IN THE BEST INTEREST OF CHILDREN DEPRIVED OF A FAMILY ENVIRONMENT: A FOCUS ON ISLAMIC *KAFALAH* AS AN ALTERNATIVE CARE OPTION

DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE LLM (HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA) FACULTY OF LAW, UNIVERSITY OF PRETORIA

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30 OCTOBER 2009

DECLARATION

I, Usang Maria ASSIM declare that the work presented in this dissertation is original. It has never been presented in any other university or institution. Where other people's works have been used, references have been duly provided. It is in this regard that I declare this work original. It is hereby submitted in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed…….

Date…….

Supervisor: Prof Julia Sloth-Nielsen

Signature……..

Date……..

DEDICATION

In loving memory of Prof ZT Fomum
(1945-2009)
You have gone ahead of us
But world conquest lives on.

And

My late kid sister
Queen-Louisa Essienawan Assim
(1984-1995)
For eleven brief years
You illuminated our hearts and home
With that special light from your heart
That light lives on Queen…
See you when we get there.

ACKNOWLEDGEMENTS

I am grateful to my supervisor, Prof Julia Sloth-Nielsen whose enthusiasm about the topic of this study kept me motivated all the way. For her thirst for excellence, which pushed me to give my best, I say thank you very much. Working under your supervision has been a privilege. I am also grateful to the many other 'giants upon whose shoulders I walked' in the course of this study. Special thanks to Benyam Mezmur who, despite his busy schedule, made time to go through and give incisive comments on portions of my work, besides providing me with materials at his disposal. I am indebted to Jill Claassen who took me on a new voyage of discovery in the world of research. I sincerely appreciate Prof Nico Steytler, Trudi Fortuin and all the staff at the Community Law Centre (CLC) for patiently encouraging me all the way. Special thanks are also due to the staff at the Inter-library loans department of the UWC library. Their promptness and efficient service delivery is exceptional. My heartfelt gratitude goes to the Centre for Human Rights (CHR), University of Pretoria for a value-added one year to my life, personality and career.

To my second semester colleagues in UWC - 'Bernange', Nkatha, Rishi, Tom and Conrad - thank you for offering your moral support, especially during those difficult moments in the beginning. Bernadette Iyodu thanks for being a friend who sticks closer than a *sister*. By extension, I express my gratitude to the entire LLM Class of 2009, especially my wonderful 1230 main housemates on 'South *Stress*' - Mwajuma, Patricia, Evelyne and Fleur. You ladies are the best…'*ubuntu* for life'. To my natural and church family members, at home and abroad, words can never be enough. God bless you. To my friends, at home and abroad, you truly proved that 'a friend in need is a friend indeed.' Thank you for keeping in touch throughout the year to offer love and encouragement.

Finally and most significantly, I am grateful to the Almighty God who has brought me from a mighty long way and is yet taking me farther because 'He knows my name'.

LIST OF ABBREVIATIONS

AC	Alternative Care
CDHRI	Cairo Declaration on Human Rights in Islam
CHH	Child-Headed Household
CRC	Convention on the Rights of the Child
CWPC	Children Without Parental Care
DRCCI	Declaration on the Rights and care of the Child in Islam
FC	Foster Care
GC	General Comment
ACRWC	African Charter on the Rights and Welfare of the Child
CDFE	Children Deprived of a Family Environment
HCI	Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption
IC	Institutional Care
ICA	Intercountry Adoption
KC	Kinship Care
KFC	Kinship Foster Care
RD	Rabat Declaration on Child Issues in the Member States of the Organisation of the Islamic Conference
SA	South Africa
UDHR	Universal declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNG	United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children
UNICEF	United Nations Children's Fund
USAID	United States Agency for International Development

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CHAPTER ONE

INTRODUCTION

1.1. Background to the study

It is trite that children represent the future and investing into a bright future requires protecting children's rights today.[1] The growing focus on the needs of children, in terms of rights, is of great importance due to the particular vulnerability of children. Consequently, their need for protection and priority care is the rationale behind the adoption of international instruments dedicated to children's rights.[2] Foremost among these are the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).[3]

The adoption of these international instruments has promoted the visibility of children beyond the scope of the family to that of them being subjects of state intervention.[4] Childhood is now regarded as a separate status in law. However, this does not mean 'that the rights of the child can be best protected when treated in isolation from the rest of the family'.[5] The CRC, the ACRWC as well as the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (HCI), all place a high premium on the need for children to grow up in a family environment. This is a necessary precondition for the full and harmonious development of a child's personality.[6]

It is against this background that the CRC and the ACRWC give an additional level of assistance and protection to children deprived of their natural family environment (CDFE).[7] This is justifiable in light of the fact that children who lack the security of a family are more vulnerable to the violation of all other rights that they are entitled to, as children and rights-bearing individuals in society. Childhood and adolescence in

[1] F Viljoen *International human rights law in Africa* (2007) 260.

[2] S Detrick (ed) *The United Nations Convention on the Rights of the Child: A guide to the "travaux preparatoires"* (1992) 19.

[3] ACRWC preamble, para 5; CRC preamble, para 4.

[4] G Van Bueren *The international law on the rights of the child* (1995) xx.

[5] As above 67.

[6] ACRWC preamble, para 4; CRC preamble, para 6; HCI preamble, para 1.

[7] Arts 20 CRC & 25 ACRWC.

the life of an individual are stages that impact significantly on the formation of character and personality. They are important periods for laying the foundation for an emotionally balanced and secure adulthood.[8]

CDFE include orphans, street children and abandoned children generally, whether or not in institutional care and their number runs into millions the world over.[9] The phenomena of HIV/AIDS, armed conflict and poverty, among others, have resulted in the production of millions of orphans and destitute children in Africa.[10] States have an obligation to provide alternative care (AC) for CDFE.[11] Various mechanisms for ensuring this include adoption, foster care, institutional placement and Islamic *kafalah*.[12]

The absence of individual personal care during childhood can result in irreversible consequences, further emphasising the importance of children growing within a family environment.[13] A family environment makes room for emotional contact, which helps children acquire the stability and security they need for proper development.[14]

The family is the basic unit upon which society is based. This makes it the most important unit of society.[15] However, the 'family' as a concept, is not static but is constantly in 'transitional development' because the understanding and practice of 'family' as a concept varies from place to place and each variation has profound implications for children and their upbringing.[16] A central assumption however, is the 'long-term stability of the family as a close physical, economic and emotional unit within which children are planned, born and reared'. Thus, the distinguishing factor

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[8] M Delplace 'Participation in Adoption' in F Ang et al *Participation rights of children* (2006) 179.

[9] At http://abandoned-orphaned.typepad.com (accessed 26/8/2009); LM Shapiro 'Inferring a right to permanent family care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and selected scientific literature' (2008) 15 *Washington and Lee Journal of Civil Rights and Social Justice* 194.

[10] T Davel 'Intercountry adoption from an African perspective' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 257.

[11] Arts 20(2) CRC & 25(2)(a) ACRWC.

[12] Arts 20(3) CRC & 25(2)(a) ACRWC.

[13] M Maclean & J Kurczewski (eds) *Families, policies and the law: perspectives from East and West Europe* (1994) 185.

[14] P Parkinson 'Child protection, permanency planning and children's right to family life' (2003) 17 *International Journal of Law, Policy and the Family* 154.

[15] CRC preamble, para 5; art 18(1) ACRWC.

[16] Van Bueren (n 4 above) 68.

between the family and other social groups is the kind and degree of 'emotional, socio-cultural and legal relationships between the various members'.[17]

Islamic *kafalah* is not only an alternative means of family care for CDFE, it is also a means of securing permanent parenthood for non-biological children. It is a guardianship system that enables a child to be brought up within a family environment without inheritance rights and 'assimilation' as the legal child of the new parents.[18] The inclusion of *kafalah* in the CRC is the first time an exclusively Islamic concept is recognised in a binding international instrument.[19] The drafting of the CRC was set against the background of compromise in relation to AC for CDFE and *kafalah* represents one of such compromises to accommodate the differences of the various state parties to the CRC.[20] However, the extent and practice of *kafalah*, as an AC for CDFE has not been a subject of much study, unlike other forms of AC like foster care and adoption.

1.2. Statement of research problem

The provision of AC for CDFE is recognized under Islamic law and Muslims have an obligation to care for such needy children.[21] However, adoption is not permitted under Islamic law and this is the basis upon which many Muslim states ratified the CRC subject to reservations on the adoption provisions.[22] Adoption is seen as creating a 'legal fiction' that equates the child to a blood relative, thereby disrupting the pattern of family relationships as regulated by Islamic law.[23]

[17] A Adepoju (ed) *Family, population and development in Africa* (1997) 28.

[18] S Ishaque 'Islamic principles on adoption: Examining the impact of illegitimacy and inheritance related concerns in the context of a child's right to an identity' (2008) 22 *International Journal of Law, Policy and the Family* 7.

[19] Art 20(3) CRC; Van Bueren (n 3 above) 100.

[20] M Freeman & P Veerman (eds) *The ideologies of children's rights* (1992) 95; Detrick (n 2 above) 26.

[21] D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' (2008) 12 *Law, Democracy and Development, Journal of the Faculty of Law UWC* 67; JJ Nasir *The Islamic law of personal status* (2002) 155.

[22] A D Gonzalez 'The Hague International Adoption Act and its interaction with Islamic law: Can an imperfect enforcement mechanism create cause for concern?' (2006-2007) *Gonzaga Journal of International Law* 10.

[23] D Pearl & W Menski *Muslim family law* (1998) 408.

Although adoption is not permitted, Islam provides the *kafalah* guardianship system for CDFE, which, though similar to adoption, does not have exactly the same legal effects as adoption in terms of rights and responsibilities.[24] This raises important questions and issues that are relevant to this study. First is the need to understand the concept and practice of *kafalah.* Second, what are the features distinguishing *kafalah* from other forms of AC? Third, what are the legal implications of *kafalah* on all parties involved? Fourth, what are the international dimensions to *kafalah* in light of the existing legal framework on intercountry adoption (ICA)?

1.3. Hypothesis

Basically, this study proceeds from the point of view that beyond the legal recognition of *kafalah*, there is a need for the development of a regulatory framework to guide the practice, so as to secure the best interest of CDFE with regard to AC.

1.4. Focus and objectives of the study

This study seeks to examine the subject of *kafalah* within the context of AC for CDFE. The study will also compare *kafalah* to other forms of AC and examine the extent to which *kafalah* is recognised and practiced internationally.

1.5. Significance of the study

The study attempts to make a contribution to the subject of children's rights in the area of AC for CDFE, with a particular focus on Africa. More specifically, it seeks to make a contribution to existing knowledge by bringing to the fore a subject (*kafalah*) that is largely left on the periphery, as far as existing literature is concerned.

1.6. Research methodology and limitations

This study will be based primarily on library research through a critical engagement with existing literature on the subject. However, it is not the aim of this study to be an

[24] UNICEF *Children in Islam: Their care, upbringing and protection* (2005) 75; Ishaque (n 18 above) 8; S Besson 'Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) *International Journal of Law, Policy and the Family* 141.

expert guide on Islamic jurisprudence on children's rights. It is mainly an academic exploration of a uniquely Islamic concept within the children's rights discourse.

1.7. Literature review

Many scholarly works on children's rights refer to *kafalah* but only within the context of its prominence during the drafting process of the CRC. Other works more focused on Islam and human rights refer to *kafalah* only within the broader framework of discussing the links and divergences between Islamic law and human rights, or children's rights more specifically. A specific focus on *kafalah* is the gap that this writer seeks to make a modest attempt at filling.

The works of Van Bueren[25], Freeman and Veerman[26] as well as Detrick[27] thoroughly examine the historical background leading up to the drafting of the CRC and how *kafalah* featured in the discourse. In addition to these Davel[28], in the volume edited by Sloth-Nielsen discusses *kafalah* as one of the reasons for ICA not gaining firm ground in African. The UNICEF guidebook[29] on children in Islam provides a detailed study of the various rights of the child as provided for under Islamic law. The books by Nasir,[30] Pearl and Menski,[31] and the article by Olowu[32] are very insightful to understanding the 'family' and personal status in Islamic law and the role and place of *kafalah* within the family. The works of Adepoju[33], Maclean and Kurczewski[34] and Delplace[35] also give a broader picture of the varying understanding of the 'family' as a concept.

The articles by Gonzalez[36] and Ishaque[37] focus on *kafalah* within the context of illegitimacy and inheritance rights of the child in Islam. Parkinson[38] deals with the

[25] Van Bueren (n 4 above).

[26] Freeman & Veerman (n 20 above).

[27] Detrick (n 2 above).

[28] Davel (n 10 above).

[29] UNICEF (n 24 above).

[30] Nasir (n 21 above).

[31] Pearl & Menski (n 23 above).

[32] Olowu (n 21 above).

[33] Adepoju (n 17 above).

[34] Maclean & Kurczewski (n 13 above).

[35] Delplace (n 8 above).

[36] Gonzalez (n 22 above).

need to create new ways of securing permanency in alternative family care besides adoption while Shapiro[39] argues that the right to permanent family care for CDFE can be derived from the existing instruments on the subject. Besson[40] writes that there is a need to balance the rights of various parties involved in adoption and other AC processes rather than prioritise one over the other. There is therefore room for a study that is more focused on *kafalah* as a topic.

1.8. Overview of chapters

This study is divided into five chapters, the first being this introductory chapter dealing with the background and justification for the study. Chapter two will examine the legal and policy framework governing the protection of CDFE. This will include an analysis of the various forms of AC available. Chapter three will deal with the concept, practice and legal implications of *kafalah*, in relation to other forms of AC. Chapter four will focus on how *kafalah* plays out at the international level, in terms of recognition, practice and regulation, in comparison to other forms of AC. Chapter five will conclude the study through an assessment of outcomes and the provision of relevant recommendations arising from the study.

[37] Ishaque (n 18 above).

[38] Parkinson (n 14 above).

[39] Shapiro (n 9 above).

[40] Besson (n 24 above).

CHAPTER TWO

INTERNATIONAL LEGAL AND POLICY FRAMEWORK FOR THE PROTECTION OF CHILDREN DEPRIVED OF A FAMILY ENVIRONMENT

Children are not the hope of the future.
No. Children are our problem NOW and
They need a response today, not tomorrow.[41]

2.1. Introduction

Prior to the 1989 United Nations Convention on the Rights of the Child (CRC)[42], children who lack a family environment were a focus of international concern albeit through non-binding declarations.[43] More recently, the impact of natural disasters, other large-scale emergencies and the impact of HIV/AIDS (especially on the African continent), have resulted in increased concern for children without parental care and, more broadly, children deprived of a family environment (CDFE).[44] The 2005 Day of General Discussion (GDD) of the Committee on the Rights of the Child (CRC Committee) was based on the theme, 'Children Without Parental Care' (CWPC). From that event, the process that resulted in the 2007 'Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children' (UNG) was initiated and it is to be introduced for UN consideration in November 2009.[45]

The aim of this chapter is to analyse the legal and policy framework for the protection of CDFE by outlining the relevant provisions of the CRC in light of the contributions of the UNG to a more practical understanding and application of the former to the

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[41] A poem by Gabriela Mistral quoted in ME Castillo 'Homeless children and their right to family life: The reality in Latin America' in J Doek *et al* (eds) *Children on the move: How to implement their right to family life* (1996) 155.

[42] At < http://www2.ohchr.org/english/law/crc.htm> (accessed 20/10/2009).

[43] See the 1924 Geneva Declaration on the Rights of the Child, the 1959 Declaration on the Rights of the Child and the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.

[44] UNICEF 'CWPC' 2005; South African (SA) Ministry of Social Development 'Policy Framework for Orphans and other Children made Vulnerable by HIV and AIDS' 2005 at < http://www.crin.org/docs/resources/treaties/crc.40/GDD2005> (accessed 17/10/2009).

[45] At <http://www.crin.org/NGOGroup/CRC/DayofGeneralDiscussion> & < http://www.crin.org/docs/DraftUNGuidelines.pdf> (accessed 17/10/2009).

subject of alternative care (AC) for CDFE. Secondly, key concepts derived from the CRC in relation to the subject will be examined. In addition, the applicable provisions of the African Charter on the Rights and Welfare of the Child[46] (ACRWC) will also be considered on a complementary and comparative basis. This is in order to locate the discussion within the peculiarities of the African continent on the subject. Finally, the major forms or broad categories of AC for CDFE will be discussed, with the exception of *kafalah*, which will be the main focus of the next chapter.

2.2. Legal and policy framework

The CRC provides the international legal framework for the protection of CDFE while the UNG represents the major international policy document on the subject. The policy framework helps strengthen the existing legal framework by providing more detailed information as to the practical application of the law in this regard.

2.2.1 The UN Convention on the Rights of the Child (CRC)

Article 20 of the CRC provides a broad framework for the protection of CDFE but establishes no rules or practical guidelines on the implementation of the provisions contained therein. Further, there is no other existing internationally binding instrument from which guidance can be sought in this regard.[47] However, inspiration for the provisions of article 20 was derived from the 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration).[48] The 1986 declaration contains the first internationally agreed upon standards of care for children whose parents are 'unavailable' or 'inappropriate'.[49]

Article 20 of the CRC provides:

[46] OAU Doc CAB/LEG/24.9/49 (1990).

[47] International Social Service (ISS) 'A global policy for the protection of children deprived of parental care' 2005 at <http://www.crin.org/resources/treaties/crc.40/GDD2005.pdf> (accessed 17/10/2009); UNICEF(n 44 above).

[48] At < http://www.un.org/documents/ga/res/41/a41r085.htm> (accessed 20/10/2009).

[49] N Cantwell & A Holzscheiter 'Article 20: Children deprived of their family environment' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008) 16.

1. A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state.
2. State Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care shall include, inter alia, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

While article 20 of the CRC provides the legal basis for the protection of CDFE, it cannot be understood and implemented in isolation from some other provisions of the CRC. For instance, where a child is removed from parental care (or a family environment), the decision to remove the child should be taken by a competent authority (based on his[50] best interests) and subject to judicial review.[51] And where a child is involuntarily removed from his family environment (not due to any direct act of commission or omission by his parents or caregivers), a family-based alternative takes priority over other alternatives.[52]

2.2.2 The UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (UNG)

The UNG commences by asserting that its aim is to fill the gap between state obligations under the CRC and implementation in practice by providing 'guidance for policies, decisions and activities' of all involved with AC for CDFE.[53] The UNG (containing 171 detailed and comprehensive articles) is the result of an array of contributions by several Non-Governmental Organisations (NGOs); state parties and

[50] Unless otherwise indicated, the use of the pronoun 'his' throughout this study refers to children of both sexes.

[51] Arts 3 & 9 CRC.

[52] The CRC and the 1986 Declaration preambles both emphasise the positive impact of a family environment on the growth and development of the child. Other related and relevant CRC provisions include arts 5 (the family and the child's evolving capacity), 7 (right to parental upbringing), 18&27 (state obligation, where necessary, to provide assistance to parents in fulfilling their parental responsibilities) & 25 (periodic review of AC placement).

[53] Arts 1 & 2 UNG.

the jurisprudence of the CRC Committee during the 2005 GDD.[54] Consequently, it targets a wide range of stakeholders such as governments, international organisations, civil society, professionals, voluntary organisations and the private sector.[55] The draft UNG is to be adopted by the UN General Assembly in November 2009, on the occasion of the 20th anniversary of the CRC. Although a non-binding instrument, its adoption will make it a useful guide for standard setting in the field of AC for CDFE and an advocacy tool for promoting children's rights in relation to alternative care.[56]

Article 5 UNG generally restates the position of article 20 CRC on the need for AC for CDFE but further provides practically for the manner in which this is to be done, with regard to the implementing authority and supervision of the process. More importantly, the UNG defines AC as:

> 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 or her parent(s) or primary caregivers, or spontaneously by a caregiver in the absence of parents.[57]

The significance of this definition is underscored not only by its comprehensiveness but also in the recognition it affords to informal forms of AC, a gap in the CRC resulting in the lack of both legal recognition and regulation of informal care. An example is, 'kinship care' (care by extended family members).[58] An additional significance of the UNG is its recognition of *kafalah* as a permanent and appropriate AC of more or less the same weight as adoption.[59] This has implications for the recognition and practice of *kafalah*, domestically and internationally.[60] More importantly, the UNG provides for an 'after care policy framework' to govern the

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[54] Reports and research papers presented during the GDD 2005 are available at <http://www.crin.org/> (n 45 above). The relevant Concluding Observations (Ethiopia (2001), Argentina (2002), United Kingdom of Great Britain and Northern Ireland (2008) etc.) and General Comments (GCs) of the CRC Committee (3 (2003), 5, 6 &7 (2005)) are on the subject are available at <http://www.unhcr.ch/tb/doc.nsf/(symbol)/GRC.GC.2005.6.En?OpenDocument> (accessed 17/10/2009).

[55] CRC Committee GDD 2005 (n 45 above); art 2 UNG.

[56] SOS Kinderdorf International 'Further steps towards the UN Guidelines on CWPC' 2005 at <http://www.sos-childrensvillage.org> (accessed 17/10/2009).

[57] Art 29 UNG.

[58] Arts 11, 17, 27 & 99-103 UNG contain provisions for filling this gap in the CRC.

[59] Arts 2(a) & 25 UNG.

[60] See chapters 3 and 4 below.

period between when CDFE in AC become adults (18 years) and progress to independence (articles 135-140).

2.3 Deconstructing article 20 CRC

Understanding the need for AC for CDFE requires an appreciation of certain concepts that flow from article 20 CRC. The UNG, together with other relevant literature, help to provide more detail to these concepts as follow:

2.3.1 Family environment

Growing up in a family environment is a universally recognized prerequisite for the full and proper development of a child's personality, talents and aptitudes because of the presumption of care, nurture, love and understanding within that environment.[61] As highlighted in the previous chapter, there are no rigid definitions from for the terms 'family', 'family life' and 'family environment' due to the variations in their understanding and practice all over the world.[62] The term 'family environment' is a new concept introduced by the CRC and adopted by the ACRWC and it has been suggested that these terms are overlapping concepts that are generally used interchangeably.[63] Consequently, 'any non-institutional living arrangement in which the education [and other nurturing and training activities] of children takes place under the responsibility of one or more adults' would amount to a family environment. This is because the family as an institution is not established upon state initiative and is ordinarily not subject to state supervision or intervention.[64]

The modern conception of the family or family environment goes beyond the traditional understanding of a man, woman and children. It therefore includes single

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[61] PH Kooymans 'Introductory speech' in J Doek (n 41 above) 18; CRC preamble; HCI preamble; Council of Europe 'Children in Institutions: Prevention and alternative care' 2005; SOS Kinderdorf International 'A child's right to a family: Family-based child care' 2005 at <http://www.crin.org/> (n 45 above); art 3 UNG.

[62] CRC Committee GC 7 'Implementing child rights in early childhood' 2005, para 19 at <http://www.unhcr.ch/tb/doc.nsf/> (accessed 17/10/2009); *SA Law Commission Report on the review of the Child Care Act* (2002) 238 at <http://www.doj.gov.za/salrc/reports/2002dec.pdf> (accessed 18/10/2009); SOS (n 61 above).

[63] Van Bueren (n 4 above) 69.

[64] CMI Moolhuysen-Fase 'Opening speech' in J Doek (n 41 above) 3.

parent families and other co-habiting individuals, whether married or not and whether of the same or opposite sex.[65] The emphasis is on the existence of a 'primary living unit in which the care and upbringing of children take place'.[66] In recognition of the different forms of family environments in existence, the CRC and the ACRWC refer to a child deprived of 'his or her' family environment and not of 'a' or 'the' family environment.[67] In addition to this, article 20 of the CRC makes reference to 'family' and not merely 'parents'. This distinction is in recognition of a broad understanding of the concept of 'family' (or 'family environment') as going beyond the mere existence of parents.[68] There are more specific provisions in the CRC that focus on parents and parental responsibilities.[69]

The importance of a family environment is not premised on the mere existence of a physical structure but on the psychological elements it represents. Ideally, the family environment is both a place of intimate relations and a social institution upon which society is based.[70] In effect, the absence of a family environment not only destroys childhood but also has damaging impacts on both the future of the child and ultimately, the society at large.[71] Thus while there is no 'right to a family' under international law, the near complete dependence of children on adult care, particularly in their early years, necessitates 'social (and legal) patterns that protect, nurture and teach children', especially those deprived of a family environment due to their increased vulnerability caused by the loss of a family environment.[72] The role of a family environment is related to a child's right to life, survival and development.[73] The significance of this right goes beyond the inherent right to life to an all-embracing approach determined by the quality of life available to the child, physically, psychologically, socially and otherwise.[74]

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[65] *SA Law Commission report* (n 62 above) 58; CRC Committee GDD 2005 (n 45 above) 3.

[66] E Terpstra 'Children on the move: A perspective from the Netherlands' in J Doek (n 41 above) 22.

[67] Cantwell & Holzscheiter (n 49 above) 32; Arts 20 CRC & 25 ACRWC.

[68] Art 20(1) CRC; UNICEF *Implementation handbook for the Convention on the Rights of the Child* (2007) 278.

[69] E.g. arts 5,9,17 & 18. However, the wording of those provisions further reflects the existing realities of all children not being cared for strictly by their parents alone.

[70] J Garbarino *et al Children and families in the social environment* (1992) 71.

[71] E Bartholet *Nobody's children: Abuse, neglect, foster drift, and the adoption alternative* (1999) 60.

[72] Committee for Legal Aid to the Poor (CLAP) India 'CWPC: A socio-legal analysis from Indian perspective' 2005 at <http://www.crin.org> (n 45 above); Garbarino (n 70 above) 74; Kooymans (n 61 above) 18.

[73] Art 6 CRC.

[74] D Fottrell (ed) *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* (2000) 5; Briefings in Medical Ethics 'The UN Convention on the Rights of the Child' (1991) *Journal of Medical Ethics*

2.3.2 Children deprived of a family environment (CDFE)

The scope of article 20 of the CRC covers CDFE either on a temporary or permanent basis and refers to categories of children who have either 'lost' or become 'separated' from their families for several reasons. Causes of loss or separation include the death of parents, children's abandonment or relinquishment by parents, armed conflict, internal displacement, temporary or permanent incapacity of parents (due to imprisonment, illness or disability) and children removed from parental care, in their best interests, by an administrative or judicial decision.[75] CDFE is thus a generic term covering a wide range of children including orphans due to HIV/AIDS and other causes of death.[76] There are also those classified as 'destitute children' (victims of a wide range of family circumstances such as poverty) and sometimes, children of single parents (especially mothers) who need to work but do not have access to childcare facilities are also considered as destitute and CDFE.[77]

According to various statistics given by UNICEF[78], UNAIDS[79], USAID[80] and Save the Children International, CDFE (as a result of natural disasters, AIDS, armed conflict and internal displacement, among others), run into hundreds of millions all over the world, with a significant impact on the African continent where many children have lost their primary caregivers (family and community members) to the HIV/AIDS pandemic.[81]

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1 - <http://www.cirp.org> (accessed 1/9/2009); CRC Committee GC 5 'General measures of the implementation of the CRC' 2005.

75 CRC Committee GDD 2005 (n 45 above) 8; UNICEF (n 44 above) 2; *SA Law Commission report* (n 62 above) 167; arts 5, 8, 20 & 30 UNG.

76 UNICEF (n 44 above) 4; CRC Committee GC 6 'Treatment of unaccompanied and separated children outside their country of origin' 2005, paras 7, 8 & 39.

77 D Tolfree *Roofs and roots: The care of separated children in the developing world* (1995) 38.

78 United Nations Children Education Fund.

79 Joint United Nations Programme on HIV/AIDS.

80 United States Agency for International Development.

81 J Sloth-Nielsen & B Mezmur 'HIV/Aids and children's rights in law and policy in Africa' in Sloth-Nielsen (n 10 above) 280; CRC Committee GC 3 'HIV/AIDS and the rights of the child' 2003 at <http://www.unhcr.ch/tb/doc.nsf/GRC.GC.2003>; Concluding Observations of the CRC Committee: Ethiopia 2001 at <http://reproductiverights.org/documents/Ethiopia2001.pdf> (accessed 17/10/2009); Cantwell & Holzscheiter (n 49 above) 3; UNICEF *Africa's orphaned and vulnerable generations: Children affected by AIDS* (2006) 1.

However, children within the juvenile justice system, though deprived of their family environment are not CDFE in this context because they are separately provided for.[82] Also, while the list is non-exhaustive, the position of street children and child-headed households (CHH) remains unclear under international law.[83] However, legal recognition is given to CHH in South Africa. This has the advantage of keeping siblings together and reducing the number of children for whom AC would have to be provided.[84] The state has an obligation to support and monitor such households, the recognition of which is not automatic but is dependent on the maturity and capacity of the child heading the household, in accordance with article 5 CRC on the evolving capacity of the child.[85] It is submitted that this approach also lends credence to article 31 of the ACRWC on the duties of the child. In addition, recognising CHH further buttresses the fact that the loss of parents or parental care does not necessarily mean the loss of a family environment. With particular reference to Africa, the care of younger siblings by older children is considered a duty that forms part of the African kinship system.[86]

2.3.3 Best interest of the child principle

Article 3 of the CRC establishes the fundamental 'best interest principle' in relation to all children's rights. But significantly, the best interest principle is restated in article 20 thereby underscoring the importance of the best interest principle in the context of CDFE.[87] Given the general consensus that a family environment serves the best interest of every child, it becomes imperative to focus on how to secure the best

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[82] Art 31 UNG; 1990 UN Standard Minimum Rules on the Administration of Juvenile Justice and 1985 Rules for Protection of Juveniles Deprived of Their Liberty. Children who are voluntarily outside of their family environment for recreational or other purposes are also excluded.

[83] Cantwell and Holzscheiter (n 49 above) 38; CRC Committee GC 3 (n 81 above) also raises concerns about CHH due to HIV/AIDS but makes no reference to their status or position.

[84] *SA Law Commission report* (n 62 above) 172.

[85] Sloth-Nielsen & Mezmur (n 81 above) 284; *SA Law Commission report* (n 62 above) 196. The acceptable minimum age in the SA Children's Act is 16 years.

[86] J Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309.

[87] The emphasis on this principle in relation to CDFE is further evidenced by its inclusion in related provisions to art 20. Such related articles include arts 9 (on separation from parents) & 21 (adoption).

interest of children who lack such an environment.[88] Some elements of a child's best interest in such circumstances include 'his or her need for affection and the right to security and continuing care'.[89]

Consequently, while the best interest principle is fundamental to the general conditions of AC for CDFE in terms of the supply of basic needs (food, clothing, shelter etc), the principle is equally based on the principle of 'individualised treatment'. In effect, 'best interest' does not mean the same thing for every child.[90] The most appropriate form of AC for each affected child will depend on the general needs of the child but more importantly, on the specific needs as well as there can be no 'one solution fits all' approach.[91]

2.3.4 Deprivation

While the term 'deprivation' usually indicates 'a deliberate act by a third party', within the context of the CRC, it denotes any reason why and situation (justified and lawful or not) where a child is lacking in parental and family care.[92] Thus, deprivation is context-based, in the sense that the focus is on the attachment or relationship lost, and not just on the physical loss of parents. This is especially important within the African and other non-western cultures where attachments are formed with a wide variety of people who play distinct but complementary roles in caring for children.[93]

The use of the term 'deprived' also draws attention to the components of a family environment (in an ideal situation), the absence of which places a child in a disadvantaged position. A major component of a family environment is stability or continuity in a 'non-exploitative caring' relationship among the members of the family.[94] Other components of a family environment include a warm relationship of acceptance and closeness between the child and the caregiver, bond formation over

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[88] CRC Committee GDD 2005 (n 45 above).

[89] Art 5 1986 Declaration.

[90] Arts 6, 58-70 & 78-98 UNG.

[91] CRC Committee GDD 2005 (n 45 above) 7; SOS (n 61 above) 4. E.g. the best interests of a victim of physical or sexual abuse would require that the AC chosen provides for emotional and psychological treatment by a trained professional in the field.

[92] Cantwell & Holzscheiter (n 49 above) 38; CRC Committee GC 3 (n 41 above).

[93] Tolfree (n 77 above) 24; UNICEF (n 44 above) 2.

[94] S Goonesekere 'Human rights as a foundation for family law reform' (2000) 8 *The International Journal of Children's Rights* 84.

a period of time with members of the family and stimulation of the child from infancy for normal development of language, intelligence and other developmental traits.[95] In specialised studies, the concept of 'deprivation' is also used to describe the consequences of living in institutions resulting in the absence of affection, personal care and deep emotional relationships, presumably present in a family environment.[96]

2.3.5 Special protection and assistance

CDFE are 'entitled to special protection and assistance provided by the state'.[97] All children are entitled to protection and priority care due to the particular vulnerability associated with childhood. The recognition of this is the rationale behind the adoption of international instruments dedicated to children's rights.[98] However, the importance of growing up in a family environment justifies the additional level of assistance and protection that states are expected to provide for CDFE. They are doubly vulnerable to the violations of all the rights they are entitled to in the absence of the security provided by a family environment.[99]

CDFE therefore require particular efforts by states to secure their protection through appropriate means.[100] In order for special protection for CDFE to be meaningful, the measures undertaken must reflect the 'lived realities of those children'. Consequently, there is no 'special protection' if the children concerned do not actually experience 'the feeling of being cared for by a care giver.'[101] This obligation bears a moral connotation because it goes to the root of the duty of the society to children. Thus, where children lack parents or families to meet their essential needs, the onus falls on the larger society to care for them. It therefore becomes state obligation

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[95] Art 4 UNG; Tolfree (n 77 above) 19; SOS (n 61 above).

[96] Gruppo di Lavoro per la CRC, Italy 'CWPC' 2005- <http://www.crin.org> (n 45 above) 3; SOS (n 61 above).

[97] Art 20(1) CRC.

[98] Detrick (n 2 above) 19.

[99] This is without prejudice to the fact that there are many children who are subjected to various forms of abuse and violations of their rights within the confines of their family environment. Nevertheless, this does not negate the general protective role of the family in shielding children from harm and risks to which they would be exposed in the absence of a family environment.

[100] Cantwell & Holzscheiter (n 49 above) 11.

[101] I Stevens 'The impact of the national care standards in Scotland: Putting article 20 into practice?' (2008) 16 *The International Journal of Children's Rights* 265; B Abramson 'Suggestions for guidelines pertaining to "Children (and adolescents) without parental care"' 2005 at <http://www.crin.org> (n 45 above).

within organised and civilized societies.[102] Flowing from this, it has been argued that there is a fiduciary relationship between the state and CDFE within the framework of alternative care for such children. A fiduciary relationship in this context places a positive obligation on the state to act in the best interests of the affected children.[103]

2.3.6 State obligations

As the ultimate guardian of all children within its jurisdiction, the state has an obligation to provide AC for CDFE in accordance with domestic law, based on the best interest principle.[104] This duty is more critical in relation to early childhood, the stage for the formation of strong emotional attachments, upon which the survival of young children depends.[105]

State obligations toward CDFE take effect not only when it is impossible for a child to be cared for by his parents but also when 'it is deemed that the child would be in danger if left in their care'. Thus, article 20 covers any child within a state's jurisdiction who, 'for whatever reason, is unable to benefit, or has been removed, from the care of his or her parent and is not being looked after informally within the extended family.'[106]

State obligations toward CDFE requires the development and programmatic implementation of AC policies and plans, in cooperation with the civil society, in consideration of factors that are peculiar to each society.[107] In practice therefore, a multidisciplinary approach is required for the fulfilment of state obligations in the provision of AC for CDFE. In addition, state obligations in this regard are not discharged merely by the provision of AC for CDFE, as there is need for continuous monitoring and regular periodic review.[108]

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102 UNICEF (n 68 above) 279.

103 S Grover 'Nowhere to turn: The Supreme Court of Canada's denial of a constitutionally-based governmental fiduciary duty to children in foster care' (2004) 12 *The International Journal of Children's Rights* 105.

104 Art 3 CRC; CLAP (n 72 above) 2; Concluding Observations of the CRC Committee: Argentina 2002 at <http://www.sim.law.uu.nl.SIM/CaseLaw/uncom.nsf>; 'CRC on best interest of the child: Comment on article 3' (2006) at <http://www.kinderrechte.gv.at/home/upload/crc.ndf> (accessed 17/19/ 2009).

105 Arts 2(1) & 20(2) CRC; CRC Committee GC 7 (n 62 above) 4.

106 Cantwell & Holzscheiter (n 49 above) 9 63.

107 Arts 32, 54-56, 108-14 & 71-77 UNG; Cantwell & Holzscheiter (n 49 above) 51.

108 UNICEF (n 68 above) 281; CRC Committee GC 5 (n 74 above).

2.3.7 Continuity in upbringing

In providing AC for CDFE, consideration must be given to the need to maintain continuity in a child's 'ethnic, religious, cultural and linguistic background'.[109] The concept of 'continuity in upbringing', as used in the CRC, represents a new norm in international law, in the context of childcare. However, the concept does not insist on AC for CDFE to conform to their recent background but on the need for 'continuity in childhood care' for CDFE with 'due regard' to the elements of their background, up to the point of becoming CDFE.[110]

In effect, 'due regard' in this context would mean that in considering AC, a child's background becomes relevant only to the extent to which maintaining it would serve his best interest. The focus is to ensure that the AC provided does not impact negatively on the child's growth and development. Like the best interest of the child principle, there is no 'one solution for all' approach in implementing 'continuity'. In practice, a case-by-case analysis is required, since 'continuity' may not always serve the best interest of all CDFE. A rigid interpretation would be incompatible with the flexible nature of the concept, making a determination of 'best interest' in each case impossible.[111]

Continuity in upbringing also refers to the need to secure CDFE in a stable and constant AC setting with love and understanding for harmonious development so as to avoid the negative effects of drifting from place to place. This rightly goes beyond mere continuity in a socio-cultural environment.[112] In addition, the concept of continuity is relevant within the context of some other related provisions of the CRC. These include the right of a child to know and be cared for by his parents[113], the right to preservation of identity,[114] the cultural and identity rights of children of minority or indigenous background,[115] and the rights to freedom of religion, expression and association.[116]

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[109] Arts 20(3) CRC & 10 UNG.

[110] Cantwell & Holzscheiter (n 49 above) 60; CRC Committee GDD 2005 (n 45 above) 9.

[111] UNICEF (n 68 above) 289; Cantwell & Holzscheiter (n 49 above) 61.

[112] UNICEF (n 68 above) 289; Cantwell & Holzscheiter (n 49 above) 62.

[113] Art 7 CRC.

[114] Art 8 CRC.

[115] Art 30 CRC.

[116] Arts 13, 14 & 15; R Reddy 'Regional practice: The Asian Pacific situation' in Doek (n 41 above) 134; UNICEF (n 68 above) 288.

2.4 Regional perspectives: the ACRWC

The ACRWC was drafted partly in response to the under-representation of African states in the drafting process of the CRC[117] and the need to address particular issues that are peculiar to children's rights in Africa beyond those covered by the CRC.[118] However, the ACRWC draws inspiration from the CRC as evidenced by the fact that the provisions of the former are framed in similar manner to the latter. The ACRWC makes direct reference to the CRC in its preamble and the ACRWC is equally premised upon the same fundamental principles of children's rights established by the CRC.[119] Nevertheless, by being region-specific in a number of areas, the complementary role that the ACRWC plays to the CRC in children's rights is quite established.[120]

2.4.1 Article 25 ACRWC v Article 20 CRC

Article 25 ACRWC is more or less the regional equivalent to article 20 CRC on AC for CDFE and both provisions are largely similar. However, the wording of article 25 suggests protection for a wider scope of children by requiring that AC be made available to CDFE 'for any reason' as opposed to article 20 CRC from which that emphasis is lacking.[121] The emphasis in article 25 is arguably a deliberate inclusion in light of the unique provisions of the ACRWC on the prohibition of the use of children as soldiers,[122] special protection for internally displaced children (in the same

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117 F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 218; Cantwell & Holzscheiter (n 49 above) 22.

118 Fottrell (n 74 above) 3; PT Zeleza 'The Struggle for Human Rights in Africa' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 42.

119 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 17. The four basic principles of children's rights are the right to life, survival and development, the best interest of the child, non-discrimination and child participation.

120 DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157; F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law: the African Charter on the Rights and Welfare of the Child' (2001) 1 *African Human Rights Law Journal* 1; D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) *The International Journal of Children's Rights*; BD Mezmur 'The African Children's Charter v UN Convention on the Rights of the Child: A Zero-Sum Game?' (2008) 23 *South Africa Public Law* 1.

121 Art 25(1)(2)(a) ACRWC; Art 20(1) CRC.

122 Art 22(2) ACRWC.

manner as refugee children),[123] special measures for the right to education of the girl-child[124] and, the prohibition of harmful traditional practices like child marriages and female genital cutting.[125] These are some of the reasons for which children could be deprived of a family environment in Africa.[126]

Like the CRC, the ACRWC also reaffirms the best interest principle and the concept of continuity in upbringing, subject to the same considerations already discussed above.[127] Unlike the CRC however, the best interest of the child is a factor not only with reference to separating a child from his parents, but also with regard to any decision regarding the choice of AC.[128] This emphasises the importance of the principle throughout the entire process.

2.4.2 The African fingerprint on AC for CDFE

The supremacy of children's rights over any inconsistent 'custom, tradition, cultural or religious practice' signifies an African acceptance of the global paradigm shift to the recognition of children as full and visible members of society, entitled to human rights in the here and now.[129] The importance of a family environment to the harmonious development of the child is reaffirmed in the ACRWC[130] with the introduction of a new and positive dimension in relation to children of imprisoned mothers. Expectant mothers and mothers of infants and young children are entitled to special treatment such as the priority of non-custodial sentences and special alternative holding institutions in the event of custodial sentences.[131] 'The success story in this is that a

[123] Art 23(4) & 25(2)(b) ACRWC.

[124] Art 11(3)(e) ACRWC.

[125] Art 21 ACRWC.

[126] The elaborate provisions of the UNG have supplemented many such gaps in the CRC on AC for CDFE.

[127] Art 25(2)(a) and (3) ACRWC. Compare art 20(1) CRC.

[128] Art 25(3) ACRWC.

[129] Arts 1(3), 7 ACRWC & 12 CRC; M Freeman 'The moral status of children', G Van Bueren 'International children's rights: A stop-go history', Y Kolosov 'The juridical significance of the Convention on the Rights of the Child' and, JV Lanotte & G Goedertier 'The procedure before the Committee on the Rights of the Child' all in E Verhellen (ed) *Understanding children's rights* (1996) 28, 316, 369 & 471; UNICEF (n 68 above) xi; Davel (n 117 above) 165.

[130] Preamble & art 18 ACRWC.

[131] Art 30 ACRWC.

child's environment and the people it grows around should be seen as important and integral to his/her welfare'.[132]

Further, article 25 makes reference to '*alternative family care*'[133] thereby suggesting the priority of a 'family-based' or 'family-like' alternative for CDFE over a non-family AC such as institutions generally.[134] This is quite a departure from the CRC, which uses the expression '*alternative care*'[135] in article 20 of the CRC.[136] This may be interpreted to mean that under the ACRWC, the concept of 'continuity in upbringing' becomes more relevant where 'alternative family care' rather than mere 'alternative care' is considered an option for CDFE, to the extent of its consistency with article 1(3) ACRWC on the supremacy of the universality of children's rights.[137]

All these go to show that the ACRWC does make distinct contributions to children's rights generally and the CRC particularly. These are positive values that resonate with the 'real needs of Africa' and buttress the fact that regional treaties are important for the resolution of regional human rights situations, while 'upholding cultural traditions and history unique to the region'.[138]

2.4.3 The missing links

It is quite interesting to note that article 25 ACRWC does not expressly make reference to *kafalah* (or adoption which is covered in article 24) as one of the AC options for CDFE. But like article 20 CRC, the wording of the former also suggests

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[132] B Iyodu 'An assessment of the achievements of the African Charter on the Rights and Welfare of the Child in the last 10 years' unpublished LLM research paper on Children's Rights and the Law, UWC 2009.

[133] My emphasis, see art 2(a) ACRWC.

[134] Cantwell & Holzscheiter (n 49 above) 23.This is without prejudice to the fact that 'placement in suitable institutions' is one of the forms of AC listed under art 25.

[135] My emphasis, see art 20(2) CRC. However, the UNG and the order of placement of the AC options in art 20 CRC also establish the priority of a family-based AC option over others.

[136] See art 20(2) CRC and compare art 25(2)(a) & (3) ACRWC.

[137] The idea of 'continuity in upbringing' under the ACRWC immediately follows the consideration of 'alternative family care' (art 25(3)). Under the CRC, 'continuity in upbringing' follows the general (but non-exhaustive) list of forms of AC (art 20(3)).

[138] A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet (2002) 10 *The International Journal of Rights* 183; LL Senghor 'Address delivered to the opening meeting of the African Experts in preparation of the African Charter on Human and Peoples' Rights' reprinted in Heyns & Stefiszyn (n 118 above) 49.

that the care options listed are non-exhaustive.[139] By implication therefore, *kafalah* falls within the scope of article 25 of the ACRWC and more so because *kafalah* represents a 'family-based' or 'family-like' form of AC for CDFE. Interestingly also, in relation to continuity in upbringing, 'culture' is omitted from the list of elements constituting a child's background.[140] However, since article 20 CRC recognises 'culture' in this regard as well as article 1(3) ACRWC, this is not necessarily a significant omission. The best interest of the child remains the deciding factor in both instances.

Both the CRC and the ACRWC do not expressly provide for kinship care (KC) as an AC option for CDFE despite its being the reality of many CDFE, particularly in Africa. It is practiced informally either spontaneously or at the requests of parents and places no 'legal' responsibilities on the caregivers.[141] Consequently, there are no specific state obligations to CDFE who have been absorbed under the most widespread and significant form of AC, since its role and status is not expressly provided for.[142] This situation is more curious in Africa because the ACRWC recognises the role of 'parents or other persons responsible for the child' in the upbringing of children.[143] The technical and narrow expression 'legal guardian' is avoided in deference to the role of 'the extended family and other *de facto* caregivers' in child upbringing.[144] In a related sense, *kafalah* though recognised, is similar to KC in this regard but that will be discussed subsequently.

2.5 Forms of alternative care (AC)

In providing for AC options, articles 20 CRC and 25 ACRWC give priority to family-based options like foster care and adoption while making 'institutional' care a subsidiary option 'if necessary', thereby making it a secondary form of AC in the

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139 Art 25(2)(a) provides that alternative family care for CDFE 'could include, *among others*,foster placement, or placement in suitable institutions for the care of children'. See also art 20(3) CRC.

140 Art 25(3) ACRWC provides for due regard to 'the child's ethnic, religious or linguistic background'.

141 ISS (n 47 above); ISS & UNICEF 'Improving protection for children without parental care, kinship care: an issue for international standards' 2004 at <http://www.crin.org> (n 45 above); Cantwell & Holzscheiter (n 49 above) 19.

142 As above; Children's Rights, New York 'Overview of institutional care in the United States' 2005 at <http://www.crin.org> (n 45 above).

143 Art 20 ACRWC on parental responsibilities.

144 Mezmur (n 120 above) 25. Compare art 18 CRC on parental responsibilities.

hierarchy of AC options.[145] This is aimed at reaffirming the 'superiority of the family environment, be it the 'natural' family environment or an alternative family placement (foster care, adoption) over other types of alternative care'.[146] The implication of this is that between the time when a child 'loses' his natural family and the time of placement in institutional care, other alternatives should be explored unless it is necessary to place the child in such care in the first place, especially if for a temporary period of time. The same approach is adopted by the UNG also.[147] Further, the options listed, prior to institutional placement, are ranked in order of permanence, that is, from the least permanent form of alternative care to the most permanent.[148]

What follows is a discussion of the forms of AC in the order of permanence, as listed in the CRC and the ACRWC (with the exception of *kafalah*) followed by institutional care. However, before considering the listed forms, it is necessary to elaborate on KC in light of its wide practice, acceptance and significance as earlier highlighted above. Besides, the UNG broadly classify all AC forms into two categories of 'formal' and 'informal', with KC (and *kafalah*) in the latter category.[149]

2.5.1 Kinship care (KC)

KC refers to the 'full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, step-parents, or any adult who has a kinship bond with a child'.[150] KC is premised on a broad interpretation of 'family' to include all the people involved in caring for a child, which differs from society to society and even from family to family. Traditionally, the extended family comprises 'everyone related by blood, marriage, and adoption', with older children having a supervisory role to play in the care of younger children in the family.[151] KC is traceable to the African tradition of children belonging not just to their nuclear family

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145 Arts 20(3) CRC & 25(2)(a) ACRWC; Cantwell & Holzscheiter (n 49 above) 16. The use of the phrase 'if necessary' before listing or permitting institutional placement is indicative of this.

146 Cantwell & Holzscheiter (n 49 above) 19.

147 CRC Committee GDD 2005 (n 45 above) para 665; Arts 20-21 UNG. Art 9 UNG also states that AC should not be based on any political, religious or economic goals of caregivers.

148 The order provided in art 20(3) CRC reads as follows: 'foster care', '*kafalah*' and 'adoption'.

149 Arts 11, 17 & 30 UNG.

150 ISS & UNICEF (n 141 above) 2; Children's Rights New York (n 142 above).

151 CR O'Donnell 'The right to a family environment in Pacific Island cultures' (1995) 3 *The International Journal of Children's Rights* 90.

but being the responsibility of the entire community within which they are born through a wide range of social relationships.[152] It is also based on the assumption that 'blood relationship is central to what the family is all about'.[153]

In many developed countries, only when kinship care is 'ordered or subsequently officialized by a competent authority does it qualify as a form of alternative care', in the strict legal sense and hence, subject to measures of state control and regulation. This is known as 'kinship foster care' (KFC) and the caregivers are entitled to financial and other assistance by the state in caring for the child involved.[154]

KC has positive values such as promoting continuity in upbringing and family autonomy especially during family crisis like divorce or separation. It also supports the extended family traditions and the value of keeping siblings together.[155] However KC has suffered some set backs (particularly in Africa) due to the weakening of kinship ties at least, in terms of physical proximity, as a result of modernity, disease, poverty and armed conflict, among others.[156] This makes it more necessary for KC to be legally recognised and assisted by states in the interest of CDFE who are absorbed by such AC option. The CRC Committee has advocated for such state support despite its not being acknowledged in domestic and international law and practice.[157] South Africa and Uganda provide best practice in this regard due to the

[152] M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; SG Rankin 'Why they won't take the money: Black grandparents and the success of informal kinship care' (2002) 10 *Elder Law Journal* 153; GA Paupeck 'When grandma becomes mom: The liberty interests of kinship foster parents' (2001) 70 *Fordham Law Review* 527; A Leonard 'Grandparent kinship caregivers' (2004) 6 *Marquette Elder's Advisor* 149.

[153] Bartholet (n 71 above) 2; Van Bueren (n 4 above) xxii.

[154] Cantwell & Holzscheiter (n 49 above) 37; C White 'Federally mandated destruction of the black family: The Adoption and Safe Families Act' (2006) *Northwestern Journal of Law & Social Policy* 303; DJ Herring 'Kinship foster care: Implications of behavioural biology research' (2008) 56 *Buffalo Law Review* 495; CG Hawkins-Leon 'The Indian Child Welfare Act and the African-American tribe: Facing the adoption crisis' (1997-98) 36 *Brandeis Journal of Family Law* 201.

[155] JW May 'Utah kinship placements: Considering the intergenerational cycle of domestic violence against children' (1996) 22 *Journal of Contemporary Law* 97; MF Brinig 'The child's best interests: A neglected perspective on interracial intimacies' (2004) *Harvard Law Review* 2129; S Coupet 'Swimming upstream against the great adoption tide: Making the case for impermanence' (2005) 34 *Capital University Law Review* 405; B Bouna & PK Smith 'The role of grandparents and the implications of legal issues on grandparent-grandchild relationships in European countries' 2005 at http://www.crin.org (n 45 above); Art 16 UNG.

[156] P Onyango & S Bali 'Regional practice: the African situation' in Doek (n 41 above) 141.

[157] CRC Committee GDD 2005 (n 45 above) 4.

decision that kinship carers should have access to simple procedures conferring necessary parental responsibility on them.[158]

2.5.2 Foster care (FC)

Generally, FC is a system of care for CDFE whereby such children are placed in the care of individuals to whom they are unrelated (unlike KFC). Historically, such placement was temporary, pending reunification with the family, but has now evolved into an AC option that may not be temporary but quite permanent or transformed into adoption.[159]

Although fostering covers a wide range of child-care arrangements, its unique characteristic is that it does not confer 'full parental responsibilities' upon the foster parents. In effect, parental responsibilities for children in FC are shared between the state and the foster parents. Consequently, it is essentially a form of social parenting that is subject to legal controls by the state.[160] 'Parental responsibility refers to the collection of tasks, activities and choices which are part and parcel of looking after and bringing up a child' and is conferred by virtue of becoming a parent (usually, a 'natural' parent).[161]

FC is today a specialized state-financed service, particularly in the more developed countries, aimed at providing 'a comprehensive approach to caring for children whose parents are themselves unable to do so' for a period ranging from short to long term. Thus, there is a wide variety of forms and models of foster care all over the world.[162]

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158 *SA Law Commission report* (n 62 above) 239; Sloth-Nielsen & Mezmur (n 81 above) 286. This makes it easy for such caregivers to make some important decisions, for instance medical surgery, on behalf of the children in their care rather than being prevented by virtue of not being their biological parents.

159 SL Waysdorf 'Families in the AIDS crisis: Access, equality, empowerment and the role of kinship caregivers' (1994) 3 *Texas Journal of Women and Law* 145.

160 A Bainham *Children: The modern law* (1998) 191.

161 B Hoggett *Parents and children* (1993) 11.

162 L Lee-Jones 'Foster care and social work from the perspective of the foster child' unpublished Masters thesis, University of Cape Town, 2003 11; International Foster Care Organisation 'CWPC' 2005 at <http://www.crin.org> (n 45 above); *SA Law Commission report* (n 62 above) is particularly unique in the development of the 'cluster foster care model'; Tolfree (n 77 above); A Armstrong 'Uncovering reality: Excavating women's rights in African family law' (1993) 7 *International Journal of Law, Policy & the Family* 314; J Thoburn *Child placement: Principles and practice* (1994); Thoburn J *et al Permanence in childcare* (1986).

2.5.3 Adoption

Adoption is 'a type of family placement in which the rights and responsibilities of one or more parents are fully and irrevocably transferred to one or more adoptive parents.' The arrangement is meant to 'provide a form of family care as close as possible to care within the child's biological family.'[163] It involves giving a child new a family by 'taking away the child's birth family, to a greater or lesser extent' that is, securing permanence by severance.[164] Adoption represents the most permanent form of AC for CDFE and the aim is the provision of a family or parental care for CDFE (family-based AC). It therefore appears paradoxical to include it as a form of AC because once the adoption process is completed; it is no longer subject to periodic review or state supervision like the other forms of AC. Full parental responsibilities are also conferred on the adoptive parent(s).[165]

Notwithstanding this paradox, it remains necessary to understand adoption as a concept and form of care for CDFE. Historically, adoption served the interests of adults and not children. This is because it was recognised and practised for purposes of meeting the needs of childless couples. Such needs include the desire for children, the need for an heir or continuity of a family's lineage or for religious purposes.[166] Today, the focus has changed and adoption is now more child-centred by providing a home or family environment for a child rather than providing a family with a child.[167] Adoption is further considered to be 'an institution that helps place the child in an improved environment', a social tool to improve the lives of CDFE by society's provision of a substitute family to children whose parents are unable or unwilling to care for them.[168]

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163 Tolfree (n 77 above) 165; Bainham (n 160 above) 205.

164 P Welbourne 'Adoption and the rights of children in the UK' (2002) 10 *The International Journal of Children's Rights* 269; Bartholet (n 71 above) 24.

165 N Cantwell 'Towards UN Guidelines on alternative care for children: from concerns to consensus' 2008 at <http://www.bettercarenetwork.nl.org> (accessed 18/10/2009); Cantwell & Holzscheiter (n 49 above) 52; D Quinton *et al Joining new families: A study of adoption and fostering in middle childhood* (1998) 6.

166 K O'Halloran *The politics of adoption: International perspectives on law, policy and practice* (2009) 1; Tolfree (n 77 above) 170.

167 Delplace (n 8 above) 163; Bainham (n 160 above) 207.

168 HD Krause *Family law in a nutshell* (1991) 163; *SA Law Commission report* (n 62 above) 233.

Generally, the legal effects of adoption include: the irrevocable termination of the legal relationship with birth parents and the acquisition of a new status as the child of the adopters; the extinguishing of former parental responsibility, to the exclusion of any future role for the biological parents in the upbringing of the adopted child and the discharge of any existing care order by a court or any other relevant body; and the termination of inheritance rights with regard to the birth family.[169] Notwithstanding the general features of adoption, there are different types of adoption and the legal effects vary depending on what type is engaged in. Broadly, adoptions may be full (complete severance) or simple (non-complete severance) on one hand or, open (with room for informal future relations among all parties) or closed (no such allowance) on the other hand.[170]

2.5.4 Intercountry adoption (ICA)

Intercountry country adoption, though a sub-set of adoption, has become a subject of significant interest in recent years. In addition, a separate legal framework regulates its practice, the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (HCI), building on article 21 CRC on ICA. It thus becomes necessary to consider ICA as an AC form on its own.

The types of adoption discussed above can take place locally or across borders thus, 'an adoption which takes place in the same country as the one in which the child was born [domestic adoption], and inter-country adoptions, where children are brought from one country to live in the country of their adopted parents.'[171] Most ICAs are 'trans-cultural' and 'trans-racial'. The former involves 'the placement of a child with a family in a cultural environment different from that of her birth family' while the latter involves 'the placement of a child with a family of a different racial origin'.[172]

Article 21 CRC provides for ICA for states that 'permit' or 'recognise' adoption. The same language is employed in article 24 of the ACRWC. However, article 21 of the

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169 Welbourne (n 164 above) 276; Bainham (n 160 above) 229.

170 S Vite & H Boechat 'Article 21: Adoption' in Alen *et al* (n 49 above) 16; W Duncan 'Children's rights, cultural diversity and private international law' in G Douglas & L Sebba (eds) *Children's rights and traditional values* (1998) 17; W Duncan 'Intercountry adoption: some issues in implementing the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption' in Doek (n 41 above) 84.

171 Van Bueren (n 4 above) 96.

172 Tolfree (n 77 above) 207.

CRC is to be read together with article 20, the umbrella provision on AC. (In the same vein, article 24 of the African Children's Charter is to be read together with its article 25 on AC). Article 21 of the CRC begins with a focus on adoption generally, before proceeding in 21(b) and the subsequent sub-paragraphs to focus on ICA. Under the CRC and the ACRWC, ICA is to be undertaken as a measure of last resort after exhausting other forms of AC for CDFE within their home country.[173]

In giving effect to the CRC provisions on ICA, the 1993 HCI operates to regulate ICA so as to avoid or deal with abuse in the system. The HCI also emphasises the importance of growing up in a family environment for the proper development of the child.[174] Consequently, ICA should be considered above institutional placement (within a child's home territory) since it 'may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin'.[175]

Therefore, there appears to be some potential for conflict between the CRC and the ACRWC on the one hand, and the HCI on the other hand with respect to the ranking of ICA on the AC scale.[176] The former appear to give preference to institutional placement within a child's state of origin above ICA while the latter places ICA above institutional placement, even if within the child's state of origin.[177] It has however been argued (and rightly so) that this approach negates a proper interpretation of article 20 and 21 of the CRC. While article 20 provides for the various forms of AC in order of permanence (with ICA forming part of adoption), article 21 provides a hierarchy only between domestic adoption and ICA, and not between institutional care and ICA.[178]

All over the world, there are controversies surrounding ICA due to various political, socio-cultural and economic reasons.[179] Consequently, it 'is a highly emotive issue

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173 UNICEF (n 68 above) 297; O'Halloran (n 166 above) 129.

174 HCI preamble.

175 As above.

176 B Stark 'Lost boys and forgotten girls: Intercountry adoption, human rights and African children' (2003) 22 *Saint Louis University Public Law Review* 288.

177 Davel (n 10 above) 263.

178 BD Mezmur 'Intercountry adoption in an African context: A legal perspective' unpublished LLD thesis UWC 2009.

179 Shapiro (n 3 above) 196; Stark (n 176 above) 289.

which elicits strong reactions, both for and against.'[180] In reaction to this, states in Africa have taken differing, and sometimes, opposing positions on the subject. For instance, some states (Malawi and South Africa, among others) allow for ICA with varying forms of regulation while others, such as Nigeria, do not permit ICA.[181]

2.5.5 Institutional care (IC)

IC refers to 'a group living arrangement for children in which care is provided by remunerated adults who would not be regarded as traditional carers within the wider society.'[182] As previously highlighted, AC for CDFE through placement in institutional facilities is the only non-family based form of AC mentioned in the relevant instruments.[183] However, the subsidiary position of IC is reflective of the negative connotations attached to such institutions.[184] All over the world, many traditional institutional establishments for CDFE are often large, overcrowded, poorly resourced, understaffed, and neglectful and in some cases, they accommodate the abuse of children, in various forms.[185] This does not however justify 'a blanket condemnation of all forms of residential care' particularly in the light of modern developments in the field of IC. The determinant factor should be 'the quality of the caring environment into which the child is placed rather than the institutionalisation per se'. Consequently, the UNG has set the minimum standard of conditions that such facilities should operate by, including a full range of educational, recreational, therapeutic and other support services for children in IC as well as professional training for the staff of the facilities.[186]

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180 Tolfree (n 77 above) 207.

181 Some of the works focused on intercountry adoption in Africa include: Davel (n 10 above); BD Mezmur 'From Angelina (to Madonna) to Zoe's Ark: What are the "A-Z" lessons for intercountry adoption in Africa?' (2009) *International Journal of Law, Policy and the Family* & J Sloth-Nielsen & BD Mezmur 'Intercountry adoption from a Southern and Eastern African perspective' unpublished research paper UWC 2009.

182 M Peterson-Badali *et al* 'Rights conception of maltreated children living in state care' (2008) 16 *The International Journal of Children's Rights* 6.

183 Cantwell & Holzscheiter (n 49 above) 53.

184 As above; CRC Committee GDD 2005 (n 45 above) 6; Child Relief and You (CRY) 'CWPC in the CRC' 2005 at <http://www.crin.org> (n 45 above); CRC Committee Concluding Observations: Argentina (n 104 above).

185 Peterson-Badali (n 182 above) 100; Tolfree (n 77 above) 60.

186 Arts 108-134 UNG; Children's Rights NY (n 142 above) 1; Tolfree (n 77 above) 59.

Significantly, institutional establishments have evolved from the traditional mode into several models more suitable for the needs of childcare. There are different facilities, which come under the broad categorisation of 'institutions' and many of them are further classified or specialised based on the categories of CDFE that they cater for (example, 'orphanages') and meet different needs. Examples include 'residential units' like 'group homes', 'family homes', 'family-type orphanages' and 'family-like boarding schools', 'community-based care' centres, 'temporary stay solutions' and, 'placement for day or night' among others. The emphasis is on making such facilities as family-based as possible in order to encourage intimate relationships and interactions, vital to proper child development.[187]

Despite the many disadvantages often associated with IC, institutions are useful in certain respects and form 'an essential part of the child and youth care system', under the supervision of trained professionals.[188] IC is necessary for 'permanency planning' (subject to periodic review) for CDFE by serving as a time-limited interim stage towards securing (permanent) AC for CDFE and who cannot be reunited to their birth families. Thus, the period spent in IC should be used for 'devising for every child in care of a permanent, and preferably family, protective solution, including intercountry adoption when no adoptive family can be found in the country of origin'.[189] This 'interim' approach to IC has the 'de-institutionalisation' of children as the ultimate aim.[190]

All forms of AC are expected to serve the best interest of the child and IC is no exception. However, the principles of 'necessity' and 'suitability' are applicable to the

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187 LG Baladon 'A child's journey across international frontiers: the Asian experience' in Doek (n 41 above) 124; Council of Europe (n 61 above) 23; The Community of Pope John Paul XXIII 'CWPC' 2005 at <http://www.crin.org> (n 45 above); Tolfree (n 77 above) 64; Cantwell & Holzscheiter (n 49 above) 53; CRC Committee GDD 2005 (n 45 above) 7.

188 Peterson-Badali (n 182 above) 106, 116; *SA Law Commission report* (n 62 above) 281.

189 A Yacoob *Report on professional foster care: A pilot project of the Inter-Ministerial Committee on Young People at Risk'* 1998 11 (Kimberley, Northern Cape Province, South Africa); Vite & Boechat (n 170 above) 25; Cantwell & Holzscheiter (n 49 above) 24; GC 3 (n 81 above) 35.

190 Art 22 UNG provides for the progressive elimination of institutional care for CDFE. However, institutional care is also useful for keeping siblings together where there are no foster or adoptive parents willing to take them all in, for absorbing street children who are unable or unwilling to go home and, for providing a 'neutral environment' for the treatment of children who have been traumatised by abuse within their family environment.

other AC forms and not to IC alone.[191] While institutional placement may not be the best environment within which children should grow up, the circumstances of each case would help to determine the best interest of the child.

2.6 Conclusion

This chapter has attempted to show that concern for CDFE is no longer an issue that can be ignored and whereas legal responses appear to be limited, the vast array of emerging policy on AC for CDFE both nationally and internationally, point all stakeholders in the right direction as far as appropriate responses are concerned. Of great significance is the development in the area of research on the impact of a family environment on the harmonious development of children, which has resulted in a re-examination of the 'all-too-simple' approach of 'institutionalising' CDFE without paying much attention to addressing their deeper, and individual needs. This has in turn resulted in a revolution in the way IC is practiced, such that there is now a shift towards family-based forms of care for CDFE in order to safeguard their best interests. It is thus clear that children's right to life, survival and development cannot be fully secured in isolation from their right to family life and with reference to CDFE, a family-based alternative.

[191] Cantwell (n 165 above) 9.

CHAPTER THREE

THE ISLAMIC *KAFALAH* APPROACH TO ALTERNATIVE CARE FOR CHILDREN DEPRIVED OF A FAMILY ENVIRONMENT

> Islam has given every child the inalienable right to a relationship of lineage to his or her 'father'. Therefore, Islam prohibits adoption because it deprives the child of this right. At the same time, Islam does not prevent any family from providing *Kafalah* to and caring for a child alien to the family. Indeed, Islam strongly urges such deeds.[192]

3.1 Introduction

The previous chapter has analysed the legal and policy framework governing the protection of CDFE on a conceptual basis, including the major forms of AC. This chapter narrows down the focus to Islamic *kafalah*, being one of the AC options listed under article 20 of the CRC. This focus is justified by the fact that *kafalah* is the least discussed form of care in existing literature on AC for CDFE and where discussed, the focus is largely on the drafting history of the CRC, how *kafalah* became included as an AC option for CDFE, as highlighted in the first chapter of this study. The implication of this is that not much is known about the concept and practice of *kafalah* as a form of AC. The significance of this chapter is therefore in its attempt at remedying this development. First, the sources of Islamic law are briefly discussed in order to properly place the topic within context. Second, the chapter will examine the relationship between Islamic law and international human rights, and particularly children's rights. Finally, the concept of *kafalah* itself is presented and discussed in relation to matters arising there from.

3.2 Sources and application of Islamic law

The realisation of human rights ideals often depends on the 'religious vision and commitment of specific communities to give them content and coherence, and to motivate voluntary compliance with their dictates.'[193] The same is true for generating political will for the practical enforcement and implementation of human rights norms

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[192] Art 4 ('The right to lineage') Declaration on the Rights and Care of the Child in Islam, 1994 at <http://www.oic-oci.org/english/conf/fm/22/Resolution22-C.htm> (accessed 6/10/2009).

[193] AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 3.

and standards.[194] Any constructive engagement with religion demands an understanding of the basics of the religion concerned. This is more so where the aim is to advance universal ideals in a realm (like Islam) where the behaviour of adherents is generally influenced by religious ideologies.[195]

Islamic law, known as *Shariah*, refers to an entire set of religious obligations that govern almost every aspect of the life of Muslims, both personal and social.[196] *Shariah* literally means 'the way to follow' and comprises four individual sources that makeup the Islamic legal framework. It is with respect to its applicability to every aspect of life that Islam is described as a 'way of life'.[197] The four sources of the *Shariah* are as follows:[198]

3.2.1 The Qur'an

The *Qur'an* is the holy book of the religion of Islam because it is based on the revealed word of Allah. It represents the primary and most authoritative source of the *Shariah*.

3.2.2 The Sunnah

The *Sunnah* refers to the utterances, traditions and known practices of the Prophet Mohammed (PBUH)[199] as recorded by the Prophet's closest family members and companions in the *Hadith* volumes.[200] It is the secondary source of the *Shariah*. The *Qur'an* overrides the *Sunnah* but where it is silent on details, the *Sunnah* becomes binding on the subject.

3.2.3 The Ijma

These are legal rules agreed upon by a consensus (of opinion) of learned Islamic scholars within the Muslim community at large. The *ijmas* are relied upon in matters where no clear or direct injunction can be found in the *Qur'an* or the *Sunnah*.

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194 As above.

195 Gonzalez (n 22 above).

196 M Rajabi-Ardeshiri 'The rights of the child in the Islamic context: The challenges of the local and the global' (2009) 17 *The International Journal of Children's Rights* 477.

197 Olowu (n 21 above) 66.

198 Indepth studies on the sources of Islamic law can be found in, among others, SHH Nadvi *Islamic legal philosophy and the qur'anic origins of the Islamic law (a legal-historical approach)* (1989), AAA Fyzee *Outlines of Muhammadan law* (1974) and Nasir (n 21 above).

199 Peace be upon him.

200 *Hadith* refers to the individual reports on the practices of the Prophet that make up the *Sunnah*.

3.2.4 The Qiyahs

These are analogies, inferences and deductions drawn from time to time by Islamic jurists in the resolution of issues that are not covered by any of the other sources. Simply put, they are the result of analogical reasoning.

The *Shariah* has been practiced in today's Islamic states since the period of the 18th century (era of Islamic civilization) and in non-Islamic states since the 19th century. But due to the influence of colonial western powers, many Islamic countries have dual legal systems; 'secular' law (based on colonial systems) to govern all affairs generally (for example, politics and economics) and the *Shariah*, which is restricted to the private sphere to govern personal and family affairs (examples include daily religious observances, marriage and divorce).[201] However, the lines are not always so clearly divided in some circumstances. In some countries, matters that ordinarily fall within the private sphere such as marriage are regulated by a combination of the *Shariah* and state-enacted colonial-based civil codes.[202] The situation is the same in some non-Islamic states. An example is Nigeria, which operates a federal system of government. Although not an Islamic state, some of the country's federating units recognise and implement the *Shariah* in the private sphere, for Muslims.[203]

There exist different Islamic schools of law as far the interpretation of the *Shariah* is concerned.[204] In effect, there is no uniform application of the *Shariah* all over the world 'In fact, Islamic law does not aim at uniformity. Allowances are given for geographical, cultural, social and other peculiarities'.[205] This is because, 'despite certain shared religious characteristics, there are a variety of Islamic jurisprudential schools (*maddhahib*), sub-cultures, languages, political structures, histories and a number of variables that differentiate Muslim communities from one another.'[206] In effect, despite the central position the *Shariah* occupies in the 'Muslim world' on matters of faith, there can be no uniformity in practice since society influences

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201 EW Fernea (ed) *Childhood in Muslim Middle East* (1995) 3; Rajabi-Ardeshiri (n 196 above) 478.

202 As above.

203 The term 'Islamic states' refers to countries where Islam is recognised by law to be the state religion. In 'non-Islamic' states, there is usually no 'state religion' (secular) but Islam is recognised for the Muslim population in such countries.

204 Rajabi-Ardeshiri (n 196 above) 478.

205 AA Oba 'Islamic law as customary law: The changing perspectives in Nigeria' (2002) 51 *International Comparative Law Quarterly* 817; Olowu (n 6 above) 70.

206 MS Sait 'Islamic perspectives on the rights of the child' in D Fottrell (n 74 above) 32.

religion in the same manner that religion influences society. In Islam, this is more so in matters of 'family and personal life' and indeed, controversies abound.[207]

3.3 The relationship between Islam and human rights

The Islamic world is no outsider to the developments in the realm of international human rights as reflected by the involvement of many Islamic states as founding members of the Universal Declaration of Human Rights (UDHR) of 1948. More recently, Islam has been used to strengthen the opposition against undemocratic regimes in some parts of the Middle East.[208] Despite such a long history, the general conception is that Islam and human rights are, in the main, poles apart from each other. This stereotype exists among both scholars and non-scholars of both western and non-western orientation. Islam is thus perceived as a 'formidable impediment to universal realisation of the norms of international human rights law'.[209] While areas of tension or seemingly irreconcilable differences exist between Islam and the modern conception of universal human rights, the stereotype does not paint an accurate picture.[210]

Islamic recognition of universal standards of human rights is reflected by the existence of a number of Islam-based human rights instruments drafted by the highest Islamic authorities at different times and in different capacities. The aim of these instruments is to aid the implementation of internationally agreed universal human rights standards without violating the *Shariah*.[211] Prominent among these are the Universal Islamic Declaration of Human Rights (UIDHR) of 1981[212] (premised on the principles contained in the UDHR) and the Cairo Declaration on Human Rights in Islam (CDHRI) of 1990.[213] The Organisation of Islamic Conference (OIC) drafted the former while the Islamic Conference of Foreign Ministers drafted the latter. There is

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207 As above

208 Rajabi-Ardeshiri (n 196 above) 480.

209 Olowu (n 21 above) 62.

210 This is without prejudice to the fact there are some facts, which tend to lend credence to the stereotype. Examples of these include patriarchal themes in Islam that privilege males over females, the affirmation of the superiority of Muslims over non-Muslims, reliance on the death penalty and physical punishment.

211 Rajabi-Ardeshiri (n 196 above) 481.

212 At <http://www.al-bab.com/arab/docs/international/hr1981.htm> (accessed 5/10/2009).

213 At <http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm> (accessed 5/10/2009).

also the Arab Charter on Human Rights which was approved by the League of Arab States in 1994 and which entered into force in March 2008.[214]

Although not child-specific, these instruments make reference to children, placing emphasis on the right of children to be cared for by their parents and the importance of the family environment for the protection and proper development of children.[215] The major point of departure between the Islamic treaties and these universal human rights agreement lies in the emphasis of the former on the acknowledgement of God as the source of rights. The Islamic instruments also greatly employ internal qualifiers of claw-back clauses in relation to many of the rights contained in them; for example, clauses like, 'subject to the *Shariah*'.[216]

3.3.1 Children's rights in Islam

Until quite recently, human rights campaigns and advocacy within the Islamic law discourse have been largely focused generally on women's rights, political rights and sexual freedoms. Children's rights in Islam have yet to receive any such detailed attention.[217]

The first claim of Islam to the recognition and protection of the rights of children derives from the prohibition of 'female infanticide' in the pre-Islamic Arab society. Muslims became defined as people who, among other things, would not 'kill their children' and this is a *quranic* injunction.[218] Another claim derives from the protection of the rights of the unborn child as reflected by the exemption of pregnant women

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214 At <http://www1.umn.edu/humanrts/instree/arabhrcharter.html> (accessed 5/10/2009).

215 Rajabi-Ardeshiri (n 196 above) 482.

216 There are a plethora of works on the relationship between Islam and human rights with a focus on the points of convergence and divergence and discussions on the resolution of differences between both. Such works include: D Littman 'Universal human rights and "human rights in Islam"' (1999) *Midstream Journal* - <http://www.dhimmitude.org/archive/universal_islam.html> (accessed 5/10/2009); AE Mayer *Islam and human rights: Tradition and politics* (1999); E Brems *Human rights: Universality and diversity* (2001); DG Littman 'Human rights and human wrongs: Sharia can't be an exception to international human rights norms' (2003) *National Review Online* - <http://article.nationalreview.com/> (accessed 5/10/2009); H Saeed *Freedom of religion, apostasy and Islam* (2004) and; I Warraq 'Democracy vs. Theocracy-Islamic human rights and the universal declaration' (2009) *International Humanist and Ethical Union* publication - <http://www.iheu.org/> (accessed 5/10/2009).

217 Even during the drafting of the CRC with the debates as to whether childhood begins at birth or at conception, it was looked at from a women's rights angle (women's reproductive rights).

218 The Holy *Qur'an* 60:12; Fernea (n 201 above) 6; Rajabi-Ardeshiri (n 196 above) 478.

from the annual *ramaddan* fast.[219] The prohibition of extra-marital sex and the strict regulation of sexual relationships in Islam are premised on the importance of guaranteeing 'children's rights to care and protection within the family environment'.[220]

The CRC has been criticised for being exclusively child-focused in a manner that undermines the role and rights of parents in raising their children.[221] The Islamic approach to children's rights does not only focus on the rights of the child but also on children's duties towards parents. This is generally in acknowledgement of the hardships parents and families generally experience in caring for and raising children. Simply put, children's responsibilities are as important as children's rights.[222] This author however argues that, on this point, the CRC is not necessarily incompatible with the Islamic position on children's rights. This is more so when viewed from the perspective of the complementary role the ACRWC plays to the CRC.[223] The ACRWC provides for the duties of the child and this concept is not incompatible with the CRC.[224] It has also been argued that the concept of the duties of the child under the ACRWC can be related to article 5 of the CRC, which deals with the evolving capacity of the child. The effect of this is that while the duties of the child are not incompatible with the rights of the child, such duties must be based on the capacity of each child depending on the age, maturity and other personal

[219] For a fixed period of 30 days in every year, Muslims are expected to fast from food and drinks from early morning till evening; that period is called '*Ramadan*'.

[220] Rajabi-Ardeshiri (n 196 above) 479.

[221] J Badamasiuy *Obligations and rights of the parents under the Child's Rights Act: A Shariah perspective* (2009) 1. This position has however been shown to have resulted from a misunderstanding of the conception of children's rights which, among others, is to establish the recognition of children as 'visible human beings', fully entitled to live lives of dignity and fulfilment in the here and now. This cannot be achieved without setting universal standards to serve as the framework for the proper protection and recognition of children. See CP Cohen 'Drafting of the Convention on the Rights of the Child: Challenges and achievements' in Verhellen (n 129 above) 350; UNICEF (n 68 above) xi; Freeman (n 129 above) 28 and; Briefings in Medical Ethics (n 74 above).

[222] Badamasiuy (n 221 above); Rajabi-Ardeshiri (n 196 above) 479.

[223] Mezmur (n 120 above) 1.

[224] Art 31 ACRWC; J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159.

attributes of the child.[225] This in itself is in consonance with the reality that childhood is based on a variety of cultural traditions.[226]

Nevertheless, the matter of children's rights and welfare occupy a prime position in Islam. Chapter four of the *Qur'an* pays particular attention to children's rights to life, sustenance and property, among others, based on the recognition of the fact that children have special needs due to their vulnerability.[227] Children are considered to be gifts from 'Allah to His faithful servants' and childhood, a period of inspiration and hope. Thus the right to life, recognised by the *Qur'an* ('do not kill a soul which Allah has made sacred', Islam's third commandment) is more sacred in relation to children.[228] Islam has also contributed to the development of the international jurisprudence on children's rights as evidenced by the inclusion of *kafalah* in the CRC.[229] It thus becomes clear that Islamic law has the potential to, and does, reinforce global advocacy for the promotion and protection of the status, rights and welfare of the child.[230]

Besides the Islamic instruments on human rights discussed under the previous heading, there are more recently some child-specific Islamic instruments, based on the principles of universal children's rights. The first of these is the 1994 Declaration on the Rights and Care of the Child in Islam (DRCCI).[231] Of great significance in this declaration is the call upon all member states to, not only sign and ratify the CRC but also to bring all national legislation and other relevant measures into conformity with the CRC.[232] This reiterates the position of the CRC and the CRC Committee on state obligations to children's rights.[233] Next is the Rabat Declaration on Child Issues of 2005 (RD).[234] The significance of the RD lies in its setting of higher standards than

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225 UM Assim '20 years down the line: Assessing the impact of the United Nations Convention on the Rights of the Child' unpublished LLM research paper on Children's Rights and the Law, UWC 2009 9.

226 Van Bueren (n 4 above) xxi.

227 Olowu (n 21 above) 66.

228 UNICEF & ICDSR (n 24 above) 3; J Sloth-Nielsen 'Children's rights and law reform in Islamic jurisdictions (with a focus on Africa)' UWC 2009 2.

229 Van Bueren (n 4 above) xxi.

230 Olowu (n 21 above) 63.

231 Resolution No 16/22-C of the Organisation of the Islamic Conference (at n 192 above).

232 DRCCI preamble, paras 2-3.

233 Art 4 CRC; GC 5 (n 74 above).

234 Rabat Declaration on Child Issues in the Member States of the Organisation of the Islamic Conference 2005 at <http://www.isesco.org.ma/english/confSpec/MinistersEnface/FAD.pdf.> (accessed 6/10/2009).

the earlier Islamic human rights instruments by going beyond the mere rhetoric of rights.[235] More emphasis is placed on addressing practical issues affecting children such as gender inequality in education, HIV/AIDS and harmful practices like female genital mutilation and child marriage.[236]

Of particular significance is the establishment of the general principles of children's rights: non-discrimination, best interests of the child, participation, survival and development of the child. Once more, these reiterate the CRC provisions on the same themes.[237] Like the DRCCI, the RD also calls for the implementation of the CRC by member states and for 'adequate and systematic training in the rights of the child for professional groups working with and for children.' This is in recognition of the role of the CRC as a framework for the promotion and protection of children's rights.[238] The RD signifies a shift from the traditional approach of trying to tailor universal concepts of children's rights to fit into the Islamic mould. For instance, in order to secure the lives of children within the family context, 'the Islamic governments are requested to take all necessary legislative measure, an initiative that may occasionally challenge the contemporary family law based on *Shariah*.'[239] These developments represent 'a more realistic approach' rather than insisting on 'an ideological stance'.[240] It is submitted that such an approach will better serve the best interests of the child.

3.3.2 Islamic law and the best interest of the child

The concept of the 'best interest of the child' has been defined as 'a set of values of material and immaterial character that are necessary for the child's proper development and due preparation, according to ability, for work for the benefit of society'.[241] It is submitted that the first beneficiary of the principle is the child himself, as an individual within the larger society. However, as already discussed in previous chapters, the 'best interest of the child' has no uniform standard but is premised on

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235 Rajabi-Ardeshiri (n 196 above) 486.

236 Arts 16, 7, 8 & 10 RD.

237 Arts 2, 3, 12 & 5 CRC.

238 RD preamble, para 2 & art 20 RD.

239 Rajabi-Ardeshiri (n 196 above) 487 e.g. the call to break the silence about HIV/AIDS and engaging in measures to combat the epidemic are not seen as conflicting with children's morality.

240 As above.

241 Maclean & Kurczewski (n 13 above) 179.

the principle of individualized treatment. In effect, the best interest of the child is determined by the circumstances and peculiarities of each child in question.[242]

Besides the inclusion of the best interest principle in the RD, this principle is not unfamiliar to Islamic jurisprudence. This is because it has roots in the *Qur'an* and the *ijma*, in cases where no complete agreement exists. Consequently, 'the primary aim in the various interpretations is how best the basic purpose will be achieved of equitably protecting the interest of the child' in varying circumstances.[243] In Islam, securing the rights and welfare of children is considered a part of the commendable religious deeds that Muslims should perform in order to gain rewards after death. To violate children's rights is to contravene the *Shariah* and to disobey Allah because 'he is not one of us who does not show mercy to our youngsters'.[244] Traditional records reveal that the Prophet Mohammed (PBUH) prophesied that 'the Muslim community would earn a name among other communities for its kindness to children'.[245]

3.3.3 Islamic law and children deprived of a family environment (CDFE)

Caring for orphans and CDFE generally[246] is a theme that stands out clearly in Islamic law, on the basis of some *quranic* provisions. Significantly, there is greater agreement between the main Islamic sects[247] on the matter of caring for such children than on any other matters of law.[248] That the *Qur'an* devotes special provisions to the subject further establishes its importance. For instance, upon taking in a 'foundling' (*laqit*), such a child must never again be abandoned.[249] There is a moral duty and an obligation to render social assistance to children (and adults) who

242 Sait (n 206 above) 43.

243 Olowu (n 21 above) 69.

244 UNICEF & ICDSR (n 24 above) 1.

245 Olowu (n 21 above) 72.

246 In Islam, it makes no difference whether or not these children have parents. The emphasis is on ensuring their sustenance through the provision of basic needs. Poverty is thus a cause for concern about the proper care of children. This is in accord with the concept of 'deprivation' in relation to CDFE. (See chapter two).

247 The Shiahs and the Sunni; the basic difference between them lies in the extent of authority of Muslim leaders after the Prophet Mohammed (PBUH).

248 R Roberts *The social laws of the Qur'an* (1990) 40.

249 Nasir (n 21 above) 155. 'A foundling is a new born baby, abandoned by its parents on grounds of poverty or shame [or young child found in the street and who does not know his family] and so unable to fend for itself. Care of a foundling is a religious duty if there is any risk that the baby might otherwise die'.

lack the basic necessities of life, whether or not they ask for it.[250] It is also a spiritual duty, the neglect of which renders a person's prayers in vain.[251] Again, traditional records reveal that the Prophet Mohammed (PBUH) once declared:

> Do you like your heart to be tender, and your wishes fulfilled? Be merciful to the orphan. Touch softly his head, and feed him from your food. Your heart will be tender and you will attain your wishes.[252]

Another *hadith* on the injunction to treat CDFE with kindness, mercy and dignity states:

> A person who touches with compassion the head of an orphan will be rewarded for each hair his hand touches. Whoever treats kindly a female or male orphan who is under his sponsorship [kafalah], I shall be his companion in Paradise.[253]

According to the *Qur'an*, 'the immediate provision of a safe and secure shelter for every orphan to help him heal the wounds of the soul is the first requirement for such needy people'.[254] This reveals the importance that Islam also places on a family environment in the wholesome development of children. It is 'the first line of defence in the protection of children from attempts to violate their other rights'. Consequently, in Islam, it is expected that CDFE be absorbed and made 'to feel at home'[255] In the words of the Prophet, 'I and the person who looks after an orphan and provides for him, will be in Paradise like this', (putting his index and middle fingers together).[256] To be acceptable, such good deeds must be based on the correct intention (*niyyah*), which is to 'do it for Allah's pleasure with sincerity'.[257]

Many legal precepts, revealed to and laid down by the Prophet Mohammed came in response to handling the circumstances of the time, thereby making pragmatic leadership and proactive solutions possible. In relation to CDFE for instance, 'the fact that increasing numbers of Muslim males fell in battle [the Battle of *Uhud*] acted as a

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250 Olowu (n 21 above) 68.

251 Sait (n 206 above) 43.

252 Related by Abu-Al-Darda, al Tabanani, quoted in MM Hassan *Islam: Its conception and principles* (undated) 113 and in Olowu (n 21 above) 67.

253 Al-Tabarani in Al-Mu'jam al-Kabir 8/239 *Hadith* 7821, on the authority of Abu Umama in UNICEF & ICDSR (n 24 above) 76.

254 UNICEF & ICDSR (n 24 above) 79.

255 As above, 73, 79.

256 *Hadith* narrated by Sahl bin Sa'd(ra); see 'Good Deeds: 1000 Keys to Paradise, No.4: look after orphans' at <http://1000gooddeeds.com/2009/08/24/4-lookafterorphans/> (accessed 24/10/2009).

257 As above.

catalyst to the verses which enjoined kindness to orphans while retaining the practice of polygamy'.[258] Also, the early life of the Prophet, having himself been left a destitute orphan, greatly influenced the emphasis on caring for CDFE.[259]

3.4 What is *Kafalah*?

As highlighted in chapter one of this study, scholarly works that mention *kafalah*, have largely done so within the context of its emergence and role in the drafting of the CRC. What follows is an attempt to focus on *kafalah*, as an AC option in itself as opposed to the history of its inclusion in the CRC, will be briefly considered in the next chapter. Three aspects will be considered in this section: the historical background to *kafalah*, the meaning, practice and legal implications of the concept and, a comparison of *kafalah* with the other AC options previously discussed.

3.4.1 Brief historical background

Adoption was recognised and practised in the pre-Islamic Arab societies, that is, the adopted son (in law) became as one born by the adoptive parents. Consequently, the rules of affinity and consanguinity were applicable; in which case, marriage between an adopted child and any member of the adoptive family was impossible.[260] However, the Prophet Mohammed (PBUH) himself once had an adopted son (Zayd), the wife of whom he once had occasion to see unveiled and got attracted to. Subsequently, his adopted son divorced his wife in favour of his 'father'.[261] Controversy thus arose, among the Prophet's followers, from the marriage between the Prophet and the divorced wife of his adopted son subsequent to which a revelation followed that adoption constituted 'no real relationship'.[262]

According to the Holy *Qur'an*:

> Nor hath he made your adopted sons your true sons. This is but a saying of your mouths. But Allah sayeth the truth and he showeth the way. Call such as are adopted

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258 Pearl & Menski (n 23 above) 3.

259 AA Sonbol 'Adoption in Islamic society: A historical survey' in Fernea (n 201 above) 50, 54.

260 Roberts (n 248 above) 49.

261 Sonbol (n 259 above) 52; Roberts (n 248 above) 50.

262 Pearl & Menski (n 23 above); Sonbol (as above); Roberts (as above).

> sons the sons of their natural fathers. This is more just before Allah. And if ye know not their fathers, let them be as your brethren in the faith and your clients.[263]

Thus, adoption was abolished, as it were and, it has been argued that this incident should not be seen as challenging the divinity of the *Qur'an* but rather the opposite, as it represents the role of the document in the creation of a new community in Mecca and Medina at the time.[264] The abolition of adoption further gained support because; adoption in pre-Islamic Arabia was practiced together with certain acts that were not supported by Islam. For instance, a family could disclaim a member and a person could renounce his biological family, 'both of which were promoted by the possibility of being adopted into another family'.[265] Interestingly, there are some scholars who argue that adoption is not actually prohibited by the verses above but is merely one of those 'acts towards which religion is indifferent' (*mubah*). This position has however not been generally accepted and the popular position remains that adoption is prohibited in Islam to the extent that it is considered a sin of apostasy (*kufr*).[266] On the basis of the minority position, critics have called for a reform of the *Shariah* to conform to formal adoption.[267] However, the eventual inclusion of *kafalah* in the CRC is reflective of the current Islamic populist position on adoption.

3.4.2 *Kafalah*: definition and implications

As a subject of international law, before its inclusion in the CRC, '*kafalah*' was first recognised in the 1986 Declaration on Foster Placement and Adoption.[268] However, the term is traced to the Islamic law of obligations. 'It permits a person to enter into a contract committing himself to certain undertakings in favour of another person provided that person has a material or moral interest in such undertaking.'[269] In relation to CDFE, based on *kafalah*, 'a family is able to take in an abandoned child or a child without a family [or whose natural parents or family are incapable of raising him or her], but unlike adoption, the child is not entitled to use the family name or

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263 Chapter 4, Holy *Qur'an*, 33:4-6 quoted in Olowu (n 21 above) 73; Roberts (n 248 above) 50.

264 Pearl & Menski (n 23 above).

265 Olowu (n 21 above) 73; Sonbol (n 259 above) 52.

266 Sonbol (n 259 above) 51.

267 Gonzalez (n 22 above) 4.

268 See chapter two, 1.

269 Olowu (n 21 above) 54.

inherit from the family' (as a right).[270] The *Qur'an* is very specific on the matter of property and wealth distribution through inheritance and they devolve on the basis of blood relationship. There are specific allotments for each member of the family and 'no individual can control the inheritance of more than one-third of his property'.[271] Apparently, the *Qur'an* did not contemplate such 'automatic' right of inheritance by virtue of blood relationship, in relation to the non-biological children/members of the family.

Nonetheless, children taken into families under *kafalah* are not left out of the property distribution process the *Qur'an* enjoins Muslims to assign portions of their wealth to others who, though unrelated to them by blood, are equally dependent on them. Consequently, such persons are provided for through the one-third portion of personal estate subject to the owner's prerogative and which can be through a will or an outright gift (*sadaqa*).[272] With particular reference to CDFE, this is very important aspect of AC because *kafalah* does not permit discrimination between '*kafalah* children' and those 'born' to the household to avoid a sense of deficiency or inferiority in the former. In fact the quranic injunction, 'and in their wealth, there is acknowledged right for the needy and destitute' (or 'and those sworn to you leave them their share') has been interpreted to mean a duty to 'render assistance to every needy person, *including children*, who lack the basic necessities of life'. *Kafalah* thus represents a form of social security for CDFE.[273] More significantly, *kafalah* is a permanent 'bonding relationship' between the child and the family in question (at least for as long as the child remains a child). The child becomes a part of the family and is raised in the same manner as the natural children of the family.[274] Generally, *kafalah* is seen not only as a meritorious deed but a religious duty as well. Usually, a child is placed in a family that is as closely related to his natural family as possible but the new 'parents' do not 'totally displace the natural parents but will perform their function as an act of personal charity or for compensation, according to the demands of each case'.[275]

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270 Van Bueren (n 4 above) xxi.

271 Sonbol (n 259 above) 48-50; Sloth-Nielsen (n 228 above) 19.

272 As above.

273 Sloth-Nielsen (n 228 above) 3; Sonbol (n 259 above) 64.

274 Sait (n 206 above) 38.

275 Olowu (n 21 above) 73

What the above (the preceding quotation) reveals is the fact that not all CDFE are poor or 'in need' materially or financially before being 'eligible' for *kafalah* that is, *kafalah* is not always strictly charity-based. In the early years of Islam, concern for CDFE did not arise only in response to the large numbers of orphans resulting from fallen Muslim men in battle, as earlier alluded to. It was also in response to the need to reward those who survived the battle. 'One form of rewarding those who fought at *Uhud* allowed them to take over the responsibility of wealthy orphans and control their wealth.'[276] Thus, a distinction is made between CDFE who are rich (by virtue of having an estate left behind by the parents) and those who are poor. In order to safeguard the interest of such children, the *Qur'an* contains several injunctions as to how their wealth should be administered. For example, 'as to the orphan, do not oppress' with 'oppression' translated to mean 'cheating him of his wealth.'[277] Emphasising the seriousness of this subject, 'those who unjustly devour the property of orphans, they do but eat a fire into their own bodies, and will soon be enduring a blazing fire.'[278] Generally the rules require that the estate be properly managed (by the *kafalah* parents) and handed over to the child when he attains the age of maturity, in the presence of witnesses. A rich guardian (or *kafalah* parent) is not expected to take anything from the estate but a poor one can take a reasonable portion 'as payment for his services'.[279] In relation to poor CDFE, *kafalah* remains basically 'a primary moral obligation for Muslims' as discussed above because they are considered 'as a community responsibility.'[280]

Thus, while Islam places great premium on raising the child within a family environment, the maintenance of one's identity, traceable to one's natural parents occupies a more central position as reflected by the view that the 'legal fiction' created by adoption is *haram* (forbidden) and so, unacceptable.[281] By investing the adopted child with legal rights and duties (especially in relation to inheritance from the adoptive parents), adoption is considered to be a disruption of 'the pattern of family relationships that Islamic law recognises'.[282] The first right recognised in Islam

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276 Sonbol (n 259 above) 54.

277 Sonbol (n 259 above) 55.

278 The Holy *Qur'an*, *sura* 4:11. See also *sura* 4:2 & 6:15; Sonbol (as above); Roberts (n 248 above) 40-43.

279 Roberts (n 248 above) 40; Sonbol (n 259 above) 55.

280 Sonbol (as above).

281 Detrick (n 2 above) 312; Sonbol (n 259 above) 57.

282 Olowu (n 21 above) 73

is the establishment of parentage through blood ties, from which other rights flow or derive.[283] As succinctly put by Van Bueren:

> The child's first right under Islamic law is to establish parentage. Once parentage has been established certain rights and duties follow, the most important of which are fosterage, custody, maintenance and guardianship. A child is entitled to custody from birth. It is a form of guardianship which jurists divide into three categories: guardianship of the infant (*hadhana*), which Islamic law places on women, to look after the child during the child's early life; guardianship of education (*al wilayat at Tarbiya*) which according to Sharia is the responsibility of the man; and guardianship of property (*al wilayat alal maal*) which entrusts the management of a property of the child to the man.[284]

3.4.3 *Kafalah* and other forms of AC

At first glance, there appear to be vast differences between *kafalah* and adoption. This study however reveals that *kafalah* is not only similar in some ways to adoption but is also similar to the other forms of AC already discussed in the previous chapter. Thus, *kafalah* combines features of adoption and FC (and KC).[285] In relation to adoption, two aspects are obvious: permanence and elements of a simple and/or open adoption. Like in simple and open adoptions, the '*kafalah* child' maintains the legal bond (and a continuing relationship albeit informal) with his family of origin not only in terms of identity but also in remaining vested with a right of inheritance or support in relation to his family's estate, if any.[286] This is significant given that open/simple adoptions are increasingly becoming more common and acceptable largely due to the disadvantages of full/closed adoptions to older children with already established and stable links and relationships with their families of origin.[287]

Until the mid-1970s, adoption was generally full/closed; a 'clean break with the past' which expunges all links to the birth family through the alteration of birth certificates and rights of inheritance, among others. Due to the centrality of issues of belonging, difference and identity to adoption (both to individuals born 'naturally' or through techniques of genetic control), open/simple adoptions have been on the rise. This development is seen as progressive because it accords with varieties of family forms

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283 Ishaque (n 18 above) 7; UNICEF & ICDSR (n 24 above) 12.

284 Van Bueren (n 4 above) xxi.

285 R Frank 'General Introduction' in Doek (n 41 above) 11.

286 Duncan (n 170 above) 36.

287 Duncan (n 170 above) 84.

that exist the world over rather the 'idealized white nuclear family' and strikes a balance between the 'right to a nationally or culturally rooted identity as well as a loving family'.[288] This approach is consistent with the CRC, ACRWC, HCI, UNG and the 1986 Declaration on the right to identity and continuity in upbringing generally.[289] Ultimately, '*kafalah* is the Islamic term that comes closest to depicting the relationship known elsewhere as adoption.'[290]

In relation to FC, *kafalah* is akin to FC (long-term) in the conferment of some (not full) parental rights and responsibilities in a child's upbringing. This is particularly in relation to the fact that *kafalah*, as shown above, 'may if necessary involve delegation of guardianship in respect of the person and property of the child'.[291] Further, fostering is recognised and permitted under Islam (unlike adoption). However, 'while foster children are forbidden to marry those with whom they were fostered, "adopted children" [*kafalah*] can marry into the family that "adopts" them' but both foster and *kafalah* children 'have no right of inheritance except as *sadaqa*, or gift'.[292]

Finally, when viewed in relation to KC, *kafalah* appears most compatible with the principle of 'continuity in upbringing' and its attendant elements.[293] This is primarily in the fact that in both cases, the closest relatives available usually absorb CDFE (on an informal, largely spontaneous and unregulated basis), and generally share several elements like culture and religion in common with them. Both *kafalah* and KC are thus able to provide stability and continuity for the progressive growth and development of the child, in light of the CRC and other instruments already discussed.[294]

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288 TA Volkman (ed) *Cultures of transnational adoption* (2005) 2; M Freeman 'The new birth right? Identity and the child of the reproduction revolution' (1996) 4 *The International Journal of Children's Rights* 273; R Snow & K Covell 'Adoption and the best interests of the child: The dilemma of cultural interpretations' (2006) 14 *The International Journal of Children's Rights* 109; O'Halloran (n 166 above) 148; Bartholet (n 71 above) 177.

289 Arts 7, 8, 9, 10 CRC; 6 ACRWC; 2, 21 UNG; 16(1)(a)(b) HCI & 8 1986 Declaration

290 Volkman (n 288 above) 380.

291 Duncan (n 170 above) 32; O'Halloran (n 166 above) 9.

292 Sonbol (n 259 above) 64.

293 Arts 20(3) CRC & 25(3) ACRWC.

294 Arts. 14 & 20 CRC; 9 ACRWC. See also art 7 Child's Right Act 2003 of Nigeria which provides inter alia, 'whenever fostering, custody, guardianship and adoption at issue, the right of the child to be brought up in and to practice his religion shall be a paramount consideration.'

3.5 Conclusion

By focusing on Islamic *kafalah*, this chapter has revealed a number of issues. First, it has shown that the matter of children's rights and particularly CDFE form part of the *Shariah*. Secondly, it has placed the concept of *kafalah* in historical context thereby revealing the fact that adoption was originally recognised in Islam. Finally, it has demonstrated that *kafalah* is not completely different from other forms of alternative care for CDFE; there are overlapping areas. Given the international recognition given to *kafalah* under the CRC, it becomes important to examine how it functions today given the plurality of varied legal systems all over the world, even in largely Islamic countries. This is more important as 'though not on the same legal plane as adoption, it [*kafalah*] is becoming rampant in transboundary child adoptions even in the Islamic world.'[295] The following chapter will therefore be an attempt to explore some of the international dimensions of *kafalah* in practice.

[295] Olowu (n 21 above) 54.

CHAPTER FOUR

INTERNATIONAL RECOGNITION AND PRACTICE OF ISLAMIC *KAFALAH*

> The way a society treats children reflects not only its qualities of compassion and protective caring but also its sense of justice, its commitment to the future and its urge to enhance the human condition for coming generations. This is as indisputably true of the community of nations as it is of nations individually.[296]

4.1 Introduction

Beyond the international recognition of *kafalah*, how is the practice regulated? This is an important question given that the other forms of AC (excluding KC) are subject to legislative controls so as to check abuse and safeguard the rights of CDFE while securing AC on their behalf. This chapter therefore begins by looking briefly at how *kafalah* came to be internationally recognised and included in the CRC. Second, the relationship between *kafalah* and intercountry adoption under the Hague Convention will be considered and third, the practice of *kafalah* in some countries will be examined before concluding the chapter.

4.2 Kafalah and the CRC: A history of inclusion

During the drafting process of the CRC, the inclusion of adoption (in-country and intercountry) as a form of AC for CDFE generated debates from Islamic states' delegates, due to the 'prohibition' of adoption under the *Shariah*, as discussed in the previous chapter.[297] The initial wording of the eventual article 21 of the CRC read, 'States Parties…shall undertake measures, where appropriate, to facilitate the process of adoption of the child'.[298] The implication of this was that states 'must' make put in place mechanisms for adoption. Eventually, a compromise was reached to the effect that states are not obliged to recognise or set up a system of adoption, by qualifying the provision from the outset; it reads, 'States Parties that recognise

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[296] Statement of the former UN Secretary-General, Javier Perez de Cuellar, 1987; also quoted in G Torkildsen *Leisure and recreation* (2005) 555; JN Ezeilo *Legislative advocacy for women's human rights: A practical guide to advocacy work* (2001) 51.

[297] Detrick (n 2 above) 26; Freeman & Veerman (n 20 above) 95.

[298] As above. Some delegates from Latin America, Asia and Africa also raised objections on grounds of inability to adequately control the process. Another text suggested by Libya was rejected because it contained no guidelines in relation to adoption at all, whether domestic or intercountry. It read that states should, 'in accordance with their domestic law and legislation, provide an alternative family for a child who does not have a natural family.'

and/or permit the system of adoption…'[299] This is said to reflect a more realistic approach to the subject by accommodating the various concerns raised, another significant one being the fact that adoption is not the 'only solution' for CDFE.[300]

In response to the opposition of the Islamic delegates also, *kafalah* became included as one of the forms of AC for CDFE in article 20 of the CRC, largely because of its family-based nature. This is significant not only because it reflected the role of cultural and religious factors in the drafting of international instruments but also because the event served as an 'entry point' for many Islamic countries into the international human rights system. In this manner, ICA, one of the subjects that eluded consensus in the CRC drafting process was successfully resolved.[301] Despite this compromise, some of the states that do not recognize adoption made reservations to the provisions on adoption. Examples include Egypt, Jordan and the Maldives.[302] These reservations are however 'superfluous, since the introductory part of article 21 already makes it clear that this provision does not apply to these countries.' Consequently, the CRC Committee has through its concluding observations on reports from such countries, recommended a withdrawal of the reservations.[303]

Under the ACRWC, article 24 is practically on all fours with article 21 CRC except for a few clarifications and an additional obligation- that ICA should be a measure of 'last resort' (CRC subsidiarity principle) and the need to guard against 'improper financial gain' (article 35 CRC) and 'trafficking'. The obligation requires states to 'establish a machinery to monitor the well-being of the adopted child'.[304]

4.3 *Kafalah* and the HCI: A history of exclusion

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299 Art 21 CRC; see also art 24 ACRWC that uses 'recognise' but avoids 'permit'.

300 Freeman & Veerman (n 20 above) 104; UNICEF (n 68 above) 280; Vite & Boechat (n 170 above) 19.

301 D Johnson 'Cultural and regional pluralism in the drafting of the UN Convention on the Rights of the Child' in Freeman & Veerman (n 20 above) 95; Sait (n 206 above) 34; Cantwell & Holzscheiter (n 49 above) 31.

302 LJ Leblanc 'Reservations to the Convention on the Rights of the Child: A macroscopic view of state practice' (1996) 4 *International Journal of Children's Rights* 357; A Bisset-Johnson 'What did states really agree to? Qualifications of signatories to the United Nations Convention on the Rights of the Child' (1994) 2 *International Journal of Children's Rights* 399; Gonzalez (n 22 above) 10.

303 Vite & Boechat (n 170 above) 20; UNICEF (n 168 above) 294.

304 Art 25ACRWC; Vite & Boechat (n 170 above) 10.

The HCI was drafted in response to the need to safeguard the best interest of the child in the context of ICA by guarding against trafficking in children, commercialisation of the adoption process and all forms of abuse generally. Consequently, the HCI provides the measures of implementation for the CRC on ICA.[305] This is done by setting minimum standards to be complied with by all parties involved in the adoption process, in relation to formal, procedural and other requirements. These include the eligibility of the applicants, adoptability of the child, counselling of all parties, among others.[306] The HCI therefore occupies a central position and plays an important role given that there is increasingly a high rate of international mobility of children across borders due to armed conflict, divorce and poverty among others.[307]

Article 2(2) of the HCI provides that the 'Convention covers only adoptions which create a permanent parent-child relationship' (both simple and full). This is interpreted to mean 'adoption', as it exists within the common law generally (based on the legal implications already discussed in chapter two generally). Consequently, the HCI excludes other long-term (and permanent) AC arrangement like *kafalah*.[308] It is significant to note that the Egyptian and Moroccan delegates (to the Hague Conference on Private International Law) suggested inclusion of *kafalah* in the ICA regime under the HCI but this was rejected basically because 'no statistics were available to the Special Commission on the frequency of intercountry kafalah and no evidence was presented concerning possible abuses in that area' unlike ICA. In addition, the exclusion was said to have been due to the need to avoid definitional problems with regard to long-term fostering arrangements so as to prevent

[305] J Murphy *International dimensions in family law* (2005) 186; O'Halloran (n 166 above) 135; Sloth-Nielsen & Mezmur (n 181 above) 2; UNICEF (n 68 above) 280.

[306] See generally the HCI, the discussion in chapter two of this study and other works dealing on the specific theme of ICA and the HC, including the history and growth of ICA such as, G Parra-Aranguren 'History, philosophy and general structure of the Hague Adoption Convention' in Doek (n 41 above) 63; HCCH *The implementation and operation of the 1993 Hague Conference Intercountry Adoption Convention: A guide to good practice* (2008); Vite & Boechat (n 170 above); E Bartholet 'What's wrong with adoption law?' (1996) 4 *International Journal of Children's Rights* 263; UNICEF (n 68 above); Sloth-Nielsen & Mezmur (n 181 above); Mezmur (n 178 above).

[307] Moolhuysen-Fase (n 64 above) 4. In Africa, only nine states have ratified the HCI (see Sloth-Nielsen & Mezmur, n 181 above).

[308] Duncan 1 (n 170 above) 84; O'Halloran (n 166 above) 168.

'excessive procedural or bureaucratic restraints on relatively simple child-care arrangements'.[309]

On the contrary, the CRC Committee has raised concerns over the practice of kafalah in some states. Concerning Brunei Darussalam, Egypt, Jordan and Syrian Arab Republic (which adopted some legislation to regulate *kafalah*), the Committee pointed out issues that may result to difficulties in implementation and more significantly, that 'in practice more girls than boys benefit from *kafalah*', hinting at some discriminatory or other tendencies in the practice.[310] In relation to definitional concerns, the HCI begins on the premise that a family environment is vital to the 'harmonious' development of the child but this exclusion indicates that under the HCI, in the absence of a natural family, the only other family environment is one created by adoption. While *kafalah* may appear to be a simple procedure, the previous chapter has shown that it is not necessarily the same as foster care, even if long-term, which is also recognised in Islam. 'The Convention does not cover 'adoptions' which are only adoptions *in name*[311] but do not establish a permanent parent-child relationship'.[312] Consequently, Muslims who choose 'adopt' CDFE under *kafalah* are eliminated from the privileges of the HCI (and other families around the world that raise CDFE as part of their family without 'adoption' formalities).[313] It is submitted that, to the extent that *kafalah* creates a permanent relationship, as highlighted in the previous chapter, it is not *an adoption in name only*.

The exclusion of *kafalah* from the HCI and international regulation generally, presents some difficulties for children's rights especially across borders where special protection is required. Examples include rights to do with consent to medical procedures, identity and freedom of movement among others because securing the relevant documents from the authorities of destination countries prove difficulty since they do not understand, appreciate or reckon with *kafalah* and the children and

[309] Duncan 1 (n 170 above) 86; Duncan 2 (n 170 above) 35.

[310] UNICEF (n 68 above) 281.

[311] My emphasis.

[312] G Parra-Aranguren 'Explanatory Report on the Hague Convention' presented to the HCCH: May 1994 quoted in Duncan 1 (n 170 above) 34.

[313] Gonzalez (n 22 above) 6.

'parents' or caregivers may find themselves in a state of legal 'limbo'.[314] For instance, the exclusion of *kafalah* has 'been accepted by immigration adjudicators and tribunals in England to deny entry to young persons who were alleged to have been adopted under Pakistani law by their sponsors settled in the United Kingdom' and in Canada, there have been cases of immigration visas for adopted children being turned down on grounds that Islamic law does not permit adoption.[315] In response to this, it was argued that 'the *de facto* practice of Muslim adoption is the same as Canadian adoption'.[316] More recently, the same position has been presented before the CRC Committee.[317]

In addition, the exclusion of *kafalah* from the HCI regime could also have implications for Muslims residing in contracting state to the HCI who may wish to 'adopt' children but would be forced to do so under the HCI since there are no provisions for *kafalah* therein. In the same vein, Muslim children could also be arbitrarily moved to contracting states for adoption purposes. In both cases, the *Shariah* would be inadvertently contravened basically because the parties were left with no choice as contemplated under the CRC.[318] The globalisation of ICA also promotes the search for children in countries that only recognise *kafalah* leading to difficulties 'from the international private law perspective as well as from the ethical point of view.'[319]

4.4 *Kafalah*: variations in state practice

Despite the prohibition of adoption in the Islamic world generally, the practice takes place in various forms.[320] First, the use of 'permit/recognise' in relation to adoption under the CRC is not redundant (as some have argued). This is because some Islamic states such as Egypt and Lebanon 'permit' adoption for non-Muslims even

[314] A Mens 'Intercountry adoption: do the existing instruments work?' in S Meuwese *et al* (eds) *100 years of child protection* (2007) 167; Sloth-Nielsen & Mezmur (n 181 above) 6. These are rights that automatically flow in relation to adoption; as far as children's rights are concerned at least, this may appear quite discriminatory.

[315] Pearl & Menski (n 23 above) 409.

[316] SM Ali 'Establishing guardianship: The Islamic alternative to family adoption in the Canadian context' (1994) 14 *Journal of Muslim Minority Affairs* 202 in Pearl & Menski (n 23 above) 410.

[317] ISS & UNICEF (n 141 above); International Foster Care Organisation (n 162 above).

[318] Duncan 1 (n 170 above) 32. This is without prejudice to the fact that the HCI does not specify that children's religion or nationality are determinants in eligibility for adoption, it is left to states discretion. However, this cannot be completely ignored in light of 'continuity in upbringing' as already discussed.

[319] Vite & Boechat (n 170 above) 21.

[320] Sonbol (n 259 above) 39.

though it remains prohibited under the *Shariah*.[321] In addition, the effects of 'nation-state structures, centralized governments, social systemization and categorization modelled after the West' have impacted on the protection CDFE beyond *kafalah*. For instance, institutional care features prominently in these states; run by the state, religious foundations or individuals/communities- with the state having a supervisory role over them all.[322] In Egypt for example, many of the children in such institutions are abandoned due to 'urbanization, poverty and homelessness' and attain age 18 years without being adopted whether under *kafalah* or other legislation permitting adoption.[323] Usually, permission is not given for the 'adoption' of a lost child who is old enough to know his name because it is presumed that the family is in search of him but those who were lost or abandoned as babies/infants can be 'adopted'. This approach is tied to the need to preserve family lineage as already discussed and the latter category of children are presumed illegitimate with its attendant negative social stigma in the Islamic society.[324]

In Islamic states that 'permit' adoption (statutorily), there are certain circumstances in which it is permitted even for Muslims to adopt despite the *Shariah* and *kafalah*. Egypt is again an example (besides Tunisia, Morocco, Pakistan and other parts of South Asia) where as a result of the fact the *Qur'an* is often interpreted to meet the demands of the changing society, adoption (even intercountry) is allowed though on a limited basis. For instance, the outright adoption (rather than *kafalah*) of an orphan (*yateem*) by a relative is allowed.[325] Nonetheless, adoption whether in-country or intercountry, is regulated as guardianship (*kafalah*) and only those with unknown relatives are available for adoption.[326] Allowing adoption for those with unknown relatives is a 'social welfare measure aimed at serving the interests of the abandoned children'.[327] In some other states like Algeria, Kuwait and Yemen, adoption remains prohibited under both the *Shariah* and statutory law. It is considered void and without legal effect unless for purposes of bequeathing property or giving a gift, subject to the provisions of a will In addition, there are legal requirements for *kafalah* applicants to

[321] Vite & Boechat (n 170 above) 21; UNICEF (n 68 above) 294.

[322] Sonbol (n 259 above) 59.

[323] Sonbol (n 259 above) 60.

[324] Sonbol (n 259 above) 60; Volkman (n 288 above) 381.

[325] Pearl & Menski (n 23 above) 409; Nasir (n 21 above) 145;Volkman (n 288) 390, 395.

[326] Nasir (n 21 above) 145; Volkman (n 288 above) 393; Sonbol (n 259 above) 62.

[327] Pearl & Menski (n 23 above) 409. This is especially the case in Somalia where adoption (in-country and intercountry) is recognised even in the codified Muslim law.

fulfil and *kafalah* may be revoked at any time at the initiative of any of the parties, even the child.[328]

4.5. Conclusion

From the above, it becomes clear that (as earlier indicated in the previous chapter about the *Shariah*) there is no uniformity in the practice of *kafalah* all over the Islamic world but variations abound due to different circumstances and state policy. Second, *kafalah* is practiced across borders (intercountry) and intercountry *kafalah* is not without problems, just like ICA. This makes it necessary for *kafalah* to be internationally monitored as well so as to secure and safeguard the best interest of CDFE who may receive AC through *kafalah*.

[328] Besson (n 24 above) 137; Volkman (n 288 above) 387, 398. In Algeria, a *kafalah* applicant should be a Muslim having a decent home and under-60 years (male) or under-55 (female). Medical certificates are also required and if the *kafalah* is to be intercountry, a special permission would be attached to the guardianship order.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

> The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided that the child's moral and physical health are not endangered. *Public authorities cannot improve upon nature*[329]

5.1. Introduction

The words above would have been an apt conclusion to this study (as far as the importance of a family environment is concerned), but for the words in italics. The provision of AC for CDFE is not an attempt to 'improve upon nature' which is impossible. It is rather an attempt at securing the best interest such children. This overriding, fundamental and foundational right of children[330] does not abate upon the loss of a family environment but rather becomes more critical as a result of that deprivation. Besides, current 'research shows that parental love has less to do with biological ties and more to do with shared experiences', a resource which proper AC can offer to CDFE.[331] This study made an attempt at examining the protection of CDFE through AC with a particular focus on Islamic *kafalah*. In this chapter, a summary of conclusions drawn from the study is presented and relevant recommendations flowing from the study are made.

5.2. Summary and conclusions

In chapter one, the basis for this study was set and through the preliminary literature review, the need for a focus on *kafalah* as an AC option for CDFE was justified by the need to make a contribution by attempting to fill the gap existing in the relevant literature on the subject. Through the CRC, *kafalah* assumes international relevance in its acceptance and recognition but no further clarity is provided with regards to its legal position or relationship with other AC forms and with regard to regulatory procedures.

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[329] Lord Templeman in *Re K.D (A minor)* (1988) AC 806 at 812 quoted in Hogget (n 161 above) 126; my emphasis (words in italics).

[330] Art 3 CRC.

[331] B Atkin *The international survey of family law* (2009) 230.

Chapter two presents an overview of the legal and policy framework for the protection of CDFE, against the background of a growing concern for the increasing numbers of CDFE. There is consequently an emerging field of study of significant importance in international human rights generally and children's rights specifically. There is also emerging, a vast array of policy developments on the subject, chief of which is the soon-to-be adopted UNG which makes far reaching contributions to the existing law on AC for CDFE. Of significance among these is the express recognition given to informal AC options (under which kinship care and *kafalah* currently fall) and the call on states to give cognisance to them. This is a practical response to the reality that the majority of CDFE are absorbed by AC provided informally and leaving the care of such children unregulated, in no way serves the best interest of the child. The contributions of the ACRWC on AC for CDFE are also highlighted as being complementary to the CRC rather than needlessly duplicating the CRC.

Through chapter three, it becomes obvious that there is a significant amount of Islamic jurisprudence on children's rights unlike in many other areas of international human rights law. Children's rights thus offers a possible platform for constructive engagement between Islamic law and international human rights. Additionally, such jurisprudence can be considered as contributions to the emerging wealth of policy development on AC for CDFE. With reference to *kafalah*, it can be said that the 'non-charity based' form is subject to internal controls and regulation under the *Shariah* while the other is not. This makes the need for overall regulation more important particularly in the light of the fact that the historical conditions of the time have ceased and as Sonbol and others reveal, the vast majority of CDFE are without any means, financial or otherwise.[332] Chapter three also generally lends credence to the need for developing a wide range of AC options for CDFE and adoption need not be the only permanent form of AC.[333] This reiterates the position of the UNG on the duty to ensure the availability of a wide range of options for different purposes, on short and long terms.[334]

The preceding chapter first highlights the significance of the CRC in promoting universalism of human rights by the inclusion of *kafalah* thereby providing an entry

[332] Sonbol (n 259 above) 45.

[333] Parkinson (n 14 above) 161.

[334] Arts 54-56 UNG.

into that realm for many states in the Islamic world. This proves that despites vast differences, dialogue can be fostered between cultures and religions.[335] We also see that the practice of *kafalah* has evolved over time to the point of assuming international dimensions and this has called into question the exclusion of *kafalah* from the ICA legal regime since it has been argued that they are more similar than dissimilar. What makes the current legal situation of *kafalah* more significant is in the fact that the absence of monitoring and regulations means that many vulnerable children are left out of the realm of protection, a situation which goes contrary to the current position of children in international law. Many CDFE taken into *kafalah* are not accounted for, even when taken across borders to relatives in developed countries, without access to basic services or documentation, in new and unfamiliar surroundings.[336] In Islamic societies, 'a completely abandoned child is a rarity'[337] but it is not enough that the child is 'picked up' or 'taken in'; compliance with children's rights requires a knowledge of 'how', 'by whom' and the child's living conditions so as to secure and safeguard the best interest of the child.

5.3. Recommendations

A central recommendation that flows from this study is on the need to provide legislatively for *kafalah*, both nationally and internationally. As the previous chapter reveals, some states have their own legislation but there are not many. Besides, there is a need to ensure that such legislation comply with the fundamental principles of children's rights (the rights to life, survival and development, non-discrimination, best interest principle and child participation). These include ensuring that: all *kafalah* placements are based on judicial decisions, 'all social benefits are attributed to these children in the same way as is done for other children', there are effective complaints mechanisms 'to receive and address complaints from children' and, both 'boys and girls are given the same opportunities under *kafalah*'.[338] In addition, it is recommended that the CRC Committee should engage more with Islamic states on *kafalah* so as to foster a better understanding of the practice. This would also be beneficial in assessing any gaps there might be, as far as children's rights are concerned and suggesting targeted means of dealing with them.

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[335] P Veerman & C Sand 'Religion and children's rights' (2000) 7 *International Journal of Children's Rights* 386.

[336] Sonbol(n 259 above) 60; ISS & UNICEF (n 141 above) 5.

[337] Volkman (n 288 above) 383.

[338] UNICEF (n 68 above) 281.

With regard to intercountry *kafalah*, it has been recommended that it should be legislatively provided for so as to guard against gaps, loopholes[339] and the problems already discussed in the previous chapter on how the current absence of legal regulation impacts on other rights of the child, with regards to travel documents, entry requirements into other states and identity documents, among others. *Kafalah* placements are on the increase but are unregulated and not properly documented. They are usually carried out privately without reference to child welfare authorities in either countries of origin or receiving countries. Therefore, as intercountry *kafalah* grows and becomes more acceptable, the scope of ICA as it currently exists needs to be expanded.[340] The growth in intercountry AC arrangements other than adoption points at a shift from an emphasis on adoption being the 'best' form of AC to an emphasis on the actual provision of a family environment for CDFE, at the domestic or international level.

The current situation results in a situation where many Muslims in developed countries wishing to care for CDFE cannot do so under *kafalah* but are forced to settle for 'guardianship' or 'custody' not the permanency that *kafalah* offers since they may not wish to adopt such children, in contravention of the *Shariah*. This challenge also compromises the position and future of Muslim children in the public childcare system of such countries.[341] This arguably contravenes the right to non-discrimination of such children.

The continued non-existence of international standards for regulating the transfer of children between states under *kafalah* therefore raises practical problems, which 'may require the kind of regulations that are provided for in the 1993 Convention.'[342] It is therefore recommended that the HCI be amended to cover *kafalah* which, as highlighted previously, is analogous to adoption. A further justification for this recommendation is derived from the fact that FC is recognised under Islamic law and subject to separate rules and implications.[343] Consequently *kafalah*, while being referred to as a form of 'long-term foster care', is distinct from FC under Islamic law

[339] Sloth-Nielsen (n 228 above).

[340] Duncan 2 (n 170 above) 85; Olowu (n 21 above) 54.

[341] Volkman (n 288 above) 390.

[342] Duncan 1 (n 170 above) 35.

[343] See chapter three.

and so, its inclusion in the HCI should be based primarily on its nature of permanence and a family-based AC for CDFE, in the same manner as adoption.

5.4 Conclusion

By attempting to discuss all the issues raised in the initial chapter of this dissertation, the objectives of the study have been achieved. In addition, the study has confirmed the hypothesis that there is a need, beyond the international recognition of *kafalah* as an AC option for CDFE, to subject its practice to legal regulation, nationally and internationally. This is indeed in the best interest of CDFE who deserve a chance at growing up 'cherished…carefree and cared for'[344] as all children should.

Word count: 16,866 (excluding preliminary pages, footnotes and bibliography)

[344] D Tutu *The rights of the child* (2004) 1.

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