

Chapter 26

Article 25

Separation from parents

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1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;
2. States Parties to the present Charter
 - (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;
 - (b) shall take all necessary measures to trace and reunite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.
3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, or linguistic background.

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1 Introduction

The rising number of children without parental care, or at risk of losing parental care, is a global concern, prevalent in Africa, with an estimated number of 35 million children without parental care or at risk of losing parental care on the continent.¹ The underlying factors for loss of parental care and placement in alternative care are diverse,² but include orphanhood, armed conflict, poverty, child

1 African Children's Committee 'Children without parental care in Africa' (2023) viii.

2 UNICEF 'Children in alternative care' (2021), <https://bit.ly/49Eldqa> (accessed 23 February 2024).

trafficking, and socio-economic and cultural factors.³ Furthermore, the repercussions of climate change⁴ and the COVID-19 pandemic⁵ are also among the contributing factors for the increasing numbers of children outside parental care. Additional elements that lead to family breakdown include the absence of national policies that prioritise support for families, as well as discriminatory policies and practices on grounds such as disability.⁶

In the absence of parental care or a family environment, children are more likely to be exposed to rights violations, including those related to life, survival, development, freedom from violence, abuse, exploitation, discrimination, and barriers to accessing education and health care.⁷ Furthermore, when children are placed in alternative care that is unsuitable, in particular in institutions – a form of care deemed to be inherently detrimental to children⁸ – they suffer immediate and lasting harm.⁹

The importance of a family environment for the optimal development and overall well-being of children is recognised under international law, including in the African Charter on the Rights and Welfare of the Child (African Children's Charter).¹⁰ Despite such recognition, article 25 foresees and addresses circumstances where children may be deprived of such a family environment, and outlines the safeguards it ought to provide. The significance of this provision, therefore, lies in recognising the vulnerability of children deprived of a family environment and requiring that they be afforded special protection and assistance, as well as the provision of alternative care that considers and promotes the best interests of the child.

This chapter provides a guide to the scope and content of article 25 of the African Children's Charter. Part 2 of this chapter offers a brief overview of the link between the article and other relevant provisions of the Children's Charter and human rights treaties. Part 3 elaborates on the relevant concepts under article 25. Part 4 unpacks the obligations deriving from article 25, while part 5 reviews the extent to which they have been implemented. Part 6 provides a conclusion and recommendations.

2 Links to other Charter articles and human rights treaties

As all rights contained in the African Children's Charter are interrelated and indivisible, and all provisions of the Charter are relevant to article 25. However, some provisions of the Charter have a more direct correlation to article 25, either in the context of protecting the family and preventing the need for alternative care, or in the protection of children who are placed in alternative care. Regarding the former, article 18(1) recognises the importance of a family environment by stipulating that the 'family' is the 'natural unit and basis of society' and affords it 'the protection and support of the state for its establishment and development'. Article 19(1) further reinforces this recognition by affording every child the right to 'the enjoyment of parental care and protection'. The provision prohibits the separation of children from their parents against their will unless such separation is deemed to be in

3 African Children's Committee (n 1) viii.

4 UNICEF 'The climate crisis is a child rights crisis: Introducing the children's climate risk index' (2021) 111, <https://bit.ly/3vIaQnr> (accessed 12 February 2024).

5 SD Hillis and others 'Global minimum estimates of children affected by COVID-19-associated orphanhood and deaths of caregivers: A modelling study' (2021) 398 *The Lancet* 391-402.

6 UNICEF (n 2).

7 E Delap and others 'Missing: Children without parental care in international development policy' (2009) 5; R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2007) 280.

8 P Pinheiro *World Report on violence against children* (2006) 87; United Nations General Assembly (UNGA) 'Global study on children deprived of liberty' (2019) paras 64 & 65; N Petrowski, C Cappa & P Gross 'Estimating the number of children in informal alternative care: Challenges and results' (2017) 83 *Child and Abuse Neglect, The International Journal* 389.

9 UNICEF (n 2).

10 For its part, the African Children's Charter in its Preamble states that 'for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding'.

their best interests by a judicial authority. Furthermore, article 20 outlines the responsibilities of parents and others responsible for the care of the child, as well as the obligation of states to provide assistance.

On the other hand, articles 11, 14 and 16 are among the relevant provisions as they ensure that children placed in alternative care have the right to education, enjoy the best attainable state of physical, mental and spiritual health, and are protected from abuse, neglect or maltreatment, including sexual abuse, respectively. Article 25 is also linked with article 24, which deals with adoption and provides for inter-country adoption to be considered as an alternative care option as a measure of last resort for children for whom foster placement or domestic adoption is not available.

Furthermore, article 25 should be read in conjunction with the four general principles of the Charter, namely, the principles of non-discrimination (article 3); best interests of the child (article 4(1)); the right to life, survival, and development (article 5); and child participation (articles 4(2) and 7). The relevance of the non-discrimination principle is two-fold in that it serves to address discriminatory practices that often lead to a child's deprivation of a family environment and subsequent placement in alternative care, as well as to guarantee equivalent rights to children placed in alternative care, including education and health care.¹¹ For instance, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has specified in its General Comment on sexual exploitation that the non-discrimination principle entails taking 'targeted measures' to protect children 'who are most vulnerable to being victims of sexual violations ... including children in care institutions'.¹²

The relevance of the principle of the best interests of the child is evidenced by its reiteration in article 25 of the African Children's Charter, which entails that the best interests of the child are considered both in the decision to take the child out of their family environment and in any decision regarding the choice of an alternative placement.¹³ Articles 4(2) and article 7 are relevant as they entail that the views of children are heard and taken into consideration throughout all stages of alternative care, particularly regarding the determination of the most appropriate placement for the child and the planning and review of the placement.¹⁴

With regard to policy framework, one of the aspirations of Agenda 2040 is that '[e]very child grows up well-nourished and with access to the basic necessities of life'.¹⁵ To this end, the two indicators of this aspiration are for states to have adopted legislation and policies for children in need of alternative care and special support, as well as to ease laws on adoption and fostering and sensitise the community to the benefits of fostering and adopting children deprived of their family environment, by 2020.¹⁶

The assessment of the first phase of implementation (2016-2020) indicates that while some states took measures to implement these goals, further action is required to ensure that children are not unnecessarily institutionalised and to enhance family-based alternatives over institutionalisation as well as to establish mechanisms for family preservation.¹⁷ The key recommendation for the next

11 N Cantwell & A Holzscheiter 'A commentary on the United Nations Convention on the Rights of the Child article 20: Children deprived of their family environment' in A Alen and others (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008) para 8.

12 African Children's Committee 'General Comment 7 on article 27 of the ACRWC "Sexual Exploitation"' (2021) para 40.

13 Cantwell & Holzscheiter (n 11) para 38.

14 CRC Committee 'General Comment 12 "The right of the child to be heard"' (2009) para 54.

15 African Children's Committee 'Agenda 2040, Africa's agenda for children: Fostering an Africa fit for children' (2016) Aspiration 5.

16 African Children's Committee (n 15) 55-56.

17 African Children's Committee 'Agenda 2040: Fostering an Africa fit for children: Assessment of the first phase of implementation' (2016-2020) 88.

monitoring period underscores the need for states to scale up care reform efforts by establishing necessary frameworks ‘to prevent separation, strengthen families, increase the availability of family-based alternative care options, and implement carefully planned and funded deinstitutionalisation efforts’.¹⁸

At the United Nations (UN) level, article 20 of the Convention on the Rights of the Child (CRC) is the counterpart of article 25 of the African Children’s Charter.¹⁹ The two provisions are similar in formulation, albeit with minor differences. Article 20(1) of CRC requires that ‘a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment shall be entitled to special protection and assistance provided by the state’. In addition, article 20(2) requires states to provide alternative care for children ‘in accordance with their national laws’, which does not have a counterpart in the African Children’s Charter. While article 20(3) prescribes *kafalah* of Islamic law and adoption as part of the possible alternative care options for children deprived of a family environment, the Children’s Charter only lists foster care and institutions. Furthermore, unlike article 20 of CRC, the African Children’s Charter imposes an additional obligation on states under article 25(2)(b) in terms of reunification of children with parents or relatives in the context of displacement due to armed conflicts or natural disasters.

In terms of the policy framework at the UN level, the UN Guidelines for the Alternative Care of Children (UN Guidelines) were developed in 2009 with a view to improving the implementation of CRC and other provisions in relevant standards pertaining to the protection of children without parental care, or at risk of losing such care.²⁰ The Guidelines establish ‘desirable orientations for policy and practice’ for preventing the need for alternative care through the prevention of family separation, the promotion of parental care and family reintegration, as well as a framework for the provision of alternative care.²¹

While the Guidelines are non-binding in nature, their unanimous adoption by the UN General Assembly signifies their robust potential to influence states’ approach concerning the protection of children deprived of their family environment.²² This is further reinforced by the CRC Committee’s consistent use of the principles set forth by UN Guidelines as reference points in formulating its Concluding Observations to determine state parties’ compliance with the provisions of the Convention relating to the alternative care of children.²³ Apart from the CRC Committee, the influence of the UN Guidelines is further evident in its use by other treaty bodies, including the African Children’s Committee, which has made references to the principles of the Guidelines in its General Comments²⁴ and Concluding Observations and recommendations.²⁵

18 African Children’s Committee (n 17) 169.

19 UN Convention on the Rights of the Child (CRC) adopted 20 November 1989, entered into force September 1990.

20 UN Guidelines for the Alternative Care of Children (UN Doc A/RES/64/142, 2009) para 1.

21 As above.

22 N Cantwell and others ‘Moving forward: Implementing the Guidelines for the Alternative Care of Children’ (2012) 20-21; J Davidson ‘Closing the implementation gap: Moving forward with the United Nations Guidelines for the Alternative Care of Children’ (2015) 6 *International Journal of Child, Youth and Family Studies* 382.

23 Cantwell and others (n 22) 21; Davidson (n 22) 382; S Chaitkin and others ‘Towards the right care for children: Orientations for reforming alternative care systems Africa, Asia, Latin America’ (2017) 8.

24 African Children’s Committee ‘General Comment 1 on article 30 of the African Charter on the Rights and Welfare of the Child on children of incarcerated and imprisoned parents and primary caregivers’ (2013) paras 40 & 63.

25 See e.g. the Concluding Observations on the initial report of the Republic of Namibia, African Children’s Committee (2015) para 29; Concluding Observations on the initial report of the Republic of Zimbabwe, African Children’s Committee (2015) para 31; and Concluding Observations on the initial report of the Republic of Mozambique, African Children’s Committee para 20.

Another significant milestone for the protection of children deprived of their family environment at the UN level is the unanimous adoption of a resolution on the rights of the child by the UN General Assembly in 2019, with a specific focus on children without parental care.²⁶ This resolution calls on states to intensify child welfare and protection systems, as well as to strengthen care reform efforts.²⁷ Furthermore, states are urged to take measures to, among others, protect children without parental care and provide a range of alternative care options.²⁸ It is worth noting that the resolution was co-sponsored by several African countries,²⁹ with ongoing efforts towards care reform in the region.³⁰

3 Concepts and definitions

3.1 Alternative family care

Article 25(2)(a) requires states to ensure that children deprived of their family environment are provided with alternative family care. A definition for the term ‘alternative family care’ is not provided under the African Children’s Charter. While it does not provide a definition of ‘alternative care’, the UN Guidelines categorise it into formal and informal alternative care.³¹ Formal alternative care refers to ‘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’.³² Hence, any placement in residential facilities is regarded as a formal alternative care placement, irrespective of who carried out the placement.³³ The reason for this is that residential care, in principle, should be provided by the state and be subject to registration and authorisation.³⁴

Informal alternative care, as the name indicates, is a private arrangement within a family setting where a child is cared for ‘on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person’ without the involvement of ‘an administrative or judicial authority or a duly accredited body’.³⁵ Although informal care is carried out without the involvement of the state, the duty of states to protect children in such care is underscored by the UN Guidelines.³⁶

3.2 Foster care

One of the alternative care options listed in article 25 is placement in foster care. Although the African Children’s Charter does not include a definition of the term, in the UN Guidelines foster care is defined as ‘[s]ituations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been

26 UNGA Resolution 74/133 on the Rights of the Child (A/RES/74/133) adopted on 18 December 2019.

27 UNGA Resolution 74/133 (n 26) para 31.

28 UNGA Resolution 74/133 (n 26) para 35(b).

29 Benin, Côte d’Ivoire, Seychelles, Lesotho, Nigeria, Madagascar, Tunisia, Liberia, Madagascar, Morocco, Rwanda, Togo and South Africa are among the list of countries that co-sponsored the Resolution. UNGA Report of the Third Committee on the Promotion and Protection of the Rights of Children (A/74/395) 2019 paras 11 & 13.

30 ACERWC (n 17) 83.

31 UN Guidelines (n 20) paras 29(b)(i) & (ii).

32 UN Guidelines (n 20) para 29(b)(ii).

33 As above; Chaitkin and others (n 23) 7-8.

34 Chaitkin and others (n 23) 7-8; Better Care Network and others ‘Identifying basic characteristics of formal alternative care settings for children’ (2013) 5, <http://bit.ly/35vS8fg> (accessed 18 February 2024)

35 UN Guidelines (n 20) para 29(b)(i).

36 UN Guidelines (n 20) para 18.

selected, qualified, approved and supervised for providing such care'.³⁷ However, the understanding of the term 'foster care' in most African countries does not always align to the definition provided in the UN Guidelines, which is the legal placement of a child within a family other than its biological family.³⁸ Although foster care is envisaged to be formal under the Guidelines, formal foster care is in its infancy in many African countries, while informal fostering is prevalent in the region.³⁹ Furthermore, for instance, in countries such as South Africa, formal foster care may refer to kinship foster care or 'relative foster care' where children are looked after by relatives or kin and subject to oversight, support and monitoring by the state.⁴⁰

Formal foster care can be short term, medium term or long term. Generally, foster care is used on a short-term basis, pending a child's reunification with their parent, adoption, or attainment of adulthood.⁴¹ In some contexts, foster care may be a long-term solution and similar to adoption.⁴² A distinct feature of foster care is that biological parents or the state retain parental authority.⁴³

3.3 Institutions

In addition to foster care, article 25 placement in 'suitable institutions' is the only explicit form of residential care constituting an alternative to family-based care settings.⁴⁴ There is an absence of a universally agreed-upon definition for the term 'institution', as well as a clear consensus on the distinction between such care and residential care settings.⁴⁵ Under the UN Guidelines, residential care is considered one of the potential suitable cares for children deprived of their 'parental care' on the condition that it meets certain standards.⁴⁶ The term means '[c]are provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes',⁴⁷ whereas, the term 'institutions' is employed in the Guidelines to refer to 'large' residential facilities, which are subject to a gradual elimination through a deinstitutionalisation strategy. While the use of the term 'large' indicates that size is a determining component of an institution, it is not the only factor to consider, as it is possible for an institutional regime to be evident in a small care setting.⁴⁸

Beyond size, another important factor to consider in distinguishing institutions is what is known as 'institutional culture'. Institutional culture is characterised as a care setting with an impersonal regime that places little or no emphasis on individuality, focuses to a large extent on the child's physical needs while overlooking psychological and emotional needs, and tends to isolate children from the outside world.⁴⁹ Therefore, while size certainly is one of the considerations to determine whether a certain

37 UN Guidelines (n 20) para 29(c)(ii).

38 J Williamson & A Greenberg 'Families, not orphanages' (2010) 17, <https://bit.ly/3Uh61uz> (accessed 22 February 2024); UN Guidelines (n 20) para 29(c)(ii).

39 PL Engle and others 'The situation of children without parental care and strategies for policy change' (2011) 76 *Monographs of the Society for Research in Child Development* 197.

40 South Africa's Children's Act 38 of 2005 sec 180(3)(b).

41 Williamson & Greenberg (n 38) 17.

42 As above.

43 D Tolfree *Roots and roots: The care of separated children in the developing world* (1995) iv.

44 Art 25(2)(a) African Children's Charter.

45 Chaitkin and others (n 23) 8; Davidson (n 22) 384.

46 UN Guidelines (n 20) paras 21, 29(c)(iv) & 126.

47 UN Guidelines (n 20) para 29(c)(iv).

48 Better Care Network (n 34) 14; Cantwell and others (n 22) 42.

49 Cantwell and others (n 22) 34; UNICEF & Inter-American Commission on Human Rights & Organization of American States 'The right of boys and girls to a family: Alternative care. Ending institutionalisation in the Americas' (2013) 137; C Csáky 'Why care matters: The importance of adequate care for children and society' (2014) 6.

care setting fits the category of institutions, institutional culture can be present in smaller care settings. Hence, establishing whether a particular setting or facility falls into the category of institutions may benefit from applying the institutional culture lens.⁵⁰

3.4 Family environment

The term 'family environment' has its origins in CRC, subsequently incorporated into the African Children's Charter.⁵¹ However, neither the Charter nor CRC provides a definition of the term. Similarly, there is no universal definition of the concept of 'family', despite its common usage in various provisions of several international human rights treaties and the protection afforded to it by the same.⁵² Such absence of definition is justifiable given the fluid and dynamic nature of the term and its varying meanings across different socio-cultural backgrounds.⁵³

The African Children's Committee has yet to provide guidance to elucidate the meaning and scope of the concept of 'family environment'. Such guidance, however, can be inferred from the CRC Committee's jurisprudence, which has opted for a broader interpretation of the term to include diverse family structures such as the extended family, reconstructed family, joint family, single-parent family, common law family, and adoptive family.⁵⁴ In the context of interpreting article 20 of CRC, the broader interpretation of the term has been understood to imply that states do not bear the obligation under the provision to ensure an alternative family environment for a child who is not in the care of their parents for any reason, but is receiving care by a member of the extended family.⁵⁵ One concern regarding this approach is the potential risk it may pose to the protection of children in informal care and the level of uncertainty regarding the role of the state.⁵⁶ Moreover, while placing a child without parental care with extended family is prioritised, it may not always be the most appropriate or suitable option for every child.⁵⁷ Hence, the need to stipulate a more restricted list of duty bearers and avoid a blanket application of the wider definition of the term 'family environment' has been emphasised.⁵⁸

Article 25 of the African Children's Charter includes 'a child who is parentless' in the category of children to whom the state has the obligation to provide alternative care, thereby suggesting a broader scope of children.⁵⁹ This may indicate that the provision is applicable to children who are deprived of parental care irrespective of the presence of extended families.⁶⁰ However, the inclusion of the term seems unintentional, as such children form part of those who are considered deprived of their family environment. However, such specific reference may offer an additional layer of protection to children

50 Davidson (n 22) 384.

51 UM Assim 'Understanding kinship care of children in Africa: A family environment or an alternative care option?' PhD thesis, University of the Western Cape, 2013 105-106.

52 E Okon 'Towards defining the "right to a family" for the African child' (2012) 12 *African Human Rights Law Journal* 375.

53 Okon (n 52) 377.

54 CRC Committee 'Day of general discussion: Role of the family in the promotion of the rights of the child' (1994) para 2.1; CRC Committee 'Day of general discussion: Children without parental care' (2005) para 644; CRC Committee General Comment 7 'Implementing child rights in early childhood' (2005) para 15. This broader interpretation aligns with the drafting history of CRC, which initially considered narrower concepts such as 'natural family environment', 'biological family' and 'parental care' before settling on the inclusive term 'family environment'. S Detrick (ed) *The United Nations Convention on the Rights of the Child: A guide to the travaux préparatoires* (1992) 297.

55 Cantwell & Holzscheiter (n 11) para 37; Detrick (n 54) 300 & 304.

56 A Alen and others (eds) *The UN children's rights convention: Theory meets practice* (2007) 396.

57 Cantwell & Holzscheiter (n 11).

58 Alen and others (n 56) 391.

59 African Children's Charter art 25(2)(a).

60 H Lim 'Legally recognising child-headed households through a rights-based approach: The case of South Africa' PhD thesis, University of Pretoria, 2010 128-129.

who have lost their parents to be provided with alternative care, whenever appropriate. Children living in child-headed households would necessarily be included in the concept 'child who is parentless'.

3.5 Deprivation of family environment

Article 25 of the African Children's Charter requires states to ensure that a 'child who is temporarily or permanently deprived of his or her family environment' is provided with alternative care. Although the term 'deprivation' typically indicates circumstances resulting from a 'deliberate act by a third party', this provision encompasses other scenarios beside a state action that could deprive a child of a meaningful family environment, such as the death of parents, abandonment and displacement.⁶¹ Moreover, given that article 25 envisions a temporary or permanent deprivation of family environment, it applies to situations from temporary incapacities of a short to medium-term nature to more long-lasting situations such as the death of parents or the 'definitive withdrawal of parental rights and responsibilities'.⁶²

However, the scope of article 25 does not cover children who are deprived of their liberty or placed in a care setting due to a decision by a judicial or administrative authority following their alleged or proven violation of the law. The administration of juvenile justice, as discussed in this *Commentary*, is addressed under article 17 of the African Children's Charter.

3.6 Special protection and assistance

Despite the entitlement to special protection and assistance afforded to children deprived of a family environment, article 25 does not specify what such obligation entails. The presence of a stand-alone provision in article 25(2), which mandates the provision of alternative care, indicates that the entitlement to 'special protection and assistance' is intended to serve as an additional safeguard for such children, beyond the provision of alternative care.⁶³ The common application of 'special protection and assistance' in international human rights law serves to address the increased vulnerability of particular groups and facilitate the realisation of their rights by addressing the unique challenges stemming from their circumstances, status, or both.⁶⁴

Similarly, for children deprived of family environments, this provision considers the increased vulnerability to rights violations, including neglect, abuse and exploitation, in the absence of the protection that a child's family environment ought to provide. For instance, the African Children's Committee has recognised the heightened risk of girls without parental care to be subject to female genital mutilation,⁶⁵ as well as the risk of children without parental care and those placed in alternative care to sexual exploitation and abuse.⁶⁶ Regarding the former, the Committee requires states to ensure that states 'as a matter of policy, articulate specific measures in respect of each vulnerable group present in their jurisdiction'.⁶⁷ This indicates that the form of such entitlement to special protection and assistance can be inferred from other provisions of the Charter, including provisions on education

61 Cantwell & Holzscheiter (n 11) paras 76 & 78.

62 N Cantwell 'The human rights of children in the context of formal alternative care' in W Vandenhoe and others (eds) *Routledge international handbook of children's rights studies* (2015) 257.

63 Lim (n 60) 131.

64 Cantwell & Holzscheiter (n 11) para 114.

65 African Children's Committee and African Commission on Human and Peoples' Rights 'Joint General Comment on female genital mutilation' (2023) para 15.

66 African Children's Committee and African Commission on Human and Peoples' Rights (n 65) para 16.

67 African Children's Committee (n 12) para 126.

(article 11); health (article 14); protection against abuse and torture (article 16); and protection against harmful social and cultural practices (article 21).⁶⁸

Given that children deprived of their family environments do not constitute a homogenous group and face various risk factors, the level and form of ‘special protection and assistance’ to children should be approached on a case-by-case basis and follow an individualistic approach that is tailored to respond to the needs of the child in question and the nature of the selected alternative care.⁶⁹

4 Nature and scope of state obligations

4.1 Entitlement to special protection and assistance

According to article 25(1) ‘any child who is permanently or temporarily deprived of his or her family environment for any reason shall be entitled to special protection and assistance’. The inclusion of the phrase ‘for any reason’ in article 25(1) suggests that the entitlement to ‘special protection and assistance’ encompasses a wider array of circumstances, thus covering a broader scope of children.⁷⁰ Within the broader context of the African Children’s Charter, including provisions such as the prohibition of the use of child soldiers and protections for internally-displaced children, the emphasis on the entitlement for special protection and assistance for ‘any reason’ becomes crucial, particularly as it addresses root causes contributing to the deprivation of family environments in the African context.⁷¹

The Children’s Charter does not specify the duty bearer for the provision of special protection and assistance. This is mainly because it omits the phrase ‘provided by the state’ found under article 20(1) of CRC. This omission has been interpreted to mean that the obligation to provide special protection and assistance is obligatory for the state and society in general.⁷²

4.2 Ensuring the provision of alternative family care

Article 25(2)(a) stipulates that ‘states shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interests cannot be brought up or allowed to remain in that environment shall be provided with alternative family care’. The latter should be read with article 19(1), which allows for the removal of a child from their parents when a competent authority determines that such removal is in the child’s best interests.

The states’ obligation under article 25(2)(a) is a strong one as indicated by the choice of terms ‘shall’ and ‘ensure’. Under this provision, states are required to ‘ensure’ the provision of alternative care, rather than ‘provide’ alternative care, which indicates that states do not have to directly provide alternative care services.⁷³ However, even in cases where the state delegates the delivery of any aspect of alternative care services to non-state actors, it does not absolve the state of its obligation to regulate and ensure the availability of alternative care services and monitor the appropriate use of resources.⁷⁴ In this regard, according to General Comment 5 of the African Children’s Committee, states are required

68 C Phillips *Child-headed households: A feasible way forward, or an infringement of children’s right to alternative care?* (2011) 47. This argument is made in the context of art 20 of CRC, which contains similar obligations.

69 Lim (n 60) 136.

70 Cantwell & Holzscheiter (n 11) para 37.

71 Assim (n 51) 109-110.

72 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 103; Hodgkin & Newell (n 7) 279.

73 Cantwell & Holzscheiter (n 11) para 118.

74 Cantwell & Holzscheiter (n 11) para 115.

to establish clear criteria in legislation for determining a child to be in need of alternative care.⁷⁵ The determination of the appropriateness of alternative care should be done on a case-by-case basis and guided by the best interests of the child.⁷⁶

Along the same lines, in terms of the UN Guidelines, the decision-making process for alternative care is based on two fundamental principles, namely, ‘necessity’ and ‘suitability’. The necessity principle entails ensuring that no child should be placed in alternative care without valid justification, and where an appropriate solution would have been the provision of support to the family. In this regard, it is noteworthy that the African Children’s Committee emphasises that a child’s removal from family should be a measure of last resort.⁷⁷ In this respect, it underscores that poverty alone should not be a sufficient reason for the separation of children from their families,⁷⁸ but instead should prompt states to provide support to parents who are unable to fulfil their parental responsibilities in accordance with article 20(2) of the Children’s Charter.⁷⁹ Moreover, pursuant to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities (African Disability Protocol) and the UN Convention on the Rights of Persons with Disabilities (CRPD), the disability of either parent or child is not a sufficient reason for removing the child from their family.⁸⁰ On the other hand, the suitability principle comes into play when the placement of a child in alternative care is warranted and it requires that the choices regarding the care provided for children should be appropriate and determined on a case-by-case basis. The African Children’s Committee mandates that the child be ‘fully consulted and have his or her views taken into account when making decisions about placements’.⁸¹

Moreover, while the African Children’s Charter does not contain a similar provision to CRC imposing the obligation of periodic reviews of placements, under General Comment 5 of the African Children’s Committee, states are required to ensure that the preliminary and periodic judicial review of a child’s placement in alternative care is provided for in legislation. The Committee further requires that the roles and responsibilities of all relevant actors to protect children from abuse and torture is included in legislation.⁸² Furthermore, states are required to enact screening measures to prevent individuals who have harmed children from working in positions where they have access to them, including in institutions and orphanages.⁸³ States are further required to ensure the inclusion of provisions for reporting child abuse and neglect, detailing responsible actors and the consequences of non-compliance.⁸⁴

In addition, in its Concluding Observations, the African Children’s Committee has further recommended that states provide training to relevant personnel to conduct ‘proper assessment, and systematic selection of placement options for children deprived of family environment’.⁸⁵ States are further encouraged to scale up resources for the supervision and monitoring of all forms of alternative care.⁸⁶

75 African Children’s Committee ‘General Comment 5 on state party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection’ (2018) 21.

76 African Children’s Committee (n 24) para 40.

77 African Children’s Committee (n 75) 21.

78 As above.

79 As above.

80 African Disability Protocol art 28(4)(g); CRPD art 23(4).

81 As above.

82 African Children’s Committee (n 75) 20-21.

83 African Children’s Committee (n 75) 21.

84 African Children’s Committee (n 75) 22-22.

85 Concluding Observations to the 1st periodic report of the Federal Democratic Republic of Ethiopia, African Children’s Committee 2022 para 23.

86 As above.

Moreover, article 25(2)(a) provides a non-exhaustive list of potential alternative care options to be considered for children deprived of their family environment, that is, foster care placement, or placement in suitable institutions. Notably, the African Children's Charter does not explicitly mention *kafalah* or adoption, and it has been argued that the exclusion of commonly-used alternative care options in Africa, such as kinship care, reflects a discrepancy with African concepts of alternative care.⁸⁷ However, the inclusion of the term 'among others' suggests that states have the liberty to explore additional alternative care options beyond those explicitly mentioned.⁸⁸

In relation to foster care, the African Children's Committee recommends that states increase the social worker capacity pool and ensure that they receive adequate training to ensure that foster care is 'effective and reliable'.⁸⁹ States are further encouraged to increase support for foster families to discourage placement in residential care and promote foster care.⁹⁰ The Committee further recommends that states allocate 'sufficient budgetary and human resources for the purpose of monitoring and following up formal placement of children in foster care'.⁹¹

A notable distinction arises when comparing article 20(3) of CRC with article 25(2)(a) of the African Children's Charter. Unlike the former, which includes the qualifier 'if necessary' regarding a child's placement in institutions, the latter lacks such a caveat. However, the Charter employs the term 'alternative family care', as opposed to the broader term 'alternative care' used in CRC.⁹² This particular choice of phrasing suggests a preference for family-based or family-like alternative care options for children deprived of their family environment and indicates that non-family alternatives, such as institutional placement, should generally be secondary options.⁹³ The Children's Committee's Concluding Observations also reaffirm that preference should be given to family-based alternative care options and that the placement of children in institutional care should only be used as a measure of last resort and be temporary.⁹⁴ In this regard, the African Children's Committee has consistently encouraged state parties to work towards the deinstitutionalisation of children by adopting a comprehensive deinstitutionalisation strategy and ensuring that institutions integrate exist strategies in their operations.⁹⁵ States are further recommended to expand and promote family-based alternative care options, including foster care and domestic adoption, through community-based campaigns, sensitisation and incentives.⁹⁶

87 Gose (n 72) 103.

88 Gose (n 72) 104.

89 The Republic of Rwanda 3rd periodic report on the implementation of the African Children's Charter (2022) para 103.

90 As above.

91 Concluding Observations on the combined 2nd, 3rd and 4th periodic report of the United Republic of Tanzania, African Children's Committee (2017) para 22.

92 Art 25(2)(a) African Children's Charter.

93 Cantwell & Holzscheiter (n 11) para 38.

94 See eg Concluding Observations: Tanzania (n 91) para 23; Concluding Observations on initial report of the Republic of Burundi, African Children's Committee (2018) para 28; Concluding Observations on the combined periodic report of the state of Eritrea, African Children's Committee (2017) para 14.

95 See eg Concluding Observations on the initial report of the Republic Kingdom of Eswatini, African Children's Committee (2019) para 29(ii); Concluding Observations on the first periodic report of the Republic of Uganda, African Children's Committee (2022) para 2; Concluding Observations on initial report of the Republic of Burundi, African Children's Committee (2018) para 28; Concluding Observations: Tanzania (n 91) para 23.

96 See Concluding Observations: Tanzania (n 91) para 23; Concluding Observations: Burundi (n 95) para 28; Concluding Observations: Uganda (n 95) para 27.

Moreover, with respect to children who are placed in residential care and institutions, the African Children's Committee requires states to monitor that institutional care centres meet the required minimum standards,⁹⁷ in terms of living conditions, social work capacity, child protection policies, and record-keeping mechanisms.⁹⁸ Furthermore, the Committee has stressed that states ensure that all residential care facilities are registered and that systems are in place to facilitate such. It has further urged states to ensure the closure of unregistered institutions.⁹⁹ The importance of allocating adequate resources for the operation of these facilities, including training for staff to ensure that appropriate alternative care is received by children, has been stressed.¹⁰⁰ States are further required to ensure that children in residential care facilities are protected from various forms of violence, including corporal punishment, and have access to basic services including quality education, psychosocial support, and developmental opportunities.¹⁰¹

4.3 'Continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'

Article 25(3) further requires that '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' when considering alternative care and the best interests of the child. The provision envisions that the best interests of the child are considered both in the decision to take the child out of their family environment, as well as in any decision regarding the choice of alternative placement.¹⁰²

Furthermore, continuity as regards the child's upbringing requires measures to be taken to ensure that the child maintains contact with parents, family and the community.¹⁰³ Such consideration also extends to taking measures to ensure that, wherever possible, the child is placed in foster care or an adoptive family with a similar cultural background.¹⁰⁴ It is important to note that the requirement to give 'due regard' to these considerations is not a rigid requirement and should also be considered to the extent that they serve the best interests of the child in question.¹⁰⁵

4.4 Reunification of children with parents or relatives in the case of internal or external displacement caused by armed conflicts or natural disasters

Article 25(2)(b) of the African Children's Charter requires states to take measures to ensure the reunification of children with parents or relatives in the case of internal or external displacement caused by armed conflicts or natural disasters. Similar obligations are found in article 23, which deals with refugee children. In this regard, according to the Concluding Observations of the African Children's Committee, measures to implement this provision include strengthening efforts for family reunification through, among others, 'a system of tracing, legal assistance, travel arrangements, and financial support'.¹⁰⁶ Moreover, concerning children whose families cannot be traced, the Children's Committee recommends that states increase the number of social workers, strengthen the capacity of

97 Concluding Observations to the 1st periodic report of the Federal Democratic Republic of Ethiopia, African Children's Committee 2022 para 23; Concluding Observations: Uganda (n 95) para 27.

98 Concluding Observations: Uganda (n 95) para 27.

99 As above.

100 Concluding Observation on the initial report of the Republic of Botswana, African Children's Committee 2023 para 33.

101 As above.

102 See art 25(3) of the African Children's Charter. See also Cantwell & Holzscheiter (n 11) para 38.

103 Hodgkin & Newell (n 7) 289.

104 As above.

105 As above; Assim (n 51) 116-117.

106 Concluding Observations on the initial report of the Republic of Namibia, African Children's Committee (2015) para 29; Concluding Observations on the initial report of the Republic of Zimbabwe, African Children's Committee (2015) para 31.

already-existing social workers, establish new public alternative care facilities and strengthen existing ones, and collaborate with civil society organisations (CSOs).¹⁰⁷

5 Implementation

A review of state parties' reports reveals the measures that have been undertaken to implement article 25 of the African Children's Charter. One of the pathways on which states report in terms of implementing the provision is by highlighting their efforts to provide family-based alternative care and deinstitutionalise children. A case in point is Rwanda, which has implemented significant reforms in child care through efforts to strengthen child social protection programmes, expand community-based centres supporting vulnerable children, enhance social work at the local level, and improve foster care as part of the ongoing reforms.¹⁰⁸ Foster care has been developed as an alternative to institutional care, with support provided to foster care givers.¹⁰⁹ Furthermore, training has been provided to relevant officers to ensure coordination and supervision at the district level for deinstitutionalisation and foster care programmes.¹¹⁰ Rwanda reported that through alternative care reform, 95 per cent of children living in institutional care have been reintegrated.¹¹¹ In Ethiopia, progress has been made in terms of expanding the number of children's community centres and a shift in alternative care trends, with a decline in institutional care and a rise in community-based and kinship care arrangements, reflecting a positive move towards family and community-centred care.¹¹² Eritrea has taken measures towards the deinstitutionalisation of children through reunification, community-based group homes, adoption, support for HIV-affected families, and financial aid to families hosting orphans.¹¹³ In Malawi, there are ongoing efforts aimed at reducing the number of children in institutions. The deinstitutionalisation programme has been expanded to include all districts in the country and has successfully deinstitutionalised 1 250 children.¹¹⁴

One area of concern identified by the African Children's Committee relates to the high rate of children placed in institutions. For instance, with respect to Eswatini, the Committee noted with concern the increased reliance on residential care facilities to care for orphaned children.¹¹⁵ Similarly, concerning Eritrea, the Committee expressed concern regarding children separated from their parents and placed in group homes or institutions, as well as the lack of data regarding such placements.¹¹⁶

Another challenge in terms of implementation is the existence of unregistered institutions that fail to meet minimum standards and lack child protection policies and complaint mechanisms. For example, in Malawi, a nationwide monitoring exercise of childcare institutions in 2021 revealed that only 25 out of 122 institutions have child protection policies with a child abuse reporting mechanism.¹¹⁷ Uganda has acknowledged that challenges persist, particularly regarding unregulated orphanages

¹⁰⁷ As above.

¹⁰⁸ Republic of Rwanda 3rd periodic report on the implementation of the African Children's Charter (2022) paras 97-112.

¹⁰⁹ Rwanda 3rd periodic report (n 108) para 104.

¹¹⁰ As above.

¹¹¹ Rwanda 3rd periodic report (n 108) para 106.

¹¹² Federal Democratic Republic of Ethiopia combined 4th and 5th periodic report on the status of implementation of the African Children's Charter (2014-2019) 2020 58-59.

¹¹³ State of Eritrea 2nd and 3rd combined report (2014-2019) on the status of implementation of the African Children's Charter (2020) para 131.

¹¹⁴ Republic of Malawi combined 1st, 2nd, 3rd, 4th, 5th and 6th periodic report on the implementation of the African Children's Charter (2018-2021) para 118.

¹¹⁵ Concluding Observations: Eswatini (n 95) para 29.

¹¹⁶ Concluding Observation: Eritrea (n 94) para 14.

¹¹⁷ Republic of Malawi combined 1st, 2nd, 3rd, 4th, 5th and 6th periodic report on the implementation of the African Children's Charter (2018-2021) para 116.

or residential care institutions, with many of them lacking professional social work capacity, child protection policies, adequate care standards, and necessary record-keeping mechanisms.¹¹⁸

Moreover, in respect of children with disabilities, concerns were raised in respect of Rwanda in relation to the high number of children with disabilities placed in institutional care.¹¹⁹ The Children's Committee recommended to the state party to ensure that efforts are made to reduce the number of children with disabilities in institutions through sensitisation, advocacy and promoting foster care for children with disabilities.¹²⁰

Regarding informal alternative care, the Committee has raised concern regarding the lack of data on children placed in informal alternative care and support to families to several countries including Eswatini, Rwanda, Nigeria and others.¹²¹ In this regard, the Committee recommends that states develop strategies to support informal care givers and extended families caring for orphans¹²² and conduct data collection and assessment on the conditions of children in informal care settings and child-headed households for an informed planning and intervention.¹²³

In terms of monitoring, several states reported the availability of mechanisms for monitoring the placement of children in alternative care. For instance, Malawi reported on the Child Cases Review Board, comprising representatives from various government ministries, the justice system, law enforcement, as well as non-governmental and religious organisations, which carries out periodic monitoring and inspection of alternative care to ensure compliance with standards. The Malawi Human Rights Commission (MHRC) also plays a role in monitoring these institutions.¹²⁴ Tanzania reported that there are mechanisms for periodic reviews and monitoring of the residential care centres,¹²⁵ with relevant actors tasked with overseeing the administration, management and general welfare of children in these establishments. There are efforts to ensure compliance with standards and regulation through undertaking regular visits, inspections, interviews with staff and children, and assessments of living conditions, education and health.¹²⁶

Despite this progress, challenges remain in terms of the monitoring of alternative care placements and settings. For instance, Botswana and Eswatini have acknowledged the monitoring challenges and have attributed this to a lack of capacity and the limited number of social workers.¹²⁷

6 Conclusion

The situation of children without parental care remains a major concern in Africa. The root causes for the loss of parental care and separation from families are multifaceted, and in recent years have been

118 Republic of Uganda periodic report on the status of implementation of the African Children's Charter (2020) 35-36.

119 Concluding Recommendations on the 2nd periodic report of the Republic of Rwanda, African Children's Committee (2019) para 31.

120 As above.

121 Concluding Observations: Eswatini (n 94) para 29.

122 Concluding Observations: Tanzania (n 91) para 22; Republic of Rwanda 3rd periodic report on the status of implementation of the African Children's Charter (2019-2022) para 97; Concluding Observations on the periodic report of Federal Republic of Nigeria, African Children's Committee (2019) para 24.

123 Concluding Observations: Eswatini (n 94) para 29; Concluding Observations: Tanzania (n 91) para 22.

124 Combined report: Malawi (n 114) para 113.

125 United Republic of Tanzania consolidated 2nd, 3rd and 4th reports on the status of implementation of the African Children's Charter (2015) paras 79-83.

126 As above.

127 Republic of Botswana Combined report on the status of implementation of the African Children's Charter (2003-2021) 2021 para 123; Eswatini initial report on the status of implementation of the African Children's Charter (2016) para 136.

exacerbated by increasing emergencies as a result of climate change and COVID-19. Although the importance of a family environment for the optimal development and overall well-being of children is recognised under the African Children's Charter, article 25 foresees and addresses circumstances where children may be deprived of such a family environment and the safeguards it ought to provide. Article 25 seeks to protect children deprived of their family environment, and entitles them to special protection and assistance, including through the provision of alternative care, with priority given to family-based alternative care.

Overall, there has been considerable progress in the implementation of article 25 of the African Children's Charter. This progress is evident through the efforts made to expand family-based alternative care options for children, including promoting foster care and domestic adoption, strengthening social protection programmes, and enhancing community-based support centres. Notably, deinstitutionalisation efforts are underway in several countries.

While efforts to expand family-based alternative options for children and implementing deinstitutionalisation strategies are commendable, there is a need for states to scale up their efforts to simultaneously ensure the protection of children who are placed in institutions. This calls for increased efforts towards ensuring that all existing institutional care centres are regulated, registered, and meet the required minimum standards.

Moreover, much remains to be done by states to improve oversight and the monitoring of children in alternative care, particularly in institutions. In this regard, concrete measures should be taken to establish and strengthen monitoring mechanisms for alternative care and to allocate the necessary budgetary and human resources for periodic reviews to ensure compliance with standards and regulations.