.[166] This will undoubtedly result in moving the child from one place to another, causing significant instability. However, from the author's perspective, the crucial element in the alternative environment is the last element given in the table above (warm, sensitive, responsive caregiving). This element is the key for effective caregiving and thereby AC. If the caregiver could build a warm, sensitive, responsive relationship with the child, then all other elements can be easily established.

This element is difficult to guarantee, assess, or monitor whether in formal, informal, or permanent family life. In the St. Petersburg study, in one institution for children up to 4 years old, the training and structural changes took place. This condition was labeled Training Plus Structural Changes (T+SC). A second institution received Training Only (TO), and a third institution received No Intervention (NoI).[167] Caregiving quality is a major issue with training caregivers — whether they actually implement the training in their behavior or not. However, in order to measure the physical and behavioral environment on the wards, the Home Inventory was used. The results for the T+SC Group improved immediately after full implementation of the intervention and remained considerably better throughout the course of the study than the other two groups. The outcomes of the study showed that children's development in T+SC and TO children, increased height, weight, and chest circumference for both developing children and those with disabilities in general. T+SC and TO children usually developed gradually with fewer functional limitations, and moreover, the longer the children were under the intervention, especially T+SC children, these physical benefits tended to become greater.

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[165] "decisions regarding children in AC, including those in informal care, should have due regard for the importance of ensuring children a stable home and of meeting their basic needs for safe and continuous attachment to their caregivers, with permanency generally being a key goal." UNGA, *supra* note 2, para 2.
[166] SOS KINDERDORF International, A Child's Right to a Family; Family-based Child Care The Vision and Experience of SOS Children's Villages, Position Paper, 2005, at 17.
[167] Annex 2

None of these measures improved among children from NoI. The Battelle Developmental Inventory assessed behavioral and mental evolution and developmental quotients for children of T+SC, significantly, there was an increase from 57 to 92=35 DQs on average.

Children with disabilities rose on average from 23 to 42=19 DQ points, 27% were more than 30 points and 14% were more than 40 points in this study. Again, the longer they were in the intervention, the better the results for children in both groups. Typically, T+SC and TO children developed in child-care free-play sessions were found to have a higher quality of play, alertness and self-regulation than NoI. Moreover, T+SC children experienced a greater positive impact on developmental, social initiative, and communication than children in TO and NoI. In group T+SC, for the ages between 11.5 and 18 months old, they were considerably less likely to be deemed disorganized than TO and NoI. Additionally, they were more likely to have an organized attachment to their favorite caregiver on a modified Strange Situation Procedure.

The intervention from St. Petersburg shows that encouraging carers to engage with children effectively in a more family-like environment can produce significant improvement in the development of resident children (infants and toddlers). One question remains, nevertheless, whether such a transformed institution can continue the improved care and have care-leavers who show more typical behavioral/mental development, after funding and intervention support has ceased. It can be summarized from these results and others[168] that institutions can be enhanced; improvements in the development of both children and disabled people are likely to result in substantial increases of physical, mental, social and behavioral development. This leads us to wonder about the possibility of improving residential care.

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[168] Groark CJ, McCall RB, McCarthy SK, Eichner JC, Warner HA & Palmer K, *The effects of a social-emotional intervention on caregivers and children in five Central American institutions,* unpublished report, authors. Pittsburgh, PA: University of Pittsburgh Office of Child Development, 2012; *See also* McCall RB, Groark CJ, Fish LA, Harkins D, Serrano G & Gordon K. A social-emotional intervention in a Latin American orphanage. Infant Mental Health Journal. 2010;31:521–542. Cited in, R. McCall, *supra* note 160; Also R. McCall , C. Groark, L. Fish , R. Muhamedrahimov , O. Palmov & N. Nikiforova*, Maintaining a social-emotional intervention and its benefits for institutionalized children*, *Child Dev, 2013, at 1734-49.*

4.2.2 The paradox of Residential Care

Some DI supporters might reject the idea of improving residential care. This topic may be incontestable for some. In practice, the pressure of closing institutions will not necessarily be beneficial — in the best interest of the child. Evidence from developing countries has shown the opposite.[169] In other words, getting children out of institutions (facilities) might result in more adverse results. From a logical perspective, closing or minimizing an administrative facility is much faster than creating a wide range of solutions in a poor community of alternatives. They are contextually various. Practices show that in some countries, institutions have moved from AC to providing alternative "services" before building a comprehensive scope of alternatives.[170] However, the availability of the alternatives is fundamental but not necessary or a presumption of right care. Effective alternative systems call for high quality of care and a state's supervision but also the suitability of the placement.

> "I think where people tend to go wrong in the process of DI is basically saying the family-based is always better for every child. And although I think the guidelines and I agree, with that said, as much as possible where in the best interests, the child should go into either, of course, their family of origin or family-based. There could also be cases where that might not be in the best interest of the child. So, it is rather than being guided by this setting as being better than the other, you are guided by what is in the best interest of the child given — that is important— that all the care settings provide quality care of course. "[171]

Moreover, as mentioned in the introductory chapter, challenges to create a fully effective and comprehensive family care system are many and various from one country to another. It is more difficult than it seems to be to establish suitable incentives for parents to adopt or foster children. [172] One other important point is that, older children and disabled children are more likely to stay

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[169] A. Nordin, *supra* note 18, at 8.

[170] *Id*, at 17.

[171] Interview with Valérie Jans, Research and Learning advisor, SOS Children's Villages International, Skype Call, Monday July 1, 2019, 2pm – 3pm (CEST).

[172] For example, most countries reject paying parents for adoption of children even though adoption for these children might be in their best interest. Besides, a professional social work infrastructure is a need to have well assessment of the suitability and necessity principles of AC such as the selection process for picking adoptive or foster parents, training them, monitoring and supporting them in the field, and helping them cope with the inevitable problems that some children from institutions are likely to have.

in residential care while a comprehensive family care system is being developed. Speaking about a family care system, it is right that the family-based alternative is naturally available in an existing family in the community regardless if there is a need for AC or not. Residential care is, on the other side, an organized arrangement, put together, to provide AC. Nevertheless, in the context of AC, both of them should be somewhat organized from an administrative point of view, to ideally offer an alternative family life.

> "The difference between how you define the setting which is quite a cold way, a kind of technical way of defining the setting which in family-based would be an existing family of origin. Then, you look at what does the setting offer and then you could say both settings (family-based, family-like) offer a family life"[173]

What determines the effectiveness of a family life, is in principle the quality of care provided. Improving care should be seen as an ongoing need. Some advocates of DI might be concerned that adopting the idea of improving residential care will likely distract the country's attention, energy, and resources from developing an alternative family/community-based system. Thus, one of the definitions for DI is that "The process of closing residential care institutions and providing alternative family-based care within the community."[174] This definition simplifies the issue of DI and makes it as a question of "placement." Families typically come with structural elements. This structure can be implemented within any arrangement to ideally produce similar developmental outcomes of natural family life. Perhaps that was the rationale behind the UNAG to describe "institution" as large-scale.

> "There is quite a lot of debates on how to interpret or understand the guidelines. The guidelines clearly say that there should be a range of alternative care options which can be foster care and you have all these different forms of residential care, and then they say that there is institutional care which is a very specific form of residential care often taking place in these very large-scale residential care facilities where there is no individual approach,

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[173] Interview with Valérie Jans, *supra* note 171.

[174] *See* Better Care Network, *Better Care Network Toolkit Glossary*, Available at <https://bettercarenetwork.org/sites/default/files/attachments/glossary.pdf > (last date visited: 20 May 2019)

which are very isolated, where certain key quality criteria are lacking and that is institutional care."[175]

The UNAG as an international instrument prevails on others. This does not mean that the lack of clarity of institutional care (large residential care) is justified or understood. The UNAG defines residential care as "care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes."[176] It can be noticed from this definition that both (small and large) institutions are in the same box of "Residential Care." Perhaps the given definition of DI above is derived from this sense. In other words, the UNAG at first glance describes the question of AC as a matter of "quality" care, but one can interpret it as a problematic of "placement."

"In the discussion, we tend to mix between what defines a care setting and what is now quality care within these care settings. I think we can all agree that across the range of options, there is a care provided in a good or bad quality way. It is not because you could find certain for example bad quality foster care settings or bad quality family-like care settings but the whole setting in itself is invalid or institutional. But I think that gets into mingle, the debate tends to mix up quality with type of care setting. I think if we would distinguish the two more. We could have a much better debate about what quality features need to be there in every care setting. "[177]

However, when it comes to the adaptation of alternative care option, small-group care or small facilities can be deemed as one of the family-like features. In this context, the family-like setting is recognized under the UNAG as an appropriate alternative and perceived as a various placement than of institutional care.[178]

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[175] Interview with Valérie Jans, *supra* note 171.
[176] UNGA, *supra* note 2, para 29 (c).
[177] Interview with Valérie Jans, *supra* note 171.
[178] UNGA, *supra* note 2, para 29 (c).

5. Case Study: SOS Children's Villages

For the last seven decades, SOS Children's Villages International (the organization) have provided family-like childcare for CWPC or are "at risk."[179] In 1949, Hermann Gmeiner, together with social worker Maria Hofer and fellow students, founded SOS Children's Villages. The vision was to enable children who have lost their parents — in the aftermath of the Second World War — to live in a family environment unlike the large orphanages that were widespread in that time.[180] Alongside these Villages, the organization provides many AC solutions and services such as Kinship Care, Foster Care, Small Group Homes, and Family Strengthening.[181] This chapter will, however, analyze the Children's Villages model and some related policies within this arrangement which are commonly implemented with other forms of SOS AC. In doing so, the material and moral elements of the so-called SOS family-like model will be critically analyzed.

5.1 Material element

As previously described, families often have structural elements. This structure can be established through innovative approaches. SOS Children's Villages implements the structure of a family life by creating a family life (home) in a small community within the wider society.

5.1.1 Creating a Family Life

The organization operates 559 villages in 136 countries or territories worldwide. Within these villages, families emphasize and demonstrate family relationships between children living in a common brotherhood and family atmosphere with at least one stable, trained, remunerated caregiver (Mother / Parent).[182] Ten to fifteen SOS families are part of the SOS Children's Village community. This number has decreased since SOS as an organization has various types of models, and through frequent review regarding the quality provided through its services. Within the SOS

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[179] *See Generally* SOS Children's Villages International, Family-like Care: A nurturing care setting in a supportive environment, a discussion paper, 2019.

[180] SOS Children's Villages International, 70 years of Impact Improving the Lives of Children Without Adequate Parental Care, Vienna, Austria, April 2019, at 9.

[181] *See* SOS Children's Villages International, *Types of alternative care supported by SOS Children's Villages*. Retrievable at <https://www.sos-childrensvillages.org/our-work/quality-care/alternative-care/types-of-alternative-care/> (accessed 15 May 2019).

[182] The profession includes couples.

large family (the village), each "family" member has a unique position. In other words, this village is a local community within the society of the child. When it comes to the terminology, however, Better Care Network — an international network of organizations specialist in AC for children — defines these villages as institutional care.[183]

Nowadays, calling a setting as an institution (institutional care) is in fact an accusation. Thus, such claiming should be combined with evidence. From the author's point of view, considering these Villages as institutional care is nonsense. This definition is not based on a sound scientific nor legal basis. It also shows insufficient knowledge and misunderstanding of the right to AC. Ironically, the given definition considers this placement as an institutional one based on scale solely. In the context of scale, one question should be posed; what is the criteria that one should question or respect for accurately evaluating one placement as institutional care? Or in the other way around, which criteria has the drafter followed to mark these Villages as institutions?

> "One finds that sometimes in the debate, some stakeholders tend to say residential care is the same as institutional care, and that can be either because (they) view residential care as bad quality care or what you also see is that whenever an organization organizes alternative care, it is institutional care."[184]

The organization affirms that there is some "means" of institutionalization by stating that "we work to reduce institutional practices to ensure the everyday life of the child and parent is similar to that of natural families. We minimize institutional features by making use of available community infrastructure and facilities as far as possible."[185] In this sense, it does not mean in any case that this model is institutional because institutional practices can be generally found in any alternative setting.

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[183] Children's Villages: a type of institutional care in which children live in small houses (rather akin to group homes) but on a large campus that also includes some communal facilities (e.g. for play, healthcare etc). *See* the source includes the UNAG within the references list. Better Care Network, *supra* note 168, at 4.

[184] Interview with Valérie Jans, *supra* note 171.

[185] *See* SOS Children's Villages International, alternative-care, family-care-for-every-child, deinstitutionalization. Retrievable at <https://www.sos-childrensvillages.org/our-work/quality-care/alternative-care/family-care-for-every-child> (accessed: 24 May 2019).

"When you look at the research (the scientific community), they often group all types of organizationally organized alternative care under institutional care whether it is good or bad quality residential care. In terms of the children's village, therefore, qualify it as institutional care. We believe it is family-like care which is also a type of alternative care, the guideline specifically distinguish as specific type of care, and therefore it is not institutional care. This does not mean that sometimes certain children's villages or SOS family-care settings do not have institutional features but means that they might not always have all the quality criteria that one might like which is the case of any alternative care setting."[186]

One might wonder what is meant by institutional features to fully understand this debate. Does it amount to institutionalization? Or how do these institutional features look in practice? The collected evidence shows that removing these features is a way of strengthening the care provided and it has nothing to do with violating the child's human rights but more about community inclusion.

"Each and every family should plan their own leisure activities, they should be the deciding unity, they should be free to spend their leisure time as they want. If the mother wants to visit, maybe, her family, taking the children with her is fine. The gates and walls of the village, of course, if it is necessary, security wise, then, there should be some protection. But, it should not mean that the SOS families cannot move out and in of the compound. It should protect them but it should not hinder them."[187]

This discussion clearly shows a conflict of understanding but also the importance of defining large-scale residential care within the UNAG. This legislative gap has interestingly led some scholars to argue that the UNAG still allow institutionalization and condone policies which likely, in one form or another, continue institutionalization for all children.[188] Perhaps providing a common internationally recognized definition to what constitutes a large or small

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[186] Interview with Valérie Jans, *supra* note 171.
[187] Interview with Gudrun Eder, Strategic Programme Development Advisor, SOS Children's Villages International, Skype Call, Friday Jun 28, 2019, 9am – 10am (CEST).
[188] Richard R. Carlson, *supra* note 16, at 5.

residential care might be problematic but there is no doubt that the quality criteria needs more consideration.

> "That is something where we are going wrong in the debate, I think as a community or as a sector, I don't even think we very clearly have defined what are the key quality criteria."[189]

Nevertheless, generally, one SOS parent and four to ten children live in their own household together. These children are mostly biological siblings and kept together within one SOS family. This is important because the outcomes for siblings placed together or apart are diverse.[190] When it comes to admission, whether siblings or not, children out-of-home are not directly enrolled to this type of care. The decision-making process has two phases (necessity and suitability)[191] and the final decision is taken when the placement has been determined and mutually agreed upon by all parties involved and most importantly the child is encouraged to participate in this process of decision-making (the child's right to be heard).[192] Then, the child moves to one of the families within the village. To clarify, the role of the organization (and its network) is distinguished from the role of the SOS family.[193] This sense of family atmosphere is made to strengthen the inclusion of SOS families within the surrounding community.

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[189] Interview with Valérie Jans, *supra* note 171.

[190] For example, sibling groups together might enjoy greater position of stability, they also more likely to be reunified, especially if they are entered care at the same time. Evidence for children's emotional and behavioral outcomes showed no relation to, or improvement in particular situations, joint or separate sibling placements. In terms of educational outcomes, a positive association was reported in some studies between educational results and a similar placement of siblings. *See* S. Meakings, J. Sebba & N. Luke, *What is known about the placement and outcomes of siblings in foster care? An international literature review*, University of Oxford, February 2017, at 5. Retrievable at <https://reescentre.web.ox.ac.uk/file/285206> (accessed: 24 May 2019); *See also* In a study of 337 young people growing up at SOS Children's Villages families in seven various countries, 75% reported having lived in the same SOS family with their biological siblings. In this sense, young people who grew up in the families of the SOS Children's Villages in Finland feel that living with their biological sibling was the most important thing. Most other children did not have biological siblings, but if they have, contact between siblings is maintained if they are not admitted together. SOS KINDERDORF International, *supra* note 142, at 17.

[191] Quality4children, *Standards for Out-of-Home Child Care in Europe,* no year*,* at 21.

[192] At this level, the child adaptation to a new environment can be complex. Therefore, the welcome must be gradual and cause as little disruption as possible to ensure the child's best interests and the well-being of all relevant parties involved.

[193] Quality4children, *supra* note 191, at 19.

5.2.1 An inclusive environment

Since the essential characteristic of family is the care relationship, the organization pays special attention to the support and promotion of this relationship. It provides support to the SOS families, and the SOS family is responsible for the children. This makes the families within the villages more autonomous and, as a result, strengthening the family feeling in the atmosphere.

"We are putting a lot of effort into strengthening SOS parents and the family autonomy. This is a big topic where we opened up, and say SOS mothers, fathers, or parents are free to get married and to have their biological children in the SOS family, to lead the SOS family autonomously and, creating a strong feeling of family. The family does their own shopping, manages the family budget etc. This is ongoing empowerment of caregivers, leading to a strong family feeling. They can live in the community if they want. They can live in the SOS village if they prefer that. So, they are free to choose you know, they are free to decorate the house as they want. To make decisions about schooling or regarding youth — SOS parents should decide together with the young person whether to stay in the SOS family, live in the community, or in a youth facility. A range of options should be possible."[194]

At the Village, additional assistance for the children is provided through professional specialized advice and counselling from education specialists and psychologists. These resources are, in addition, used to foster contact with the biological family, guiding the highly sensitive relationship between the child, the biological parent(s) and the SOS mother/father/parent — a tripled relationship is achieved to facilitate effective inclusion between the child and her/his local community including their biological parents or relatives. The organization workforce affirms the importance of the UNAG in this regard.

"The guidelines are forcing us to think where we are; what we are doing; is it right what we are doing. I think they help, they give strong push to question practices. So that is important. Also, anchoring our programmes in the local community. That is also, I think,

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[194] Interview with Gudrun Eder, *supra* note 187.

a very important point to opening up. In many locations, the village is very much opening up to the community, there are a lot of exchanges, we have more and more villages where in some houses we have SOS families but some are rented to families from the community or they are rented to counselling services that are not specific SOS services but they work for SOS and also for others."[195]

Moreover, each family relies on community resources to support child development, as the organization fosters communication with the local community. Nevertheless, it is common that children and young people with disabilities struggle to fully access their rights and participate as resourceful and empowered members of society. They face considerably higher risk of abandonment. The organization works with and for children living without or at risk of being left without parental care but children with disabilities are particularly vulnerable. It has a specific policy on the inclusion of children with disabilities "Valuing Diversity – Valuing Differing Ability" seeks "the fulfilment of the rights of children with disabilities to play a role as full, active, and resourceful members of their communities." [196]

In the context of communities, the theoretical discourse perceives them as they are the savior. Practically, however, some of those emancipated communities stigmatize CWPC,[197] but, in particular, children who live in residential care. This leads the author to ask the following question; whom shall be reformed? Those unfair communities or the vulnerable child who found "no one" to take care of her/him but residential care.

However, the family is a key element in every person's life; they have the greatest impact on a child's socialization. Socialization is a learned behavior that remains with a person their entire life. Family influences nearly every aspect of a child's life, including their education. At the village, children are individually supported to be educated, and trained. The organization has adopted

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[195] Quality4children, *supra* note 191, at 19.
[196] *See generally* SOS KINDERDORF International, SOS Policy, *Valuing Diversity – Valuing Differing Ability*, Policy on the Inclusion of Children with Disabilities, November, 2008.
[197] UNGA, *supra* note 2, para 32 & 95.

Formal Education Policy "Learning for Life" which expresses the organization's stand on formal education and establishes a framework for action for the organization in SOS Children's Villages as it is in line with international law.[198]

The policy is comprehensive and based on several principles.[199] Mainly, it is child-centered education that respects the child as a resourceful and unique individual who participates actively in her/his process of development. For this reason, caregivers are supported as they are primarily responsible for the education of their children. High-quality teachers are, also, supported as they are a part of good education policy but also good quality education requires the effectiveness and improvement of kindergartens or schools. These elements are respected within the policy and to make it sustainable with other partners to most crucially enhance social justice by building inclusive indiscriminate education. In this sense, the organization has transferred the responsibility of its schools to governments or authorities to hopefully strengthen the community.

> "The schools are run by the local authorities and not by SOS anymore. The idea is to strengthen the community. If there are people who could run a good school. It does not have to be SOS running the school all the time, but the community."[200]

As the essential feature of family life child care is the caring relationship between the child and the caregiver. The SOS family is expected to offer stability and security. It is supposed to support each child to develop according to each child's needs, with particular emphasis on the child's emotional and social well-being.

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[198] *See generally* SOS KINDERDORF International, SOS Policy, *Learning for Life*, Formal Education Policy, October 27, 2008. Retrievable at <https://www.sos-childrensvillages.org/getmedia/5ae907ac-4151-4cca-9ff8-464aa7d45124/Education-Policy-Oct08-en_1.pdf> (accessed: 25 May 2019)

[199] *Id*, at 3-4.

[200] Interview with Gudrun Eder, *supra* note 187.

5.2 Moral element

Raising a child who is caring, organized, goal-oriented, and successful, needs a stable environment in which she/he can experience a childhood filled with both love and bonding experiences. A well-bonded child is secure and does better at everything. If raised in a stable family life by a "sensitive caregiver", children will have less anxiety and a higher threshold of security. Feeling secure, makes the child's approach everything have a stronger sense of self and thereby personality. As a result, she/he will learn to depend on his own resources and capacities, which allows her/him to be independent and self-actualized. Stability and security represent the moral element of an effective substitute family life. This section will, therefore, look at how the model of SOS Children's Village provides this sense of a family life through firstly its qualified caregivers to, secondly, assess its long-term impact on children.

5.2.1 Aiming at qualified caregivers

At the model of SOS Children's Village, SOS mother/father/parent is the starting point of stable care, by being fully responsible for the child and actively participating in their daily lives as well as their long-term planning. As already stated, effective caregiving has complex requirements. They should therefore receive extensive training, especially with regard to psycho-social and therapeutic skills. This is important to assure quality care for children. In this model, training caregivers is taken into account. Among other things, careful selection procedures including child welfare vetting is ensured, quality training for the caregivers and other employees including child rights and protection is provided, caregivers and other staff should be trained to cooperate with children's biological parents and to be aware of the specific needs of individual children. In training, they learn how to use appropriate language, establish a close relationship with the child/young adult, have good listening skills, be understanding, empathetic and patient. [201] Interestingly, caregivers are not directly hired but follow a careful recruitment process, SOS mothers/fathers/parents receive a comprehensive orientation programme and initial two-year

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[201] SOS KINDERDORF International, *supra* note 161 , at 27.

training programme.[202] Once they have passed a final examination, they are "awarded" a professional diploma. SOS mothers/fathers/parents continue to receive training throughout their careers. A minimum of two weeks' follow-up training once every two years and in-service training have proven crucial for maintaining high standards of child care." [203]

Care in this model is stable and consistent for three main reasons.[204] Firstly, the child can stay under the care of this model as long as it is necessary. Secondly, the child-caregivers relationship is built and stable. Lastly, there is a sense of social and cultural stability since the environment of this model is typically established within the child's cultural and social environment, but also deemed from the fact that children remain their care placement, regardless of the child-caregiver stability.

"children to have stability in their home, school, friends and community, as well in the local support network around them, that can support them in dealing with a possible change in caregiver. As such, the level of disruption is kept to a minimum. Moreover, as far as possible, children are placed in family-like care settings, where the caregiver shares the same social and cultural background, providing children with stability in their socio-cultural development."[205]

Effective caregiving also requires a monitoring strategy. For example, in traditionally structured families, governments or authorized bodies often separate a child from its parents as they are either considered unfit or violated the rights of the child. Since this model seeks to create a family life such consideration should be taken into account to assess the quality provided.

"We have several indicators available in the area of "Care". For instance, in alternative care we assess the level of participation of young people in decisions affecting their own life (e.g. in development planning). The main way how we evaluate the quality of care is

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[202] *Id*
[203] *Id*
[204] SOS Children's Villages International, *supra* note 179, at 9.
[205] *Id*

by looking at the results in all dimensions of wellbeing of a child/young person, and the development over time (e.g. educational progress, health improvements, etc.). If all dimensions are progressing well, then we assume the quality of care to be high, especially if comparing these indicators with external data (this has been done e.g. in Benin with UNICEF data). The above-mentioned indicators exist for all forms of Alternative Care we work with in SOS (SOS families, foster families, small group homes, youth care, and other residential care, e.g. group homes for young adult refugees/unaccompanied minors)."[206]

From this discussion it can be summarized that children's outcomes are influenced by the multiple environments they encounter. One way that quality of care provided can be evaluated is by looking at the long term impact on the child.

5.2.2 Long-term Impact

The organization has been leading an international campaign on care leaving.[207] The aim is to ensure that young individuals who live or experienced living in AC are properly prepared for the leave and can continue to have access to care, in accordance with their individual needs. This campaign encompasses all forms of SOS AC: from foster care to residential care, to achieve several objectives.[208] These objectives are firstly, share knowledge and raise awareness on care leaving since young people aged out of care face many challenges but their results and well-being are not researched or documented. Secondly, increasing youth participation and empowerment among those who have experienced living in AC, as they are the main experts and actors of the care system. For instance, four young people are members of the team planning and implementing the national campaign on leaving care in Azerbaijan. Some of them are from institutional care and others from the care of an SOS Children's Village family. In February 2009, the young people took the initiative to create the first youth in care network in Azerbaijan, the "Youth Reliance

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[206] Email from Ms Rosalind Willi — Research and Learning Advisor, SOS Children's Villages International — to author, July 5, 2019.

[207] *See Generally* SOS Children's Villages International, *preparation for independent living*, Briefing Paper, September 2009.

[208] *Id*, at 5-7.

Bridge".[209] Thirdly, improve policy through creating a proper leaving care support network within an adequate legal framework to, finally, realize such a policy in practice.[210] It is important to mention that this movement has taken place in Europe and Central Asia, such as Croatia, Czech Republic, Estonia, France, Georgia, and Germany.

However, prior to the adoption of the UNGA, the organization has created and adopted a programme called "the semi-independent living" which is the main aftercare service provided in the CEE/CIS/Baltics region.[211] The aim of this programme, is to facilitate an easy transition to an independent life and to build the required skills and abilities of a young person to be fully prepared for the future. Interestingly, one of the main explicit objectives of the semi-independent living programme is that young people have "appropriate housing." [212] In terms of duration, the programme in principle lasts for 3 years. However, some exceptional circumstances can be found, for example, if the young person is married, living with a partner or is a single parent; or if she/he is doing mandatory military service.[213] In other cases, high school and university students have a special treatment in SOS Children's Villages' semi-independent living programme where the support depends on the length of their studies.[214]

Moreover, within the continental framework, each SOS Children's Village association listed in the programme is tasked with developing after care concepts in general and for semi-independent living in particular. These developments are considered in accordance with the particularities of each country such as domestic laws, cultural requirements and the socio-economic situation. These domestic concepts define the requirements for shifting to semi-independent life, prioritize housing problems and economic support, types of assistance and guidelines. It also determines young persons' rights and obligations for their residency within the semi-independent livelihood programme. When to comes to the results, the organization has recently published a report on the impact of its care.[215] The trends according to SOS Care, show that 90% of former participants (care

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[209] *Id*, at 6.
[210] *Id*
[211] *Id*, at 17.
[212] *Id*
[213] *Id*
[214] *Id, at 18.*
[215] SOS Children's Villages International, *supra* note 180, at 19.

leavers) give good care to their own children, while 60% of the participants have received education and skills. As a result, they are succeeding in the job market and earn a decent living and have basic needs such as adequate accommodation, food, and health. While 80% of them are living happy lives.

Despite all these intensive efforts, the internal trends of the organization show that many of their care-leavers "currently have difficulties in finding employment and leading a self-sufficient life."[216] Consequently, the organization has adopted a new approach, "strategy 2030." One aim of this strategy, among many others, is to "empower young people" by strengthening the "quality" of care and employment.[217] To achieve this, there is a number of objectives are in place. Firstly, shifting away from the youth care models that have been evaluated as containing some institutional features. The present alternative to this model is the integration of young people into the "wider community." In this regard, one might wonder in which way they will be integrated.

> "The idea is not only reintegrate them with their biological families, but they can stay in the SOS family as long as they need, until they are self-reliant, as needed. The idea again, there should be a range of options, there should not be only the youth facility. Some keep the youth facilities, some have apartments where a few live together (three or four), some stay in the family (SOS Family). The idea is, it should be evaluated; what is in this individual child or young person's best interests? And then, for some it will be to stay in the family, for some it will be in the youth facility, for others to maybe stay in a rented apartment in the community together with others or maybe alone. I think the idea is that each individual case needs an individual solution."[218]

Secondly, training care co-workers on how to prepare the target groups such as children, young people, and parents to succeed in life. Thirdly, focusing on coaching, including, formal education, career development, training caregivers and parents, languages and technology skills. This goal is expected to be achieved via partnerships and the experience of alumni networks. Lastly, young

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[216] SOS Children's Villages International, *STRATEGY 2030: as recommended by the International Senate for endorsement of the General Assembly in June 2016*, 2016, at 9.
[217] *Id*, at 17.
[218] Interview with Gudrun Eder, *supra* note 187.

people will be supported to enter the job market. Nevertheless, the quality of care in this model leads one to contemplate whether other existing alternatives are currently suitable and in the position of providing this level of care.

> "The purpose of the setting, within family-based care, is not to offer alternative care while in a family-like setting, the whole purpose of that setting is to offer alternative care. I think because of the purpose of family-like care is to offer alternative care, that at times, makes it more suitable to offer, maybe, more specialized forms of care or offer specific attention to children because it's actually been created and set up for this very purpose."[219]

The whole discussion within this chapter shows mainly the possibility of improving residential care, and how complex is the right to AC. But, most importantly, it proves that the question of AC should not be based on the mere existence of a family life but on the quality it represents.

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[219] Interview with Valérie Jans, *supra* note 171.

Conclusion and Recommendations:

Law is often seen as a mirror of society — reflecting customs and moral principles — that functions to preserve social order. Therefore, international law represented by the CRC, affirms the importance of a family life for a decent and happy life, and guarantees the right to AC for those children whose families of origin have failed to provide them the right care. The AC, as the law stands, includes the placement of children in "suitable institutions." This recognition of institutional care should be seen as a reflection of the ignorance of communities towards CWPC. Institutional Care has, consequently, proliferated and was a result of a traditional social attitude, as a form of social care.

The UNAG, as a key piece of legislation that underpins all policy drivers, has been basically introduced to guide the stakeholders to understand the position and pre-conditions of "suitable" institutions. This is essential since effective DI process requires first understanding the status of institutional care (residential care) within the discourse. In this aspect, the UNAG has two linked attitudes of residential care. The first, examining it from the "quality" perspective (large residential care) while the second deals with it as comparatively "inappropriate" placement in relation to the family-based setting. Despite this, the substantial role of the UNAG in reforming the AC systems around the world and, most importantly, raising awareness of many silent issues surrounding this right, which is an undeniable achievement. However, it seems that international law-making bodies could not provide more than guiding us with very general principles, especially when it comes to residential care. In the context of quality, stakeholders could tackle this issue by seeking other complementary sources of the care required in a residential facility. For example, the Recommendation of the Committee of Ministers of the Council of Europe 2005 (5) on the rights of children living in residential institutions, is one important guiding document in this regard. What can be problematic, nevertheless, is understanding the legal status of residential care. Is it deemed as an appropriate option when the given subjective criteria within the UNAG is respected? Or whether minimizing them (small residential care) is just the first step towards their elimination in favor of family-based care?

Knowing the answers for these questions can make a difference for those countries who seek assistance from foreign entities, since they should abstain from any initiative inconsistent with the UNAG to receive the respective support. Otherwise, the process will likely be uncertain and subjective. Then, it should be unsurprising for stakeholders to address many various unanticipated consequences in the field. Whereas the process of DI is inherently considered as a path to reduce the potential risk involved in an AC system. Vulnerable groups including CWPC, are a population that already has some specific characteristics that make them at higher risk over others. Stakeholders should eliminate those risks, or at least, not undermine them theoretically or practically.

In this sense, what the author is certain about is that the right to AC would not be achieved by the mere existence of a family life but the quality it represents - mainly the moral element. Any alternative arrangement might contain a level of institutional features which must be eliminated. Thus, ideally, the transition to fully family-based care systems requires first deconstructing our view towards these children as they enjoy a right called the right to AC, which, in all cases, should be seen as important as any other rights and, most critically, needs our heartfelt contribution as human beings to tackle a wide range of challenges.

Until hopefully achieving this, some research and practices suggest that it is the quality of care, perhaps more than the particular type of placement. Solutions and problems are different from one country to another but what is common is the need for quality care at all levels. Besides, whatever system a country would adopt, it is likely to need a professional social welfare infrastructure (quality system) to efficiently provide AC. Governments cannot simply ask or financially support the public to rear children; it should stem from a dedicated person who expected to fulfill specific requirements of care. Of course, caring people are highly recommended but ongoing technical expertise and support is also needed to relatively assure quality care within the respective placement. The SOS family-like model shows to which extent the right to AC is complex and sensitive. Meanwhile, it drives one to question whether communities are currently ready to take responsibility.

In the short-term, children are likely to remain in poor care including institutions. Depending on the context and size, improving institutions might support the development of vast numbers of children. Although improving institutions should not turn back efforts and resources from establishing a rich AC system, it helps one country to develop a holistic system that benefits all CWPC. Given the serious and size of the problems in providing effective AC, the author recommends that the need for AC within the concept of DI should be understood as *the process to secure a quality, suitable alternative care placement in the best interests of the child*. When any arrangement — regardless of what so called or described — provides quality care for CWPC, it has the potential to replicate and offer "a" family life. Caregivers, in all alternatives, are the core of high quality care since they lead the *moral* element of a family life in which they offer child-centric emotional space. Therefore, the process of DI should be seen as an "invitation" to improve care for children in all dimensions and placements. To ideally achieve this, there should be a more comprehensive international standards on what constitutes quality care for each alternative placement. This overall quality reform not just a priority, it is a necessity.

The UNAG has continuously led us to question the required quality of AC, which, in turn, needs our ongoing investment in families and alternative care. On the contrary, the deprivation of "a" family of origin will be deemed as "the" loss of family life. It is well-know that quality AC is not an easy task. Hermann Gmeiner has said, "every big thing in the world only comes true, when somebody does more than what he has to do." In the end, the remaining question is; are we ready to invest in high quality care for our children, the children of the world?

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Time of Interview: 9am – 10am (CEST)
Date: Fri Jun 28, 2019
Place: Skype Call
Interviewer: The author
Interviewee: Gudrun Eder
Position of Interviewee: Strategic Programme Development Advisor at SOS Children's Villages International

Questions:

1. In the context of DI, what do you mean by institutional features?

2. SOS 2030; how will the shift from youth care models will support the integration of young people into the wider community? what is/are the alternative/s?

3. How you evaluate the family atmosphere within the family-like model after 2009?

4. In the context of DI, what do you mean by institutional features?

5. SOS 2030; how will the shift from youth care models will support the integration of young people into the wider community? what is/are the alternative/s?

6. How you evaluate the family atmosphere within the family-like model after 2009?

Time of Interview: 2pm – 3pm (CEST)
Date: Mon Jul 1, 2019
Place: Skype Call
Interviewer: The author
Interviewee: Valérie Jans
Position of Interviewee: Research and Learning advisor at SOS Children's Villages International

Unstructured interview

Annex 2:

| T+SC: | Baseline | Implement Training + Structural Changes | Training + Structural Changes |
| | Child, Staff Assess. | | Child Assessments on Age Schedule Staff Assessments Annually |

| TO: | Baseline | Implement Training Only | Training Only |
| | Child, Staff Assessment | | Child Assessments on Age Schedule Staff Assessments Annually |

| NoI: | Baseline | No Intervention |
| | Child, Staff Assessment | Child Assess. on Age Sched. Staff Assess. Annually |

Project Year: 1 2 3 4 5