

**The Right to Alternative Care for Children in Tanzania:
An Inquiry into the Law and Practice of Foster Care**

Dissertation

**zur Erlangung des Grades eines Doktors der Rechte
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Declaration

I, Veronica Gabriel Buchumi, declare that this thesis submitted for the award of Doctor of Laws (Dr. jur.) at the University of Bayreuth has not been previously submitted by me for a degree at this or any other university for the award of a similar degree. I further declare that all sources used, referred to or quoted have been duly acknowledged.

Veronica Gabriel Buchumi

Bayreuth, 23.08.2021

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Dedication

To all those who have experienced a heartbreak for whatever reason...

“When you are standing in a forest of sorrow, you cannot imagine that you could ever find your way to a better place. But if someone can assure you that they themselves have stood in that place, and now have moved on, sometimes this will bring hope.” By Elizabeth Gilbert

Acronyms and abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
Art	Article
AU	African Union
CBO	Community-Based Organisation
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CELCIS	Centre for Excellence for Looked after Children in Scotland
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of People with Disabilities
CSW	Commissioner for Social Welfare
FBO	Faith-Based Organisation
fn	Footnote
FSP	Family Strengthening Programme
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immune Deficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFCO	International Foster Care Organisation
LCA	Law of the Child Act (Mainland Tanzania)
LGA	Local Government Authorities
MHCDGEC	Ministry of Health, Community Development, Gender, Elderly and Children
MVC	Most Vulnerable Children
NCPA	National Costed Plan of Action

NGO	Non-Governmental Organisation
NPA-VAWC	National Plan of Action for Violence Against Women and Children
NSGRP	National Strategy for Growth and Reduction of Poverty
OAU	Organisation of African Union
OHCHR	Office of the High Commissioner for Human Rights
p	Page
PASADA	Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese
pp	Pages
PSSN	Productive Social Safety Net
PWESCR	Programme on Women’s Economic, Social and Cultural Rights (India)
R.E.	Revised Edition
Reg	Regulation
Sec	Section
TASAF	Tanzania Social Action Fund
TV	Television
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children’s Emergency Fund
URT	United Republic of Tanzania
USA	United States of America

List of legal instruments, laws and policy documents

1. International and regional instruments

1.1. United Nations (and predecessor League of Nations)

1.1.1. Treaties

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

Vienna Convention on the Law of Treaties, 1969

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention on the Rights of the Child, 1989

Convention on the Rights of People with Disabilities, 2006

1.1.2. Declarations and Guidelines

Geneva Declaration of the Rights of the Child, 1924

Universal Declaration of Human Rights, 1948

Declaration of the Rights of the Child, 1959

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

General Assembly, Guidelines for the Alternative Care of Children, 2010

1.1.3. General Comments

Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, General Comment No. 6: The Right to Life (Art. 6), 1982

Committee on the Rights of the Child, General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child, 2003

Committee on the Rights of the Child, General Comment No. 12 on the right of the child to be heard, 2009

Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1), 2013

1.2. African Union (and predecessor Organisation of African Unity)

1.2.1. Treaties

African Charter on Human and Peoples' Rights, 1981

African Charter on the Rights and Welfare of the Child, 1990

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

1.2.2. Declarations

Declaration of the Rights and Welfare of the African Child, 1979

1.2.3. General Comments

African Committee of Experts on the Rights and Welfare of Children, General Comment No 5 on State Party Obligations under the African Charter on the Rights and Welfare of Children (Art 1) and Systems Strengthening for Child Protection, 2018

2. Laws and policy documents of the United Republic of Tanzania

2.1. Mainland Tanzania

2.1.1. Constitution

The Constitution of the United Republic of Tanzania, 1977, Chapter 2 of the Laws of Tanzania R.E. 2008

2.1.2. Policies

Child Development Policy, 2008

2.1.3. Principal legislation

Law of the Child Act, Chapter 13 of the Laws of Tanzania R.E. 2019

Law of Marriage Act, Chapter 29 of the Laws of Tanzania R.E. 2019

Local Government (District Authorities) Act, Chapter 287 of the Laws of Tanzania R.E of 2002

Local Government (Urban Authorities) Act, Chapter 288 of the Laws of Tanzania R.E of 2002

2.1.4. Subsidiary legislation

Adoption of a Child Regulations, 2011, Government Notice No. 197 of 2012; in Kiswahili: Kanuni za Kuasili Watoto, za Mwaka 2012, Tangazo la Serikali Na. 164 la 2016

Child Protection Regulations, 2014, Government Notice No. 11 of 2015; in Kiswahili: Kanuni za Usalama wa Mtoto za Mwaka 2014, Tangazo la Serikali Na. 169 la 2016

Children's Homes Regulations, 2012, Government Notice No. 155 of 2012; in Kiswahili: Kanuni za Makao ya Watoto za Mwaka, 2012, Tangazo la Serikali Na. 166 la 2016

Foster Care Placement Regulations, 2012, Government Notice No. 153 of 2012; in Kiswahili: Kanuni za Malezi ya Kambo za Mwaka 2012, Tangazo la Serikali Na. 165 la 2016

Law of the Child (Juvenile Court Procedures) Rules, 2016, Government Notice No. 182 of 2016

2.1.5. Guidelines

National Guidelines on Children's Reintegration with Families, 2019

National Guidelines for Identification of Most- Vulnerable Children and Linkage to Care, Support and Protection, 2017

Muongozo wa Majukumu ya Maafisa Ustawi (available in Kiswahili language only, year not indicated) (*English: Guidelines on the Responsibilities of Social Welfare Officers*)

2.1.6. Plans of Action and strategies

National Costed Plan of Action for Most Vulnerable Children, 2007-2010

National Costed Plan of Action for Most Vulnerable Children, 2013-2017

National Action Plan to end Violence against Women and Children, 2017/18-2021/22

Tanzania Development Vision 2025

National Strategy for Growth and Reduction of Poverty, 2005/06-2009/10

National Strategy for Growth and Reduction of Poverty, 2010/11-2014/16

Five-Year Development Plan, 2016/17-2020/21

Tanzania Social Action Fund, 2000 (ongoing)

2.2. Zanzibar

2.2.1. Principal legislation

Children's Act No. 6 of 2011

2.2.2. Subsidiary legislation

Foster Care Regulations of Zanzibar, 2017 Legal Notice No. 71 of 2017

3. Laws of other countries

3.1. Constitutions

Constitution of Kenya, 2010

Constitution of Uganda, 1995

Constitution of South Africa, 1996

3.2. Principal legislation

Children's Act No. 560 of 1998 as amended by the Children's (Amendment) Act, No. 937 of 2016 (Ghana)

Children's Act No. 38 of 2005 (South Africa)

3.3. Subsidiary legislation

Foster Care Regulations, 2018 (Ghana)

Abstract

Children need to grow up in a loving and caring family environment for their development. In the absence of such an environment, children become vulnerable to violations of their rights, hence the need for alternative care, preferably family-based. The right to appropriate alternative care for children deprived of their family environment is guaranteed under the UN Convention on the Rights of the Child of 1989 and the African Charter on the Rights and Welfare of the Child of 1990, both ratified by Tanzania in 1991 and 2003, respectively. Mainland Tanzania domesticated these treaties through the Law of the Child Act in 2009, in which the need for alternative care for children deprived of their family environment is reflected, with an emphasis on family-based alternative care rather than institutional care. However, in practice, institutional care is more prevalent in Tanzania. The limited use of foster care as one of the family-based alternative care options to protect children deprived of their family environment necessitated this study, which assesses the place of foster care in the continuum of child care in Mainland Tanzania. In this study, foster care, as distinct from informal traditional kinship care, refers to a form of family-based care, to be ordered and supervised by the competent social welfare authority, where a child deprived of his or her family environment is placed in the home of a carer who is selected, approved and supervised by the authority to provide such care. However, in Tanzania, foster care is understood and used in practice merely as a prerequisite for adoption, rather than an independent form of alternative care as provided in the laws. On the other hand, with the so-called fit person programme, a type of short-term foster care is used in practice, without relating it to real foster care. Therefore, the study examines the efficiency and effectiveness in practice of the legal framework regulating foster care and other forms of protection of children deprived of their family environment.

By analysing the relevant legal and policy documents and conducting interviews with selected respondents, the challenges and prospects of foster care as family-based alternative care in Mainland Tanzania are unravelled in the light of international and regional standards and principles, such as the principles of necessity and suitability. The narrow definition of foster care in the Law of the Child Act which is limited to care by non-relatives, lack of clarity on the objectives and uses of foster care, and lack of coherence in the Law of the Child Act and the regulations made under it, stand out as the major legal challenges which have resulted in limited use of foster care. Against this background, the study analyses the role of social welfare officers in the protection of children, child-care traditions in the culture of Tanzanians, and the prevalence of poverty as critical challenges affecting the use of foster care in Tanzania. It is

contended that existing campaigns to deinstitutionalise alternative care in favour of family-based care, the need for a case-by-case analysis of children's needs, and flexibility in the practice of foster care provide prospects for a functioning foster care system in Tanzania. The study emphasises that adopting a holistic approach and looking at the whole system of protection of children is essential for developing an optimal foster care system, as foster care cannot be a solution on its own. The study calls for a reform of the legal framework on child protection and concretisation of the right to alternative care within the legal framework.

PART ONE: THE RIGHT TO ALTERNATIVE CARE

CHAPTER ONE: GENERAL INTRODUCTION

1.1. Background to the study

Children are vulnerable due to their tender age and lack of maturity. For this reason, families, particularly parents, are expected to ensure the care and protection of children they beget. It is a common understanding that a child needs to grow up in a loving and caring family environment for full and harmonious development. Ideally, a child is considered safe and protected if he or she is in the care of his or her parents or other family members, free from all forms of abuse and neglect. On this basis, national law and international instruments on children's rights require states to provide the necessary support and environment for parents and families to fulfil their childcare and upbringing responsibilities in every way possible.

The absence of a loving and caring family maximises children's susceptibility to abuse, neglect, violence, retarded growth, and underdevelopment. A family acts as a canopy or a shield for the children, and if it is unwilling or unable to fulfil its obligations, this may lead to children being exposed to harsh conditions within the society they are living in. Thus, while all children require protection and attention, children without parental or family care demand special care, assistance, and protection. One way of protecting this group of children is to provide them with immediate alternative care arranged by the state. The right to such alternative care is enshrined in art 20 of the Convention on the Rights of the Child (CRC)¹ and art 25 of the African Charter on the Rights and Welfare of the Child (ACRWC).²

Art 20(1) of the CRC and art 25(1) of the ACRWC call on states parties to ensure that children deprived of their family environment, or those who, for whatever reason and in their own interest, cannot remain in such an environment, are accorded special protection and assistance. Among other protection measures, states are required to provide and ensure alternative care for such children. Both the CRC and ACRWC go further to enumerate inclusive alternative care options that the state parties can establish in their respective states. The care options include foster care placement, *kafala* under Islamic law,³ adoption,⁴ and placement in suitable institutions for the care of children. In providing alternative care to children, emphasis is placed

¹ Convention on the Rights of the Child (UN General Assembly, November 20, 1989) (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990, in accordance with art 49).

² African Charter on the Rights and Welfare of the Child, July 11, 1990 (Adopted by the Twenty-sixth ordinary session of the assembly of the head of states and government of OAU, Addis Ababa, Ethiopia - July 1990 and entered into force 29 November 1999).

³ Mentioned only in the CRC.

⁴ Adoption is not mentioned in art 25(2)(a) of the ACRWC. However, in art 24(b) of the charter it is mentioned that adoption can be used as a last resort as an alternative means of child care.

on the use of family-based care options in preference to institutionalised care; however, the latter is prevalent in most parts of the world, including Tanzania.⁵ Over-institutionalisation of care for children needing alternative care has led to a worldwide campaign calling for the deinstitutionalisation of alternative care services.⁶ Institutional care for children is to be used as a measure of last resort unless it is proved that such care is suitable and in the child's best interests.⁷

Despite this deinstitutionalisation campaign, institutional care still serves most children in need of alternative care in Tanzania.⁸ However, instead of being used as a measure of last resort as provided for under the Tanzanian legal framework and in the principles governing provision of alternative care for children,⁹ in practice, institutional care is used as a measure of the first instance for many children. Children in need of alternative care, especially those who cannot be cared for by extended family members or be adopted, end up in children's homes without due attention being paid to their specific needs. Institutional care through children's homes is an immediate measure and a standby that is readily available to receive children in need of alternative care in Tanzania.

The limited use of foster care as a family-based alternative care option in Tanzania is the driving force behind this study. Though recognised and given much relevance in the law, family-based alternative care options are, in practice, underdeveloped and underutilised. On this basis, this study provides a deep examination of the law and practice of foster care and assesses its relevance and viability in Tanzania in connection with caring for children needing alternative care.

1.2. Problem statement

In Tanzania, children in need of alternative care belong to the group of most vulnerable children requiring special attention and protection from the state and the community at large.¹⁰

⁵ Para 21-23 of the UN Guidelines for the Alternative Care of Children, (Resolution/adopted by the UN General Assembly, 24 February 2010, A/RES/64/142); Mariana Josephat Makuu, Situational Analysis of Orphans and Vulnerable in Existing Alternative Care Systems in Dar es Salaam, Tanzania, *Social Work and Society International Online Journal* 17, no. 1 (2019): 2.

⁶ Philip S. Goldman et al., Institutionalisation and Deinstitutionalisation of Children 2: Policy and Practice Recommendations for Global, National, and Local Actors, *The Lancet Child & Adolescent Health* 4, no. 8 (August 2020): 606–7; Miriana Giraldo, Deinstitutionalisation and Quality Alternative Care for Children in Europe: Lessons Learned and the Way Forward (Working Paper) (Eurochild, 2014), 9.

⁷ Para 23-23 of the UN Guidelines for the Alternative Care of Children.

⁸ Mariana Josephat Makuu, Family Matters: Strengthening Existing Alternative Care Systems for Orphans and Vulnerable Children in Dar-Es-Salaam (Tanzania) (PhD thesis, Botswana, University of Botswana, 2017), 215.

⁹ See section 3.4.2.1 of chapter three of this study for more details.

¹⁰ United Republic of Tanzania, National Costed Plan of Action for Most Vulnerable Children 2007-2010 (NCPA) (United Republic of Tanzania, 2008), 9; United Republic of Tanzania, National Costed Plan of Action for Most Vulnerable Children (NCPA II) 2013-2017, (United Republic of Tanzania, 2012), 9.

Moreover, sec 16 of the Law of the Child Act of 2009 (LCA) identifies children needing alternative care due to different reasons as children needing protection and care.¹¹ In many of its pronouncements, the government of Tanzania acknowledges and appreciates the role that the community has been playing in providing the required safety net for children who happen to be without parental care.¹² Orphans and children who lack family care due to illness, family disintegration, or any other reason, have automatically been taken into the care of their relatives or close friends of their families without state intervention. Thus, over time the government's involvement in the actual protection of children needing alternative care has been indirect and rather minimal.¹³

Acute poverty and increasing social disintegration have progressively led to an increase in children needing alternative care, and have affected the strength and capacity of the community safety nets to ensure the protection of such children without the state's direct involvement.¹⁴ For instance, poverty has been a factor causing parents or relatives to abandon or neglect their children, in some cases to the extent of surrendering their children to children's homes.¹⁵ Moreover, child abuse and violence may be a reaction to the hardships resulting from poverty. The struggles of parents to overcome poverty and earn a living have left many children unattended and uncared for.¹⁶

At the same time, the onset of HIV/AIDS with its adverse impacts led to increased numbers of orphans and sick persons who demanded care from other members of society, which in turn overstrained the capacity of extended families and the community to care for orphans and those in need of care.¹⁷ This led to a proliferation of orphanages that started absorbing children as a result of the emerging crisis.¹⁸ Child-headed households also began to emerge, which denied

¹¹ Law of the Child Act, Chapter 13 of Laws of Tanzania, revised edition of 2019. See also reg 4 of the Child Protection Regulations, 2014 Government Notice No.11 published on 09/11/2015,

¹² United Republic of Tanzania, National Guidelines for Improving Quality of Care, Support, and Protection for Most Vulnerable Children in Tanzania (United Republic of Tanzania, 2009), 1.

¹³ United Republic of Tanzania, 1 *ibid*.

¹⁴ Andrew S.T. Mchomvu and Abu Mvungi, Status of Children in Tanzania: Child Rights Situational Analysis of Children without Parental Care and at Risk of Losing Parental Care (SOS Children's Villages International), iii.

¹⁵ Bart Rwezaura, This Is Not My Child: The Task of Integrating Orphans into the Mainstream of the Society in Tanzania, in *International Survey of Family Law*, ed. Andrew Bainham (International Society of Family Law, 2001), 412; See also Kathy Barbell and Madelyn Freundlich, *Foster Care Today* (Washington, DC: Casey Family Programs, 2001), chap. 2.

¹⁶ An interview conducted with a social welfare officer at Kinondoni Municipal Council in Dar es Salaam on 09/01/2019. Also, in an interview conducted with a social worker at Msimbazi Centre for Orphans and Most Vulnerable Children in Dar es Salaam on 18/01/2019.

¹⁷ Makuu, Situational Analysis of Orphans and Vulnerable in Existing Alternative Care Systems in Dar es Salaam, Tanzania, 2–3.

¹⁸ United Republic of Tanzania, National Guidelines for the Establishment and Management of Children's Homes (United Republic of Tanzania, 2006), 1.

children in such settings enjoyment of their childhood and many of their rights, as they had to carry more responsibilities for their own and their siblings' survival and wellbeing.¹⁹

At this juncture, the state was awakened and realised that the time to play an active role in the care and protection of orphans and other vulnerable children was long overdue. Thus, since the 1990s, the government has been developing mechanisms and strategies to ensure and enhance care and protection for orphans and other vulnerable children. The government's efforts are manifested through the creation and adoption of different regulations, plans of actions, laws, policies and guidelines directed towards the protection of the most vulnerable children.²⁰ Among the early initiatives adopted by the state are the National Guidelines for Community Based Care, Support and Protection of Orphans and other Vulnerable Children of 1994, initially known as the National Guidelines and Strategies for Care of Orphans.

Save for a few guidelines²¹ and laws, such as those related to the establishment of children's homes, adoption, and foster care, most of the initiatives taken by the state were general rather than specific with regard to children in need of alternative care. However, in these general initiatives, issues relating to the provision of alternative care for children in need of such care were included. An important observation in respect of all these initiatives is that there has always been an emphasis on preventing the removal of children from the care of their parents or families wherever possible. Where this cannot be prevented, children deprived of their family environment should be provided with suitable alternative family care. Institutional care is discouraged and must only be used as a measure of last resort.²²

Despite the discouragement of institutional care, in practice, children's homes continue to play a significant role in providing alternative care services for children.²³ The majority of these children's homes are operated by non-governmental organisations, faith-based organisations, or individuals. Up to March 2019, the government itself operated a single children's home in Dar es Salaam Region. For a long time, the state's role in providing alternative care services for

¹⁹ Makuu, Situational Analysis of Orphans and Vulnerable in Existing Alternative Care Systems in Dar es Salaam, Tanzania, 4.

²⁰ A detailed discussion of these initiatives is provided in chapters three and four of this thesis.

²¹ United Republic of Tanzania, National Guidelines for Provision and Management of Foster Care and Adoption Services (United Republic of Tanzania, 2006); United Republic of Tanzania, National Guidelines for the Establishment and Management of Children's Home (2006).

²² See the preamble of the United Republic of Tanzania, National Guidelines for the Establishment and Management of Children's Home, 1; see also United Republic of Tanzania, National Guidelines for Improving Quality of Care, Support, and Protection for Most Vulnerable Children in Tanzania, 5, 10.

²³ See also Department of Social Welfare, A Draft Report on Assessment of the Situation of Children in Institutional Care. (Ministry of health and social welfare, 2011), 29. In all five local government authorities visited during this study, the social welfare officers indicated that institutional care was an alternative care option for the majority of children in need of such care.

children has been more that of a watchman than that of an actual player. The state's role is felt in the preparation of policies, guidelines and regulations, and the monitoring and guiding of those running children's homes and other services related to children in need of alternative care.

Apart from care by relatives or kinship care, which is largely informal and unregulated, the use of family-based alternative care options, such as foster care, is limited and underutilised. For instance, since the enactment of the LCA in 2009 and the Foster Care Placement Regulations²⁴ in 2012, foster care in Tanzania has extensively been linked to adoption.²⁵ Foster care is used as a step towards adoption rather than as an independent alternative care option.

Against this background, this study proceeds on the premise that the long-standing practice of using foster care as a pre-adoption process only defeats the objectives and goals of foster care as a wider alternative care option. Moreover, this practice also defeats the principle that a child in need of alternative care should be given the most suitable substitute care by the state.²⁶ As it stands now, the prevalent formal alternative care option practised in Tanzania is institutional care through established children's homes.²⁷ Thus, most of the children needing care are likely to be placed directly in children's homes, even when this does not serve the best interests of the child or meet the child's needs. It is only recently that the state has initiated the placement of children with fit persons or fit families as a distinct family-based alternative care option.

Thus, I found it pressing to inquire into the law and practice of foster care in order to understand the legal and practical challenges that inhibit the full implementation of the law on foster care in Tanzania. This inquiry has paved the way for assessing the prospects and place of foster care and its relevance in protecting children in need of alternative care in the socio-economic context of Tanzania. However, this study is not proposing that foster care would meet the needs of every child in need of alternative care if the law were fully implemented. In providing alternative care services for children in need of care, there is no one size fits all kind of alternative care option. State authorities need to put in place diverse alternative care options ready to serve the different circumstances, interests and needs of children and their families.²⁸ Thus, a functioning foster

²⁴ Foster Care Placement Regulations, 2012, Government Notice No. 153 published on 04/05/2012.

²⁵ An interview with a social welfare officer at Ilemela municipal council conducted on 23/03/2018 in Mwanza Region. Further, this was also confirmed during interviews with other social welfare officers in municipal councils in Dar es Salaam and Mwanza Regions.

²⁶ For example, see sec 7(3) of the Law of the Child Act which provides inter alia that "...where a competent authority or a court determines in accordance with the laws and procedures applicable that it is in the best interest of the child to separate him from his parents the best substitute care available shall be provided for the child"; para 5 of the UN Guidelines for the Alternative Care of Children.

²⁷ Makuu, *Situational Analysis of Orphans and Vulnerable in Existing Alternative Care Systems in Dar es Salaam, Tanzania*, 2.

²⁸ See para 7 of the UN Guidelines for the Alternative Care of Children.

care system would save children who cannot be cared for by their parents or extended family members or those who cannot be adopted from being institutionalised when institutional care is not in their best interest.

1.3. Objectives and key research questions

This study is a critical analysis and assessment of the law and practice of foster care in Tanzania based on the international and regional principles guiding the realisation and provision of the right to alternative care for children. It aims to identify the legal and practical challenges associated with implementing the law on foster care in Tanzania following enactment of the LCA. The underutilisation of foster care as a complete and independent care option in the country underscores the importance of this study.

In order to achieve the above-mentioned main objective, it has been necessary to develop other related objectives to provide a roadmap for the study. Firstly, the study examines and discusses the standards and principles governing the provision of alternative care as captured in the international and regional instruments on children's rights to which Tanzania is a state party. These principles and standards help us to understand the nature of the state's obligations concerning children's right to alternative care.

Secondly, the study unveils the situation and plight of children in need of alternative care, and the threat to their rights, welfare, and development. The nature of this group of children is identified and discussed, along with the factors that lead to them needing alternative care and the associated risks facing them. The study analyses and discusses the measures that Tanzania has adopted to address the plight of these children, and presents a comprehensive overview of the legal and institutional framework for child protection at this juncture. The focus is on the framework regulating the provision of alternative care services and preventing the occurrence of children needing alternative care. The strengths and weaknesses of the current alternative care system for children in Tanzania are presented.

Thirdly, a detailed analysis is given of the law regulating foster care in Tanzania. The focus is on ascertaining the nature, objectives, and envisaged operation of foster care. The study unpacks and analyses the law relating to foster care in order to determine issues concerning mandated authorities, eligibility to become a foster carer, conditions for foster placements, rights and obligations of interested parties, and the eventual termination of foster care placements.

The study was guided by four related research questions to achieve the above-formulated general and specific objectives successfully. The first question relates to how the right to alternative care is dealt with under the international and regional children's rights instruments,

i.e. what are the standards and principles governing the realisation of this right emanating from these instruments? The second question is, what is the legal and institutional framework for child protection in Tanzania? This is complemented by the question of what measures Tanzania has taken to protect and assist children in need. The third question relates to the legal and institutional framework governing the provision of foster care services in Tanzania. The final question is, what are the challenges and prospects of the law and practice of foster care in the socio-economic context of Tanzania?

1.4. Research methodology and methods

A combination of descriptive, exploratory and analytical approaches were adopted to achieve the intended objectives. These approaches were selected due to the nature of the research problem and the setting in which the problem is based. There has been limited legal research on the provision of alternative care for children in Tanzania. While considerable research has been conducted on institutional care,²⁹ there are hardly any studies of foster care in Tanzania, resulting in a narrow understanding and misconceptions of foster care and its role in the protection of children needing alternative care.

A descriptive approach was adopted to give interested and targeted readers an understanding of children deprived of their family environment and their associated right to alternative care as articulated under the international and regional instruments, and in the national laws of Tanzania. Beyond this, the study describes foster care as envisaged in the law and its practice in Tanzania. Through this approach, the study answers questions relating to what foster care is, when and how foster care is used in Tanzania, and who can become a foster carer.

After having studied the provisions defining and regulating foster care under the LCA and its subsidiary legislation, I explored the implementation of foster care in the social, economic and cultural contexts of Tanzania through empirical research, which was necessary because of limited information on this subject. I collected the available information on the practice of foster care in Tanzania to identify and discuss the challenges and prospects of foster care in the country.

In combination with these two approaches, the study is based on an analytical approach. As a student of law, I conducted a critical analysis of the international and national normative frameworks governing the provision of alternative care to children. Further, a detailed analysis

²⁹ See Department of Social Welfare, A Draft Report on Assessment of the Situation of Children in Institutional Care. See also Katharin Hermenau et al., Maltreatment and Mental Health in Institutional Care - Comparing Early and Late Institutionalised Children in Tanzania: Maltreatment and Mental Health in Institutional Care, *Infant Mental Health Journal* 35, no. 2 (March 2014): 102–10.

of the law and practice of foster care in Tanzania is provided, which unfolds the legal challenges relating to foster care practices. This approach provided the basis for assessing the viability of foster care as envisaged in the law. It further provided a basis for recommending necessary reforms in the whole system of protecting children deprived of their family environment.

1.4.1. Data collection methods

This socio-legal study is aimed at examining and analysing the law and practice of foster care in Tanzania. As socio-legal research, it is based on both documentary and empirical data. Documentary research was conducted to gain a general understanding of children deprived of their family environment and their associated right to alternative care. Reading, reviewing, and analysing existing legal and non-legal sources of data provided the foundation for this study and paved the way for developing the arguments and theses presented in it. Empirical research was important to collect data related to the implementation of foster care in Tanzania. There has been hardly any research on foster care since the enactment of the LCA, or before it, so conducting empirical research was inevitable in order to ascertain the answers to some of the questions raised in the study.

1.4.2. Documentary research

Both primary and secondary legal sources and non-legal data were collected through physical and electronic libraries, online databases and different search engines. The libraries of the University of Bayreuth and the University of Dar es Salaam were the major data collection centres.

Further, the Parliament of the United Republic of Tanzania in Dodoma and the Office of the Attorney General in Dodoma were visited. The aim of visiting these two offices was to obtain the original bill that led to the enactment of the LCA, Hansards containing the parliamentary debates related to the enactment of the LCA and the subsidiary regulations and rules made under LCA. The websites of relevant national ministries and departments contained additional materials, such as guidelines, policies, plans of action and strategies related to the protection of children, including children needing alternative care. The website of the Ministry of Health, Community Development, Gender, Elderly and Children was very useful in this respect.

The websites of different organisations dealing with the protection of children provided another useful source of information. These websites included resource centres of organisations like UNICEF, the Office of the High Commissioner for Human Rights (OHCHR), Better Care Network, the International Foster Care Organisation (IFCO), SOS Children's Village

International, the Centre for Excellence for Looked after Children in Scotland (CELCIS) and the African Child Policy Forum.

1.4.3. Empirical research

In addition to the documentary research, this study required the collection of empirical data from selected areas and respondents in Tanzania to answer the questions relevant to the study's objectives. The absence of court judgments on the provisions relating to foster care, and of current guidelines or practice notes on these provisions, made it necessary to seek data from selected respondents. The practice of foster care in Tanzania can only be ascertained and understood by contacting the authorities mandated with implementing the law on foster care and the protection of children generally. In order to understand the current situation of children deprived of their family environment and the extent to which their right to alternative care is respected, it was necessary to conduct interviews with individuals, officers and representatives of organisations providing different services to children in need of care. Such services include family preservation, family reunification and reintegration, and alternative care provision through established children's homes.

Field research was conducted in three selected regions of Tanzania: Dar es Salaam, Mwanza and Dodoma. It was divided into three research phases. The first phase was between December 2017 and April 2018. It was followed by the second phase, which took place between December 2018 and March 2019, and the final research phase was conducted between December 2019 and January 2020. During the first and second phases of the research, all three regions were visited, and interviews were conducted with selected respondents, as explained below. The third phase was based in Dar es Salaam Region only to fill in the gaps that were identified after the analysis of the data obtained during the initial two research phases.

1.4.3.1. Overview of the interviews conducted

Interviews were used to obtain primary data from the selected field research areas. A total of 39 respondents were reached and interviewed.³⁰ Four of the respondents were in Dodoma in the Department of Social Welfare at the Ministry of Health, Community Development, Gender, Elderly and Children. At this ministry, a spontaneous interview was also conducted with a legal officer in charge of the Department of Social Welfare.

In Dar es Salaam Region, a total of 24 respondents were interviewed. These respondents comprised social welfare officers and a para-social worker in the social welfare departments of

³⁰ A detailed list of respondents is attached as an appendix.

the selected local government authorities. Other respondents included officers and childcarers working in selected non-government organisations and children's homes. Five children's homes were visited: SOS Children's Village, Kijiji cha Furaha,³¹ Msimbazi Centre for Orphans and Most Vulnerable Children, Mburahati Children's Home, and Umra Orphanage and Most Vulnerable Children's Home. In these children's homes, a total of eight respondents were interviewed. Further, two other interviews were conducted at Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese (PASADA), a non-governmental organisation aimed at enhancing family preservation, family integration and operating some livelihood programmes for selected beneficiaries. In addition, five other interviews involving legal practitioners (one advocate and four judicial officers, including one Judge of the High Court and three magistrates) were conducted.

In the Mwanza region, a total of eleven interviews were conducted. Two of the interviews involved social welfare officers from selected local government authorities, Ilemela municipal council and the Mwanza city council. Another interview was conducted with the regional social welfare officer. The other eight interviews involved officers, representatives and carers from selected non-governmental organisations which operated children's homes and carried out family strengthening and preservation programmes. These included SOS Children's Village (Mwanza branch), Forever Angels Baby Home, Hisani Children's Home and Village of Hope. Semi-structured interviews were used in collecting the required data. Since the study adopted descriptive and exploratory approaches, semi-structured interviews were the best option to facilitate the achievement of the objectives set by this study. The flexibility and freedom allowed to both the interviewer and interviewees justify the adoption of the semi-structured approach. This kind of interview enabled the researcher to obtain more information from the respondents on different aspects related to children without parental care, the right to alternative care and the practice of foster care in Tanzania. The researcher could adjust and raise follow up questions whenever necessary during the interviews.

1.4.3.2. Nature of respondents

The Ministry of Health, Community Development, Gender, Elderly and Children (MHCDGEC): At the national level, this ministry is vested, among others, with the power and responsibility to deal with issues relating to child welfare and development.³² The protection of

³¹ English: Village of Joy.

³² The Ministers (Assignment of Ministerial Functions) Notice, 2016, 10 (Government Notice No. 144 published on 22/04/2016).

most vulnerable children, including children in need of alternative care, is the full responsibility of this ministry.³³ The ministry discharges this responsibility through its department of social welfare, which, among other responsibilities, oversees and regulates the provision of alternative care services in the country.³⁴ Thus, data was collected and obtained from the ministry through this department.

The ministry is divided into two major branches: one dealing with health and the other dealing with community development, gender, elderly and children (technically known as Vote 53 Community Development, Gender, Elderly and Children).³⁵ Among other departments, the branch dealing with community development, gender, elderly and children hosts the department of social welfare. However, the department of social welfare in this ministry should not be confused with the social welfare departments established at the level of local government authorities, as explained below.³⁶

The local government authorities (LGA): Sec 94 of the LCA mandates the local government authorities to safeguard and promote the welfare of children within their areas of jurisdiction. To elaborate on this function, reg 6 of the Child Protection Regulations, 2014³⁷ says that this function of the local government authorities is to be discharged through the established social welfare departments. For the purposes of this study, five local government authorities in two regions, Mwanza and Dar es Salaam, were selected as the focus research areas. Ilemela municipal council and the Mwanza city council were selected from the Mwanza region. In Dar es Salaam, the authorities selected were Kinondoni municipal council, Ilala municipal council, and Temeke municipal council. Data was collected from the established social welfare departments of these local government authorities.

³³ The LCA does not have a specific provision indicating that this ministry is in charge of child welfare and development. In the LCA reference is made to the minister responsible for social welfare or the minister responsible for child affairs. Since 2015 child affairs and social welfare are under the auspices of the Ministry of Health, Community Development, Gender, Elderly and Children. For more details visit <https://www.jamii.go.tz/pages/historical-background>.

³⁴ Visit <https://www.jamii.go.tz/department> for more details on the function of the department of social welfare. In the organisation structure of the ministry, the department is known as the social welfare division.

³⁵ See the organisational structure of the ministry at <https://www.moh.go.tz/en/about-ministry/organization-structure>. The ministry has two permanent secretaries, one for health and the other for community development, gender, elderly and children. The ministry has two different websites: <https://www.moh.go.tz/en/> for health affairs and <https://www.jamii.go.tz/> for community development, gender, elderly and children.

³⁶ Reg 2 of the Child Protection Regulations, 2014 indicates that the phrase Department of Social Welfare refers to the department within the ministry responsible for social welfare, while the phrase social welfare department refers to a department, unit, section or other administrative body in the local government authority that is responsible for child protection services and acts on behalf of the local government authority to safeguard and promote the welfare of children. However, in this study, these titles are not distinguished as linguistically they mean the same thing. See section 3.3.1 of chapter three of this study for more details.

³⁷ Child Protection Regulations, 2014, Government Notice No. 11 published on 09/01/2015.

The primary criteria for selecting the municipalities in Mwanza and Dar es Salaam were the level of their development and the researcher's familiarity with these regions. Besides, the number of children's homes and non-governmental organisations dealing with children's rights and issues in these regions is higher than in other regions. Otherwise, the selection of local government authorities in the two regions was randomly made. The main objective was not to treat these areas as case studies but rather to obtain data to substantiate the findings from other sources. Further, data from the local authorities were used to ascertain the practice and enforceability of the law on foster care in Tanzania.

Non-governmental organisations (NGOs), including community-based organisations (CBOs) and faith-based organisations (FBOs), constituted another group of respondents. Only organisations dealing with children deprived of their family environment or those at risk of losing this environment were included in the data collection process. The identification and selection of these organisations was randomly done in both Mwanza and Dar es Salaam regions. This category of respondents was necessary for ascertaining exactly the situation of the children mentioned. The daily engagement of these organisations with vulnerable children and their families made it possible to obtain data on the causes of deprivation and the challenges associated with the child protection system. The selected organisations included UNICEF, SOS Children's Village, Forever Angels and Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese (PASADA).

Children's homes in both Mwanza and Dar es Salaam regions were also randomly selected for this study. The selection of these children's homes was not based on the selected local government authorities, as these homes receive children from within and outside of the local government authorities and the regions in which they are established. Most of the selected non-government organisations operate children's homes, too. A total of five children's homes were selected and visited in Dar es Salaam, while a total of four were selected and visited in the Mwanza region.³⁸ The main objective of including children's homes was to get an overview of institutional care in Tanzania and ascertain the care providers' opinions on the whole question of children without parental or family care and their right to alternative care in Tanzania.

Child law experts and legal practitioners, including judicial officers and practising lawyers, complemented the above-mentioned respondents. The objective of having this group was to ascertain their understanding of and opinion on the provisions of the law regulating foster care in Tanzania. Nevertheless, since courts do not directly implement foster care, it was not possible

³⁸ See above, section 1.4.3.1.

to find legal practitioners who were fully aware of the provisions of the law on foster care. Four judicial officers from the High Court and Juvenile Court in Dar es Salaam, and one family and child law practising advocate were interviewed, making a total of five legal experts and practitioners.

1.5. Delimitations and scope of the research

The United Republic of Tanzania (URT) is a state formed following the union of Tanganyika (Mainland Tanzania) and Zanzibar in 1964. The administration of the union is somewhat unique due to the existence of two levels of state authority. Art 4(1) of the Constitution of the United Republic of Tanzania of 1977³⁹ provides that:

“all state authority in the URT shall be exercised and controlled by two organs vested with executive powers, two organs vested with judicial powers and two organs vested with legislative and supervisory powers over the conduct of public affairs.”

Thus, the executive organs are the government of the United Republic of Tanzania and the Revolutionary Government of Zanzibar. The former holds executive powers over all union matters and the non-union matters for Mainland Tanzania, while the latter has executive powers over non-union matters in Tanzania Zanzibar. The two organs vested with judicial powers are the judiciary of the United Republic of Tanzania and the judiciary of the Revolutionary Government of Zanzibar. The two legislative and supervisory power organs include the Parliament of the United Republic of Tanzania and the House of Representatives of Tanzania Zanzibar.⁴⁰

The first schedule to the Constitution governs the operation of the two governments, which gives a list of union matters. All matters listed in the first schedule (referred to as union matters) fall in the exclusive jurisdiction of the government of the United Republic of Tanzania. Matters not listed, referred to as non-union matters, are within the jurisdiction of the Revolutionary Government of Zanzibar.⁴¹ In the absence of a specific government for Mainland Tanzania, the government of the United Republic of Tanzania is also vested with powers to deal with non-union matters for Mainland Tanzania.⁴²

Issues relating to children and their protection are not included in the first schedule of the Constitution of the URT. Therefore, there are two distinct policy and institutional frameworks

³⁹ The Constitution of the United Republic of Tanzania of 1977, Chapter 2 of the Laws of Tanzania as amended up to 31/12/2008.

⁴⁰ Art 4(2) of the Constitution of the United Republic of Tanzania of 1977.

⁴¹ Art 102 of the Constitution of the United Republic of Tanzania of 1977.

⁴² Art 34(1) of the Constitution of the United Republic of Tanzania of 1977.

for protecting children's rights and welfare for Mainland Tanzania and Tanzania Zanzibar. While the LCA, 2009 was enacted by the Parliament of the United Republic of Tanzania to promote, protect, and maintain the welfare and rights of children in Mainland Tanzania,⁴³ the Zanzibar Children's Act, 2011 was enacted by the House of Representatives of Zanzibar for the same purposes in Tanzania Zanzibar. These two laws, the LCA and the Children's Act, *inter alia*, provide for the right to alternative care for children in need of such care and articulate the different alternative care options, including foster care, that can be used if it is necessary for the child in question to be placed in alternative care.

The initially conceived idea for this study was to deal with the law and practice of foster care in Mainland Tanzania and Tanzania Zanzibar and adopt a comparative approach to the implementation and role of foster care in Tanzania. However, as the study developed, it was clear that narrowing down the geographical research area was necessary to facilitate the successful and realistic achievement of the objectives of the research. The time available for completing the study made it difficult to conduct in-depth research in both parts of the United Republic of Tanzania. Therefore, the researcher reached the pragmatic conclusion to limit the study to Mainland Tanzania.

Besides the question of available time, the decision to limit the study to Mainland Tanzania was influenced by the different dates on which the laws regulating foster care in the two parts of the Union were enacted. While the LCA of Mainland Tanzania was enacted in 2009, the Children's Act of Zanzibar was enacted in 2011. Most of the regulations for the enforcement and implementation of the LCA of Mainland Tanzania were enacted between 2012 and 2014. For the Children's Act of Zanzibar, most of the regulations were enacted around 2017. Thus, while regulations on foster care placement in Mainland Tanzania were adopted in 2012, similar regulations were adopted in Zanzibar only in 2017. Since the aim of the study was to assess the implementation of the provisions relating to foster care, the law in Mainland Tanzania was considered to provide a better basis for the intended assessment, as it had been in force for a longer period compared to the law in Zanzibar. It was assumed that familiarity with the law and its implementation would be more vivid in Mainland Tanzania than in Zanzibar where the law was still in transformation.

A limited budget and the costs of conducting field research on both sides of the Union posed another challenge for extending the research to Zanzibar. Studying both parts of the Union would need more time and more financial resources to facilitate the process of data collection.

⁴³ Sec 2 of the Law of the Child Act.

The allocated field research budget was not enough to facilitate the same research in both parts of the Union without creating biases in the data collection process. The researcher is more familiar with Mainland Tanzania. Cultural and religious differences between Mainland Tanzania and Zanzibar also contributed to the need to limit the study's scope. The significant influence of Islamic law and practices in Zanzibar affects the law and the role of the state and the community in protecting children deprived of their family environment, more than in Mainland Tanzania where the influence of Islam is not as outstanding. Hence, research including Zanzibar would have needed a deep study of Islam and Islamic law in preparation for the research. For the above reasons, research on foster care in Zanzibar had to be postponed to a later time, if possible in cooperation with experts on Islamic and child law in Zanzibar.

Though the study is limited to Mainland Tanzania, references to and reflections on the law regulating foster care in Zanzibar are made. The Children's Act of Zanzibar is referred to for comparative purposes from time to time when it helps to clarify the provisions of the LCA.

1.6. Challenges of the research

The data collection process encountered *bureaucratic challenges*. Conducting field research in Tanzania was a challenging and yet inevitable process necessary for successfully conducting and completing the study. Securing field research permits to conduct field research in selected areas was an experience on its own, demanding patience and perseverance. As a member of the University of Dar es Salaam, I initially requested a research clearance letter from the university. The research clearance letter serves as an introduction letter to the authorities in the intended field research areas. While there was also a possibility of getting this introduction letter from my supervisor at the host university, the letter from the home university was preferable to simplify securing the research permits. During the first field research phase which took place between December 2017 and April 2018, the processing of the research clearance took more than two months, although the application for the letter was made almost one month before the scheduled time for field research. This delay hindered the process of securing research permits in Dar es Salaam, Mwanza and Dodoma regions where field research was to be conducted.

Moreover, the convoluted process of securing research permits in the selected regions and ministries of the government made it difficult to start data collection within the scheduled time frames. For instance, during the first phase of field research, getting field research permits took two or three weeks in all areas where data was to be collected. To get a permit to do research in the selected local government councils, one must seek approval from the regional authorities within which the council is located. Once the approval from the regional authorities is obtained,

it must be taken to the respective district authorities, which approve the research and forward the researcher to the respective municipal or city council, which then issues research permits. At each stage, multiple forms must be photocopied and filled by the researcher. The process can be frustrating because one can never be sure when the research permit will be granted, except for a few authorities, like Ilala Municipal Council which has specific days for handling issues related to issuing research permits. The worst experience was dealing with the registry office and the officers who receive the application and facilitate the entire process of securing the permit. Most registry officers require the researcher to make multiple trips to follow up the progress of the application.

Difficulties in securing current statistics on the status of children deprived of their family environment and those in alternative care posed another challenge. One of the objectives of this study was to ascertain the status and statistics of children deprived of their family environment and those already in alternative care. However, due to poor record-keeping and the absence of reliable statistics from the respective authorities, such as the Ministry of Health, Community Development, Gender, Elderly and Children and the social welfare departments of the selected local government authorities, it was impossible to obtain reliable national or local statistics. To overcome this challenge, I resorted to using the few existing research reports on children in institutional care in Tanzania.

Consequently, the study does not dwell much on providing statistics for children deprived of their family environment. The same problem was experienced in ascertaining the number of foster parents, which would ordinarily be in the custody of each local government authority, and which should be reflected in the records of the department of social welfare at the national level. However, mainly due to the nature of foster care practices in Tanzania described below in chapter six, it was not possible to get such statistics. For instance, there was only random registration of applications by those aspiring to foster at the national level, and of information showing whether the applicants got children to foster. Poor record-keeping and management make it challenging to provide adequate and efficient services for the individuals in need. For instance, due to the lack of current national statistics on children deprived of their family environment, it is not possible to ascertain the magnitude of the problem and develop viable strategies to ensure protection and care for this group of vulnerable children.

Another challenge is *limited interpretation aids* concerning the provisions of the LCA and associated regulations. Interpretation and analysis of the laws and other legal instruments is an integral part of this study. However, understanding and analysing certain provisions on foster

care as articulated in the LCA and the regulations and rules made under the LCA was not an easy task. In the absence of case law, practice notes or directives on the implementation of the law, there was no basis for ascertaining the meaning of unclear provisions on foster care under the LCA. The Hansards containing the parliamentary debates that led to the passing of the Law of the Child Act were very little help for understanding the objectives and purpose of many of the provisions on foster care. For instance, the LCA contains two different parts with provisions relating to foster care, part IV (foster care and placements) and part VI (fosterage and adoption), with similar but not identical provisions on foster care, such as sec 32 and sec 53 of the LCA. Throughout this study, it was challenging to ascertain the rationale, connection, and differences between the provisions on foster care under part IV and part VI of the LCA and other relevant provisions on alternative care found in the LCA and its regulations.

Unreadiness, uninformedness and the busy schedule of the respondents posed another challenge during data collection. It was difficult to secure appointments with social welfare officers and some NGOs due to busy schedules in their offices. Sometimes appointments would be made but then postponed or cancelled due to a change of office plans. For instance, the respondent at Kurasini National Children's Home in Dar es Salaam cancelled the appointment after I had arrived at the agreed meeting point. Sometimes, for willing respondents, interviews were scheduled to take place at weekends or after office hours to allow flexibility. In other cases, it was not easy to get the full attention of the respondents due to interruptions emanating from their daily engagements at the office.

In addition to the time challenge, some respondents were not willing to engage in interviews, resulting in minimum collaboration. A respondent at one of the children's homes in Dar es Salaam refused to be interviewed or provide information relating to the care of the children they were accommodating, on the grounds that what they do is a charity, and they have a policy of not revealing details of the services they provide to children in their care.

Another problem was the lack of understanding of what foster care involves. In most cases, the respondents, including social welfare officers, were not aware of the possibility of foster care. Those who were aware of it often did not fully understand it, let alone the current legal framework governing and regulating the provision of foster care services.

1.7. Literature review

As stated above, this study provides a critical analysis and evaluation of the law and practice of foster care in Tanzania as one of the alternative care options for children deprived of their family environment. Achieving this objective necessitated a review of existing literature on the right

to alternative care for children under different international and regional instruments on children's rights. The purpose of reviewing the literature was to equip the researcher with a general understanding of the scope of various regional and international provisions on the right to alternative care and the different alternative care options for children. In addition, a review was also made of literature dealing with children needing alternative care or those at risk of losing their family environment in order to understand the factors leading to this situation and the plight faced by these children.

Specific attention was given to literature specific to foster care as an alternative care option, in order to understand what foster care is and its place in the continuum of care for children deprived of their family environment. In this regard, literature providing a comparative approach between foster care and other alternative care options was also reviewed to understand what differentiates foster care from other family-based alternative care options. The literature review below is organised into different themes based on the key aspects that have been addressed in this research.

1.7.1. The right to alternative care for children

There is extensive literature that provides a basis for understanding the meaning and the scope of the right to alternative care as envisaged under the different international and regional instruments and national laws. Hodgkin and Newell provide a detailed analysis of the scope and application of art 20 of the CRC for implementation purposes.⁴⁴ They note that art 20 concerns children who temporarily or permanently and for whatever reason are not in their family environment or cannot be left in such an environment. This is also echoed in the work of Cantwell and Holzscheiter in their commentary on art 20 of the CRC, contending that art 20 addresses children who are not able to live with their families, either because they have lost or become separated from their families for a wide variety of reasons or because a competent authority has determined that it is not in the child's best interests to remain in such an environment.⁴⁵

As stated by Assim and Sloth-Nielsen, the right to alternative care for children is founded on the well-accepted principle that for full and harmonious development, a child needs to grow up in a family environment. Without this, the child is exposed to vulnerabilities that affect his or

⁴⁴ Rachel Hodgkin and Peter Newell, eds., *Implementation Handbook for the Convention on the Rights of the Child*, Fully rev. 3. ed (Geneva: UNICEF, 2007), 277.

⁴⁵ Nigel Cantwell and Anna Holzscheiter, *Article 20: Children Deprived of Their Family Environment*, A Commentary on the United Nations Convention on the Rights of the Child (Leiden; Boston: Martinus Nijhoff Publishers, 2008), 1, 31.

her development and well-being.⁴⁶ Scholars and researchers on issues relating to the right of children to alternative care are in agreement that the provision of alternative care should be driven by two basic principles that can be derived from the 2010 UN Guidelines for Alternative Care of Children. These are the principles of necessity and suitability.⁴⁷ Sandberg goes further by emphasising the need for tackling the root causes of children being deprived of their family environment as an important step towards providing such children with the care and protection they deserve.⁴⁸ Cantwell and others also emphasise the need for having a range of care options should alternative care be deemed necessary for a child deprived of their family environment.⁴⁹

The existing literature on the right to alternative care provides the foundation on which this research is built and developed by providing a general understanding of the scope and applicability of the international and regional instruments on the right to alternative care. Nevertheless, most scholars have based their work on the provisions of the CRC and the 2010 UN Guidelines for the Alternative Care of Children, with less focus on the provisions of the ACRWC. This gap is filled by this study which provides an essential basis for discussing the right to alternative care under the ACRWC. Moreover, this current study focuses on the right to alternative care for children as articulated in Tanzania's legal and policy framework based on the standards and principles developed at the international and regional level. Furthermore, this study comprises comprehensive socio-legal research which focuses not only on the law, but also on practices related to protecting children deprived of their family environment and their right to alternative care in Tanzania.

1.7.2. States' obligations to children needing alternative care

The obligation to be discharged by states goes beyond establishing and providing alternative care options by requiring states to put in place mechanisms that aim to prevent the placement of children in alternative care whenever possible.⁵⁰ States are required to ensure that families

⁴⁶ Usang Maria Assim and Julie Sloth-Nielsen, *Islamic Kafalah as an Alternative Care Option for Children Deprived of Their Family Environment*, *African Human Rights Journal* 14 (2014): 323.

⁴⁷ Nigel Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children* (UK: Center for Excellence for Looked after Children in Scotland, 2012), 18; See also Usang Maria Assim and Aquinaldo Mandlate, *The Right to Alternative Care for Children Deprived of Their Family Environment: Overview of International Norms and the Legislative Framework of Mozambique*, in *International Survey of Family Law* (Bristol: Family Law (Jordan Publishing Limited), 2014), 347.

⁴⁸ Kirsten Sandberg, *Children's Right to Protection Under the CRC*, in *Human Rights in Child Protection: Implementation for Professional Practice and Policy*, ed. Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (Palgrave Macmillan, 2018), 4–6; Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, chap. 5 on the necessity principle.

⁴⁹ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, chap. 6 on the necessity principle.

⁵⁰ Kirsten Sandberg, *Children's Right to Protection Under the CRC*, 34; Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 279–80; Cantwell and Holzscheiter, *Article 20*, 7–8;

are given the necessary support to enable them to discharge their childcare responsibilities and adopt appropriate gatekeeping mechanisms to prevent unnecessary placement of children in alternative care.⁵¹ Moreover, states are also required to ensure that aftercare services are available for children who are leaving care to prepare them for independent living or reintegration into their families.⁵² In the provision of the necessary services for children deprived of their family environment, states are required to adhere to the basic principles forming the foundation for the realisation of children's rights, including the best interests of the child, non-discrimination, right to life, survival and development of a child, and child participation.⁵³

Scholars and researchers have emphasised the importance of states collaborating and cooperating with other stakeholders in any steps taken to protect children deprived of their family environment and to provide the necessary services. Families, communities, and local and international civil society organisations should not be left behind in any initiative to protect such children.⁵⁴ Regarding the need for cooperation and coordination in protecting these children, Wulczyn and others underline the need for states to adopt a systems approach in child protection matters.⁵⁵ They contend that when thinking of a systems approach to child protection, it is important to remember the highly interactive nature of the parts and the whole in a given context.⁵⁶ Thus, in their endeavour to protect children deprived of their family environment, including the provision of alternative care, states should consider the entire child protection system and all key stakeholders in their varying roles.

Though not specific to Tanzania, the above literature and other texts not reviewed here help to shed light on the nature and scope of states' obligations in protecting children deprived of their family environment. The systems approach, advocated by Wulczyn and others,⁵⁷ has provided a basis for assessing the legal framework governing child protection, especially in making a case for the prospects of foster care in Tanzania, where, as shown below, laws regulating

Rwezaura, *This Is Not My Child: The Task of Integrating Orphans into the Mainstream of the Society in Tanzania*, 413–14.

⁵¹ Kirsten Sandberg, *Alternative Care and Children's Rights*, in *International Human Rights for Children*, ed. Ursula Kilkelly and Ton Liefaard, Precision Manufacturing (Singapore: Springer Singapore, 2018), 4–6.

⁵² Sandberg, 23–24.

⁵³ Cantwell and Holzscheiter, *Article 20*, 5–9.

⁵⁴ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 121–25; See also Ian Milligan et al., *Alternative Child Care and Deinstitutionalisation in Sub-Saharan Africa: Findings of a Desk Review* (European Union, CELCIS and SOS Children's Villages, 2016), 54.

⁵⁵ Fred Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations* (UNICEF, 2010), 14, 18–21.

⁵⁶ Wulczyn et al., 18.

⁵⁷ Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations*.

different alternative care options are regarded mainly as independent components. Against this background, this study dwells on the law and practice of foster care and provides a broader picture of the child protection system as established in Tanzania. It offers a glimpse of the child protection system within which the foster care system is embedded.

1.7.3. Foster care as an alternative care option

Two books, “The World of Foster Care: An International Sourcebook on Foster Family Care Systems”⁵⁸ and “Global Perspective on Foster Family Care”,⁵⁹ both edited by Colton and Williams, have been beneficial to this study by providing an understanding of what foster is as an alternative care option. These two books present the role and structure of foster family care systems in 24 countries. In their general overview and conclusions, Colton and Williams state that one of the issues facing foster care is how it should be defined. The understanding of foster care in various countries depends on the social, cultural, economic and political factors prevalent in each country.⁶⁰ Family for Every Child,⁶¹ also expressing the challenge of defining foster care across the world, states that there are wide differences in how foster care is defined, making comparisons across countries difficult.⁶² For instance, after examining the role and structure of foster care systems in different countries, Colton and Williams propose that foster care can only be defined in terms of what it is intended to accomplish.⁶³

Despite the difficulties in defining foster care, there is a consensus among scholars and researchers on the essential attributes of foster care as an alternative care option. Foster care is family-based alternative care aimed at providing care for abandoned, abused and neglected children; in every case, the child is cared for in the foster family's home without parental rights being transferred to the foster carer.⁶⁴ Moreover, foster care has developed from focusing only on the child to working with the child's family to determine the possibility of a child being

⁵⁸ M. J. Colton and Margaret Williams, eds., *The World of Foster Care: An International Sourcebook on Foster Family Care Systems* (Brookfield, Vt: Arena, 1997).

⁵⁹ M. J. Colton and Margaret Williams, eds., *Global Perspectives on Foster Family Care* (Lyme Regis, Dorset: Russell House, 2006).

⁶⁰ Colton and Williams, *The World of Foster Care*, 285–88; Colton and Williams, *Global Perspectives on Foster Family Care*, 99–100; See also Musavengana W.T Chibwana, Foster Care Ontologies: A Qualitative Study in Zimbabwe, *Journal of African Studies and Development* 11, no. 6 (2019): 119–22.

⁶¹ Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers* (Family for Every Child, 2015), 8.

⁶² See also Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes* (Family for Every Child, 2015), 8.

⁶³ Colton and Williams, *The World of Foster Care*, 288.

⁶⁴ Colton and Williams, 289; Colton and Williams, *Global Perspectives on Foster Family Care*, 99–100; See also EveryChild, *Fostering Better Care: Improving Foster Care* (Positive Care Choices: Working Paper 2) (EveryChild (UK: London), 2011), 7.

reunited with his or her family.⁶⁵ Family for Every Child emphasises that there are different kinds of foster care, depending on the varying needs of children needing alternative care.⁶⁶ The existing literature helps us to understand that, in establishing an effective foster care system, there is a need to have a clear statement of the purposes and objectives of foster care, which determines the types of foster care needed.

Family for Every Child⁶⁷ notes that developing countries are shifting towards foster care services to reduce the over-institutionalisation of children needing alternative care. However, they also note that in such contexts there is often a lack of research, knowledge, and understanding of implementing effective, safe foster care programmes.⁶⁸ Against this background, this study aims to fill this gap with regard to Tanzania, where hardly any research has been done on the place of foster care in the child protection system. Thus, this is the first comprehensive study dedicated to the right to alternative care for children with a specific focus on the law and practice of foster care in Tanzania. The socio-legal approach adopted here provides a blend of the influence of the law in designing the child protection system and the indispensable impact of the socio-economic and cultural contexts of Tanzanian society.

While most existing studies, including those not reviewed here, are not specific to Tanzania, they provide an understanding of foster care as an alternative care option, and the challenges that countries face in establishing an effective foster care system. Colton and Williams argue that:

“The countries selected for inclusion in this book represent very different traditions, regimes and cultures but they are all struggling with essentially the same difficulties in their efforts to use foster care to the best advantage of children and families.”⁶⁹

Thus, they claim that all countries, whether developed or developing, face the same challenges regarding the place of foster care in protecting children deprived of their family environment. However, it is doubtful whether such a generalised statement can be made. This question is examined in this study. The recent work on foster care in the USA by Font and Gershoff⁷⁰

⁶⁵ Colton and Williams, *Global Perspectives on Foster Family Care*, 100.

⁶⁶ Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 9–11.

⁶⁷ Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices*, 6.

⁶⁸ Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices*, 6.

⁶⁹ Colton and Williams, *Global Perspectives on Foster Family Care*, 99; See also Colton and Williams, *The World of Foster Care*, 285.

⁷⁰ Sarah A. Font and Elizabeth T Gershoff, *Foster Care and Best Interests of the Child: Integrating Research, Policy, and Practice*, 2020.

examines the challenges associated with the foster care system in the USA, where foster care has long been established. Font and Gershoff contend that:

“Foster care is, and will continue to be, a necessary intervention for some children who experience severe risks in their family environments. However, the current foster care system is, in many ways, ill-equipped to advance children’s best interests and provide the quality of care that children need to heal from their experiences of abuse and neglect.”⁷¹

Thus, Font and Gershoff emphasise that foster care, despite its challenges, can be approached, evaluated, and reformed.⁷² However, this and most other existing studies of foster care are based on developed countries. Their focus is not on the challenges of establishing a foster care system, but on improving an existing system and the welfare of children placed in foster care.⁷³ This study concentrates on the situation in Tanzania and other low- and middle-income countries that are still working towards establishing a proper foster care system and the deinstitutionalisation of alternative care services for children deprived of their family environment. In Tanzania, foster care is mainly a step leading to adoption and not a form of alternative care in its own right, a situation which requires a specific approach to evaluating and reforming foster care.

1.8. Understanding of concepts and terms

In this study, “family care for children” refers to the care, upbringing and protection of children by their family, within the natural confines of the family environment and without the involvement of state authorities.

“Family environment for children” refers to the circumstances and social climate conditions of families within which children live, grow and develop. Every child’s family environment is unique, depending on the social, cultural and economic conditions to which the family is subjected. Thus, while every child needs a family environment for their full and harmonious development, the nature and attributes of the family environment may be determined differently

⁷¹ Font and Gershoff, *Foster Care and Best Interests of the Child*, 83.

⁷² Font and Gershoff, 83.

⁷³ For instance, the following works: Elizabeth Fernandez and Richard Barth, eds., *How Does Foster Care Work? International Evidence on Outcomes*. (London: Jessica Kingsley Publishers, 2011); Barbell and Freundlich, *Foster Care Today*; Ian Sinclair, *Fostering Now: Messages from Research*, 1st American paperback ed (London; Philadelphia: Jessica Kingsley Publishers, 2005).

from child to child. Factors like family structures and family relations in a given culture greatly influence defining and determining the child's family environment.⁷⁴

“Children deprived of their family environment” refers to children who, for whatever reason or circumstance, are not in the care of their parents or families, or for whom it is not in their best interest to remain in such care. However, it does not generally include children deprived of their family environment due to the proceedings of a juvenile justice system, i.e. a child in conflict with the law once convicted and given a custodial sentence may not be regarded as a child deprived of their family environment.⁷⁵

“Alternative care for children” refers to care provided for children when their parents or families are unavailable, unwilling or unsuitable to provide the children with the desired care for whatever reason or circumstance. However, in this study alternative care does not include the placement of children in day-care or boarding school. Though alternative care can be formal or informal, this study is limited to formal alternative care, i.e. only care authorised by competent authorities.⁷⁶

“Alternative care system” refers to all measures, actions and initiatives, including legal, judicial and administrative, aiming at protecting and promoting the rights and interests of children deprived of their family environment or those at risk of losing their family environment. It encompasses all laws, policies, personnel, and institutions aimed at protecting children deprived of their family environment. It goes beyond the mere existence of alternative care options to include prevention and gatekeeping mechanisms and helping children to move from alternative care back to their families through family reunification and social reintegration.

“Foster care” is a form of family-based alternative care ordered by a competent judicial or administrative authority, where a child is placed in the domestic environment or home of a carer who has been selected, qualified, approved and supervised to provide such care.⁷⁷ Foster care may take on different meanings and forms depending on the prevailing legal and socio-economic factors in the given context.⁷⁸

⁷⁴ See also Killian Mullan et al., *A Safe and Supportive Family Environment for Children: Key Components and Links to Child Outcomes* (Canberra: Dept. of Social Services, 2014), 2; See also Cantwell and Holzscheiter, *Article 20*, 64–65.

⁷⁵ See also Cantwell and Holzscheiter, *Article 20*, 40.

⁷⁶ See para 29(b) of the UN Guidelines for the Alternative Care of Children, 6.

⁷⁷ See also para 29(c)(ii) of the UN Guidelines for the Alternative Care of Children, 6.

⁷⁸ See also Colton and Williams, *Global Perspectives on Foster Family Care*, 99.

“Child protection” refers to any measures and structures to prevent and respond to abuse, neglect, exploitation and violence affecting children.⁷⁹

“Child protection system” means certain formal and informal structures, functions and capacities that have been assembled to prevent and respond to violence, abuse, neglect and exploitation of children.⁸⁰

“Deinstitutionalisation of children” means a policy-driven process of reforming a country’s alternative care system, aimed primarily at decreasing reliance on institutional and residential care with a complementary increase in family and community-based care and services. It also entails preventing the separation of children from their parents by providing adequate support for children, families and communities, preparing the process of leaving care, ensuring social inclusion for care leavers and a smooth transition towards independent living.⁸¹

“Social service workforce” means paid and unpaid, governmental and non-governmental, professionals and para-professionals, working to ensure the healthy development and well-being of children and families. The social service workforce focuses on preventative, responsive and promotive programmes that support families and children in communities by alleviating poverty, reducing discrimination, facilitating access to services, promoting social justice and preventing and responding to violence, abuse, exploitation, neglect and family separation.⁸²

“Social welfare officers” in Tanzania refers to persons in the service of the government in the departments of social welfare of the central government or local government to provide social services to the people.⁸³ Some are trained in social work, while some are trained in other related fields like sociology.

“Social workers” refers to individuals trained in the profession of social work. In this study, the term has also been used to refer to individuals working for non-state organisations or institutions dealing with children in need of alternative care.

⁷⁹ Better Care Network, Glossary of Key Terms, Better Care Network, 2019, <https://bettercarenetwork.org/toolkit/glossary-of-key-terms>.

⁸⁰ UNICEF et al., A Better Way to Protect All Children: The Theory and Practice of Child Protection Systems (13-16 November 2012, New Delhi, India.), Conference Report (UNICEF, 2013), 3.

⁸¹ See Eurochild, Deinstitutionalisation and Quality Alternative Care for Children in Europe: Lessons Learned and the Way Forward (Working Paper) (Eurochild, 2014), 6.

⁸² UNICEF, Guidelines to Strengthen the Social Service Workforce for Child Protection (UNICEF, New York, 2019), 5.

⁸³ Sec 3 of the Law of the Child Act. See also, reg 2 of the Child Protection Regulations, 2014. Also, reg 2 of the Foster Care Placement Regulations, 2012.

1.9. Outline of the thesis structure

This study has eight chapters, divided into two parts each containing four chapters. Part one is dedicated to the right to alternative care generally, while part two is dedicated to the law and practice of foster care in Tanzania. This introductory chapter provides a detailed understanding of the research design by providing the background of the research problem and how the objectives of this research have been achieved. Chapter two expounds the international legal framework and foundation of the right to alternative care as provided in different regional and international instruments and guidelines on children's rights. This chapter lays the foundation for the following chapters as it describes the principles, standards and state obligations related to realisation of the right to alternative care for children deprived of their family environment.

The third chapter presents the framework for child protection in Tanzania, which also covers care for children deprived of their family environment. The chapter presents and examines the role of families as the primary carers and protectors of children they beget. The state's role in assisting parents and families that are in danger of failing to discharge this primary responsibility of caring for children is also discussed. It will be shown that the state bears the responsibility to ensure that, among other things, alternative care is provided for children who are deprived of their family environment. The principles and standards guiding the protection of children and provision of the right to alternative care under the LCA and the regulations regulating the provision of alternative care are also explained and discussed. The chapter ends with a discussion of the essential processes and procedures related to the protection of children that directly impact children deprived of their family environment, as provided in the legal and policy framework for child protection.

Chapter four dwells on the initiatives and interventions by the state in ensuring the protection of children deprived of their family environment or at risk of losing it. The protection of children deprived of their family environment is not only achieved through the provision of alternative care by the state. Preventing the occurrence of situations in which children are deprived of their family environment, and ensuring post-placement services are central to protecting those children. Thus, this chapter, which is based on the leading principles of necessity and suitability, presents the preventive and protection measures that Tanzania has adopted to enhance the protection of children. Chapters three and four provide the broader context of child protection regarding children deprived of their family environment or those at risk of losing such an environment.

Part two, which also consists of four chapters, narrows down from the right to alternative care to focus on the law and practice of foster care in Tanzania. The fifth chapter presents the legal and institutional framework governing the provision of foster care in the LCA and relevant subsidiary legislation. This chapter deals with the eligibility of foster carers and foster children. It also deals with issues related to the rights and obligations of interested parties before, during and after placement. It goes beyond this to explain the conditions for terminating foster care placement. An attempt is also made to examine the extent to which the law on foster care conforms to the international principles and standards for providing alternative care.

Chapter six presents the legal and practical challenges associated with the current practice of foster care in Tanzania. The findings of this chapter reveal misconceptions and underutilisation of foster care. On the basis of the collected data, the chapter expounds the challenges and other aspects of the current practice of foster care in Tanzania. Proceeding from this discussion, chapter seven dwells on the prospects of foster care in Tanzania in the light of the identified and presented challenges. The chapter seeks to assess the hope of implementing foster care in Tanzania beyond its role as a pre-adoption process. In this chapter, based on foster care practices in some developing countries, recommendations are made for the implementation of foster care in terms of legal reforms and practical steps to be taken. The last chapter presents the general conclusions of the study and makes a case for further research.

CHAPTER TWO: INTERNATIONAL LEGAL FOUNDATION AND FRAMEWORK FOR THE RIGHT TO ALTERNATIVE CARE

Understanding the legal foundation for the right to alternative care is crucial for setting out the foundation on which foster care as an alternative care option can be discussed and analysed. Therefore, this chapter presents and analyses the basis for the right to alternative care for children under international children's rights. It also discusses the general principles of the right to alternative care as provided in various international and regional instruments to which Tanzania is a party.

This chapter helps to understand why the right to alternative care for children is essential and the measures that states are expected to take to realise this right. The discussions in this chapter are based mainly on the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and the United Nations Guidelines for the Alternative Care of Children. These instruments have greatly influenced the enactment of the Law of the Child Act (LCA) of Tanzania, which contains provisions on the right to alternative care, among other children's rights.

2.1. UN normative framework for the right to alternative care

Under this heading, a brief summary is presented of the historical and contemporary legal initiatives taken to ensure the care and protection of children deprived of their family environment. The initiatives taken by the League of Nations and later the United Nations are discussed, showing how the right to alternative care has been recognised by the international community as a means of assuring the welfare of children who are deprived of their family environment.

2.1.1. Foundation of the right to alternative care

Due to their incapacity, immaturity, and vulnerability, children require continuous and stable care, protection, and guidance for their full and harmonious development.¹ The responsibility to care, protect and guide children is primarily placed on parents.² For parents to be able to discharge this responsibility, states are expected to provide the necessary support to parents to facilitate their parenting responsibilities.³ On this basis, international and regional instruments

¹ Family for Every Child, *Why Care Matters: The Importance of Adequate Care for Children and Society* (Family for Every Child, 2014), 3.

² Art 18 of the UN Convention on the Rights of the Child, 1989; see also art 20 of the African Charter on the Rights and Welfare of the Child.

³ Art 5 and art 18(2)(3) of the UN Convention on the Rights of the Child, 1989; Art 20(2) of the African Charter on the Rights and Welfare of the Child, 1990.

contain provisions that prohibit the arbitrary separation of children from their parents, save for where such separation is warranted by law and authorised by a competent authority mandated under the law.⁴ Thus, the CRC and the ACRWC emphasise the need for children to grow up in a family environment in an atmosphere of happiness, love and understanding.⁵

Nevertheless, due to the uncertainties surrounding human life, at a certain point in the lifetime of some children, the parental care and family environment assumed to be necessary for their growth and development may be unavailable or unsuitable for their welfare and development.⁶ Therefore, there is always a need to have alternative care mechanisms in place to fill the void left by the unavailable or unsuitable family environment and to protect such children's best interest and welfare. Thus, children who lack or are at risk of losing family care or parental care are entitled to special care and protection from the state.⁷ The kind of special care and protection to be provided for such children depends on the circumstances of the individual case. In some circumstances, such as economic hardships, the state may assist and protect the child without removing the child from his or her family. Nevertheless, other circumstances, such as abandonment, neglect or abuse, may necessitate assistance and protection out of the original home, hence the need for alternative care for such a child.⁸

2.1.2. Declarations preceding the Convention on the Rights of the Child

Recognition of the need to enhance support for children in need of alternative care is not new: struggles to reduce the vulnerability of children have a long history. In 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child (commonly known as the Geneva Declaration).⁹ This declaration was the first document at the international level that recognised and affirmed the existence of rights specific to children and the responsibility of

⁴ Art 9(1) of the UN Convention on the Rights of the Child, 1989; art 19(1) of the African Charter on the Rights and Welfare of the Child, 1990; Jane Fortin, *Children's Rights and the Developing Law* (Cambridge, UK; New York: Cambridge University Press, 2009), 518.

⁵ See the preamble of the UN Convention on the Rights of the Child, 1989; see also the preamble of the African Charter on the Rights and Welfare of the Child, 1990.

⁶ Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 277.

⁷ Hodgkin and Newell, 277.

⁸ Family for Every Child, *Why Care Matters: The Importance of Adequate Care for Children and Society*, 3, 9–10; Samantha Chaitkin et al., *Towards the Right Care for Children: Orientations for Reforming Alternative Care Systems: Africa, Asia, Latin America*. (Luxembourg: European Union, 2016), 11–14.

⁹ The Declaration was adopted on 26/09/1924 by the General Assembly of the League of Nations. The Declaration was an initiative of Eglantyne Jebb, the founder of Save the Children, one of the key pioneers of children's rights and protection. The declaration can be found at www.un-documents.net/gdrc1924.htm.

adults towards children.¹⁰ It is noteworthy that the declaration does not refer to its provisions as children's rights but as obligations owed by adults to children.¹¹

Principle 2 of the 1924 Geneva Declaration is directly relevant to the right to alternative care. It says that humankind is obligated, *inter alia*, to shelter “the orphan and the waif” and feed a hungry child. The need to provide “orphans and waifs” with shelter can be arguably interpreted to mean, among other suitable measures, the provision of alternative care, as these children are likely to lack family care. The declaration, which was adopted a few years after World War One, aimed at protecting and promoting children’s welfare and minimising the adverse effects of the war which had greatly affected the social order.¹²

Apart from principle 2, the declaration does not directly mention the right to alternative care. Nevertheless, the declaration foresees the possibility of children being in need of shelter and protection for one reason or the other. The 1924 declaration paved the way for stronger pronouncements by the international community on the need to protect children who are deprived of their family environment.¹³ Nevertheless, the League of Nations was not able to adopt any binding instrument concerning children’s rights before the outbreak of World War II in 1939. The war led to its demise and the establishment of the United Nations Organisation (the current United Nations) in 1945.

The 1924 Geneva Declaration was followed by the UN Declaration of the Rights of the Child in 1959, aimed at ensuring that a child has a happy childhood and enjoys this for his or her good and the good of society.¹⁴ Principle 6 of the 1959 declaration appears to be relevant to the right to alternative care for children. In the wording of principle 6, it can be inferred that the primary responsibility for raising and caring for children is placed on the parents and that there could be circumstances that make parents unavailable or unable to care for their children. Consequently, the declaration places a duty on society and public authorities to extend particular care to children without a family and to those without adequate means of support. Nevertheless, the declaration does not explicitly state what kind of care should be accorded to children without a family or those with families but without adequate means of support.

¹⁰ Geraldine Van Bueren, *The International Law on the Rights of the Child*, International Studies in Human Rights, v. 35 (Dordrecht; Boston: Norwell, MA: M. Nijhoff, 1995), 8–9.

¹¹ Van Bueren, 8. See the wording of the preamble to the 1924 Declaration: “men and women of all nations, recognising that mankind owes to the child the best it has to give, declare and accept it as their duty that...”

¹² Dominique Marshall, The Construction of Children as an Object of International Relations: The Declaration of Children’s Rights and the Child Welfare Committee of League of Nations, 1900-1924, *The International Journal of Children’s Rights* 7, no. 2 (1999): 105–6.

¹³ Its relevance is reflected in the preamble to the Convention on the Rights of the Child, 1989.

¹⁴ UN Declaration of the Rights of the Child of 1959 adopted by the UN general assembly on 20/11/1959 (through resolution number A/RES/1386[XIV]).

Principle 6 of the 1959 declaration also reflects the complementarity of parents and family in the care and upbringing of children, as it directs that particular care should be extended to a child without a family and not to a child without parents.

In 1986, the 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, was adopted by the United Nations.¹⁵ This is one of the early instruments that were more specifically concerned with children without parental or family care, addressing foster care and adoption issues. The 1986 declaration refers *inter alia* to principle 6 of the 1959 declaration as the basis on which it was made. It enumerates factors contributing to increased numbers of children being deprived of their family environment, including abandonment, violence, armed conflict, internal disturbance, natural disasters, economic crises, or social problems. The factors enumerated then are still the same factors that continue to contribute to increasing numbers of children in need of alternative care in different parts of the world today.

The 1986 declaration stipulated several principles to guide states in providing protection and care for children in need of care or those at risk of losing family care. As shown below, the principles in the 1986 declaration found their way into the Convention on the Rights of the Child and the UN Guidelines for the Alternative Care of Children of 2010. Art 5 of the 1986 declaration names the principle of the child's best interests as a paramount consideration in all procedures related to the placement of a child in alternative care.¹⁶

Like the 1959 declaration, art 1 and art 2 of the 1986 declaration underscore the inherent role of the family in enhancing the welfare and development of children. More interesting is art 3, which states that the child's priority is to be cared for by his or her parents. However, art 4 emphasises care by parents' relatives where parental care is unavailable or inadequate, before placement in substitute families such as a foster or an adoptive family, or, where circumstances dictate, in appropriate institutional care. Art 4 of the 1986 declaration, like principle 6 of the 1959 declaration, manifests the complementarity of parents and family in the care of the child. From the wording of art 4 of the 1986 declaration, it follows that placement of a child with

¹⁵ 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 adopted by the UN general assembly resolution 41/45 on 03/12/1986.

¹⁶ See para 5 of the preamble and art 5 of the 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.

relatives of the child's parents is to be given priority over foster care and adoption, but that these options are preferable to institutional care which should be used only if necessary.¹⁷

The 1986 declaration acknowledged the existence of various alternative care options in different parts of the world, which may be influenced by a state's social and economic setup, by citing the example of *kafalah* in Islamic societies.¹⁸ This reflects the fact that states are free to establish a variety of alternative care services to suit the social, economic, and cultural circumstances provided that the child's best interests are given due consideration.

The 1986 declaration contains specific provisions on foster care and adoption and clarifies the differences between the two.¹⁹ Foster care is intended to be used as a temporary arrangement before reuniting the child with his or her biological family or arranging for adoption. On the other hand, adoption aims at providing the child with a new permanent family.²⁰ However, a child placed in foster care may remain in the foster family until adulthood if this is considered the best solution for the child. In all decisions, participation of the child, the parents and all interested parties such as the prospective foster family or adoptive family is also emphasised to ensure the protection of the interests of all the involved parties.²¹

Moreover, article 6 of the 1986 declaration states the need for the personnel responsible for foster placement or adoption to be professionals or possess appropriate training. This requirement is not emphasised in art 20 of the CRC; however, the 2010 UN Guidelines for Alternative Care of Children fill this gap, as indicated below. The 1986 declaration had more specific and clear rules or principles of implementation when compared to the provisions in the Convention on the Rights of the Child, which will be discussed in the following subsections. The absence of clear direction on the protection of children deprived of their family environment in the CRC led to the adoption of the UN Guidelines for the Alternative Care for Children in 2010 by the UN general assembly.

It is noteworthy that the declarations discussed above have no binding authority over states due to their soft nature under international law. Nevertheless, as noted above, these declarations

¹⁷ The subsidiarity of institutional care found its way in art 20 of the CRC.

¹⁸ See para 6 of the preamble to the 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.

¹⁹ Parts B and C of the 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.

²⁰ See art 11 and 13 of the 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.

²¹ Art 12 of the 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.

played a significant role in setting the foundation upon which the Convention on the Rights of the Child, 1989, was built. As noted in the subsequent discussion, these declarations are referred to in the 1989 Convention, and some of the principles in these declarations found their way into it.

2.1.3. The International Bill of Human Rights

The International Bill of Human Rights consists of five documents:²² The Universal Declaration of Human Rights (UDHR),²³ the International Covenant on Civil and Political Rights (ICCPR)²⁴ and its two optional protocols,²⁵ the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁶ The International Bill of Human Rights does not explicitly refer to the right to alternative care for children without parental care. Nonetheless, the right to alternative care is reflected in several provisions of the UDHR, ICCPR and ICESCR.²⁷

The UDHR, ICCPR and ICESCR acknowledge the importance of the family as a natural and fundamental group unit of society entitled to protection and assistance by and from the state and society for smooth fulfilment of its responsibilities, including that of care for children.²⁸ Thus, the provisions of these three instruments reflect the centrality of the family in the care of children and other members. These provisions calling on states and society to provide the family with the widest possible protection and support are based on the assumption that there could be circumstances in which a family, if not supported, may not be able to discharge its care responsibilities towards children.

Furthermore, art 10(3) of the ICESCR and art 25(2) of the UDHR call on states to ensure special care, assistance and protection of motherhood, children and young persons.²⁹ The right to social security and social insurance for everyone, in events such as sickness, widowhood, old age or

²² UN Office of the High Commissioner for Human Rights, The Fact Sheet No 2 (Rev 1): The International Bill of Human Rights, 1996, 1.

²³ Universal Declaration of Human Rights of 1948 adopted and proclaimed by General Assembly resolution 217 A (III) of 10/12/1948.

²⁴ International Covenant on Civil and Political Rights of 1966 adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16/12/1966.

²⁵ Optional Protocol to the International Covenant on Civil and Political Rights, 1966 adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16/12/1966. Second Optional Protocol to the International Covenant, aiming at the Abolition of the Death Penalty, 1986 adopted and proclaimed by General Assembly resolution 44/128 of 15/12/1989.

²⁶ International Covenant on Economic, Social and Cultural Rights of 1966 adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16/12 1966.

²⁷ John Tobin, ed., *The UN Convention on the Rights of the Child: A Commentary*, First edition, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2019), 727.

²⁸ Art 16(3) of the Universal Declaration of Human Rights of 1948; art 23(1) of the International Covenant on Civil and Political Rights of 1966; and art 10(1) of the International Covenant on Economic, Social and Cultural Rights of 1966.

²⁹ Art 24(1) of the International Covenant on Civil and Political Rights of 1966.

other conditions beyond one's control, is also guaranteed under the International Bill of Human Rights.³⁰ Related to these rights is the right to a standard of living adequate for every individual's health and well-being and that of his or her family.³¹ In the light of the above provisions, it can be argued that an obligation is placed on states and society to ensure the protection and assistance of children who are deprived of their family environment, and to help them to develop their personality and well-being.

These provisions of the International Bill of Human Rights reflect the vulnerability and dependent nature of children and emphasise the role of the family in the upbringing of children. The need of the family, as a primary unit of the society, for protection and assistance, and its indispensable role in the upbringing of children, is mirrored in the CRC in the preamble and other specific provisions as will be shown below. Thus, it can be asserted that the International Bill of Human Rights sets the foundation upon which the provisions of the CRC on children deprived of their family environment were built.

2.1.4. The Convention on the Rights of the Child

The United Nations adopted the CRC to guarantee and ensure the protection of children's rights in order to ensure their full development and survival. The Convention is founded on earlier international declarations and covenants, as discussed above, which emphasised the need for respecting and protecting children's rights as human rights.³² The CRC is one of the human rights conventions that has received almost universal acceptance. It has been ratified by 196 states parties, and the United States of America is the only country that has not ratified it.³³

The preamble to the CRC acknowledges the need for special care and assistance during childhood and states that a child should grow up in a family environment for his or her full and harmonious development. It is noteworthy that the emphasis is not only on the right of a child to live in a family environment, but also on the fact that this environment should provide the child with an atmosphere of happiness, love and understanding.³⁴ Moreover, by underlining that the family is a fundamental unit of society and the natural environment for the growth and well-being of its members and particularly children, the CRC calls for protection and assistance of

³⁰ Art 22 and art 25(1) of the Universal Declaration of Human Rights of 1948; and art 9 of the International Covenant on Economic, Social and Cultural Rights of 1966.

³¹ Art 25 of the Universal Declaration of Human Rights of 1948; and art 11 of the International Covenant on Economic, Social and Cultural Rights of 1966.

³² See the preamble to the CRC on the instruments which laid the foundation for the adoption of the CRC. The instruments include the declarations and covenants discussed in the foregoing sections.

³³ See <https://indicators.ohchr.org/> for the ratification status of the CRC as of 09/02/2021. See also https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en showing the CRC status by country as of 10/03/2021.

³⁴ See the preamble of the UN Convention on the Rights of the Child, 1989.

families to enable them to assume their responsibilities within the community.³⁵ The CRC deliberately does not define the term family, due to differences among the states parties. It is left to the states parties to define the scope of what amounts to a family based on their traditions and cultural values.³⁶

As shown above, the CRC acknowledges that parents are responsible for the upbringing and development of their children and requires states to ensure recognition of this principle.³⁷ The CRC contains provisions indicating that this responsibility may be discharged by individuals other than the parents of the child, including legal guardians or any other person who has the care of the child.³⁸ It follows that every child has a right to live with his or her parents or other individuals responsible for his or her daily care and development. Against this background, the CRC calls on states to ensure the provision of alternative care for children who are deprived of their family environment. The right to alternative care is provided for under art 20 of the CRC:

“1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.”

The article refers to “a child who is temporarily or permanently deprived of his or her family environment” or a child “in whose own best interests cannot be allowed to remain in his or her family environment”. It can be deduced that two major categories of children are covered: children who have no family environment and those who have a family environment, but for whom it is not in their best interest to remain there. Unfortunately, the CRC does not go beyond

³⁵ See the preamble and art 18(2) of the UN Convention on the Rights of the Child, 1989.

³⁶ Para 2 of the UN Human Rights Committee, CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of Spouses (1990), adopted at the Thirty-ninth session of the Human Rights Committee, on 27/07/1990.

³⁷ Art 18(1) of the UN Convention on the Rights of the Child, 1989. See also part 2.1.1 of this study.

³⁸ See art 5, 18(1)(2) and 19(1) of the UN Convention on the Rights of the Child, 1989, where words like parents, members of extended family, legal guardians or any other person who has the care of the child are mentioned without further clarification.

this formulation to clearly state the circumstances under which it is in the child's best interests to remove him or her from that environment, a gap which is filled by the 2010 UN Guidelines for the Alternative Care of Children, as discussed below.

Different authors have made attempts to define the scope of this article. Cantwell and Holzscheiter, in their commentary on art 20 of the CRC, discuss which children are covered under art 20.³⁹ They assert⁴⁰ that the category of children protected under art 20 is broader than that envisaged in the 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children discussed above, which referred to abandoned children and orphans only.⁴¹ However, in my opinion, the phrase "when care by the child's own parents is unavailable or inappropriate" in art 4 of the 1986 Declaration covers more than just abandoned children and orphans.⁴² The use of the word "inappropriate" can be equated to the phrase "or in whose own best interests cannot be allowed to remain in that environment" in art 20 of the CRC.

Art 20 envisages, on the one hand, children who have been removed from the care of their parents by the competent authorities after determining that it is not in the child's best interests to remain there, as provided for under art 9 of the CRC. On the other hand, the article covers children who, for some other reason, such as parents' death, abandonment, relinquishment or poverty, may lack a family environment in which to grow and develop.⁴³ Children deprived of their family environment due to measures adopted in the administration of juvenile justice, such as detention or imprisonment, are not within the scope of this article as they are separately dealt with under art 37 and art 40 of the CRC.⁴⁴ However, the provisions of art 20 may be extended to children seeking refugee status in cases where no parents or other family members can be found.⁴⁵

³⁹ Cantwell and Holzscheiter, *Article 20*, 38–48; Usang Maria Assim, *Understanding Kinship Care of Children in Africa: A Family Environment or an Alternative Care Option* (South Africa, University of Western Cape, 2013), 104–16; See also Assim and Mandlate, *The Right to Alternative Care for Children Deprived of Their Family Environment: Overview of International Norms and the Legislative Framework of Mozambique*, 344–48.

⁴⁰ Cantwell and Holzscheiter, *Article 20*, 38.

⁴¹ See paragraph 4 of the preamble to the 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.

⁴² Cantwell and Holzscheiter bases their assertion on the preamble of the 1989 UN Declaration alone which only mentions children who are orphans or those abandoned.

⁴³ Cantwell and Holzscheiter, *Article 20*, 39 on the reasons that may lead to a child's deprivation of his or her family environment; see also Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 277.

⁴⁴ Cantwell and Holzscheiter, *Article 20*, 39–40; Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 277.

⁴⁵ See article 22(2) of the UN Convention on the Rights of the Child, 1989 which extends the right to alternative care to children seeking asylum.

Thus, states parties to the CRC are obliged to provide alternative care for children deprived of their family environment in accordance with their national laws. It is important to note that art 20 refers to children deprived of their family environment and not only those deprived of parental care.⁴⁶ As argued by Cantwell and Holzscheiter, this article does not place an obligation on states to provide alternative care and protection for children who are receiving good care from members of the extended family who may not be their parents.⁴⁷

A list of alternative care options that states can establish to ensure the enjoyment of this right is also given. The list is not exclusive or exhaustive, thus creating possibilities for options other than those mentioned in art 20(3) of the CRC. Cantwell and Holzscheiter argue that the wording or listing of the alternative care options in art 20 creates a hierarchy of care options that subordinates institutionalised care, to be used as a measure of last resort, while preference is given to family-based care, such as foster care, *kafalah* or adoption.⁴⁸ The subordinate character of institutionalised care can be deduced from the use of the phrase “if necessary” before the words “in suitable institutions”. While it is true that the use of phrases such as “a measure of last resort” subordinates the role of institutions in the provision of alternative care, this largely depends on the way the state handles the options for alternative care on a case-by-case basis. Ideally, if a state observes all the established principles in dealing with children needing alternative care, each child will be placed in the type of care that best suits his or her circumstances, regardless of the presumed subordination of institutionalised care.⁴⁹

It can also be argued that the subordination of institutionalised care was deliberate on the part of the CRC’s drafters. There is extensive evidence of the excessive use of institutionalised care in many countries regardless of the needs and circumstances of each child.⁵⁰ Thus, the wording of art 20(3) of the CRC can be seen as an initiative to encourage states to create a wide range of care options and reduce excessive reliance on institutionalised care.

Art 20(3) of the CRC provides that when choosing a suitable care option, attention should be given to the continuity of the child’s upbringing and the child’s ethnic, religious, cultural, and linguistic background. This provision aims to ensure preservation of the child’s identity and

⁴⁶ Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 278.

⁴⁷ Cantwell and Holzscheiter, *Article 20*, 53–54; Nigel Cantwell, Children’s Rights in Relation to Their Family, in *The UN Children’s Rights Convention: Theory Meets Practice*, ed. André Alen (Antwerpen: Intersentia, 2007), 396; See also Tobin, *The UN Convention on the Rights of the Child*, 734.

⁴⁸ Cantwell and Holzscheiter, *Article 20*, 53–54; Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 72, 94.

⁴⁹ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 94.

⁵⁰ Ian Milligan, *Alternative Child Care and Deinstitutionalisation: A Case Study of Uganda*, (CELCIS, EU & SOS Children Villages International, 2016), 28–29.

maintain links with his or her origin and background as provided for in art 8(1) of the CRC.⁵¹ This requirement under art 20(3) of the CRC is necessary to protect the other rights of children placed in alternative care, such as the right to participate fully in the cultural life of his or her own community under art 30 of the CRC.⁵²

2.1.5 The 2010 UN Guidelines for the Alternative Care of Children

The 2010 UN Guidelines for the Alternative Care of Children were adopted to enhance the implementation and realisation of the right to alternative care for children deprived of their family environment.⁵³ These guidelines complement art 20 of the CRC and clarify its provisions by setting out desirable orientations for policy development and practice.⁵⁴ The 2010 UN Guidelines provide no legally binding obligations on the part of the CRC states parties. However, states are encouraged to take the guidelines into account and bring them to the attention of all those involved with providing alternative care and ensuring children's rights in general.⁵⁵

The 2010 UN Guidelines for the Alternative Care of Children play an important role as they map out measures to be taken to enhance the protection of children in need of alternative care.⁵⁶ Unlike art 20 of the CRC, which uses the phrase "children deprived of their family environment", the 2009 UN Guidelines uses the phrase "children without parental care or children deprived of parental care." It has been contended by some scholars that the use of the phrase "children without parental care or deprived of parental care" narrows the category of children covered by art 20, which refers not only to children without parental care but also to those who are deprived of their family environment.⁵⁷ On the face of it, it looks as if the 2010 UN Guidelines are a call to provide alternative care for children who are not in the care of their

⁵¹ See also art 9(3) of the UN Convention on the Rights of the Child, 1989 on the respect of the child's right to maintain personal relations and direct contact with his or her parents upon separation.

⁵² Art 20(3) of the CRC also relates to art 7 of the UN Convention on the Rights of the Child, 1989 on the right of a child to know and be cared for by his or her parents; see also Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 288.

⁵³ See paras 1-2 of the UN Guidelines for the Alternative Care of Children.

⁵⁴ See part I on the purposes of the UN Guidelines for the Alternative Care of Children. See also UN General Assembly resolution A/RES/64/142 adopted on 24/02/2010. See also Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 14, 19.

⁵⁵ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 15, 20. See also para 2 of the UN General Assembly resolution 64/142 adopted on 24/02/2010. See paras 24-25 on measures to promote the application of the UN Guidelines for the Alternative Care of Children. The word should rather than shall is used to explain the responsibility of states arising out of the guidelines.

⁵⁶ See Part III of the UN Guidelines for the Alternative Care of Children on the scope of the Guidelines. The Guidelines do not apply to children in conflict with the law, those who are adopted and those in informal arrangements where such arrangement is not related to parents' inability or unwillingness to provide adequate care to their children.

⁵⁷ See Assim, *Understanding Kinship Care of Children in Africa: A Family Environment or an Alternative Care Option*, 135.

parents even if they are in the good care of members of their extended family. This can be deduced from the definition of children without parental care:

“Children without parental care: are all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances...”⁵⁸

However, the 2010 UN Guidelines do not define the word parent, and thus it is not clear whether this definition is limited to the biological parents of the child or whether it includes legal guardians or those who might be in charge of caring for a child under traditional or customary arrangements. Further, para 29(b)(i) of the UN Guidelines categorises informal alternative care as:

“any private arrangement in a family environment, where a child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his or her parents or other person without this arrangement having been ordered by an administrative or judicial authority or duly accredited body.”

It follows that care of children by relatives is one form of alternative care provided that such care is not done for reasons connected with the parents’ general inability or unwillingness to provide adequate care.⁵⁹ However, as argued by Assim,⁶⁰ the formulation adopted by the UN Guidelines, which uses the phrase children without parental care and includes care by relatives as a form of alternative care, needs to be approached with caution depending on the given social and cultural context. In a country like Tanzania, where the word family always means the extended family, categorising care by relatives or kinship care as a form of alternative care might not be easily understood.⁶¹ However, the UN Guidelines do acknowledge the role of informal care, which includes care by the child’s relatives, and states are encouraged to recognise the role played by this kind of care and take adequate measures to support it.⁶²

⁵⁸ Para 29(a) of the UN Guidelines for the Alternative Care of Children. This para should be contrasted with para 5 of the UN Guidelines which call for provision of alternative care when a child cannot be cared for by his or her family and not parents alone. See also para 30(c) of the UN Guidelines which excludes informal arrangements where a child voluntarily stays with relatives or friends for recreational purposes and reasons not connected with the parents’ general inability or unwillingness to provide adequate care.

⁵⁹ Para 30(c) of the UN Guidelines for the Alternative Care of Children.

⁶⁰ Assim, *Understanding Kinship Care of Children in Africa: A Family Environment or an Alternative Care Option*, 135-136.

⁶¹ This aspect on the place of relatives in the care for children is discussed in detail in chapter 3 of this study.

⁶² Part VII(1) of the UN Guidelines for the Alternative Care of Children on informal care. See also para 27 of the UN Guidelines.

Besides these challenges regarding interpretation of the UN Guidelines, they are a helpful implementation aid for the provision of alternative care for children deprived of their family environment. Like the CRC, the Guidelines acknowledge the importance of a family in the care and development of the child and encourage states to ensure support for families.⁶³ As discussed below, the Guidelines are built on two major principles (the necessity and suitability principles) as can be deduced from the provisions of the Guidelines.⁶⁴ These two principles have provided a useful foundation for the preceding chapters that deal with the protection of children deprived of their family environment and foster care, particularly in Tanzania, and the contents of the UN Guidelines will be referred to from time to time throughout this study. This makes it redundant to go into details here.

2.2. The African Union (AU) framework for the right to alternative care

At the African regional level, efforts have also been made to adopt instruments related to the promotion and protection of children's rights. The efforts are manifested through the adoption of the African Charter on the Rights and Welfare of the Child, 1990 in addition to other existing human rights instruments in the region.⁶⁵ In this part, the right to alternative care for children is presented and discussed as it is envisaged under the identified regional instruments. Where necessary, the similarities and differences between the African regional framework and the UN framework on the right to alternative care are also pointed out for comparative purposes, as both frameworks significantly influence the Tanzanian framework on the protection of children in need of alternative care.

2.2.1. Declaration of the Rights and Welfare of the African child

In 1979 the assembly of heads of state and government of the Organisation of African Unity, the current AU, adopted the Declaration of the Rights and Welfare of the African Child.⁶⁶ The adoption of this declaration was inspired by the International Year of the Child of 1979.⁶⁷ As indicated in its preamble, the declaration was based on previous UN pronouncements, especially the 1959 Declaration on the Rights of the Child. This 1979 declaration also formed the basis upon which the ACRWC was developed and adopted by the then OAU in 1990.

⁶³ See part II(A) of the UN Guidelines for the Alternative Care of Children on the child and the family.

⁶⁴ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 22.

⁶⁵ Other key substantive human rights instrument in the region include the African Charter on Human and Peoples' Rights of 1981, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003.

⁶⁶ Declaration on the Rights and Welfare of the African Child adopted by the Assembly of heads of states and government of the OAU during the sixteenth ordinary session at Monrovia, Liberia from 17 - 20 July 1979, AHG/ST 4(XVI)Rev 1; The declaration can be found in: Geraldine Van Bueren, ed., *International Documents on Children*, 2nd rev. ed. (The Hague; Boston: Cambridge, MA: M. Nijhoff; 1998), 31–33.

⁶⁷ See the preamble of the Declaration.

The declaration was adopted to enhance the promotion and protection of the rights and welfare of the African child. Thus, OAU member states were encouraged to take necessary measures to ensure the development of African children's rights and welfare.⁶⁸ The declaration contained no specific provisions on children in need of alternative care. However, the declaration emphasised the importance of the child's parents and other family members in the welfare of the African child.⁶⁹ This acknowledgement reflects the collective responsibility of the family for the care of the child, a responsibility not exclusively vested in the parents of the child. Moreover, principle 6 of the declaration appealed to the OAU member states to give priority to the most deprived and vulnerable children, which include children who are deprived of their family environment or those who are likely to be deprived of such care due to their vulnerable nature.⁷⁰

Though the declaration contained no specific provision on children deprived of their family environment and their right to alternative care, its relevance cannot be disregarded. It played an important role by making a case for the promotion and protection of the rights and welfare of African children and paved the way for the adoption of the ACRWC, which calls for the provision of special protection and assistance to children deprived of their family environment, as shown below.

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

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted in 1990 and entered into force in 1999. The charter is built on the principles developed in the preceding instruments, binding and non-binding, on children's rights of both the AU and the UN.⁷¹ As of June 2019, 49 out of the 55 AU member states had ratified the Charter.⁷²

Like the CRC, the ACRWC is based on the belief that a child should grow up in a family environment in an atmosphere of happiness, love, and understanding for the full and harmonious development of a child's personality.⁷³ Art 20(1) of the ACRWC provides that parents or other persons responsible have the primary responsibility for the upbringing and development of the child.⁷⁴ States parties are vested with the responsibility of providing

⁶⁸ See para 6 of the Declaration on the Rights and Welfare of the African Child.

⁶⁹ See the preamble of the Declaration on the Rights and Welfare of African Child.

⁷⁰ The inclusion of children deprived of their family environment under Most Vulnerable Children is discussed in detail in chapter three.

⁷¹ See paragraph 7 of the African Charter on the Rights and Welfare of the Child, 1990.

⁷² <https://au.int/en/treaties/1164>.

⁷³ See para 4 of the African Charter on the Rights and Welfare of the Child, 1990.

⁷⁴ Compare art 20 of the ACRWC to art 18(1) of the CRC which provides that parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. In both articles the

necessary support, where needed, to enable parents to discharge this primary responsibility.⁷⁵ Unique in the ACRWC is that it goes beyond this and specifically states that in case of need, states should provide parents with material assistance and support programmes relating to nutrition, health, education, clothing and housing.⁷⁶

Like art 9(1) of the CRC, art 19(1) of the ACRWC is against the arbitrary separation of a child from his or her parents. This is based on the right of a child to enjoy the care and protection of his or her parents. If such separation is deemed necessary, separation should be in accordance with the appropriate law and the child's best interests. As per art 19(2) of the Charter, a child separated from one or both parents, has a right to maintain regular contact with the parent(s). This right to maintain contact with both parents upon separation is not subjected to the best interests of the child requirement as it is under art 9(3) of the CRC, which allows contact with parents unless it is not in the child's best interests.

The importance of allowing the child to grow up in the care of his or her parents or other responsible persons sets the foundation for the provisions of art 25 of the ACRWC, which is the equivalent of art 20 of the CRC, providing for rights of children deprived of their family environment. Art 25 of the ACRWC states as follows:

“Article 25: Separation from Parents

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

phrases “other persons responsible” or “legal guardians” have not been explained to indicate who is being referred to and when do these persons take up the responsibility to care for children.

⁷⁵ Art 20(2) of the African Charter on the Rights and Welfare of the Child, 1990, see also art 18(1) of the charter.

⁷⁶ Article 20(2)(a) of the ACRWC, African Charter on the Rights and Welfare of the Child, 1990.

3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.”

Like art 20(1) of the CRC, art 25(1) of the ACRWC calls for special protection and assistance for a child who is temporarily or permanently deprived of his or her family environment. Under art 25(2)(a) of the ACRWC, states are obliged to provide alternative family care to a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment. The wording of 25(2)(a) is silently different from that of art 20(1)(2) of the CRC as it specifically points out the issue of parentless children.⁷⁷ Presumably, the specific mention of parentless as a cause of family deprivation for children reflects the adverse effects of HIV/AIDS on the continent, which led to an increased number of orphans and disrupted the traditional safety nets for childcare.

Foster placement and placement in suitable institutions for the care of the children are care options that are listed as examples, among others that are not specified under art 25(2)(a) of the Charter. Unlike art 20(2) of the CRC, art 25(2)(a) of the ACRWC does not mention *kafalah* and adoption; however, the latter is covered under art 24 of the Charter. As in the CRC, the alternative care options under the ACRWC are not exhaustive. Thus, state parties can establish more care options as they deem fit in their states to ensure the protection and welfare of children deprived of their family environment. Further, the ACRWC does not contain the words “if necessary” before the words “placement in suitable institutions”, as in art 20(2) of the CRC. Thus, it can be argued here that the ACRWC attaches equal importance to both institutional care and family-based alternative care options such as foster care. Whether deliberately or inadvertently, this kind of drafting does not respond well to the call to deinstitutionalise alternative care services for children, especially in Africa, where most children in need of alternative care are still in institutionalised care.

The ACRWC under article 25(3) clearly states the need for states to pay due regard to the desirability of continuity in a child's upbringing, and to the child's ethnic, religious or linguistic background, in the determination of alternative family care and the best interest of the child.⁷⁸

⁷⁷Art 25 of the ACRWC and art 20 of the CRC have other notable differences in the wording, such as the use of “alternative care” in the CRC and “alternative family care” which do not seem to have any significant difference as the alternative care options given in both articles are similar.

⁷⁸ Unlike the CRC, the list of factors to be considered in the provision of alternative care under art 25(3) does not include cultural background. In the absence of accessible legislative history of the ACRWC it is not clear if this

This requirement, as discussed above, aims at enhancing other essential rights of children deprived of their family environment, guaranteed by the Charter, once in alternative care.⁷⁹ These include other rights enshrined in the Charter, for instance art 12(2) on the child's right to participate in cultural and artistic life, art 6 on the right to name and nationality, or art 19(2) on the right of a child to maintain contact with his or her parents upon separation.

Further, under article 25(2)(b) the ACRWC provides for family reunion for children who have been separated from their parents or relatives due to internal or external displacement arising from armed conflicts or natural disasters. This provision reflects the realities that for a long time have been prevalent on the African continent.⁸⁰ The need for family reunion is one of the important aspects when it comes to the protection of children deprived of their family environment. Though family reunion is only emphasised for specific groups of children, this article raises an important aspect that is not found under art 20 of the CRC. It is shown below that the main goal in the protection of children deprived of their family environment is, where possible, to reintegrate and reunite the child with his or her family or provide permanent alternative family care for any child that cannot be reunited with his or her family.

2.3. Temporary vs permanent deprivation of a family environment

An essential feature in art 20 of the CRC and art 25 of the ACRWC is that children in need of alternative care may be classified in two major categories. The first category refers to those children whose lack of family environment is temporary. This category includes children from family settings that can be transformed or where assistance can be provided in creating a suitable environment for the care of the child after a certain period. When children are temporarily deprived of their family or parental care, this is usually due to factors like poverty, illness of the parents or temporary inability of the family to care adequately for the child. This means that if the cause of lack of parental or family care is worked upon, there would be prospects for the child going back into the care of his or her family. In such cases, placement of the child in alternative care needs to go hand in hand with preparation of the child and the family for family reunification. To minimise the period the child spends in alternative care, mechanisms need to put in place to address the situation in the child's family that led to the child being placed in alternative care.

was a deliberate omission or not, especially because culture is believed to play an important role in the lives of Africans.

⁷⁹ See section 2.1.4 for further clarification.

⁸⁰ See para 3 of preamble to the African Charter on the Rights and Welfare of the Child, 1990.

The other group encompasses those children who are deprived of their family environment permanently. This category captures, among others, children who are orphans, abandoned, neglected, or whose parents or relatives cannot be traced. Children permanently deprived of their family environment require a suitable stable alternative care option that is able to serve the child's best interests; this may entail examining possibilities for the adoption of the child as a permanent solution. Depending on the nature of the alternative care option in which a child is placed, children permanently deprived of their parental or family care may also require services that prepare them for independent living after growing out of care.

Therefore, a proper protection system for children deprived of their family environment needs to take into consideration this distinction. Appreciating the difference between the two categories of children in need of alternative care plays a vital role in determining the nature of alternative care services to be put in place to ensure full enjoyment of the right to alternative care. This is also important to avoid generalisation of the needs of every child in need of alternative care. It also underscores the importance of case-by-case determination of the specific situation and needs of children requiring alternative care.

2.4. The role of other international and regional human rights instruments

Apart from the above-discussed instruments, other regional and international human rights instruments contain provisions related to the right to alternative care. Art 18 of the African Charter on Human and Peoples' Rights,⁸¹ among other things, emphasises the importance of the family as a natural unit and basis of society entitled to protection and assistance from the State. Although this provision does not directly address issues related to children in need of alternative care, it acknowledges the role of the family in caring for and protecting its members and insists on the role of the state in ensuring the protection of children's rights. The protection and assistance given to the family by the state have a direct impact on the children who are part of the family. The stability of the family enhances the welfare and development of its members, including children.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸² and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo protocol)⁸³ also contain provisions that emphasise the

⁸¹ The African Charter on Human and Peoples' Rights was adopted by the OAU heads of states and governments on 01/06/1981 and entered into force on 21/10/1986.

⁸² The CEDAW was adopted and opened for signature, ratification and accession by the UN General Assembly resolution 34/180 of 18/12/1979 and entered into force on 03/09/1981.

⁸³ The Protocol also known as the Maputo Protocol was adopted by the 2nd ordinary session on the Assembly of AU on 01/07/2003 and entered into force on 25/11/2005.

importance of the family and the importance of both men and women in the care, upbringing and development of their children.⁸⁴ Further, art 8 of the Maputo protocol recognises responsibility for the upbringing and development of children as a social function primarily vested in both parents and that the state and the private sector have a secondary responsibility.⁸⁵ These provisions are relevant to the right to alternative care for children as they point to the importance of both parents in the welfare and development of children. At all points in all matters concerning the parents, their children's rights should be duly considered. This approach is crucial as it plays an essential role in preventing children from being deprived of their family environment.

Art 11(2)(c) of the CEDAW calls on states to take appropriate measures to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment and development of a network of childcare facilities. Involvement in employment or economic activities by both parents, especially those who are economically poor, is a potential cause of some children being at risk of not receiving appropriate care from the parents, leading to children being placed in alternative care.⁸⁶ Thus, this provision of the CEDAW is important as it calls on states to ensure that the employment of parents does not affect the parents' primary responsibility to care for their children. As discussed below, the prevention of factors leading to children being deprived of their family environment is an essential aspect of the provision of alternative care for children.

Art 23 of the Convention on the Rights of Persons with Disabilities⁸⁷ (CRPD) on respect for home and family has a direct link to the right to alternative care for children with disabilities. Children with disabilities or those whose parents have disabilities are likely to be placed in alternative care due to neglect, abandonment and segregation.⁸⁸ For this reason, art 23(3) of the CRPD recognises that children with disabilities have equal rights concerning family life. Consequently, the CRPD requires states to provide early and comprehensive information, services and support to children with disabilities and their families. Further, under art 23(4) of the CRPD, states parties are required to ensure that a child is not separated from his or her

⁸⁴ See the third para and art 5(b) of the CEDAW. See also art 6(1), 7 and 8 of the Maputo protocol

⁸⁵ See also art 5(b) and 16(d) of the CEDAW on the common responsibility of men and women in the upbringing and development of their children.

⁸⁶ See para 38 of the UN Guidelines for the Alternative Care of Children.

⁸⁷ The Convention on the Rights of People with Disabilities was adopted by the UN General Assembly on 13/12/2006 during its sixty-first session in New York and entered into force on 03/05/2008.

⁸⁸ See Kirsten Sandberg, *Alternative Care and Children's Rights*, in *International Human Rights for Children*, ed. Ursula Kilkelly and Ton Liefwaard, Precision Manufacturing (Singapore: Springer Singapore, 2018), 7–8.

parents against their will unless such separation is determined to be necessary for the child by a competent authority. Art 23(5) of the CRPD requires states to undertake every effort to provide alternative care within the wider family if the immediate family is unable to care for a child with disabilities, and, failing that, within the community in a family setting.⁸⁹

2.5. The key principles of the right to alternative care

The principles governing the provision of the right to alternative care are presented in two levels or categories. The first category is based on the general principles governing the implementation and the realisation of children's rights. The second category relates to specific principles that complement the general principles in implementing and realising the right to alternative care. The specific principles of the right to alternative care have been developed from the UN Guidelines for the Alternative Care of Children.

2.5.1. The general core principles on the rights of the child

The realisation and enjoyment of children's rights, as provided for under the CRC and ACRWC, are based on four basic principles, which have been accepted as a yardstick in the implementation and realisation of all children's rights, including the right to alternative care.⁹⁰ These principles are to be adhered to by all states and non-state actors in all actions taken or decisions directly or indirectly impacting children.⁹¹ The general principles include the child's right to life, survival and development, the best interests of the child, non-discrimination, and child participation.

2.5.1.1. The child's right to life, survival and development

Arts 6 and 5 of the CRC and ACRWC respectively embrace very important rights, which have gained the status of being among the core principles of realising and implementing children's rights. The right to life and the need to ensure the survival and development of a child is the foundation upon which all the other children's rights claim the validity of their existence.⁹² Realistic enjoyment of other children's rights as guaranteed in the CRC and ACRWC depends

⁸⁹ Art 23 of CRPD can be read together with art 23 of the CRC and art 13 of the ACRWC.

⁹⁰ See para 12 of the General Comment No. 5 on General Measures of Implementation of the CRC adopted by the Committee on the Rights of the Child at its thirty-fourth session (19/09 – 03/10/2003). See also part IV of the General Comment No. 5 on State Party Obligations under the ACRWC and Systems Strengthening for Child Protection adopted by the African Committee of Experts on the Rights and Welfare of the Child in 2018.

⁹¹ See para 12 of the General Comment No. 5: General Measures of Implementation of the CRC and part IV of the General Comment No. 5: State Obligations under the ACRWC.

⁹² Elaine E Sutherland, *The Child's Right to Life, Survival and Development: Evolution and Progress*, *Stellensbosch Law Review* 26, no. 2 (2015): 272, 279; Manfred Nowak, *Article 6: The Right to Life, Survival, and Development*, A Commentary on the United Nations Convention on the Rights of the Child (Leiden; Boston: Martinus Nijhoff Publishers, 2005), 1; Douglas Hodgson, *The Child's Right to Life, Survival and Development*, *The International Journal of Children's Rights* 2, no. 4 (1994): 372.

on the continuing life of a child, which needs to be protected by the state and the community at large.

The right to life and the need to ensure the child's survival and development imposes on states both negative and positive duties to ensure the protection and realisation of this right.⁹³ Negative duties imply that states need to refrain from those acts or decisions that may affect the right to life, survival and development of children.⁹⁴ The positive duties imply the need for states to adopt and take actions or measures to facilitate and enhance children's life, survival, and development.⁹⁵

Under art 6(2) of the CRC and art 5(2) of ACRWC, states are obliged to ensure, to the maximum extent possible, the survival and development of the child. It is contended that the use of the phrase 'to the maximum extent possible' implies that the obligation of the states to ensure survival and development depends on the socio-economic capacity and ability of the state to adopt necessary measures.⁹⁶ Sutherland regards the inclusion of the right to life, survival, and development as an attempt to bridge the civil and political right to social, economic, and cultural rights. Arguably, the state's obligations to ensure the child's survival and development facilitate and enhance the protection and enjoyment of the right to life.

The CRC committee further directs states not to define the word "development" narrowly. The committee attempts to interpret the word development as used under art 6 of the CRC to mean a holistic concept embracing the child's physical, mental, spiritual, moral, psychological, and social development.⁹⁷ Relying on this definition, child development depends on the realisation and enjoyment of all children's rights.⁹⁸ Moreover, the African Committee of Experts on the rights and welfare of children emphasises the need for adopting a holistic approach in realising the rights and welfare of children.⁹⁹

The relevance of this principle in realising the right to alternative care for children deprived of their family environment cannot be ignored. The principle of ensuring a child's survival and development places obligations not only on the state but also on those charged with the daily upbringing of the child.¹⁰⁰ Nowak, in his commentary on art 6 of the CRC, tries to show how

⁹³ Sutherland, *The Child's Right to Life, Survival and Development: Evolution and Progress*, 280.

⁹⁴ Para 3 and 4 of the CCPR General Comment No. 6: Article 6 (Right to life) adopted by the UN Human Rights Committee at its sixteenth session on 30/04/1982.

⁹⁵ Para 5 of the CCPR General Comment No.6: Article 6 (Right to life).

⁹⁶ Sutherland, *The Child's Right to Life, Survival and Development: Evolution and Progress*, 273, 292.

⁹⁷ Para 2 of the General Comment No. 5 on General Measures of Implementation of the CRC.

⁹⁸ See part 4.3 of the General Comment No. 5 on State Party Obligations under the ACRWC.

⁹⁹ See part 4.3 of the General Comment No. 5 on State Party Obligation under the ACRWC.

¹⁰⁰ Nowak, *Article 6*, 7–8.

the principle is linked or related to the CRC provisions related to child and family, and how achievement of the obligations attached to it depends on the proper implementation of other rights, including the right enshrined under art 20 of the CRC.¹⁰¹ The provision of alternative care services should, inter alia, aim at enhancing a child's life, survival and development. The nature, manner and quality of alternative care services provided in a given state ought to, directly or indirectly, enhance the right to life, survival and development of children in need of alternative care.

2.5.1.2. The best interests of the child

The principle of the child's best interests is enshrined in art 3(1) of the CRC and art 4(1) of the ACRWC. In children's rights, this principle is widely accepted as one of the major guiding principles in the realisation of all other rights to be enjoyed by children as guaranteed by various children's rights instruments internationally, regionally, and even domestically.¹⁰²

In its general comment on Article 3(1) of the CRC, the UN Committee on the Rights of the Child stipulates that the best interests of the child are a threefold concept.¹⁰³ First, the principle entails that the child has a right to have his or her best interests assessed and taken as a primary consideration when different interests are being considered to decide on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child.¹⁰⁴ Second, the principle regards the best interests of the child as the fundamental interpretative legal principle.¹⁰⁵ The Committee directs that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen. Third, the best interests of the child principle is presented as a rule of procedure.¹⁰⁶ This implies that there is an imperative need to determine the negative or positive impacts that such a process may have on children in whatever decision-making process. The

¹⁰¹ Nowak, 8; See also Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 93.

¹⁰² André Alen, ed., *The UN Children's Rights Convention: Theory Meets Practice* (Antwerpen: Intersentia, 2007), 42–43.

¹⁰³ Part I of the General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1) adopted by the Committee on the Rights of the Children at its sixty-second session (14 January – 1 February 2013). The African Committee of Experts on the Rights and Welfare of the Child is yet to adopt a similar comment or guideline on the best interests of the child.

¹⁰⁴ See para 6(a) of the General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

¹⁰⁵ See para 6(b) of the General Comment No. 14(2013). See also Van Bueren, *The International Law on the Rights of the Child*, 45.

¹⁰⁶ See para 6(c) of the General Comment No. 14 (2013).

CRC committee explains further that an assessment or determination of a child's best interests requires procedural guarantees.¹⁰⁷

The adoption by the CRC Committee of the General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration plays an important role for states parties in defining and determining the best interests of the child. The principle has raised some controversies in the academic arena and greatly received criticism for its indeterminacy and subjectivity.¹⁰⁸ Some scholars have challenged the broadness of the principle and the absence of its interpretation in the creating instruments by contending that the principle could be arbitrarily or negatively used or interpreted by those holding decision-making powers.¹⁰⁹ Despite these criticisms, the relevancy and role of this principle in the realisation of children's rights and welfare cannot be overlooked.

Art 20 of the CRC and art 25 of the ACRWC are among the provisions that contain a reference to the best interests of the child. Arguably, the principle is particularly necessary for the provision of alternative care to children deprived of their family environment. Ideally, it is in the child's best interests to grow up and develop in the care of his or her parents.¹¹⁰ As such, in the absence of such parental or family care, the child's best interests both as a rule of procedure and an interpretative legal rule play an important role in determining the options that suit the conditions and needs of a specific child.¹¹¹

Protection of children deprived of their family environment is one aspect of children's rights likely to be convoluted with the conflicting interests of different parties, including the deprived children, the parents and family, state actors and non-state actors. Thus, in their attempt to provide the necessary protection and assistance to such children, states are faced with the question of what is in children's best interests and balancing these interests with the interests of other parties which may not correspond to what is regarded to be in the best interests of a child. The UN guidelines for the alternative care of children try to identify factors to be taken into consideration when determining the best interests of a child who is deprived of parental care or at risk of being so:

¹⁰⁷ Paragraph 6(c) of the General Comment No. 14 (2013).

¹⁰⁸ Michael D. A. Freeman, *Article 3: The Best Interests of the Child*, Commentary on the United Nations Convention on the Rights of the Child, v. 3 (Leiden: Martinus Nijhoff, 2007), 2 and 27.

¹⁰⁹ Janet L. Dolgin, Why Has the Best Interest Standard Survived? The Historical and Social Context, *Children's Legal Rights Journal* 16, no. 2 (1996): 2.

¹¹⁰ See para 58-78 of the General Comment No. 14 (2013). See also Inter-Parliamentary Union and UNICEF, *Child Protection: A Handbook for Parliamentarians* (UNICEF, 2004).

¹¹¹ See para 6, 7, and part II(B) of the UN Guidelines for the Alternative Care of Children.

“In applying the present Guidelines, determination of the best interests of the child shall be designed to **identify courses of action** for children deprived of parental care, or at risk of being so, **that are best suited to satisfying their needs and rights, taking into account the full and personal development of their rights in their family,** social and cultural environment, and their status as subjects of rights, both at the time of the determination and in the longer term...”¹¹²

It is clear from the above paragraph of the UN guidelines for the alternative care of children that ideal alternative care services giving due regard to the child's best interests are those which give a child full enjoyment of his or her rights and realisation of his or her basic needs. Moreover, such services must allow the possibility of maintaining contact between the child and his or her biological family without downplaying the social and cultural environment of a child in need of alternative care.

Furthermore, the determination of the child's best interests should not only focus on what is best for the child at that time only but, where possible due regard should be paid to the long-term effects of the decision taken.¹¹³ On this basis, states are required to make care plans that will be reviewed at certain time intervals to ensure that the measures taken still serve the best interests of the child.¹¹⁴ Moreover, to realise the child's best interests, decisions concerning alternative care should be made in the course of judicial, administrative, or other adequate and recognised procedures, with legal safeguards such as legal representation in any legal proceedings.¹¹⁵ The decision-making process should be based on rigorous assessment, planning and review, through established structures and mechanisms, and should be carried out on a case-by-case basis.¹¹⁶

Determination of the child's best interests in the provision of alternative care services stands at the centre of the right to alternative care. States need to indicate how the child's best interests are determined and attained in cases involving children who are deprived of their family environment.

¹¹² Para 7 of the UN Guidelines for the Alternative Care of Children. See also part 1(c) (on preservation of the family environment and maintaining relations) of the General Comment No. 14 (2013).

¹¹³ Para 7 and 57 of the UN Guidelines for the Alternative Care of Children.

¹¹⁴ Part VI of the UN Guidelines for the Alternative Care of Children.

¹¹⁵ Para 57 of the UN Guidelines for the Alternative Care of Children. See also para 65 of the General Comment No. 14 (2013).

¹¹⁶ Para 57 of the UN Guidelines for the Alternative Care of Children.

2.5.1.3. Non-discrimination

The principle of non-discrimination is a long-standing principle in international human rights law.¹¹⁷ The principle is enshrined in several human rights treaties obliging states to eliminate discrimination against and within their people and to perpetuate equality in humankind.¹¹⁸ Under international children's rights, non-discrimination is another core principle in the realisation of children's rights. The principle is provided under art 2 of the CRC and art 3 of the ACRWC. Both provisions underscore the right of every child to enjoy the rights enshrined in the two instruments without any discrimination on the grounds of sex, age, ethnic group, colour, religion, language, or political or other opinions. The possible grounds for discrimination are similar in the provisions of the CRC and ACRWC (the differences are indicated in the footnote).¹¹⁹ As a core principle of international children's rights, the principle of non-discrimination needs to be applied in the realisation of all rights enshrined in the CRC and ACRWC, including the right to alternative care.

The vulnerability of children in the enjoyment of their rights made it necessary for the CRC to contain a more specific provision on non-discrimination addressing the specific status of children.¹²⁰ For instance, art 2(2) of the CRC prohibits discrimination against a child because of the status, activities, or expressed opinions or beliefs of the child's parents, legal guardians or family members. This provision shows that discrimination against children can be double. As human beings, they can be discriminated against based on the general grounds listed in art 2(1) of the CRC. At the same time, children can be discriminated against based on the people related to them.

Besson argues that children are often doubly discriminated against, first as children and second as members of a specific gender or group in a given society.¹²¹ Children can be discriminated against by the state and even their families due to their status as minors. Moreover, children can be discriminated against when compared to other children but also when compared to adults.¹²² For instance, in various judicial or administrative proceedings affecting a child's well-being,

¹¹⁷ Para 1 of the General Comment No. 18 on Non-Discrimination adopted by the thirty-seventh session of the Human Rights Committee on 10/11/1989.

¹¹⁸ Samantha Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, *International Journal of Children's Rights* 13 (2005): 440–44.

¹¹⁹ Art 2(1) of the CRC includes disability and property as other possible grounds for discrimination. Moreover, art 2(2) of the CRC stipulates that a child should be protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members. On the other hand, art 3 of the ACRWC identifies fortune as a possible ground for discrimination.

¹²⁰ Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, 444.

¹²¹ Besson, 443.

¹²² Van Bueren, *The International Law on the Rights of the Child*, 38.

say in proceedings for removing a child from his or her family environment, the child's view may be disregarded due to the tender age or immaturity of the child. In the light of such vulnerability to discrimination, it was necessary to include a specific provision on non-discrimination against children in the CRC and ACRWC, besides the protection against discrimination provided in other human rights instruments as mentioned above.

The relevance of the principle of non-discrimination in realising the right to alternative care for children cannot be overemphasised. The UN guidelines for the alternative care of children reiterate the principle of non-discrimination to be applied in all decisions, initiatives and approaches adopted by states in dealing with children deprived of their family environment.¹²³ Cantwell and Holzscheiter point out that children deprived of their family environment face widespread discrimination.¹²⁴ Discrimination practices are often responsible for a child's placement in alternative care, for instance in the case of children with disabilities or those affected with HIV/AIDS or who belong to a minority group.¹²⁵ Moreover, placement in alternative care poses another potential vulnerability to discrimination when children in alternative care are compared to those under the care of their parents or families.

Disparities in the provision of social and welfare services between rural and urban areas create another indirect discrimination that may affect the numbers of children in need of alternative care. In most developing countries, social and welfare services in urban areas are better in terms of quality and quantity than those in rural areas.¹²⁶ Acute poverty levels and inadequate support services have caused children in rural areas to find themselves in need of alternative care. This disparity inadvertently creates discrimination against children in need of alternative care. Further, the age of children in need of alternative care may also determine the nature and quality of the services offered. For instance, young children are better positioned to receive adoption services or family-based alternative care than older children who are likely to end up in institutional care.

Thus, in dealing with children deprived of their family environment and needing alternative care, state actors and non-state actors need to embrace the principle of non-discrimination as enshrined in the CRC and ACRWC. Non-discrimination will reduce unwarranted differential treatment of children needing alternative care and those in the care of their parents or families.

¹²³ Para 6, 9(a), 10 and 32 of the UN Guidelines for the Alternative Care of Children.

¹²⁴ Cantwell and Holzscheiter, *Article 20*, 6.

¹²⁵ Cantwell and Holzscheiter, 6.

¹²⁶ See also Van Bueren, *The International Law on the Rights of the Child*, 38–39.

2.5.1.4. Child participation

Child participation completes the set of four core general principles on the rights of children. This principle is enshrined in art 12 of the CRC and art 4(2) and 7 of the ACRWC. The Committee on the Rights of the Child defines child participation as a term widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.¹²⁷ On the one hand, child participation as a general principle for the implementation of children's rights envisages the right of children to express their views on all matters concerning or affecting them.¹²⁸ On the other hand, it encompasses the right of children to be heard in any judicial and administrative proceedings involving the child either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.¹²⁹

The UN Committee on the Rights of the Child notes that art 12 of the CRC is a unique provision as it tends to address the legal and social status of the child. On the one hand, the provision shows that children lack the full autonomy of adults, and on the other hand, children are subjects of rights.¹³⁰ This analysis by the UN committee is made clear in the wording of art 12: “the child capable of forming his or her own views”, “the right to express their views freely” and “the views of the child being given due weight in accordance with the age and maturity of the child”. Thus, the child's right to express his or her views in matters affecting him or her is subject to the child's capacity to form his or her views together with the child's age and maturity.¹³¹ However, art 7 of the ACRWC does not make the right of the child to express his or her views dependent on his or her age and maturity.

In interpreting the phrases quoted above, the UN Committee on the Rights of the Child states that the states parties must assess the capacity of the child to form an autonomous opinion to

¹²⁷ Para 3 of the General Comment No. 12 (2009) on the right of the child to be heard adopted by the Committee on the Rights of the Child at its fifty-first session in Geneva held on 25/05 – 12/06/2009. At the time of this study, the African Committee of Experts on the Rights and Welfare of the Child was yet to adopt any comment or guideline on art 4(2) and 7 of the ACRWC.

¹²⁸ Art 12(1) of the UN Convention on the Rights of the Child, 1989; See also art 7 of the African Charter on the Rights and Welfare of the Child, 1990. Art 7 of the ACRWC subjects the freedom of children to express their views to restrictions prescribed by law.

¹²⁹ Art 12(2) of the UN Convention on the Rights of the Child, 1989. See also art 4(2) of the African Charter on the Rights and Welfare of the Child, 1990. The right of a child to be heard under both instruments is subjected to the provisions of appropriate national laws.

¹³⁰ Para 1 of the General Comment No. 12 (2009) on the right of the child to be heard.

¹³¹ Para 15 of the General Comment No. 12 (2009) on the right to be heard. See also Gerison Lansdown, *Every Child's Right to Be Heard. A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12* (London: Save the Children and UNICEF, 2011), 3.

the greatest extent possible.¹³² The assessment, however, should not be based on set age limits that determine when a child can be regarded as capable of forming opinions.¹³³ The Committee contends that it has been proved that children from the youngest age can express their views even if not verbally. It is upon the responsible actors to recognize and respect the views of a child even where those views are expressed through non-verbal forms of communication.¹³⁴

Besides the general provision on the right to be heard under art 12(1) of the CRC, which guarantees the right of children to be heard in all matters affecting them, art 12(2) of the CRC and art 4(2) of the ACRWC specifically require children to be accorded an opportunity to be heard in any judicial and administrative proceedings affecting the child. This opportunity can be given to a child directly or through a representative by following the procedural rules of national law. The UN Committee on the Rights of the Child points out that the reference to rules of national law should not be used arbitrarily to inhibit the enjoyment of this right by children.¹³⁵

The UN Committee identifies five steps that are necessary for the implementation of the right of the child to be heard.¹³⁶ The steps include preparation, hearing, assessment of the capacity of the child, information about the weight given to the views of the child (feedback) and finally, complaints, remedies and redress. The CRC committee requires these steps to be applied on a case-by-case basis and in an appropriate manner for a given context to ensure that unique factors concerning the child and the matter at hand are well catered for.¹³⁷

The steps listed above show that allowing children to express their views in matters that affect them is a process that requires conviction by the state in its implementation. For the process to be effective and meaningful, the Committee on the Rights of the Child goes further to state requirements for the implementation of the child's right to be heard.¹³⁸ The basic requirements were included in the general comment to assist states parties to refrain from adopting a tokenistic approach in the implementation of the right to be heard. The Committee requires or directs that the process of child participation needs to be transparent and informative, inclusive,

¹³² Para 20 of the General Comment No. 12 (2009) on the right to be heard.

¹³³ Para 21 of the General Comment No. 12 (2009) on the right to be heard. See also Gerison Lansdown, *Promoting Children's Participation in Democratic Decision-Making* (Florence, Italy: UNICEF, United Nations Children's Fund, Innocenti Research Centre, 2001), 2.

¹³⁴ Para 21 of the General Comment No. 12 (2009) on the right to be heard. See also Van Bueren, *The International Law on the Rights of the Child*, 136.

¹³⁵ Para 38-39 of the General Comment No. 12 (2009) on the right to be heard.

¹³⁶ Para 40-47 of the General Comment No. 12 (2009) on the right to be heard. See also sections 4.4 and 6.8 of General Comment No. 5 on state party obligations and the explanation of the principle of child participation by the African Committee of Experts on the Rights and Welfare of the Child.

¹³⁷ Para 44 of the General Comment No. 12 (2009) on the right to be heard.

¹³⁸ Para 132-134 of the General Comment No. 12 (2009) on the right to be heard.

voluntary, respectful, relevant to the child's life, child-friendly and accountable, supported by training, and sensitive to risk. Ensuring these conditions of child participation will meaningfully and effectively realise the child's right to be heard.¹³⁹

Separation of children from their parents and their placement in alternative care is an area that directly affects children.¹⁴⁰ Such cases may involve conflicting or diverse interests of the interested parties. These diverse interests need to be balanced to find a solution that furthers the child's best interests without disregarding the interests of other interested parties. Here, the importance of the right of the child to express his or her views and the right to be heard in these processes is crucial.¹⁴¹ Obtaining and considering the child's view on matters relating to alternative care and separation from the parents may assist decision-makers in determining the child's best interests.¹⁴² Mechanisms need to be introduced to ensure that children in all forms of alternative care can express their views and that their views are given due weight in the decision-making process.¹⁴³ Failure to solicit and obtain a child's opinion in providing the right to alternative care could result in placing children in care options that may not necessarily be best for them.¹⁴⁴

Generally, effective and meaningful alternative care services for children deprived of their family environment can be realised if the children affected are allowed to express their views at all stages. The children need to be heard at the pre-placement, placement and post-placement stages of alternative care. States parties need to ensure that an environment suitable for obtaining a child's views is available to implement the right to alternative care. As interested parties in the processes involved in the provision of alternative care, children need a suitable environment to express their views without any discrimination.¹⁴⁵

¹³⁹ Para 134 of the General Comment No. 12 (2009) on the right to be heard.

¹⁴⁰ Elaine E Sutherland, Listening to the Voice of the Child: The Evolution of Participation Rights, *New Zealand Law Review* 3 (2013): 354.

¹⁴¹ Para 53-66 of the General Comment No. 12 (2009) on the right to be heard. See also Lansdown, *Every Child's Right to Be Heard. A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12*, 66.

¹⁴² Para 6, 57, 66-67 and 98-99 UN Guidelines for the Alternative Care of Children emphasise the importance of obtaining the child's view.

¹⁴³ Lansdown, *Every Child's Right to Be Heard. A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12*, 86-88; Para 57 of the UN Guidelines for the Alternative Care of Children.

¹⁴⁴ Lansdown, *Every Child's Right to Be Heard. A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12*, 5-11; Elaine E. Sutherland, Listening to the Child's Voice in the Family Setting: From Aspiration to Reality, *Child and Family Law Quarterly* 26, no. 2 (2014): 154-57.

¹⁴⁵ On the participation of children in care, see Judy Cashmore, Promoting the Participation of Children and Young People in Care, *Child Abuse & Neglect* 26, no. 8 (August 2002): 837-47.

2.5.2. Specific principles of the right to alternative care

In addition to these four core principles of the rights of the child, the UN Guidelines for the Alternative Care of Children adopt two more specific principles to guide states parties in the realisation of the right to alternative care. Though not explicitly stated, it is generally accepted that the guidelines are based on two major principles that should govern the provision of alternative care for children.¹⁴⁶ One is the necessity principle, and the other is the suitability principle. These two principles complement and enhance application of the four core principles on the implementation of children's rights.¹⁴⁷

2.5.2.1. Necessity principle

The necessity principle entails that children should be placed in alternative care only if there is a pressing need to remove them from the care of their parents or family.¹⁴⁸ The rationale of this principle is that the home of their parents or family is the natural environment for the growth, well-being and protection of children.¹⁴⁹ The necessity principle echoes the importance of adopting preventive measures or mechanisms for children needing alternative care.¹⁵⁰ The principle calls for combating the factors that contribute to family breakdown. It also calls for rigorous gatekeeping mechanisms to prevent the unnecessary placement of children in alternative care.¹⁵¹ In their resource book accompanying the 2009 UN Guidelines for the Alternative Care of Children, Cantwell and others classify the preventive measures that can help prevent unnecessary placement in alternative care into three levels: primary, secondary, and tertiary level of prevention.¹⁵²

The primary level of prevention entails the need of states to ensure access to basic services, social justice, and protection of human rights without discrimination by the general population. It further calls for the adoption of measures that aim at strengthening families, providing family support, empowering young people, and helping single and adolescent parents. These measures can help to prevent child abandonment, relinquishment, and separation of the child from his or her family and promote parental or family care of children.¹⁵³

¹⁴⁶ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 22; see part II(A) of the UN Guidelines for the Alternative Care of Children on the child and the family.

¹⁴⁷ See para 6 of the UN Guidelines for the Alternative Care of Children.

¹⁴⁸ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 22.

¹⁴⁹ Para 3 of the UN Guidelines for the Alternative Care of Children.

¹⁵⁰ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 22–23.

¹⁵¹ See more in part IV(A) & (B) of the UN Guidelines for the Alternative Care of Children on preventing the need for alternative care.

¹⁵² Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 50.

¹⁵³ See para 32-38 of the UN Guidelines for the Alternative Care of Children for more details of the primary prevention measures.

The secondary level of prevention is regarded as a safety net or gatekeeping mechanism.¹⁵⁴ Unlike the first level, which focuses on the general population, the secondary level focuses on individuals and families who may be identified or declare themselves vulnerable and for whom, for whatever reason, primary prevention measures have proved inadequate.¹⁵⁵ Secondary prevention measures may include counselling and social support to enable the parents to continue looking after their children, and examining the possibility of making appropriate care arrangements with relatives.¹⁵⁶ Emphasis is also laid on the importance of an effective gatekeeping system to refer parents applying to place their children in alternative care to appropriate psychosocial and practical support services.¹⁵⁷ At this level, efforts should be made to ensure that removal does not proceed unless the results show that separation of a child from the parents is the only way to safeguard the interests and well-being of the child.

The final level is the tertiary level of prevention, referring to measures taken to ensure that children placed in alternative care do not remain there unnecessarily.¹⁵⁸ These are measures taken in cases where neither primary nor secondary prevention have succeeded, and entry into alternative care is unavoidable. At this level, the focus is on returning the child to his or her family as soon as possible and ensuring that re-placement in alternative care is not taking place (this process is referred to as family reintegration).¹⁵⁹ Securing family reintegration requires a regular review of the suitability and necessity of the placement to determine whether the circumstances are conducive to returning the child to the care of his or her parents or family.¹⁶⁰ Generally, the tertiary level of prevention requires the establishment of adequate and effective aftercare services for children placed in alternative care to prepare them for life after placement.

The importance of the principle of necessity cannot be overemphasised. Its purpose is to ensure that children remain in the care of their parents or wider family whenever possible. Nevertheless, several questions arise concerning the principle of necessity. In a conference on alternative care conducted in 2016 in Geneva, one keynote speaker¹⁶¹ noted that it is important

¹⁵⁴ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 53.

¹⁵⁵ Cantwell et al., 53.

¹⁵⁶ Para 44-45 of the UN Guidelines for the Alternative Care of Children.

¹⁵⁷ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 54; Para 44-45 of the UN Guidelines for the Alternative Care of Children.

¹⁵⁸ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 62.

¹⁵⁹ Para 49-52 of the UN Guidelines for the Alternative Care of Children.

¹⁶⁰ Para 52 of the UN Guidelines for the Alternative Care of Children; See also art 25 of the UN Convention on the Rights of the Child, 1989.

¹⁶¹ Peter Gross on 3/10/2016, at a session on the necessity principle and preventing the need for alternative care, held at the International Alternative Care Conference, Geneva, which took place from 3-5/10/2016. (The video of his presentation can be accessed at https://www.youtube.com/watch?v=v-rh8uq2KIs&feature=youtu.be&ab_channel=AlternativeCare).

to be conscious of the principle as it can be a contested concept. In his speech, the speaker raised questions that are worthy of considering when discussing the necessity principle, including the issue of who defines necessity and who makes the decision that separation is or is not necessary. It is a fact that necessity as a concept is not only socially constructed but also individually constructed. One family's necessity may not be the same as in other families, and this is also true of different countries. What amounts to necessity and when it can be regarded as necessary to separate children from their families, needs to be determined in the light of the circumstances of each individual case. For this reason, the UN guidelines insist on a case-by-case analysis considering the needs of the individual child and family involved.

2.5.2.2. Suitability principle

This principle comes into play after establishing that alternative care is genuinely needed by the child. The principle is that once alternative care is considered necessary for a child, such care must be suitable or appropriate to the child. The type of alternative care chosen must further the child's best interests and needs.¹⁶² To achieve the goal of this principle, mechanisms and processes for authorising care providers, based on established criteria, need to be put in place.¹⁶³

The principle also requires the existence of minimum standards and conditions that need to be adhered to in all care settings. These standards or conditions apply to staffing and staff qualifications, financing protection and access to basic services such as health and education.¹⁶⁴

In addition, there needs to be a range of alternative care options available to allow the possibility of making a suitable choice for a specific case.¹⁶⁵ In choosing a suitable alternative care option for a child, emphasis is placed on family-based or community-based options and reducing unnecessary institutionalisation of children.¹⁶⁶ It is generally agreed that children deprived of their family environment are better cared for in a family setting than in institutionalised care. Selecting an appropriate alternative care option for a child requires rigorous assessment, planning and review and participation of all interested parties, including the child and his or her family where necessary.¹⁶⁷ All interested parties, including the concerned child, need to be consulted to ascertain their views, which may influence the decision. The process for

¹⁶² Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 22.

¹⁶³ Para 55 and 57 of the UN Guidelines for the Alternative Care of Children; Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 22.

¹⁶⁴ See part VI and VII(A)(2) of the UN Guidelines for the Alternative Care of Children on determination of the most appropriate form of care and general conditions applying to all forms of formal alternative care.

¹⁶⁵ Para 54 of the UN Guidelines for the Alternative Care of Children.

¹⁶⁶ Para 23, 53, 123 and 126 of the UN Guidelines for the Alternative Care of Children.

¹⁶⁷ Para 57 of the UN Guidelines for the Alternative Care of Children.

determining placement needs to be transparent and comprehensive.¹⁶⁸ The decision needs to be based on short-term and long-term considerations, with the child's future interests in mind. To achieve this, there need to be regular reviews of the child's placement¹⁶⁹ in order to ensure that the placement is still suitable and necessary for the child.

Adherence to these two underlying principles of the UN Guidelines for the Alternative Care of Children depends largely on the process which Cantwell and others term as "gatekeeping".¹⁷⁰ Gatekeeping is understood to mean:

"a systematic set of procedures that encompass the mechanisms of assessment and individual case planning and management, so that all those involved in the care of children can make well-informed decisions and individualised choices in the best interests of the child."¹⁷¹

The gatekeeping process ensures that alternative care is only used when necessary and the most suitable alternative care or other support is offered to meet a child's individual needs. The process is aimed at reuniting the child with his or her family if and whenever possible. Those growing out of care receive the most appropriate support, and permanent alternatives are found if required. Nevertheless, a functioning gatekeeping process can only be realised if adequate and efficient financial and human resources are available. Moreover, effective and efficient policies and administrative and legislative mechanisms must be put in place to ensure a working gatekeeping process.

From the above discussion on the principles governing the realisation of the right to alternative for children deprived of their family environment, it is clear that providing alternative care services needs to go hand in hand with preventive and protective measures. For instance, establishing effective alternative care options such as foster care without tackling the factors that lead to children needing alternative care, or ensuring that children do not unnecessarily remain in care, will not yield the desired results in terms of the protection of children deprived of their family environment. Thus, it is crucial to adopt a holistic approach or a systems

¹⁶⁸ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 72–73.

¹⁶⁹ Art 25 of the UN Convention on the Rights of the Child, 1989; See also para 67-68 of the UN Guidelines for the Alternative Care of Children.

¹⁷⁰ Cantwell et al., *Moving Forward: Implementing the Guidelines for the Alternative Care of Children*, 67.

¹⁷¹ Cantwell et al., 68.

approach in any efforts taken to promote and enhance the right to alternative care for children.¹⁷² Alternative care services need to be considered within a broader system of child protection.¹⁷³

2.6. Conclusion

The right to alternative care for children deprived of their family environment is based on the right of the child to grow up in the care of his or her family. Ideally, the family as a basic unit of society provides an environment conducive to the full and harmonious development of the child. The absence of such an environment for children creates a need to provide an alternative environment in which a child can be placed for his or her development and well-being. As shown above, international and regional children's rights instruments require states to ensure that a child who is deprived of his or her family environment, when all other means have failed to retain the child in this environment, be accorded appropriate alternative care. This approach is based on the principles of necessity and suitability, which should guide states and all those dealing with the provision of alternative care for children deprived of their family environment.

Thus, the emphasis is on taking all necessary steps to ensure that children can remain in the care of their families. Alternative care for children should only be considered when all measures to keep them in their families have failed. Thus, states should adopt and establish preventive measures that are aimed at supporting parents and families to discharge their childcare and upbringing responsibilities, parallel to appropriate alternative care options. Moreover, family reintegration and family reunification measures need to be established to ensure that children do not remain in alternative care unnecessarily.

The principles guiding the provision of alternative care for children deprived of their family environment show that for the successful protection of such children it is necessary to adopt a holistic approach or a systems approach. The services provided to protect children deprived of their family environment need to be taken as a whole due to their interconnectedness and interdependence. Children deprived of their family environment need to be incorporated into the broader child protection system, paying due regard to all the factors that contribute to children being deprived of their family environment. Likewise, alternative care services for children should be taken as a whole rather than independent services having nothing to do with one another.

¹⁷² Fred Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations*, (UNICEF, 2010), provides a detailed information on the interdependence and interconnection of different elements of children protection systems.

¹⁷³ The need to adopt a holistic approach in implementing the right to alternative care for children is discussed in detail in subsequent chapters.

As a state party to both the CRC and ACRWC, Tanzania is under obligation to implement the rights guaranteed in these instruments according to the principles and standards set in them. In the rest of this study, the national principles and standards guiding the protection of children deprived of their family environment and the provision of alternative care in Tanzania are presented and analysed in the light of the international and regional legal framework in respect of the right to alternative care.

CHAPTER THREE: THE CHILD PROTECTION FRAMEWORK IN TANZANIA

This chapter builds on the foundation established in the previous chapter, which dwelt on the legal foundation and framework of the right to alternative care for children deprived of their family environment at the international and regional levels. The previous chapter reveals that the right to alternative care for children is best protected when considered within a broader child protection framework. Thus, the protection of children deprived of their family environment requires more than the mere placement of children in alternative care. The protection of children deprived of their family environment depends on an effective and efficient child protection system considered holistically, meaning that alternative care services cannot be discussed in total disregard of other components constituting the child protection system.

This chapter provides an overview of the child protection system in Tanzania as presented in the child protection legal and policy framework that also caters for children deprived of their family environment. Based on this policy and legal framework, the place and roles of the parents and family as the primary bearers of responsibility for the care, upbringing and protection of children is presented and analysed. The chapter also presents and examines the state's role in assisting parents and families in fulfilling their responsibilities towards children. The chapter shows the extent to which the child protection framework of Tanzania conforms to the international and regional principles and standards guiding the implementation of the right to alternative care for children.

3.1. Policy and legal framework for child protection

The legal framework of protection for children deprived of their family environment in Tanzania is embedded within the broader children's protection system. Therefore, this section presents an overview of the policy and legal framework related to children in need of care and protection, aiming to help the reader understand the principles on which the protection of children deprived of their family environment is based. However, the discussion is limited to policies, laws, guidelines, and action plans that are connected to children deprived of their family environment. The provision of alternative care to children results from care and protection initiatives and proceedings that consider the necessity of placing a child in alternative care.¹ The framework described below provides a basis for discussing various issues raised in the subsequent chapters of this study.

¹ See below section 3.5 on child protection processes and procedures.

3.1.1. The Constitution of the United Republic of Tanzania

The UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child have encouraged states parties to include the rights of children in their national constitutions as a best practice aimed at acknowledging that children and adults are holders of human rights.² Inclusion of children's rights in the bill of rights in national constitutions provides a starting point for attaching value and seriousness to the way children's rights are regarded and implemented. The Constitution of Tanzania does not contain any provision on children's rights, just as it does not provide for any specific group rights in its bill of rights. This can be contrasted with the constitutions of some other countries in Africa which contain specific provisions on the rights of children, including the right to alternative care.³

In 2011 Tanzania started a process for enacting a new constitution, which resulted in three constitutional drafts; however, the process has not been completed.⁴ All constitutional drafts contain provisions in similar words on the rights of the child, including the right of children to get care and protection from their parents, guardians or state authorities without any discrimination.⁵ It can therefore be anticipated that if the process of making the new constitution is completed, then the right to family care, and alternative care where family care is unavailable or unsuitable for the child, will be guaranteed and protected under the Constitution.⁶

3.1.2. The Child Development Policy, 2008

Tanzania formulated the first Child Development Policy in 1996, intended to guide activities relating to child survival, protection and development, which were regarded as the pillars of the policy. Due to factors like HIV/AIDS and globalisation, the changing social and economic conditions in Tanzania have led to new challenges related to the realisation of children's rights, and the formulation of the 2008 Child Development Policy. The 1996 policy was also revised

² See para 21 of the General Comment No. 5 on General Measures of Implementation of the CRC adopted by the Committee on the Rights of the Child at its thirty-fourth session (19/09 – 03/10/2003). See also section 5.2 of the General Comment No. 5 on State Party Obligations under the ACRWC and Systems Strengthening for Child Protection.

³ See sec 28(1)(b) of the 1996 Constitution of the Republic of South Africa; and art 31(4)(5) of the 1995 Constitution of Uganda. See also art 53(1)(e) of the 2010 Constitution of Kenya which provides for the child's right to parental care and protection.

⁴ The first two drafts were written in 2013 by the Constitutional Review Commission that was led by Honourable Judge Joseph Warioba (retired) followed by a further draft called Proposed Constitution which was written in 2014 by the Constituent Assembly after deliberating the second draft submitted by the Warioba Commission.

⁵ See art 42(1)(g) and art 43(1)(g) of the Warioba Commission's first and second Draft Constitutions and art 53(1)(g) of the proposed Constitution draft by the Constituent Assembly.

⁶ For more details of the constitutional reform processes, see Juliana Masabo and Ulrike Wanitzek, Constitutional Reform in Tanzania: Developing Process and Preliminary Results, *Verfassung in Recht Und Übersee* 48, no. 3 (2015): 329, 355.

to expand the pillars on which it was based by including participation rights and non-discrimination, which did not feature in the 1996 version.⁷

The discussion in this section is based on the 2008 version of the Child Development Policy, which is built on five pillars, including the right of a child to live, the right of a child to develop, the right to protection, the right for a child to participate in matters concerning him or her and the right to be protected from discrimination. The objective of the 2008 Child Development Policy is to provide a vision and mission for enhancing the rights, welfare and development of Tanzanian children. Moreover, the policy aims at providing direction for solving the problems of children with special needs, such as orphans, those with disabilities, street children and others living in hard conditions.⁸

Para 11 of the 2008 Policy acknowledges that fulfilment and realisation of children's rights in Tanzania largely depend on the parents' social and economic situation, which affects their ability to provide for their children's rights. This reflects the place and role of parents in the care and development of their children. Para 11 states that vulnerable children, particularly orphans, are in great danger of denial and violation of their rights, hence the need for the community and the state to ensure protection of the rights of these children. Furthermore, para 41(ii) of the Policy points out that one of its objectives is to mobilise communities to understand children in the most vulnerable circumstances, to provide them with basic services, and give direction on their care and protection.⁹ Para 41(viii) of the Policy emphasises the responsibilities of all parents or guardians, both men and women, in providing for the care and upbringing of their children, which is directly linked to the right to alternative care. This objective reflects the importance of parents or other persons charged with the daily care of children, which is the foundation upon which the right to alternative care for children is built.

Para 51 of the 2008 Policy has a direct link to children deprived of their family environment. It focuses on the issue of the development, care and upbringing of orphaned and vulnerable children. Among other things, the Policy calls on central and local governments to lay down coordinated community and society systems that take care of orphans and other vulnerable

⁷ The Child Development Policy, 2008 of Tanzania, 6.

⁸ See para 35, 38-40 of the Child Development Policy, 2008 of Tanzania.

⁹ Phrases like vulnerable children, children in most vulnerable circumstance or children in need of special needs have been used in different areas without further clarification. However, it appears that they are meant to include orphans, children with disabilities (para 38, 47), street children (para 38, 48, 51), institutionalised children (para 51), those in conflict with the law (para 51) or those performing child labour (para 51). These categories of children are also recognised under sec 16 of the Law of the Child Act which provides a list of children in need of care and protection.

children and raise funds for helping such children.¹⁰ Though the Policy does not make direct reference to children in need of alternative care or children deprived of their family environment, para 51 recognises possible circumstances where children would lack a proper family environment and the need for the state authorities to protect such children.

While the 2008 Child Development Policy contains no specific provisions related to the right to alternative care, it lays a foundation for the promotion, respect and protection of all children's rights without any discrimination. The practical realisation of all children's rights would imply establishing appropriate systems to deal with all children, including those deprived of their family environment. Moreover, the cooperation and coordination among different stakeholders, including families and children themselves, is an important feature of the Policy as the realisation of children's rights calls for collective efforts from the family level to the national level.

3.1.3. The Law of the Child Act, 2009 and its subsidiary legislation

The 2008 Child Development Policy was followed by the enactment of the LCA in 2009, which was revised in 2019.¹¹ The Child Development Policy made a call to reform laws that provided for different matters related to children.¹² Before the LCA was enacted in 2009, children's issues or affairs were scattered among various different laws. For instance, the Law of Marriage Act¹³ dealt with issues related to the maintenance and custody of children generally. By contrast, the Affiliation Act dealt with issues relating to paternity, and the custody and maintenance of children born out of wedlock. The Children and Young Persons Act dealt with the administration of juvenile justice, and the Adoption Act regulated issues relating to the adoption of children. Then there was the Children's Homes (Regulation) Act of 1968 which regulated the establishment and operation of children's homes in Tanzania.¹⁴ The legal framework in respect of child protection was largely uncoordinated and outdated as most of these laws (except for the Law of Marriage Act) could be traced back to the colonial era with minimum reforms after independence.

The enactment of the LCA reformed and consolidated these different pieces of legislation, making it umbrella legislation for all major issues concerning children's rights, protection,

¹⁰ See also para 53(1) of the policy on the need for the government in collaboration with the community and society and other stakeholders to prepare strategies and programmes protecting children against violence.

¹¹ Chapter 13 of the Laws of Tanzania R.E. of 2019

¹² See para 64 of the Child Development Policy, 2008.

¹³ Chapter 29 of the Laws of Tanzania R.E. of 2019.

¹⁴ Sec 160(1) of the Law of the Child Act repealed some of these laws including the Affiliation Act, the Adoption Act, the Day Care Centres Act, the Children and Young Persons Act and the Children's Homes (Regulation) Act.

welfare and development. The LCA further domesticates the international and regional instruments related to children's rights to which Tanzania is a party. The enactment of the LCA has been a milestone achievement in the legislative reforms of Tanzania concerning children's rights and welfare. The Act consists of thirteen parts addressing various issues related to children, including rights and welfare of the child; care and protection of children; foster care and placements; parentage, custody and maintenance; fosterage and adoption; employment of a child; support for the child by local government authorities; child in conflict with the law; approved schools; and institutionalised care.

Complementing the LCA are several subsidiary laws (regulations and rules) adopted to ensure the operationalisation of specific aspects provided for under the principal legislation. Concerning children deprived of their family environment and the right to alternative care, the relevant regulations include the Foster Care Placement Regulations,¹⁵ the Children's Homes Regulations,¹⁶ and the Adoption of a Child Regulations.¹⁷ Most of these regulations were adopted in 2011, two years after the enactment of the LCA. By virtue of section 160(2)(c) of the LCA, the rules that were made under the laws repealed by the LCA were to be used until such rules were replaced by new rules that were to be made following the provisions of the LCA. The process of adopting regulations or rules under the LCA is still going on. For instance, during the field research for this study, it was discovered that the process of making Fit Persons Regulations was still underway though the programme was already taking place in different local councils in the country, including Temeke and Kinondoni, which were visited by the author. It was further discovered that the current operationalisation of the Fit Persons programme is based on guidelines developed because the law does not elaborate further on fit persons apart from just mentioning this as one of the alternative care options.¹⁸

Besides the specific regulations on different alternative care options, there are also the Child Protection Regulations.¹⁹ These regulations are an umbrella set of regulations as they describe in detail different processes and procedures related to children in need of care and protection. The regulations, among other things, contain specific provisions relating to children deprived of their family environment and needing alternative care. From these regulations, principles to

¹⁵ Foster Care Placement Regulations, 2012 Government Notice No. 153 published on 04/05/2012.

¹⁶ Children's Homes Regulations, 2012 Government Notice No. 155 published on 04/05/2012.

¹⁷ Adoption of a Child Regulations, 2011 Government Notice No. 197 published on 27/03/2012.

¹⁸ The guidelines could not be obtained despite all efforts.

¹⁹ Child Protection Regulations, 2014 Government Notice No. 11 published on 09/01/2015.

adhere to in the provision of alternative care are also articulated. The regulations further explain how children may be placed in alternative care and how they may be removed from care.

Another important piece of subsidiary legislation under the LCA is the Juvenile Court Procedure Rules adopted in 2016.²⁰ As discussed below, in certain instances, a child may be placed in alternative care following a care or supervision order issued by the juvenile court. The application of these orders is made in the court, and the handling of children against whom a care or supervision order is issued is to be based on the conditions prescribed in the respective orders given by the juvenile court. Apart from the LCA, the Law of Marriage Act contains provisions relevant to children, especially those related to custody and maintenance of children.²¹

3.1.4. National guidelines and plans of action

In addition to the legislative measures mentioned above, the government, through the Department of Social Welfare in the Ministry of Health, Community Development, Gender, Elderly and Children, adopted several administrative measures, including guidelines and national plans of action relating to child care and protection. The guidelines are usually adopted as implementation aids to those providing different childcare and protection services and offer a simplified understanding of different provisions of the laws or plans of action. In this regard, the Ministry of Health, Community Development, Gender, Elderly and Children has recently adopted several new guidelines relevant to the protection of children deprived of their family environment. Such guidelines include the National Guidelines on Children's Reintegration with Families of 2019; the National Guidelines for Identification of Most Vulnerable Children and Linkage to Care, Support and Protection of 2017; and the National Guidelines on the Responsibilities of Social Welfare Officers.²²

Some guidelines were adopted before the enactment of the Law of the Child Act, including the National Guidelines for the Establishment and Management of Children's Homes of 2006 and the National Guidelines for Provision and Management of Foster Care and Adoption Services of 2006.²³ These two guidelines are obsolete following the enactment of the LCA and specific

²⁰ Law of the Child (Juvenile Court Procedure) Rules, 2016 Government Notice No. 182 published on 20/05/2016.

²¹ See part VI(h) of the Law of Marriage Act Chapter 29 Laws of Tanzania R.E. of 2019 on custody and maintenance of children.

²² All these guidelines can be found on the website of the ministry via the following link: <https://www.jamii.go.tz/>. The guidelines on the responsibilities of social welfare officers are in Kiswahili. The version available on the ministry website does not indicate the year in which these guidelines were made, but they might have been made between 2017 and 2019.

²³ The National Guidelines for Improving Quality of Care, Support and Protection for Most Vulnerable Children in Tanzania of 2009 is another set of guidelines that were adopted to facilitate implementation of the National Costed Plan of Action for Most Vulnerable Children 2007-2010.

regulations on the matters that the guidelines addressed. Most of the aspects covered in the guidelines are quite different from the regulations which are more authoritative than the guidelines. Though the LCA does not contain specific provisions on repealing these guidelines, their application would only be valid to the extent of their compatibility with the LCA and the related regulations.²⁴

National plans of action offer another administrative measure that the state adopts to provide a national strategy on various aspects requiring action. Regarding child care and protection, Tanzania has been adopting periodic plans of action related to the protection of the most vulnerable children. The National Plan of Action to End Violence Against Women and Children in Tanzania 2017/18-2021/22 (NPA-VAWC) is the latest plan which replaced, among others, the National Costed Plan of Action for Most Vulnerable Children 2013-2017 (NCPA II). The NPA-VAWC, unlike its predecessor, applies not only to children but also to women; its scope is narrow as it only addresses issues related to ending violence against women and children.²⁵ The NCPA II was preceded by the National Costed Plan of Action for Most Vulnerable Children 2007-2010 (NCPA I).²⁶

3.2. The place of family in childcare and upbringing

As discussed in chapter two, the right to alternative care is based on the right of children to grow up in a family environment, preferably in the care and protection of their parents, for their full and harmonious development. Against this background, this section explores the place and role of the family in the care and upbringing of children in Tanzania using the legal and policy framework described above. A discussion is made on who bears the social and legal responsibility for the care and upbringing of children in such family environments and what happens when such an environment is not available or unsuitable in terms of the children's best interests.

3.2.1. The place and role of parents

Socially and legally, parents bear the primary responsibility to care for and ensure appropriate upbringing for the children they beget. Parents are expected to ensure the harmonious and safe development of their children by providing them with the basic needs essential for their growth

²⁴ See sec 160(2)(d) of the Law of the Child Act.

²⁵ The Commissioner for social welfare shared this sentiment on the narrowness of the NPA-VAWC in an interview conducted in Dar es Salaam on 21/01/2019.

²⁶ A detailed account of these guidelines and plans of action is given in chapter 4 which addresses issues related to realisation of the right to alternative care in Tanzania.

and development.²⁷ To uphold this natural and social responsibility of parents towards children, sec 7(1) of the LCA echoing the CRC and ACRWC acknowledges and guarantees the right of a child to live with and be cared for by his or her parents.²⁸ Sec 7 of the LCA states as follows:

- “(1) A child shall be entitled to live with his parents or guardians
- (2) A person shall not deny a child the right to live with his parents, guardian or family and grow up in a caring and peaceful environment unless it is decided by the court that living with his parents or family shall –
 - (a) lead to a significant harm to the child;
 - (b) subject the child to serious abuse; or
 - (c) not to be in the best interest of the child.
- (3) Subject to the provision of subsection (1) and (2), where a competent authority or a court determines in accordance with the laws and procedures applicable that it is in the best of the child to separate him from his parents, the best substitute care available shall be provided for the child.”²⁹

The provisions of sec 7 of the LCA are relevant as it reflects who a child is entitled to live with under different circumstances.³⁰ Sec 7 of the LCA does not restrict itself to the child’s right to live with and be cared for by his or her parents alone. The section also refers to guardians and families, which reflects the social reality of Tanzanian society, where children may be living not only with their parents but also with other members of their extended family. The word parent under the LCA is interpreted in sec 3 to mean:

“a biological father or mother, the adoptive father or mother and any other person under whose care a child has been committed.”

However, reg 2 of the Child Protection Regulations, 2014 defines the word parent to mean:

“a biological father or mother, or the adoptive father or mother of the child.”

²⁷ See also Kenneth J Arrow, The Responsibility of Parents towards Children, in *The Proceedings of 12th Plenary Session of the Pontifical Academy of Social Sciences 20 April-2 May 2006* (Pontifical Academy of Social Sciences, Vatican City: Pontifical Academy of Social Science, 2006), 48–49; see also para 56 of the John Locke and Crawford B. Macpherson, *Second Treatise of Government*, 2. print (Indianapolis, In: Hackett, 1980); see also Fortin, *Children’s Rights and the Developing Law*, 598.

²⁸ See art 7(1) and 9(1) of the UN Convention on the Rights of the Child, 1989; and art 19(1) of the African Charter on the Rights and Welfare of the Child, 1990.

²⁹ According to sec 8(a) of the Interpretation of Laws Act, Chapter 1 of the Laws of Tanzania revised edition of 2019 the use of the masculine pronoun ‘his’ in sec 7 of the LCA includes the feminine gender. This provision is gender insensitive.

³⁰ See sec 129 of the Law of Marriage Act on the duty of parents to maintain their children. Under this section the duty is primarily placed on the father. The mother has a duty to maintain her children when the father is deceased or his whereabouts are unknown or if the father is unable to maintain the children. This provision is contrary to CRC and ACRWC which emphasises the equal responsibility of parents to care for their children.

The definition of a parent under sec 3 of the LCA seems too broad to include all those who might be in charge of the care of a child. The Law does not specifically state who any other person is and under what circumstances such a person can be in charge of the care of children.³¹ It can only be assumed that the word parent is given such a broad interpretation to cover different circumstances where a child might not be in the care of his or her biological or adoptive parents, who assume the responsibility to care for children in the first instance. For instance, a foster carer would be regarded as a parent of a child in his or her care. The definition of a parent under the LCA thus goes beyond the traditional construction of the word parent to cover legal and social constructions of the word parent. It appears that deciding who is a parent of a child in Tanzania would depend on the prevailing circumstances and conditions of the child's care and upbringing. Perhaps adding the words "where applicable" after the word "and" in the definition of parent under sec 3 of the LCA would put the broadness of the definition into perspective. However, for the purposes of this study, the definition given in the Child Protection Regulations of 2014 limiting the word parent to the biological father or mother of a child or an adoptive father or mother of a child is convenient and more appropriate. Moreover, this definition is consistent with other provisions of the law, where relatives, guardians and other child-carers are mentioned in addition to parents.³²

According to sec 8(1) of the LCA, concerning the right of the child to grow up in the care of his or her parents, parents have to maintain their children by providing them with their daily needs, including food, shelter, clothing, medical care, education and guidance, liberty, and play and leisure. The duty of parents to maintain their children is fundamental to their growth, survival and development. Thus, a child lacking parents to maintain him or her is likely to be deprived of his or her well-being and to suffer violation of his or her rights if no arrangements are made concerning the child's care and maintenance. Moreover, sec 9(3) of the LCA states as follows:

“Every parent shall have duties and responsibilities whether imposed by law or otherwise towards his child which include the duty to –

- a) protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression;

³¹ The LCA uses the words parents, guardians, family, relatives inconsistently when explaining various children's rights and entitlements in its different provisions. See sec 6, 7, 8(1)(4), and 9 of the LCA as examples of the inconsistent use of such words.

³² See sec 7(1), 8(1), 16(1)(c), 24 of the Law of the Child Act.

- b) provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development;
 - c) ensure that in the temporary absence of a parent, the child shall be cared for by a competent person,
- except where the parent has surrendered his rights and responsibilities in accordance with a written law or any traditional or customary arrangement.”

From the above sections of the LCA, it can be said that parents are the primary duty bearers in ensuring the care and protection of children they beget. Moreover, parents have a right to care for their children without unnecessary interference from other people and state authorities. This is reflected in various provisions of the LCA, which require parental consent and participation in matters that affect the status and well-being of their children, such as adoption or placement with foster parents.³³ Thus, as long as parents are duly discharging their responsibilities towards children, they are entitled to respect and protection as primary duty bearers in the care and protection of their children.³⁴

However, sec 9(3) shows that parents may surrender their rights and responsibilities towards their children by written law or any traditional or customary arrangement. The law does not make it clear or give circumstances where parents may surrender their rights and responsibilities towards children. This kind of drafting works to the detriment of children if parents are allowed to surrender their rights without explicit provisions of the law on how and when such surrendering of parental rights can be exercised.

3.2.2. The role of members of the extended family

In Tanzania, as in other countries in Africa, members of the extended family often play an important role in the care and upbringing of children. Childcare and upbringing responsibilities are shared among different family members, and parents do not exclusively discharge such responsibilities. It is not uncommon to find children living with and being cared for by their relatives even when their own parents are alive and able to care for them.³⁵ Thus, in Tanzania

³³ See sec 57(1) Law of the Child Act; and reg 5(1) Adoption of a Child Regulations, 2011; see also reg 8(3) of the Foster Care Placement Regulations, 2012.

³⁴ Sec 8 and 9 of the LCA might need to be revised as they contain very similar provisions on the duties of parents towards their children and at the same time contain provisions that might have been put into separate sections. The provisions tend to be very broad and capture issues that relate not only to parents but also to the state and society at large.

³⁵ See also Alice Armstrong, *A Child Belongs to Everyone: Law, Family and the Construction of the Best Interests of the Child in Zimbabwe*, Occasional papers, Innocenti Occasional Papers, Child Rights Series (Florence, Italy: International Child Development Centre, 1995), 3–13.

a family environment for children is provided not only by the birth or adoptive parents alone but also by members of the extended family, depending on the prevailing circumstances.

There are different circumstances and reasons that may lead children being in the care of their relatives at different points in life.³⁶ Such circumstances and reasons are not always associated with the parents' unavailability or unwillingness to care for their children.³⁷ For instance, some children are in the care of their relatives in order to have access to better education opportunities or be close to their schools. Other children live with their grandparents to give them company and support, while their parents are still in control of all affairs related to their children's care and well-being. Ideally, such children in the care of their relatives are not deprived of their rights and are not at a disadvantage compared to children in the care of their parents. As contended by Armstrong, parenthood means more than biology.³⁸

Thus, though a child may not be in the care of his or her parents, such a child may be in the care of his or her relatives where his or her well-being and development are duly protected and enhanced. It follows that a child who is in the care of his or her relatives is not a child deprived of their family environment or a child needing alternative care. Such care is to be considered as family care, providing a family environment in which a child can grow and develop. Children cared for by relatives, where such care is organised by the members of the extended family themselves and not ordered by state authorities, do not fall into the category of children needing alternative care as understood in the CRC, in the ACRCW and in this study.

The role of the extended family in the care of children has been acknowledged in the policy and legal framework regulating child care and protection in Tanzania. Acknowledgement of the role played by relatives in rearing children can be seen in various provisions of the LCA and its regulations relating to child care and protection, which refer to parents and family or relatives. For instance, sec 7(2) of the LCA provides that "a person shall not deny a child the right to live with his parents, guardian or family and grow up in a caring and peaceful environment..."³⁹

³⁶ See also Uche C. Isiugo-Abanihe, Child Fosterage in West Africa, *Population and Development Review* 11, no. 1 (1985): 56–58 on the different reasons for children being in the care of their relatives and close friends. A practice that Uche terms as child fostering, though in this study this kind of practice is referred to as care by relatives.

³⁷ Uche identifies five categories of child fostering, including kinship fostering, crisis fostering, alliance and apprentice fostering, domestic fostering and educational fostering. These categories are based on different reasons and circumstances.

³⁸ Armstrong, *A Child Belong to Everyone: Law, Family and the Construction of the Best Interests of the Child in Zimbabwe*, 10.

³⁹ See also sec 6(1)(2) of the Law of the Child Act; Also, reg 44(2) of the Child Protection Regulations, 2014.

This provision can be distinguished from some of the provisions of CRC or ACRWC which uses the term parent alone in connection with the care and upbringing of children.⁴⁰

Today, the role of members of the extended family in caring for children is generally diminishing or weakening due to changing socio-economic factors. Increasing poverty, the impacts of HIV/AIDS, and globalisation have greatly affected this customary practice.⁴¹ For instance, a regional health officer in Dar es Salaam, when asked for his opinion concerning the diminishing role of relatives in the care of children, was of the view that one of the challenges of receiving a child of a relative is the cost of food which has become expensive, so that people are less willing to increase their family size.⁴² Despite these challenges care by relatives is still very common in Tanzania.

3.2.3. The role of the state in respect of families and their childcare roles

The CRC, ACRWC and other international human rights instruments acknowledge the family as a fundamental unit of society entitled to protection and preservation by the society and state authorities.⁴³ As a state party to most of these instruments, Tanzania is obligated to ensure the support and protection of the family and its responsibilities towards its members, including children, through state policies and laws. However, the obligation of the state to ensure the protection and preservation of the family does not depend on state authorities alone but also on the engagement of the society in which families are situated. Thus, the role of the state towards families and their childcare roles is twofold, as discussed below.

On the one hand, state authorities ought to respect and promote the responsibilities of families towards children. So long as families are duly discharging their childcare responsibilities, they are entitled to maximum protection of their privacy and freedom from state intervention. Though not explicitly, sec 7(2) and (3) of the LCA (quoted above) reflects the autonomy of families towards their children as these provisions prohibit the unnecessary separation of children from their parents, guardians or families. The provisions of the LCA and those of the Child Protection Regulations, 2014, requiring the involvement of parents, guardians or other family members in various child care and protection processes, further reflect the role of the

⁴⁰ See art 7(1) and 9(1) of the UN Convention on the Rights of the Child, 1989; see also art 19(1) of the African Charter on the Rights and Welfare of the Child, 1990.

⁴¹ Bart Rwezaura, This is Not My Child: The Task of Integrating Orphans into the Mainstream of the Society in Tanzania, in *International Survey of Family Law*, ed. Andrew Bainham (International Society of Family Law, 2001), 411; Bart Rwezaura, The Value of a Child Marginal Children and the Law in Contemporary Tanzania, *International Journal of Law, Policy and the Family* 14 (2000): 327; United Republic of Tanzania, National Guidelines for Improving Quality of Care, Support, and Protection for Most Vulnerable Children in Tanzania, 1.

⁴² An interview conducted at Dar es Salaam Regional Commissioner's office in Dar es Salaam on 07/02/2019.

⁴³ See sections 2.2.1 and 2.3 for more details.

state to respect, promote and preserve the family as a fundamental unit for child development and growth.⁴⁴

The obligation of the state to respect and promote families' responsibilities towards children entails the provision of necessary support services to enable families to discharge their responsibilities. For instance, whether through its own authorities or non-state actors, the state has to ensure the availability of parenting education and awareness-raising programmes to help parents and families to know how they can discharge their parenting roles.⁴⁵ States are also obliged to ensure the availability of child day care services for working parents to enable them to perform their work without compromising their childcare responsibilities. Generally, the state has to ensure a conducive environment for parents and families to discharge their childcare and upbringing responsibilities.⁴⁶

On the other hand, state authorities are required to ensure the protection of children while in the care of their families. Thus, states have the right to intervene in the affairs of the family for the purpose of protecting children in their care. The degree of state intervention allowed hinges on the nature of the issues to be addressed. In some situations, the states can take protection measures while the child continues to be in the care of the parents. In such cases, the relevant state authorities can make an application for a supervision order and monitor the child's progress while in the care of his or her parents or family.⁴⁷ However, in other circumstances, state authorities might adopt more restrictive measures, such as removing a child from the care of his or her family and providing the child with alternative care by way of care orders or voluntary care arrangements.⁴⁸ Where necessary, the responsible state authorities might go a step further and prohibit or limit contact between the child and the family, after removing a child from the care of his or her parents or family.⁴⁹

⁴⁴ The requirement of parental consent in adoption of a child or placement of a child in foster care, and seeking the views of parents or those in charge of caring for a child in all child protection processes are examples of provisions that reflect the obligation of the state to promote and respect families and their childcare roles.

⁴⁵ The LCA does not contain an explicit provision on the need of the state to support families. A provision like sec 10(3) of the Children's Act, 2011 of Zanzibar explicit on the role of the state to support families is necessary in the LCA.

⁴⁶ United Republic of Tanzania, National Guidelines on Children's Reintegration with Families (Ministry of Health, Community Development, Gender, Elderly and Children (Department of Social Welfare), 2019), 10–11.

⁴⁷ See sec 19 of the Law of the Child Act; see also part X of the Child Protection Regulations, 2014; see also part X of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

⁴⁸ See sec 18 of the Law of the Child Act on care orders; see reg 42 Child Protection Regulations, 2014 on voluntary care arrangement and reg 44 on care orders; see also part X Law of the Child (Juvenile Court Procedure) Rules, 2016 on care orders.

⁴⁹ See sec 28 of the Law of the Child Act on exclusions orders; see also part XII of the Law of the Child (Juvenile Court Procedure) Rules, 2016 on exclusion orders.

Thus, it is clear that, in appropriate circumstances, the state may substitute parents in their childcare and upbringing roles to ensure the protection of the child's best interests. However, the state's obligation to provide substitute care for children is limited to cases where the family environment is unsuitable for the children or where parents or families are not available for whatever reasons. The following parts of this study provide a detailed discussion on how the state discharges its responsibility towards families and children, as reflected in the child protection policy and legal framework. The aim is to provide a brief picture of who bears responsibility for childcare and upbringing at different times and in different circumstances.

3.3. Administrative and institutional framework for child protection

The protection of children deprived of their family environment in Tanzania falls within the broader system of children protection. The provision of alternative care services for children is usually a response to a child protection concern, and is rarely a stand-alone response. Any discussion of the administrative and institutional framework for protecting children deprived of their family environment needs to take the entire child protection system into account, which must be considered holistically. For instance, any given alternative care system consists of sub-systems relating to the prevention of children being deprived of their family environment; different forms of alternative care services such as adoption, foster care, and institutional care; and aftercare services including integration and reunification services or preparing children in care for independent living. Below, an overview of the administrative and institutional framework for child protection is presented, with a specific focus on providing alternative care services for children deprived of their family environment.

3.3.1. Department of Social Welfare

The Department of Social Welfare, among other responsibilities, is charged with providing child protection services, including but not limited to the provision and regulation of alternative care services in Tanzania.⁵⁰ The department is responsible for providing social services and ensuring the protection of vulnerable groups in the community, including children and older people. The department is also in charge of guaranteeing different services to families and children, including counselling and reconciliation for spouses and families, and early childhood development services.⁵¹

⁵⁰ See United Republic of Tanzania, Muongozo wa Majukumu ya Maafisa Ustawi wa Jamii, (Ministry of Health, Community Development, Gender, Elderly and Children (Department of Social Welfare)), on the functions and responsibilities of the department of social welfare. The guidelines are only available in Kiswahili.

⁵¹ For further details visit <https://www.jamii.go.tz/department>.

The Child Protection Regulations, 2014 differentiate between the department of social welfare and the social welfare department. Reg 2 of the Child Protection Regulations defines the department of social welfare as a department within the ministry responsible for social welfare. At the same time, the same regulation defines the social welfare department as a department, unit, section, or other administrative body in the local government that acts on behalf of the local government authority to safeguard and promote the welfare of children. Distinguishing between these two phrases is unnecessary because, in practice, there is no distinct social welfare department responsible for welfare of children at the local government level.⁵² The existence of a department of social welfare at the central government and local government levels is not reason enough to warrant the different interpretations of linguistically similar terms. Perhaps, the social welfare department responsible for protection and welfare of children in the local government should be given a separate name.

To facilitate the decentralisation by devolution system of governance, which Tanzania implements, the department of social welfare is established at different government levels: national, regional and local. The duties and responsibilities of the department regarding children deprived of their family environment and the provision of alternative care services are discussed based on these different levels.

3.3.1.1. National level

Since 2015, the department of social welfare at the national level has been located in the Ministry of Health, Community Development, Gender, Elderly and Children.⁵³ A commissioner heads the department of social welfare at the national level, assisted by several social welfare officers responsible for different services discharged by the department. Based on the guidelines describing the responsibilities and duties of social welfare officers issued by the ministry, the department of social welfare, inter alia, plays a regulatory and supervisory role to ensure the quality of social services provided by the local government authorities. The department is responsible for preparing, disseminating and implementing policies, laws, regulations and guidelines related to the provision of social services.⁵⁴ Generally, the

⁵² In the Kiswahili version of the Child Protection Regulations, referred to as: “Tafsiri ya Kanuni za Usalama wa Mtoto, 2014 Tangazo la Serikali Na 169 la 13/5/2016” the term *idara ya ustawi wa jamii* is defined twice in reg 2. The phrases department of social welfare or social welfare department can only be translated as *idara ya ustawi wa jamii* in Kiswahili.

⁵³ See Second Schedule of the Ministers (Assignment of Ministerial Functions) Notice, 2016 Government Notice No. 144 published on 22/04/2016 at p. 10 on the duties and functions on the Ministry of Health, Community Development, Gender, Elderly and Children. For more details visit <https://www.jamii.go.tz/pages/historical-background>.

⁵⁴ See part 2.1. of the United Republic of Tanzania, Muongozo wa Majukumu ya Maafisa Ustawi wa Jamii, 5 on the responsibilities of social welfare officers at the national level.

department of social welfare sets the national vision and strategises how the vision can be achieved.

Apart from its general regulatory and supervisory roles, the department of social welfare at the national level is directly responsible for providing alternative care services and the protection of children deprived of their family environment. For instance, the LCA and the Foster Care Placement Regulations, 2012 vest power in the commissioner for social welfare to receive and approve individuals applying to become foster carers. Moreover, children can only be placed in foster care following the direction or approval of the commissioner for social welfare.⁵⁵ The commissioner for social welfare is also vested with powers to issue licences for children's homes.⁵⁶ The department of social welfare also plays an important role in the enactment of various regulations and guidelines related to the provision of alternative care services and the protection of vulnerable children.⁵⁷

3.3.1.2. Regional level (secretariat of regional authorities)

At the regional level, the department of social welfare bridges the social welfare departments at the national and local levels. At this level, the social welfare officers have to ensure the dissemination of relevant laws, policies, and guidelines related to providing social services to the respective local government authorities in their regions. Moreover, through regional social welfare officers, the department helps the local government authorities to interpret and understand the national policies, laws, regulations, and guidelines related to the provision of social services. Furthermore, the department has to help in planning and budgeting for the local government authorities' social welfare services. Thus, the social welfare officers at the regional secretariats are required to ensure the implementation and provision of all national policies, laws, regulations and guidelines related to social services, including those related to protecting children in their region.⁵⁸

The department of social welfare at the regional level has no direct involvement in providing alternative care services or protecting children deprived of their family environment. The regional social welfare officers have to ensure and facilitate the provision of these services by

⁵⁵ A detailed discussion on the role of the department of social welfare in foster care services is provided in chapter 5 of this study.

⁵⁶ For a detailed discussion, see section 4.3.4.1 of this study.

⁵⁷ Examples of guidelines prepared by the department include United Republic of Tanzania, National Guidelines on Children's Reintegration with Families, 2019; and United Republic of Tanzania, National Guidelines for Identification of Most Vulnerable Children and Linkage to Care, Support and Protection, 2017.

⁵⁸ See part 2.2 United Republic of Tanzania, Muongozo wa Majukumu ya Maafisa Ustawi wa Jamii, 5–6 on the responsibilities of social welfare officers at the regional secretariat.

the local government authorities in their regions by ensuring that they understand their responsibilities and assisting them in planning the discharge of these responsibilities.

3.3.1.3. Local level

In Tanzania, local government authorities are established under the authority of art 145 of the Constitution of the United Republic of Tanzania. Art 146 of the Constitution of Tanzania further provides, among other things, that the purpose of having local government authorities is to transfer authority to the people, i.e. decentralisation of power. These provisions in the Constitution led to the enactment of laws related to the establishment of local government authorities.⁵⁹ Based on the enacted laws, there are two kinds of local government authorities in Tanzania, district authorities and urban authorities. The district authorities include village councils, district councils and township authorities.⁶⁰ The urban authorities include city councils, municipal councils and town councils.⁶¹

These authorities have a full mandate over the designated jurisdiction areas. Among other essential functions, local government authorities are required to promote the social welfare and economic well-being of all persons within their area of jurisdiction. Subject to national policy and plans for rural and urban development, local authorities are also expected to further the social and economic development of their area of jurisdiction.⁶² Against this background, the social welfare department at the local government level is responsible for providing social welfare services in the local area. The department is specifically charged with providing services related to families, children and early childhood development; services to people with disabilities and older people; and services related to the rehabilitation of children in conflict with the law.⁶³

Regarding the protection of children, part VIII of the LCA stipulates the duties towards children of local government authorities. In this regard, sec 94(1) of the LCA is relevant, and it provides as follows:

“94.-(1) A local government authority shall have a duty to safeguard and promote the welfare of the child within its area of jurisdiction.

⁵⁹ The basic laws include the Local Government (District Authorities) Act, Chapter 287 of Laws of Tanzania R.E. of 2002 and the Local Government (Urban Authorities) Act 288 of Laws of Tanzania R.E. of 2002.

⁶⁰ See sec 3 and part II of the Local Government (District Authorities) Act.

⁶¹ See sec 3 and part II of the Local Government (Urban Authorities) Act.

⁶² See sec 60(1)(b) of the Local Government (Urban Authorities) Act, sec 113(1)(b) of the Local Government (District Authorities) Act

⁶³ See part 3 of the United Republic of Tanzania, Muongozo wa Majukumu ya Maafisa Ustawi wa Jamii, 7.

(2) The social welfare officer in the local government authority shall in the exercise of his functions in relation to the welfare of children, and may be assisted by such officers of the local government authority as the authority may determine.⁶⁴

(3) A local government authority through a social welfare officer shall provide parental counselling to both parents, guardians, relatives and children for the purpose of promoting reconciliation between them.

(4) The local government authority shall have the duty to keep a register of most vulnerable children within its area of jurisdiction and give assistance to them whenever possible in order to enable those children grow up with dignity among other children and to develop their potential and self reliance.

(5) Each local government authority shall, within its area of jurisdiction, be required to provide assistance and accommodation for any child who appears to the authority to require such assistance as a result of having been lost or abandoned or is seeking refuge.

(6) Each local government authority shall, in collaboration with the police force, make every effort to trace the parents, guardians or relatives of any lost or abandoned child and return the child to the place where he ordinarily resides and; where the authority does not succeed, refer the matter to the social welfare officer.

(7) The social welfare officer and the police officer shall, within the area of a local government authority, investigate all cases of breach or violation of the right of the child.”

Part III of the Child Protection Regulations, 2014 complements part VIII of the LCA on the duty of local governments to support and protect children. Reg 6 of the Child Protection Regulations provides that;

“6(1) A local government authority shall:

- (a) establish a district social welfare department to safeguard and promote the welfare of children in need of care and protection;

⁶⁴ The LCA R.E. of 2019 contains mistakes that were not in 2009 edition. Sec 94(2) of the LCA is one such example where the previous edition read “the social welfare officer in the local government authority shall exercise his functions....” and not as it appears in the 2019 edition quoted above. Several other language mistakes can be noted in the 2019 edition. Nevertheless, the 2009 edition of the LCA is not free from such mistakes.

- (b) appoint a head of the social welfare department to ensure the effective provision of child protection in the district;
 - (c) ensure that adequate numbers of social welfare officers, at least four of them at district level are appointed to ensure the effective delivery of services to children in need of protection; and
 - (d) ensure that at least one social welfare assistant responsible for services to children in need of protection is appointed in each ward of the district.”
- (2) The local government authority shall afford mandate in relation to the welfare of children to the social welfare department.”

These provisions show that the local government authority discharges its responsibility to support and protect children through the department of social welfare that must be established by each local government authority. The author of this study discovered that in practice these functions are discharged through the general social welfare department; there is no specific department to handle particular issues related to children as required under reg 6(1) of the Child Protection Regulations, 2014.

Reg 7(1) of the Child Protection Regulations, 2014 states that the head of the social welfare department in each district shall ensure that all necessary measures are taken to protect children from all forms of harm. Reg 7(2) of the Child Protection Regulations, 2014 enumerates the obligations to be fulfilled by the social welfare department regarding children. The list is quite long, and cannot be reproduced here. It contains obligations that require the department of social welfare to adopt measures to ensure the prevention of children being deprived of their family environment. Thus, the department is expected to adopt measures to promote the upbringing of children by their families, an essential component of any given child protection system.⁶⁵ The department of social welfare is also required to identify and keep a register of the most vulnerable children and promote these children’s welfare.⁶⁶

Regarding children deprived of their family environment, reg 7(2) of the Child Protection Regulations, 2014 contain specific obligations. The department of social welfare is required to ensure adequate alternative care, including foster care and approved children’s homes and institutions to meet the needs of children temporarily or permanently deprived of their families.⁶⁷ At this juncture, it suffices to state that the department of social welfare established by the local government authority has a mandate to deal with childcare and protection issues.

⁶⁵ See reg 7(2)(b)(e) of the Child Protection Regulations, 2014.

⁶⁶ See reg 7(2)(a)(b)(i) of the Child Protection Regulations, 2014.

⁶⁷ See reg 7(2)(g-h) of the Child Protection Regulations, 2014.

This mandate includes providing alternative care services for children who are, for whatever reason, temporarily or permanently deprived of their family environment.⁶⁸

In discharging the responsibilities that they have under the law, social welfare officers have a great deal of discretion in determining appropriate action to meet the needs of a child needing care and protection services.⁶⁹ As is shown throughout this study, the law provides for different processes, activities and procedures that social welfare officers have to follow in dealing with children needing care and protection services. Nevertheless, the law does not dictate the kind of decision to be made or action to be taken. Based on their professional skills and standards, social welfare officers are expected to make appropriate decisions fitting the needs and circumstances of children.⁷⁰ For instance, reg 62(1) of the Child Protection Regulations, 2014 provides alternative care options for children needing alternative care; however, it is left to the social welfare officers to decide which option is appropriate for any particular child.⁷¹ Thus, social welfare officers play a vital role in determining what actions are taken regarding children needing care and protection.

3.3.2. Courts

Courts play an essential role in protecting children in Tanzania as they have the power to make orders to protect and enhance children's welfare and development. Apart from the standard powers of courts to make custody, parentage and maintenance orders, juvenile courts in Tanzania have the power to make other orders, including care orders, supervision orders, exclusion orders, and search and production orders.⁷² The court can issue any of these orders when it deems that a child in respect of whom such orders are sought is suffering or is at risk of suffering significant harm. Supervision orders, exclusion orders or search and production orders play a preventive role by ensuring that a child is not suffering harm while in his or her carers' hands. Simultaneously, once the court issues a care order, the local government authority that applied for the order receives the child into its care and is obligated to provide a child with suitable alternative care.

⁶⁸ A detailed discussion on the specific functions and duties of the department of social welfare in the protection of children deprived of their family environment is explored in the preceding chapters dealing with alternative care services.

⁶⁹ See also Franklin Akosa and Bossman E. Asare, *Street-Level Bureaucrats and the Exercise of Discretion*, in *Global Encyclopedia of Public Administration, Public Policy, and Governance*, ed. Ali Farazmand (Cham: Springer International Publishing, 2017), 1–6.

⁷⁰ See also Akosa and Asare, 3.

⁷¹ See more details in section 4.3. of this study.

⁷² These orders are provided for in the LCA, the Child Protection Regulations, 2014 and the Law of the Child (Juvenile Court Procedure) Rules, 2016. For a detailed discussion of these orders, see section 3.5.5 of this study.

Though courts may not have the direct power to place children in alternative care, their role in protecting children deprived of their family environment needs to be recognised and acknowledged. Courts help local government authorities by issuing orders that enable local governments to discharge their responsibilities towards children in need of care and protection. Moreover, the proceedings leading to the issuance of these orders provide checks and balances as the courts only issue these orders when they are satisfied that the evidence before them warrants granting of orders or reliefs sought by the local government authorities.

The courts have another important role in connection with the protection of children deprived of their family environment, namely their power to grant adoption orders. Adoption is one of the permanent alternative care options for such children. Unlike other alternative care options such as foster care or institutional care, where placement is primarily an administrative action, the adoption of children in Tanzania is a judicial action following an adoption order issued by courts of competent jurisdiction.⁷³

3.3.3. Police force

The local government authorities collaborate with police officers in handling cases relating to children in need of care and protection. Police officers play a significant role in child protection by assisting the responsible social welfare officers in carrying out particular tasks. For instance, sec 94(6) of the LCA requires local government authorities to collaborate with the police force in tracing the parents, guardians or relatives of any lost or abandoned child. Moreover, under sec 94(7) of the LCA police officers, together with the social welfare officer of a given local government, have a duty to investigate all cases of breach or violation of children's rights in their area of jurisdiction.

Further, sec 96(1) of the LCA requires police officers to accompany social welfare officers in entering and searching premises where the social welfare officer has reasonable grounds to suspect child abuse. In this regard, reg 15 of the Child Protection Regulations, 2014 provides for an initial joint investigation between police officers and social welfare officers where a child referral made to the social welfare officer constitutes a criminal offence. The police force may also be involved in ascertaining criminal records of individuals wanting to care for children, such as applicants to become foster carers, as provided under reg 6(3)(e) of the Foster Care Placement Regulations, 2012.

⁷³ See section 4.3.5 for more details of the jurisdiction of courts in respect of the adoption of a child in Tanzania.

3.3.4. Non-governmental organisations

The term non-governmental organisations is used here to mean all national and international organisations that deal with child care and protection issues and that are not part of the government. Regulation 7(3) of the Child Protection Regulations, 2014, provides that the head of a social welfare department may reach an agreement with a registered NGO to provide children's services. This provision means that it might not be possible for the social welfare department to be the sole provider of social services to promote children's welfare and protection. Whether local governments make such agreements or not, it is indisputable that non-state organisations are involved in providing different services related to protecting children, including those deprived of their family environment or those at risk of losing their family environment. The role played by various institutions such as faith-based, community-based or civil society organisations cannot be overlooked. These institutions carry out different initiatives related to family strengthening and provide alternative care services to children who need alternative care. For instance, non-governmental organisations own most of the children's homes accommodating children needing alternative care.

UNICEF Tanzania, one of the UN agencies, plays a vital role in assisting the government to strengthen the child protection system. Though not always directly involved in protecting children in need of alternative care, UNICEF provides financial support and training to social welfare officers in handling cases related to child protection.⁷⁴ UNICEF has been at the forefront of the policy and law reforms related to children's affairs in the country. Apart from UNICEF, other organisations, such as Save the Children, SOS Children's Village International, play notable roles in protecting children deprived of their family environment. A detailed discussion of the roles played by non-governmental organisations can be found in chapter four of this study.⁷⁵

3.3.5. A call for coordination and cooperation

Above all these institutions is the Ministry of Health, Community Development, Gender, Elderly and Children, which oversees all activities related to the welfare and protection of children in Tanzania. The ministry sets the country's goal to ensure that children are protected and enjoy their rights. The value and importance attached to the department of social welfare by the ministry in terms of resource allocation and its empowerment determine the strength of a functioning child protection system. However, the administrative and institutional framework

⁷⁴ An interview conducted at UNICEF with the child protection officer in Dar es Salaam region on 21/01/2019.

⁷⁵ See section 4.1.4 of this study for further details.

must always be seen within the wider network of actors in the field of child protection. One cannot overlook the role played not only by other government ministries,⁷⁶ departments and agencies, but also by families and community members, who at some point may have to collaborate with the institutions discussed above or to act on their own in ensuring the protection of children deprived or likely to be deprived of their family environment. Successful protection of such children calls for a holistic approach to enhance coordination and cooperation among these institutions and stakeholders in the child protection system.

3.4. Principles and standards governing the protection of children

This section presents and discusses the general principles and standards governing children's protection as provided for in Tanzania's child protection framework. These general principles are discussed because alternative care services constitute an integral part of the broader child protection system. Specific principles governing the protection of children deprived of their family environment are provided for in the Child Protection Regulations, 2014 and the Children's Homes Regulations, 2012. These principles are discussed in the light of the international and regional principles governing the protection of children deprived of their family environment, as presented in chapter two of this study. Here, the aim is to assess the extent to which Tanzania's policy and legal framework conform to the international and regional standards for protecting children deprived of their family environment.

3.4.1. General principles

The LCA does not contain general principles or standards to guide those dealing with children's matters. As a remedy, part II of the Child Protection Regulations, 2014 fills this gap by providing general principles and standards to guide institutions or persons who make decisions that impact children. These general principles should have been included in the principal legislation, the LCA, rather than in the subsidiary legislation. Inclusion of the general principles in the principal legislation would add value and weight to these principles for those in charge of handling children's affairs.⁷⁷ Moreover, the inclusion of general principles and standards in the principal legislation would help to create consistency across the entire policy and legal framework governing child protection.

⁷⁶ For instance, the Ministry of the President's Office Regional Administration and Local Government is an important ministry as it is in charge of the operation and budgets for the local governments with the responsibility to ensure the protection of children welfare in their jurisdiction.

⁷⁷ See chapter 2 of the Children's Act 38 of 2005 of South Africa as amended. See also sec 3 of the Uganda Children Act of 1997 as Amended which provides general guiding principles on dealing with children.

Reg 3(1) of the Child Protection Regulations, 2014 provide the general principles for child protection as follows:

“In reaching any decision relating to a child, social welfare institutions, court, local government authorities, the police, members of the Most Vulnerable Children Committee (MVCC) or any other body mandated as such shall be guided by the following principles-

- (a) the best interests of the child shall be the primary consideration;
- (b) a child who is capable of expressing his own views is afforded the right to express those views freely in all matters affecting him and to have those views given due weight in accordance with his age and maturity;
- (c) a child is afforded an opportunity to be heard in any judicial [or] administrative proceedings affecting him, either directly, through a representative, or an appropriate body, in a manner consistent with the procedural rules of the Juvenile Court or other relevant court.”

In these provisions, two fundamental principles governing the implementation of children’s rights as envisaged under regional and international children’s rights can be identified. Reg 3(1)(a) obliges individuals and institutions dealing with children to give primary consideration to the child’s best interests in their decision-making processes. Sec 4(2) of the LCA and reg 4(1) of the Children’s Homes Regulations, 2012 also reiterate the best interest principle as a primary consideration in all actions concerning children, whether taken by public or private institutions, courts or administrative bodies.

Child participation and the right of the child to be heard in all matters concerning him or her is another principle captured under reg 3(1)(b)(c) of the Child Protection Regulations, 2014. This principle is also provided for by sec 11 of the LCA. A child or his or her representative needs to be involved in all processes, whether judicial or administrative, that affect the child’s life. A child’s representative can be a parent or guardian. If no parent or guardian is able to provide effective representation for the child, and the child cannot afford to pay for legal representation, the child must be provided with a representative free of charge whenever practicable. If it is impracticable to provide free legal assistance to the child, the court must ensure that the child is provided with appropriate assistance in the

form of a guardian ad litem.⁷⁸ The LCA and its regulations enshrine this principle in several provisions addressing matters affecting the child in both civil and criminal issues that cannot be captured in this study. However, the significance of this principle in dealing with children deprived of their family environment is discussed in the subsequent parts of this study.

Reg 3(1) of the Child Protection Regulations does not contain the principles of non-discrimination and the right to life, survival and development, which are among the four basic principles guiding the protection of children's rights in international and regional instruments. Nevertheless, these principles are provided in the LCA and its other regulations though not always designated as principles or standards.⁷⁹ The absence of these principles under reg 3 of the Child Protection Regulations, 2014, does not water down the centrality of these principles in all processes dealing with child protection in Tanzania. Under the international and regional framework, Tanzania is bound to protect children's rights and to adhere to the four core principles governing the implementation and realisation of children's rights. However, it would have been appropriate to include these two principles in the legislation by giving them the importance they deserve.

3.4.2. Specific principles for children deprived of their family environment

Reg 3(2) of the Child Protection Regulations, 2014 and reg 3 of the Children's Homes Regulations, 2012 provide specific principles for responsible individuals and institutions in dealing with children deprived of or at risk of losing their family environment. Adding extra principles for such children reflects awareness of the increased vulnerability of these children and the need to take additional measures to ensure that appropriate protection is accorded to them. Reg 3(2) of the Child Protection Regulations, 2014 provides that:

“Where a child is-

- (a) lost;
- (b) abandoned or seeking refuge;
- (c) is placed in the voluntary care of a local government authority;
- (d) suffering or likely to suffer harm and cannot live with his parents,

any decision on the child's care shall be subject to the following general principles-

⁷⁸ Reg 3 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 defines guardian ad litem as a person who takes the responsibility or is appointed to represent and protect the interests of a child in a Juvenile Court proceedings.

⁷⁹ See sec 5, 9(3)(b) and 42 of the Law of the Child Act; see also reg 4(2)(a) of the Children's Homes Regulations, 2012, prohibiting discrimination against children placed in children's homes.

- (a) a placement should be family based rather than institutional;
- (b) a placement for a child should be permanent rather than temporary;
- (c) unless it is in the best interests of a child, siblings should not be separated;
- (d) 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; and
- (e) delay in reaching a decision on the child's future should be avoided as it is likely to prejudice the welfare of the child.”

On the other hand, reg 3 of the Children's Homes Regulations, 2012 provides as follows:

“Where a child is deprived of his or her family environment, any decision on his care shall be subject to the following general principles-

- (a) that the child shall grow up in a family environment for the full and harmonious development of his or her personality;
- (b) that the child's wishes and feelings shall be ascertained as far as practicable and shall be given due consideration, having regard to the child's age, development and understanding;
- (c) that placement for a child in a Children's home should be temporary rather than permanent measure and must be used as a last resort;
- (d) that a placement shall be family-based rather than institutional;
- (e) that placement shall be national rather than international;
- (f) that the decisions on any placement for a child shall be taken in the best interests of the child;
- (g) that, due regard shall be paid to the desirability of continuity in a child's upbringing, and to the child's religious and cultural background;
- (h) that, all public bodies shall act expeditiously in the process of deciding any matter relating to the child;
- (i) any child admitted in the home shall be entitled to a birth certificate, and if the child who is admitted in the Children's Home does not have a birth certificate, the Manager must obtain one as soon as practicable, and the institution shall bear the costs;
- (j) that, a child with disabilities shall be entitled to special care, treatment, facilities for his or her rehabilitation and equal opportunities to education and training whenever possible to develop his or her maximum potential and to [become] self-reliant; and

(k) that, siblings shall preferably not be separated unless their best interests dictate otherwise.”

The differences between these two sets of general principles guiding the protection of children deprived of their family environment underscore the importance of including them in the principal legislation, in this case, the LCA. If the LCA enshrined the general principles in its provisions, it would not be necessary to formulate general principles of child protection in the subsidiary legislation. Moreover, there would not be unnecessary repetitions and inconsistencies in the provisions of the subsidiary legislation. A few principles, those appearing in both regulations and relating to the necessity and suitability principles, are selected and discussed below.

3.4.2.1. Family-based care over institutional care

The importance of allowing a child to grow up in a family environment cannot be overemphasised. In chapter two, where the international and regional legal foundation of the right to alternative care is discussed, the nature of the family as the natural and most suitable place for children to grow and develop is highlighted. When all factors remain constant, it is a principle legally upheld that a child has a right, whenever possible, to grow up in the care of his or her family, preferably in the care of the parents. This long-standing principle generates a vital standard in protecting children deprived of their family environment that family-based care should be preferred over institutional care. This principle is enshrined under reg 3(2)(a) of the Child Protection Regulations and reg 3(d) of the Children’s Homes Regulations, 2012.⁸⁰

Ideally, family-based alternative care is deemed to be in the best interests of children deprived of their family environment and preferable to institutional care. In institutional care, a child may lack love and affection and be unable to develop an attachment to a constant caregiver.⁸¹ When regulated and coordinated appropriately, family-based alternative care can undoubtedly provide a child with more opportunities compared to children placed in institutional care. Family-based alternative care can enable a child to remain attached to the community and learn community values, and can enhance the child’s integration in the community.

3.4.2.2. Placement should be permanent rather than temporary

A child deprived of his or her parental care or family environment is entitled to alternative care that is stable to avoid unnecessary distractions in the child's development and welfare. One way

⁸⁰ These provisions can be read together with reg 62 of the Child Protection Regulations, 2014 on placement of a child.

⁸¹ See section 4.3.4.5 of this study for more details on the effects of institutional care on children

of achieving this goal is by ensuring continuity of the child's alternative care. Nevertheless, in some instances, children without family care are subjected to multiple placements that are likely to affect their physical, mental, and psychological development.⁸² Para 60 of the UN Guidelines for the Alternative Care of Children states that frequent changes in the care setting are detrimental to the child's development and ability to form attachments and should be avoided. It is against this background that the principle of permanent care rather than temporary care is important.

Authorities in charge of children needing alternative care must ensure that stable and, where appropriate, permanent alternative care is preferred over temporary care. The question which arises is what amounts to permanent care or temporary care? Unfortunately, neither the LCA, the CRC, nor the ACRWC attempts to define or describe what amounts to permanent care or temporary care. The online Cambridge Dictionary defines the word permanent as something lasting for a long time or forever or that which exists or happens all the time. On the other hand, the same dictionary defines temporary as something not lasting or that which is not permanent.⁸³ However, from paragraph 60 of the UN Guidelines for the Alternative Care of Children, the reference to the permanency of placement is connected to the stability of the placement.

In most instances, there is a tendency to think that adoption or reintegrating the child back into his or her family are the only permanent care options. By contrast, foster care and institutional care have been classified as temporary care placements.⁸⁴ However, the classification of alternative care services depends on how a given state or community has described such care options. Apart from adoption, the other alternative care options, including foster care or institutional care, can be permanent or temporary, depending on how they are being used in a given setting. For instance, under the Children's Act of Zanzibar, foster care, which is regarded as a temporary measure under the LCA, is defined as a temporary or long-term provision of a caring home to a child in need of alternative care.⁸⁵

Perhaps the words 'permanent or temporary placement' should be replaced with 'long-term or short-term placement'. In an ideal situation, the time for the child to stay in alternative care is determined mainly by the factors that led to the child needing alternative care and the needs of that child. Not all children needing alternative care require permanent care. Paragraph 61 of

⁸² See para 60-63 of the UN Guidelines for the Alternative Care of Children on the rationale of permanency of alternative care.

⁸³ <http://cambridge.org/dictionary/english>.

⁸⁴ Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 9–11, 15 on the potentials of foster care as an alternative care option.

⁸⁵ See sec 2 of the Children's Act, 2011 of Zanzibar.

the UN Guidelines for Alternative Care elaborates this point by stating that planning for the provision of alternative care and permanency should be carried out from the earliest possible time, ideally before the child enters care. The planning requires considering the immediate and long-term outcomes of each option considered and should comprise short- and long-term propositions depending on the circumstances that led to the child needing alternative care. For instance, an orphan or an abandoned child whose parents' whereabouts are not known may require long-term placement or permanent placement, unlike a lost child or a child whose parents are only temporarily incapacitated. Thus, understanding and differentiating between these different needs is an essential element in protecting children needing alternative care.

Whether to go for permanent or temporary alternative care depends on the child's specific needs and the stability of the care option after due assessment of the circumstances and conditions of the child and those of the child's family. Determining appropriate and stable alternative care for children by preparing care plans and placement reviews constitutes an essential element of protecting children deprived of their family environment.

3.4.2.3. Siblings should not be separated

The importance of preserving family relationships is made clear in the principle that where siblings are without family care, efforts must be made to ensure that they are not separated, unless separation is in their best interests.⁸⁶ This principle is closely linked to the principle that alternative care for a child should ensure continuity in the child's upbringing and cultural, ethnic, religious and linguistic background. An inference can be drawn from para 22 of the UN Guidelines for the Alternative Care of Children that it is in the child's best interest to maintain contact with his or her siblings. And for this reason, if it is not possible to accommodate siblings in a single family, then appropriate institutional care should be provided to avoid separating the siblings. Nevertheless, the proviso added to this principle that non-separation of siblings is subject to the child's best interests underscores the importance of considering the needs of each individual child before deciding to keep siblings together.

3.4.2.4. Continuity in the child's upbringing and background

This principle is captured under reg 3(2)(d) of the Child Protection Regulations, 2014 and reg 3(g) of the Children's Homes Regulations, 2012. It is also reflected in reg 48(a)(iv) and 62(3)(b) of the Child Protection Regulations, 2014, which requires the social welfare officer to ensure that a child is placed in a care option that allows the child to live near his or her former home.

⁸⁶ Reg 3(2)(c) of the Child Protection Regulations, 2014; and reg 3(k) of the Children's Homes Regulations, 2012.

Moreover, the care option should not disrupt the child's education or training. A child's upbringing and cultural, religious, ethnic and linguistic background are crucial components of the child's identity, which is one of the rights of children protected by CRC and ACRWC. Moreover, reg 3(e) of the Children's Homes Regulations provides another principle connected to this: child placement shall be national rather than international. Adherence to this principle entails having complete details about the child's background and establishing adequate alternative care options within and across the different parts of the country.

3.5. Child protection processes and procedures

The LCA and its subsidiary legislation, especially the Child Protection Regulations, 2014 and the Law of the Child (Juvenile Court Procedures) Rules, 2016, provide processes and procedures to be followed in handling children in need of care and protection. According to reg 4(1) of the Child Protection Regulations, 2014, a child is regarded as needing care and protection if the child has suffered harm or is at risk of suffering harm based on the circumstances stipulated under sec 16 and 144 of the LCA.⁸⁷ Sec 16 of the LCA provides an inclusive list of children needing care and protection. The list includes, among others, orphans or children abandoned by their relatives, neglected or ill-treated children, destitute children or children under the care of destitute parents. Sec 144 provides for a mother imprisoned with a child, in which case a social welfare officer is required, among other things, to provide the most appropriate care for the child. If the social welfare officer fails to provide such a child with the most appropriate care, that child is deemed to be in need of care and protection.

The processes and procedures of dealing with children in need of care and protection are essential for this study because children deprived of their family environment are children in need of care and protection. Ideally, a child in need of alternative care cannot be placed in alternative care or provided with other appropriate care and protection services without going through the processes and procedures expounded below. Moreover, placement of a child in alternative care should be an outcome of care and protection proceedings that help the relevant authorities to determine the appropriate action to protect the child. The discussion below focuses on critical processes and procedures to provide a basic understanding of child protection in Tanzania and how the principles discussed above are reflected in the system in Tanzania.

⁸⁷ See reg 4(4)(5) of the Child Protection Regulations, 2014 on what constitutes harm to a child and the factors to determine the extent of harm that a child has suffered.

3.5.1. Child protection referrals

Authorities in charge of ensuring care and protection of children, in this case the local government authority through its social welfare department, may not always be aware of children in need of care and protection in their jurisdiction without receiving information from members of the public. Sec 95(1) of the LCA places a duty on every community member, with evidence of child's right violation, to report any child protection concern to the local government authority. Reg 11 of the Child Protection Regulations, 2014 expands on the provision of sec 95(1) of the LCA and provides that:

“11(1) Any member of the community who has a reasonable cause to believe that-

- (a) a child is suffering or is at risk of suffering harm within the meaning of regulation 4; or
- (b) a child is lost, abandoned or excluded from home;
- (c) a child is engaged in exploitative child labour; or
- (d) a parent, guardian, relative or carer who has custody of a child is refusing or neglecting to provide the child with food, shelter, the right to play or leisure, clothing, medical care or education report shall refer the matter to the local government authority of the area.”⁸⁸

Reg 11(2) of the Child Protection Regulations, 2014 provides that a child protection referral under reg 11(1) of the Child Protection Regulations, 2014 may be made orally or in writing by a community member or by telephone through the child helpline. The procedure of communicating child protection referrals is simplified to enable each community member to consult relevant authorities in the case of any child protection concern. Nevertheless, according to reg 12(2), a professional, staff member, or volunteer working with or providing services to children can also make a child protection referral to the intake social welfare officer or a social welfare officer in the ward. In such circumstances, the referral has to be confirmed in writing.⁸⁹

Reg 10 of the Child Protection Regulations, 2014 requires the head of the social welfare department in the respective local government authority to ensure the availability of an intake social welfare officer to receive child protection referrals at all times.⁹⁰ Nevertheless, under reg

⁸⁸ Read together with reg 12 of the Child Protection Regulations, 2014 on professional referral of a child. See also rule 50(7) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 on referrals made by the juvenile court to the social welfare department where the child has no fixed place of abode or is without parental care.

⁸⁹ See reg 12(1)(2) of the Child Protection Regulations, 2014.

⁹⁰ Reg 2 of the Child Protection Regulations, 2014 defines an intake social welfare officer as a social welfare officer who is responsible for receiving referrals and for taking emergency action with respect to a child who is in need of protection.

11(1) of the Child Protection Regulations, 2014, the child protection referral can be received by other personnel in the local government authority, such as a social welfare officer in the ward, a district social welfare officer, a ward executive officer, a village executive officer or *mtaa* (street) executive officer, or a police officer stationed in the area.⁹¹ When the child protection referral is received by a person other than the intake social welfare officer or a social welfare officer in the ward, the receiving person has to inform the intake social welfare officer or the social welfare in the ward.⁹² In all circumstances, a child protection referral must reach the intake social welfare officer not later than 24 hours after reception of the referral.

Reg 13 of the Child Protection Regulations, 2014 provides the procedure to be followed by the intake social welfare officer after receiving a child protection referral. The intake social welfare officer has to ensure the existence of a file for a child mentioned in the referral. If there is a previously closed file concerning the child, the file can be reopened. The intake social welfare officer has to open a new hard copy file for the child in any other circumstances.⁹³ Once the intake social welfare officer receives the referral, he or she is required to determine within 24 hours whether there is a cause for concern and if the matter needs to be investigated further.⁹⁴ However, in circumstances where the intake social welfare officer reasonably believes that the child is not at immediate risk of harm, he or she may request the ward social welfare officer to clarify with the referrer the nature of the concerns, how and why they have arisen. Once the intake social welfare officer makes such a request, the ward social welfare officer has to contact the referrer within 48 hours.

The ward social welfare officer has to provide any information obtained from the referrer to the requesting intake social welfare officer within 24 hours after receiving such information. After receiving this additional information, the intake social welfare officer has to decide within 24 hours if there is a cause for concern and if an initial investigation is necessary.⁹⁵ The intake social welfare officer may decide not to proceed with an initial investigation. In such instances, the intake social welfare officer has to inform the referrer of the decision not to proceed with the investigation within 24 hours of the decision and record the decision with the reasons on the child's hard copy file. If no further action is needed, the intake social welfare officer may close the child's file.⁹⁶

⁹¹ See reg 11(2) of the Child Protection Regulations, 2014.

⁹² See reg 11(3) of the Child Protection Regulations, 2014.

⁹³ See reg 13(1)(2)(3) of the Child Protection Regulations, 2014.

⁹⁴ See reg 11(5)(6) of the Child Protection Regulations, 2014.

⁹⁵ See reg 13(6-10) of the Child Protection Regulations, 2014.

⁹⁶ See reg 13(11) of the Child Protection Regulations, 2014.

3.5.2. Initial investigation

An initial investigation is a risk assessment process to determine whether intervention is required to ensure that the child does not suffer or does not continue to be at risk of suffering harm.⁹⁷ An initial investigation takes place following a child protection referral received per reg 11 and 12 of the Child Protection Regulations, or at any other time when the intake social welfare officer obtains information or believes that a child requires protection.⁹⁸ The head of the social welfare department is the one who has the power to direct that an initial investigation be undertaken.⁹⁹ The head of the social welfare department has the power to direct the intake social welfare officer or another social welfare officer, or, in the absence of a social welfare officer in the ward and a lack of capacity in the social welfare department, a trained member of the most vulnerable children committee, to conduct such an investigation.¹⁰⁰

Reg 14(5) of the Child Protection Regulations, 2014 provides time frames to conduct the initial investigation. In normal cases, the intake social welfare officer or the person directed to conduct the initial investigation must acknowledge the referral information within 72 hours (3 days). The initial investigation has to commence within 72 hours and be completed within seven days after commencement. However, in cases where there is evidence that a child is at immediate risk of harm or requires immediate protection, the intake social welfare officer has to complete the initial investigation within 24 hours. After the initial investigation, the intake social welfare officer or the person who conducted the investigation must prepare a written report to be placed in the child's file.¹⁰¹ In cases where the information received by the social welfare department constitutes a criminal offence against a child, the department of social welfare must collaborate with the police and determine the way forward, including the possibility of doing a joint investigation per reg 15 of the Child Protection Regulations, 2014.

In the course of conducting the investigation, reg 16 of the Child Protection Regulations, 2014 requires that a child who is capable of verbal expression should be allowed to express his or her views. This appears to be discriminative against those children who are not capable of verbal expression but who are capable of expressing their views through non-verbal means. Ascertaining children's views can help to determine whether there is reasonable cause to believe that the child is suffering harm or is at risk of suffering harm. If a criminal offence may have

⁹⁷ Reg 14(1) of the Child Protection Regulations, 2014.

⁹⁸ See reg 14(1)(a-e) on different circumstances that may lead to initial investigation. See also rule 89(5)(f) of the Law of the Child (Juvenile Court Procedure) Rules on child protection referrals by the juvenile court.

⁹⁹ Reg 14(1) of the Child Protection Regulations, 2014.

¹⁰⁰ Reg 14(2) of the Child Protection Regulations, 2014. Note, the Most Vulnerable Children Committees were integrated within the institutional framework of the NPA-VAWC as discussed in section 4.1.2. of this study.

¹⁰¹ Reg 14(5) of the Child Protection Regulations, 2014.

been committed against a child, a police officer must conduct an investigative interview with the child in the presence of a social welfare officer.¹⁰² The social welfare officer or the police officer interviewing the child must have received training on how to interview children who have suffered or are at risk of suffering harm or those who are victims or witnesses of a crime.¹⁰³

The initial investigation may be associated with many other actions or processes essential to the fulfilment of the objective of the investigation. For instance, a child may be subjected to a medical examination.¹⁰⁴ Moreover, where a child who is the subject of initial investigation cannot be located by the social welfare officer or police officers due to the actions of parents or guardians, the head of the social welfare department may apply for a care or supervision order under which a search and production order may be sought in a juvenile court.¹⁰⁵ A search and production order allows the head of the social welfare department of the local government authority to enter the place where the child is suspected to be and remove the child to a place of safety. The order may also require the child's parent to produce the child at a place and time determined by the court.¹⁰⁶

At the end of the initial investigation, the intake social welfare officer, in consultation with the head of the social welfare department, has to decide if there is a reasonable cause to believe that the child or any other child in the household is suffering harm or is at risk of suffering harm. Depending on the findings resulting from the initial investigation, the intake social welfare officer may decide that there is no reasonable cause to believe that a child is suffering harm or is at risk of suffering harm. In this instance, the social welfare officer may decide that no further action is needed or that the family be referred to the local Most Vulnerable Children Committee for support. The child's file is then closed. However, the social welfare officer may decide that there is reasonable cause for concern.¹⁰⁷ If a parent or relative is charged with a criminal offence concerning the child following the initial investigation, the child's file cannot be closed until the conclusion of the criminal case against that person.¹⁰⁸ The intake social welfare officer has

¹⁰² Reg 16(3) of the Child Protection Regulations, 2014.

¹⁰³ Reg 16(5) of the Child Protection Regulations, 2014.

¹⁰⁴ See reg 16(6) of the Child Protection Regulations read together with reg 20 and 21 of the same regulations on the refusal of a parent to agree to a medical examination and child's consent to medical examination respectively.

¹⁰⁵ See reg 18 and 19 of the Child Protection Regulations, 2014. See also sec 29(2) of the LCA and part XI of the Law of the Child (Juvenile Court Procedure) Rules, 2016. The references to the juvenile court rules in the Child Protection Regulations under reg 19 are wrong. The Juvenile Court Procedure Rules contain no part XIV.

¹⁰⁶ See also sec 29(2) of the LCA and part XI of the Law of the Child (Juvenile Court Procedure) Rules, 2016 for more on search and production order.

¹⁰⁷ See reg 24(1) of the Child Protection Regulations, 2014.

¹⁰⁸ See reg 24(3) of the Child Protection Regulations, 2014.

to inform the referrer of the outcome of the initial investigation as per reg 25 of the Child Protection Regulations, 2014.

3.5.3. Social investigation

A social investigation follows the initial investigation, if this shows that there is reasonable cause for concern in relation to the child. The social investigation has to be completed within seven days once started.¹⁰⁹ Unlike the initial investigation, which aims to determine if intervention is necessary to protect the child after the reception of a referral, the social investigation looks into the child's and the family's social environment to determine appropriate steps to be taken to ensure the protection of the child. The social investigation leads to a social investigation report, which shows whether there is harm or potential risk of harm suffered by the child, and assesses the parents' or guardians' ability to care for and respond to the child's needs appropriately.¹¹⁰

In the course of this investigation, the intake social welfare officer has to ascertain the views of different persons involved in the case. If the child is sufficiently mature, the social welfare officer has to speak to the child alone. If the child is not of sufficient maturity, the social welfare officer has to speak to the child's parents, guardian or carer, and other relatives. Moreover, professionals and other people in contact with the child and the family have to be contacted and asked for their views on the child's situation. Where appropriate, the intake social welfare officer may also arrange for the child to be medically examined. The child's history and information obtained from all sources, including any existing records, must be analysed.¹¹¹

At the end of the social investigation, the intake social welfare officer, in consultation with the head of the social welfare department, have to decide on the child's way forward. If there is cause to believe that a crime has been committed against the child, police authorities have to be consulted in reaching the decision. Reg 26(4) of the Child Protection Regulations, 2014 provides four possible decisions that can be made following the social investigation. First, there is no reasonable cause to believe that the child or any other child in the household is suffering or is at risk of suffering harm and no further action is required. Second, there is no reasonable cause to believe that the child or any other child in the household is suffering harm. Still, the family should be referred to the nearest Most Vulnerable Children Committee for support. Third, there is reasonable cause to believe that the child is suffering harm, and the child's case

¹⁰⁹ Reg 26(1) of the Child Protection Regulations, 2014.

¹¹⁰ Reg 26(2) of the Child Protection Regulations, 2014.

¹¹¹ Reg 26(3) of the Child Protection Regulations, 2014.

must be referred to a child protection conference. Lastly, the child is suffering harm or is at immediate risk of harm and emergency action is required to safeguard the child. In this last case, the intake social welfare officer, in consultation with the head of the social welfare department, may remove the child to a place of safety.¹¹² Reg 26(4)(d) gives no further clarification on what amounts to emergency action to safeguard the child.

3.5.4. Child protection conference and child protection plan

Reg 26(4)(c) of the Child Protection Regulations, 2014, provides that after a social investigation the intake social welfare officer may decide that there is reasonable cause to believe that the child is suffering harm and that the child's case be referred to a child protection conference. This is explained in Part VIII of the Child Protection Regulations, 2014. A child protection conference is held when the child is suffering or is at risk of suffering harm, but immediate action is not required to safeguard the child.¹¹³ When a child is referred to a child protection conference as per reg 26(4)(c) of the Child Protection Regulations, 2014, the head of the social welfare department has to assign the case to another social welfare officer to handle the case. The assigned social welfare officer has to convene the child protection conference within ten days of completing a social investigation.¹¹⁴

Reg 27(3) of the Child Protection Regulations, 2014, provides that the purpose of the child protection conference is to enable the professionals involved with the child and the family to review all relevant information and plan how to safeguard the child and promote the child's welfare.¹¹⁵ Reg 27(5) of the Child Protection Regulations, 2014 provides different duties for the child protection conference, including gathering and analysing information about the child's health, development and well-being.¹¹⁶ The conference also has to analyse the capacity of the parents, guardian or any carer to ensure the child's safety and promote the child's health and development. The conference has to reach a decision on the likelihood of the child suffering harm in the future, recommend needed future action to safeguard the child and how that action can be taken forward.

¹¹² Reg 4(5) of the Child Protection Regulations, 2014 provides criteria that the social welfare officer can use to determine whether a child has suffered harm.

¹¹³ Reg 27(1) of the Child Protection Regulations, 2014.

¹¹⁴ Reg 27(2) of the Child Protection Regulations, 2014.

¹¹⁵ Reg 27(4) of the Child Protection Regulations, 2014, identifies persons who the social welfare officer may invite to participate in the child protection conference, including parents, guardians or relatives, the social welfare officer who conducted the social investigation, and professionals like doctors, nurses, teachers or police officers.

¹¹⁶ Read reg 27(5) with reg 29 of the Child Protection Regulations on the information to be presented by the assigned social welfare officer to the child protection conference.

Reg 28 provides for the involvement of a child of sufficient age and maturity, and of the child's parents or guardians in the child protection conference. If it is not against the child's best interests, the child, parents, or guardians should be informed of the conference's purpose. They should also be allowed to bring advocates or friends to support or assist them at the conference. However, a parent or guardian who is alleged to have abused a child or is facing criminal prosecution against the child or whose presence at the conference may result in violence or intimidation of the child may be excluded by the chairperson from the child protection conference.¹¹⁷ Parents or guardians who are excluded, unwilling or unable to attend the conference should be permitted to send a statement in writing to be read by members of the conference. They can also present oral evidence through advocates, friends, supporters or a member of the conference other than the child. Moreover, where a child wishes to attend the child protection conference but cannot find an advocate, supporter or friend, the social welfare officer has to identify a person to assist the child. The social welfare officer has to ascertain and make known the views of a child who is not able to attend the conference in his or her own best interests.¹¹⁸

After the child protection conference, the professional members and the chairperson have to decide if the child is at continuing risk of suffering harm.¹¹⁹ A decision that a child is at continuing risk of suffering harm should be based on the evidence presented on the balance of probabilities. If there is no evidence or the evidence presented is insufficient to decide that a child is at continuing risk of harm, the child protection conference may recommend that no further action needs to be taken. The conference may also recommend that the child be referred to the Most Vulnerable Children Committee for the provision of services.¹²⁰ If the conference concludes that the child is at continuing risk of suffering harm and that his or her health and development can be safeguarded through a child protection plan, then it is required to draft an outline of such a plan.¹²¹ If a child is at continuing risk of suffering harm and the child protection plan is inadequate to safeguard the child against harm and to prevent impairment of the child's

¹¹⁷ Reg 28(3) of the Child Protection Regulations, 2014.

¹¹⁸ See the entire reg 28 of the Child Protection Regulations on the involvement of the child and his or her family members in the child protection conference.

¹¹⁹ See reg 35(1) of the Child Protection Regulations, 2014. The Chairperson is the one who heads the child protection conference as provided under reg 30 and 31 of the Child Protection Regulations.

¹²⁰ Reg 35(3) of the Child Protection Regulations, 2014.

¹²¹ Reg 35(5) read together with reg 36(3) of the Child protection Regulations, 2014 on the factors to be considered when making a child protection plan outline.

health and development, the case should be referred back to the head of the social welfare department for immediate action.¹²²

The purpose of the child protection plan is to safeguard the child from further harm and promote the child's health and development while the child remains in the family with his or her parent, guardian or carer.¹²³ Based on the recommendations of the child protection conference and the outline of the child protection plan, the social welfare officer responsible for the child has to finalise the plan.¹²⁴ The child protection plan identifies the roles and responsibilities of professionals and relatives, including the nature and the frequency of contact by professionals with the child. Moreover, the plan has to set the dates or points at which progress will be reviewed and how progress will be judged.¹²⁵ In making the outline child protection plan, the child's views and the views of the parents, guardians or carers must be considered to the extent that the views are in the child's best interests.¹²⁶

The child protection plan remains valid for not more than 12 months as per reg 36(6) of the Child Protection Regulations, 2014.¹²⁷ The social welfare officer must provide the parents, guardians or carers with a copy of the written child protection plan and obtain written agreement to the plan's provisions.¹²⁸ As per reg 36(10) of the Child Protection Regulations, if the parents, guardians or carers refuse to agree to the provisions of the child protection plan, the child's case should be referred to the head of the social welfare department for further action. Further, a child subject to a child protection plan has to be registered on the vulnerable children register kept by the social welfare department. The name of a child who is no longer the subject of a child protection plan continues to be in the register until the child reaches the age of 18 years.¹²⁹

As per reg 37(1) of the Child Protection Regulations, 2014, the child protection plan needs to be reviewed after a certain period. The child protection plan has to set the dates to review the progress of the child. The regulations require that a first review of the plan be done not later than 28 days from the start of the plan. Subsequent reviews must take place not later than three months after the last review for as long as the child protection plan subsists. Wherever possible, the plan should be reviewed at a review conference chaired by the person who chaired the initial

¹²² Reg 35(7) of the Child Protection Regulations 2014.

¹²³ Reg 36(1) of the Child Protection Regulations, 2014.

¹²⁴ Reg 36(4) of the Child Protection Regulations, 2014.

¹²⁵ Reg 36(5) of the Child Protection Regulations, 2014.

¹²⁶ See reg 36(3)(e) of the Child Protection Regulation, 2014.

¹²⁷ See more details on the child protection plan in the remaining provisions of reg 36 of the Child Protection Regulations, 2014.

¹²⁸ Reg 36(7) read together with reg 36(8) of the Child Protection Regulations, 2014 requires that a copy of the written child protection plan be sent to all professionals or services working with the child.

¹²⁹ Reg 36(11)(12) of the Child Protection Regulations, 2014.

child protection conference. Moreover, the persons invited to the review conference must be those who attended the child protection conference and any other person that the chairperson considers necessary to assist the conference. The aim of the review conference is to consider whether the child protection plan continues to be adequate to safeguard the child. Moreover, the review is necessary to ensure that the child protection plan has been followed and to assess whether there is a need to change it.¹³⁰ Depending on the child's age and maturity, his or her views should be ascertained during the review conference. The child may present his or her views on the implementation of the child protection plan either orally or in writing. If the child wishes, he or she may be supported by the assigned social welfare officer or by a friend or supporter of his or her choice.¹³¹

At the end of the review conference, the chairperson must make a recommendation to the head of the social welfare department on the way forward. Reg 37(11) of the Child Protection Regulations, 2014 provides for three recommendations that can be made by the chairperson. The chairperson may recommend that the child protection plan continue as originally drafted; that the plan has to be varied; that the plan is no longer necessary in order to safeguard the child, or that further intervention is required to safeguard the child. If the recommendation is to vary the plan, the chairperson must inform the head of the social welfare department and provide a recommendation on the changes to be made and the reasons for those changes. The head of the social welfare department may, subject to the child's best interests, accept or reject the chairperson's recommendation. If the head of the social welfare department rejects the recommendation, he or she may continue with the plan in force, vary the plan in order to meet the child's needs, or send the plan back to the child protection conference with directions on matters to be reconsidered.

If the chairperson recommends that the child protection plan is no longer needed, the head of the social welfare department must consider the recommendation and decide whether to accept or reject the recommendation. If the recommendation to cease the plan is rejected, then the plan must continue in force. However, the head of the social welfare department may make changes to the plan as deemed necessary. Further, if the chairperson has reasonable cause to believe that the child protection plan is not adequate to safeguard the child, the chairperson has to refer the case back to the head of the social welfare department within 72 hours. In that case, the chairperson has to inform all the parties to the review conference. Upon receiving a referral

¹³⁰ Reg 37(7) of the Child Protection Regulations, 2014.

¹³¹ Reg 37(8) of the Child Protection Regulations, 2014.

from the chairperson, the head of the social welfare department must arrange for a further social investigation to be undertaken and completed within seven days. In collaboration with the assigned social welfare officer, the head of the social welfare department has to determine, not later than 72 hours from receipt of the social investigation report, whether further action needs to be taken to protect the child from harm and safeguard his health and development. The assigned social welfare officer has to inform the parents of any changes made to the child protection plan.¹³²

3.5.5. Child protection orders

In addition to the above processes and procedures, the LCA and its subsidiary legislation provide for various child protection orders to ensure the protection of children found to need care and protection. These orders are to be granted by the juvenile court following an application by the local government authority through its social welfare department. The orders include care orders or interim care orders, supervision or interim supervision orders, search and production orders, and exclusion orders.¹³³ Application to the court for any of these orders can be made when there is a child protection referral or when there is reasonable ground to believe that a child is suffering harm or is at risk of suffering harm, and his or her protection would require one of the orders mentioned above.

Care orders or interim care orders give the social welfare officer the power to remove a child from any situation where the child is suffering or is likely to suffer significant harm.¹³⁴ Once the court grants a care order, the parental rights are transferred to the social welfare officer.¹³⁵ Care orders or interim care orders provide one way for children to enter alternative care in Tanzania, as discussed in chapter four of this study. Unlike care orders, supervision orders or interim supervision orders aim to give a social welfare officer powers to prevent any significant harm being caused to the child. A child under a supervision order remains in the family home in the custody of parents, guardians or relatives.¹³⁶

A search and production order is an order granted by the court empowering a social welfare officer, alone or with a police officer, to enter premises and remove a child who is suffering or

¹³² See the whole of reg 37 of the Child Protection Regulations, 2014 on the processes, procedures and actions involved in reviewing the child protection plan.

¹³³ The Law provides for more orders, such as maintenance orders, custody orders, or orders to confirm parentage, but the orders mentioned above are those relevant to the protection of children deprived or likely to be deprived of their family environment.

¹³⁴ Care orders are provided for under sec 18 of the LCA, Part X of the Child Protection Regulations, 2014, see also part X of the Law of the Child Act (Juvenile Court Procedure) Rules, 2016.

¹³⁵ See section 4.2.3. of this study for more details of care orders or interim care orders.

¹³⁶ See sec 19 of the LCA. For more details on supervision orders, see Part X of the Child Protection Regulations, 2014 and Part X of the Law of the Child (Juvenile Court Procedure Rules), 2016.

is at risk of suffering harm to a place of safety. A search and production order can also require the parent or guardian to produce the child at a place and time determined by the court.¹³⁷ As per reg 19(1) of the Child Protection Regulations 2014 and rule 111 of the Juvenile Court Procedure Rules, 2016, a search and production order should be made within an application for a care order or supervision order.¹³⁸ When an application for a care order or supervision order is just made to obtain a search and production order, after the court grants the search and production order, the social welfare officer may apply for the court to stay the application for a care or supervision order.¹³⁹

An exclusion order is an order made by the court to prohibit a named person from having contact with the child and persons looking after the child.¹⁴⁰ An exclusion order is issued when there is evidence that a child is suffering or is likely to suffer significant harm; and that the harm would cease if a named person is removed from the child's home or is prevented from having any contact with the child. Like the search and production order, an exclusion order must be made within an application for a care order or supervision order.¹⁴¹ Rule 116(1) of the Juvenile Court Procedure Rules, 2016 shows that an exclusion order can also be applied for by a parent, guardian or carer, or by the child who is the subject of the care or supervision proceedings. In respect of the other orders discussed above, only the local government authority can lodge applications to the court through its social welfare department. Parents, guardians, carers and children can only be respondents in such applications.

The discussion above shows that in protecting children deemed to need care and protection, the local government authority through its social welfare department can always, when appropriate, apply to the court for any of these orders to enhance the protection of children. Moreover, the court's involvement in child care and protection cases is necessary to limit the power of social welfare officers in handling such cases. The court can only issue the orders applied for if, based on the evidence adduced, the court is satisfied that granting such an order is necessary to protect the child named in the application.

¹³⁷ See sec 29(2) of the LCA read together with Part XI of the Law of the Child (Juvenile Court Procedure) Rules, 2016. See also reg 19 of the Child Protection Regulations.

¹³⁸ See also sec 29(2) of the Law of the Child Act.

¹³⁹ See rule 115 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 read together with reg 19(8) of the Child Protection Regulations, 2014.

¹⁴⁰ See sec 28 of the Law of the Child Act, part XII of the Law of the Child (Juvenile Court Procedure) Rules, 2016 and reg 56 of the Child Protection Regulations, 2014

¹⁴¹ See sec 28(1) of the Law of the Child Act and rule 116 of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

3.6 Conclusion

This chapter shows that the protection of children deprived of their family environment is part and parcel of the entire child protection framework. The protection of children is a responsibility that is fulfilled by families and the state authorities. Families bear primary responsibility for the care and maintenance of their children by ensuring that they have a conducive environment for their growth and development. Parents and, where appropriate, members of the extended family must provide the child with the necessities essential for the welfare and development of their children. The state authorities are responsible for assisting families in their childcare responsibilities and where necessary for taking protection measures, including the provision of alternative care, for a child whose welfare is at risk whilst in the care of his or her parents or family. The child protection policy and legal framework reflect the shared and interchanging roles of families and the state in childcare and upbringing.

Another critical point revealed in this chapter is the centrality of the social welfare department in dealing with children needing care and protection. In their different capacities, the social welfare officers have significant discretion in deciding the fate of a child from the time when a child protection referral is made, as described in section 3.5. above. Social welfare officers have to use their professional skills in deciding whether a child is suffering harm or at risk of suffering harm and determining appropriate action regarding the child. Though the law requires specific actions, such as an initial investigation and a social investigation, to be taken once a child protection referral is made, it does not dictate how the investigation is to be conducted or what decisions or actions are to be taken. Thus, the protection of children, including those deprived of their family environment, can be influenced by how the social welfare officers exercise their discretion.

Moreover, the policy and legal framework of child protection presented and discussed above underscore the importance of a holistic approach when dealing with children deprived of their family environment. The alternative care system for such children constitutes a part of the child protection system whose success depends on the efficiency and effectiveness of all other components in the system. Based on the framework presented above, the next chapter discusses Tanzania's measures to protect children deprived of their family environment or at risk of being deprived, and the alternative care options available in Tanzania.

CHAPTER FOUR: THE ALTERNATIVE CARE SYSTEM FOR CHILDREN IN TANZANIA

This chapter builds on the preceding chapters and narrows the focus down to explore the alternative care system for children as one of the essential components or sub-systems of Tanzania's child protection system. Based on the principles and standards discussed in chapters two and three, an ideal alternative care system for children consists of three main aspects: prevention services, alternative care services, and aftercare services. An alternative care system with effective and efficient prevention services, adequate and well-established alternative care options and aftercare services for children leaving care reflects the necessity and suitability principles.¹ These principles require that children be placed in alternative care only when necessary, and, when alternative care is inevitable, that the placement be suitable for the needs of the child and in the child's best interests.

The legal and policy framework discussed in chapter three provides a tool for mapping out the alternative care system for children in Tanzania. In the light of the international and regional standards governing the protection of children deprived of their family environment, this chapter provides an assessment of the alternative care system in Tanzania, especially the preventive and protective measures adopted in Tanzania for children deprived of their family environment.

4.1. Preventive measures – necessity principle

Child protection systems cannot exclude appropriate measures to enhance family strengthening and preservation. The state and the community have to take steps to ensure that children remain in the care of their parents and family wherever possible. Measures to curb factors that cause children to be deprived of their family environment thus constitute an essential component of the alternative care system. As the necessity principle demands, children should be placed in alternative care only when all attempts to retain the child in his or her family have failed. Regardless of how well they are designed, alternative care services cannot replace the birth family for the child's development and welfare.

Initiatives and interventions directed at family strengthening and family preservation uphold the necessity principle. This calls for the adoption of prevention initiatives while the child is still within his or her family and after the child has been placed in alternative care. In essence, the necessity principle focuses on addressing and mitigating the root causes of children being

¹ These principles, based on the UN Guidelines for the Alternative Care of Children, are discussed in section 2.5.2 of this study.

deprived of their family environment. The preventive measures adopted in Tanzania are presented below in terms of the varying degrees of the necessity principle, i.e. primary, secondary, and tertiary prevention.²

4.1.1. Primary level prevention

These are measures or initiatives to be taken by the state to ensure access to basic services, social justice, and protection of human rights for the general population. In Tanzania, several measures and initiatives have been taken to enhance the welfare and development of the people through social, economic, and political reforms. These initiatives can be traced back to independence struggles to emancipate the country from colonial rule.³ National independence was regarded as a step towards attaining social, economic, and political development and overcoming colonial oppression which affected the welfare of the people.⁴ After independence, the country adopted a socialist approach to create social and economic emancipation.⁵ This was manifested in the Arusha Declaration, which introduced a state-controlled economy.⁶

The Arusha Declaration aimed to facilitate self-sufficiency and improve the welfare of the people. At that time, the state oversaw all economic affairs and dictated the economy of the country. However, with its socialism and self-sufficiency policy, the government did not attain the goal of improving the people's economic situation and social well-being.⁷ Consequently, in the 1980s, Tanzania decided to adopt a market-oriented economy leading to the privatisation of different economic sectors. Even with this change of approach, not much was attained regarding the social and economic well-being of the people. There was deepening poverty coupled with inadequate and poor-quality basic services for the people.⁸

In 1995, the government issued the Tanzania Development Vision 2025. This document sets out the economic, social, and political level of development that the country aspires to attain by 2025. The 2025 development vision is built on three basic objectives: to achieve quality and good life for all, good governance and the rule of law, and building a strong and resilient economy that can effectively withstand global competition.⁹ The government continues to adopt and review strategies to enhance economic growth and facilitate poverty reduction to

² See section 2.5.2.1. of this study for more details on the necessity principle.

³ United Republic of Tanzania, The Tanzania Development Vision 2025, 6.

⁴ The United Republic of Tanzania, The National Poverty Eradication Strategy (The Government Printer, Dar es Salaam, 1998), 11–12.

⁵ United Republic of Tanzania, The Arusha Declaration and TANU's Policy on Socialism and Self-Reliance (The Publicity Section, TANU - Dar es Salaam, 1967), 1–3.

⁶ United Republic of Tanzania, 3–4.

⁷ United Republic of Tanzania, The Tanzania Development Vision 2025, 6.

⁸ United Republic of Tanzania, 1.

⁹ United Republic of Tanzania, 12–14.

achieve the 2025 development vision. The notable strategies include the National Strategy for Growth and Reduction of Poverty 2005/6 – 2009/10 (NSGRP).¹⁰ After the expiry of this first strategy, a review was done, and the Second National Strategy for Growth and Reduction of Poverty 2010/11 – 2014/15 (NSGRP II) was adopted.¹¹ Each of the two strategies operated for five years. The second strategy was extended to complete the Five-Year Development Plan that replaced the NSGRP II and was implemented from 2016/17-2020/21. These two strategies were preceded by the National Poverty Eradication Strategy of 1998, which emphasised the importance of economic growth and improvement in social services.¹²

The objectives of the NSGRP and NSGRP II were grouped into three main clusters.¹³ The clusters include enhancing growth and reducing income poverty of the nation and the citizens; improving people's quality of life and social well-being by ensuring basic services and needs; and promoting good governance and accountability of the state to its people. The overall goal of these strategies was to enhance and promote the nation's economic, social, and political development. The strategies aspired to create an environment that would enable individuals to participate in economic activities for profit, and increase availability of and access to basic social services such as education, health, and water to improve the welfare of the people.¹⁴

Thus, there is evidence that the government of Tanzania, in collaboration with development partners and other interested stakeholders, is aware of its duty to ensure socio-economic development and social welfare for its citizens. Though the initiatives and measures discussed above are not specific to families and children, they play a significant role in preventing children from being deprived of their family environment. The initiatives aim to reduce poverty and improve the social and economic conditions of Tanzanians by ensuring the availability of essential social and economic services. Poverty is one of the major factors leading to children being deprived of their family environment and any initiative to curb poverty in Tanzania directly impacts families and children. Moreover, promoting and enhancing good governance in the country is also a positive initiative. It plays a vital role in strengthening the nation's social, economic, and political development and its people, including families and children. Good

¹⁰ United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty (NSGRP) (The United Republic of Tanzania, 2005), 1.

¹¹ United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty II (NSGRP II) (The United Republic of Tanzania, 2010).

¹² The United Republic of Tanzania, The National Poverty Eradication Strategy, vi.

¹³ See chapter 4 of the United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty (NSGRP); see also chapter 4 of the United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty II (NSGRP II).

¹⁴ United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty (NSGRP), 1.

governance creates a sense of accountability and efficiency in the government in discharging its responsibility towards the nation.

4.1.2. Secondary level prevention

The primary level prevention measures and initiatives, targeting every member of society, do not always respond equally to the needs and circumstances of all persons.¹⁵ Degrees of vulnerability vary from one person to another, depending on their environment. This necessitates establishing another level of prevention, which aims to counteract the failure or inadequacy of primary level initiatives and acts as a safety net and gatekeeping mechanism. Secondary level prevention entails adopting mechanisms to deal with those parts of the population that require special attention and action. It focuses on supporting individuals and families identified as vulnerable and for whom the primary prevention initiatives have not proved to be of help.¹⁶

One of the secondary prevention initiatives that the government has adopted in Tanzania is the Tanzania Social Action Fund (TASAF).¹⁷ TASAF is a community-driven development operation initiated by the government of Tanzania to enhance its efforts in poverty reduction.¹⁸ Since its launching in 2000, TASAF has been implemented in three phases. The first phase, which started in 2000, was more of a pilot phase as it was implemented in only 42 districts in both parts of the union. The second phase lasted from 2005 to 2013, followed by the third phase, referred to as Productive Social Safety Net (PSSN).¹⁹ Though the initial two phases also focused on improving the lives of poor households, the emphasis was on setting the institutional and operational framework for TASAF. For instance, TASAF I had three main objectives or components: community development, public works programmes that targeted poor rural areas, and institutional development. TASAF II had two major components, the National Village Fund and capacity enhancement. The former aimed to promote and support vulnerable members of the community, including orphans, disabled, widows or those affected with HIV/AIDS, by

¹⁵ United Republic of Tanzania, Tanzania Third Social Action Fund (Productive Social Safety Net -PSSN): Operation Manual (Government Project Preparation Team, 2013), 1.

¹⁶ See section 2.5.2.1. for an explanation of the secondary level of prevention.

¹⁷ More details on TASAF can be found at www.tasaf.go.tz.

¹⁸ United Republic of Tanzania, Tanzania Social Action Fund: First Quarter Implementation Progress Report (July-September 2011) (TASAF Management Unit, 2011), vi.

¹⁹ Tanzania Social Action Fund (TASAF), UNICEF Office of Research - Innocenti, and Policy Research for Development (REPOA), Tanzania Youth Study of the Productive Social Safety Net (PSSN) Impact Evaluation: Endline Report (UNICEF, 2018), 10.

providing them with assistance to manage sustainable economic activities for income generation purposes.²⁰

The third phase of TASAF comprises four components: Productive Social Safety Net (PSSN), enhancement of livelihoods and increasing incomes, targeted infrastructure development, and capacity building.²¹ Conditional and unconditional cash transfers are provided to members of society identified as vulnerable. In addition to the cash transfers, beneficiaries of TASAF can be employed in public works projects where they are paid and increase their incomes. TASAF is implemented in all local government areas in Tanzania. However, the programme has been rolled out gradually to ensure the development of systems and required capacities. TASAF targets people, including families and children, living under the basic needs poverty line, who constitute about 33.6% of the population.²² Poverty is one of the major contributing factors leading to children being deprived of their family environment. Therefore, any attempt to help families or households affected by poverty directly impacts children in these families or households.

While TASAF is aimed at reducing poverty and enhancing the social and economic well-being of families, the department of social welfare is directly responsible for ensuring the welfare and stability of families.²³ Among other functions, the department is required to provide counselling and support to families and facilitate reconciliation of families and marriages about to break down. Moreover, the department of social welfare provides child maintenance services where a parent denies responsibility for his or her child. All these services are necessary for family strengthening, which is essential in preventing child abandonment, relinquishment, and separation of children from their families.

In addition to family services provided by the social welfare department, there have been initiatives specifically focusing on the protection of Most Vulnerable Children (MVC). A series of plans of action and guidelines have been adopted at different times to enhance the protection of children identified as most vulnerable. Among the notable action plans are the National Costed Plan of Action for Most Vulnerable Children (NCPA I, 2007-2010) and the National Costed Plan of Action for Most Vulnerable Children (NCPA II, 2013-2017). These plans of

²⁰ United Republic of Tanzania, Tanzania Social Action Fund: First Quarter Implementation Progress Report (July-September 2011) (TASAF Management Unit, 2011), vi.

²¹ See part II of the United Republic of Tanzania, Tanzania Third Social Action Fund (Productive Social Safety Net -PSSN): Operation Manual.

²² See more details on TASAF III in United Republic of Tanzania, Tanzania Third Social Action Fund (Productive Social Safety Net -PSSN): Operation Manual.

²³ See section 3.3.1 on the responsibilities of the department of social welfare with regard to children and families.

action consisted of strategies for preventing children's vulnerability, including strengthening families to ensure that children remain in the care of their parents or families. The plans of action set out activities that need to be taken by the state and the community to ensure the survival and development of children in difficult situations.²⁴

One of the notable impacts of these plans of action is the identification of vulnerable children, analysing their needs and providing them with the assistance needed depending on available resources.²⁵ However, due to limited resources in respect of personnel and finance, it has not always been possible to provide adequate and sufficient support after the identification process.²⁶ A para-social worker in Bunju ward located in Kinondoni district had this to say in one of the interviews conducted during field research:

“For instance, in my area, some time back, we were given directions to identify the most vulnerable children. However, after the children were identified, no further action was taken to assist the identified children.”²⁷

The NCPA II was replaced by the National Plan of Action to End Violence against Women and Children (NPA VAWC – 2017/18 – 2021/22). This plan of action was adopted to consolidate previous action plans addressing various issues related to the protection of women and children.²⁸ The NPA VAWC aims at ending violence against children and women as it is believed that violence is the catalyst for vulnerabilities to which women and children are subjected.²⁹ However, the NPA VAWC is limited in its scope as it is focused on violence unlike the initial plans of action that aimed at addressing children's vulnerability from a broader perspective.³⁰ The NPA VAWC establishes a new institutional framework that merges the pre-existing institutional frameworks in the previous plans of action, including the Most Vulnerable Children Committees (MVCC) established by the National Costed Plans of Action.³¹

²⁴ United Republic of Tanzania, National Costed Plan of Action for Most Vulnerable Children 2007-2010 (NCPA), 3–4; United Republic of Tanzania, National Costed Plan of Action for Most Vulnerable Children (NCPAII) 2013-2017, 1–2.

²⁵ United Republic of Tanzania, National Costed Plan of Action for Most Vulnerable Children 2007-2010 (NCPA), 8–9.

²⁶ URT, National Guidelines for Identification of Most Vulnerable Children and Linkage to Care, Support and Protection, 3–4 on the challenges associated with identification of MVC.

²⁷ Information obtained in a personal interview with a para-social worker at Bunju ward conducted in Dar es Salaam on 17/01/2019.

²⁸ United Republic of Tanzania, National Plan of Action to End Violence Against Women and Children in Tanzania 2017/18 - 2021/22, (The United Republic of Tanzania, 2016), 6–7.

²⁹ United Republic of Tanzania, 6.

³⁰ This view was also shared by a respondent in the Department of Social Welfare at the ministry in an interview conducted in Dar es Salaam on 21/02/2019.

³¹ United Republic of Tanzania, National Plan of Action to End Violence Against Women and Children in Tanzania 2017/18 - 2021/22, 25–30.

Despite the implementation challenges of these strategies, these measures and initiatives have contributed to improving the situation of some families and children in need of care and protection services. Nevertheless, more efforts are still needed to improve the safety nets and gatekeeping mechanisms to prevent the unnecessary placement of children in alternative care. For instance, it is essential to have explicit provisions in the child laws stipulating preventive measures for families and children in need of such services.³² The majority of children in children's homes actually have one or both parent(s) still alive. Others have relatives who, if properly involved, would be willing to receive these children into their care. Though the law emphasises that poverty should not be the sole reason for placing children in alternative care, most children in alternative care are there for this reason. In practice, there lacks an efficient and adequate mechanism to scrutinise the placement of children in alternative care. Counselling and psychosocial support for families and children are still limited to supporting families in distress or those on the brink of surrendering their parental responsibilities.

4.1.3. Tertiary level of prevention

In some cases, efforts to prevent children from being deprived of their family environment may fail even where support services have been given to such children and their families. This situation necessitates the placement of children in alternative care. While this is done to ensure the protection of children, it is also important to plan the return of a child into his or her family or to find a permanent solution. Hence, the tertiary level of prevention entails initiatives adopted to avoid the unnecessary continued stay of children in alternative care. At the tertiary level of prevention, measures and initiatives should also aim at preventing multiple placements of children while in care.³³

Family reunification and family reintegration are at the centre of this level of prevention. This entails having clear plans guiding and regulating the handling of the child and the family after placement is done. The law provides guidance on handling children in alternative care which emphasises family reunification and reintegration. In 2019, guidelines were adopted to enhance and guide the integration and reunification of children with their families.³⁴

However, in practice, family reunification and reintegration are wanting. The majority of children remain in alternative care till they age out of care. Research reveals that care plans for the child and the family are usually not prepared by the respective social welfare department.

³² See for instance sec 26 of the Children's Act of Zanzibar on additional orders that the children's court can make to ensure that a child is only removed from his or her family as a measure of last resort.

³³ See section 2.5.2.1. of this study for more details on the tertiary level of prevention.

³⁴ United Republic of Tanzania, National Guidelines on Children's Reintegration with Families.

The respondents in children's homes visited during field research stated that in most cases they do not receive information and care plans from the social welfare officers when children are placed in their care.³⁵ Without care plans and reviewing such plans, it is difficult to keep track of the needs of children in care and formulate necessary steps for the future of such children after placement in care. Perhaps with the adoption of the new reintegration guidelines, there are prospects of improving the return of children to their families where reintegration is considered the best option for the child.

It is essential to mention that some children's homes, like SOS Children's Village, with the help of the respective social welfare officers, have started facilitating the process of reintegrating children back into their families.³⁶ Among the challenges experienced in attempts to facilitate reunification are difficulties associated with family tracing, and the readiness of children and parents to be reunited. Sometimes lack of cooperation from relatives and parents has made reunification a complex task.³⁷ Hopefully, the new 2019 guidelines on children's reintegration will provide a viable solution to these challenges and enhance the reintegration of children in care with their families.

4.1.4. The role of non-government organisations

Besides the government initiatives to prevent children from needing alternative care, non-government organisations also play an essential role here. These organisations promote the protection of children's rights and raise awareness in the community of the importance of family care for children. They are also engaged in activities related to family strengthening by providing material, financial and psychosocial support to vulnerable families and children. These non-government organisations pursue different activities depending on the reasons for their establishment. While some engage in protecting specific groups of children based on selected criteria, others deal with children and their families. For instance, while Railway Children³⁸ is dedicated to issues related to children in the streets, Save the Children³⁹ is concerned with the protection of children's rights. The latter categorises its operations in seven

³⁵ All nine children's homes visited during this study shared this sentiment.

³⁶ This information was obtained during interviews at SOS Children's Village in Mwanza on 19/03/2019 and Dar es Salaam on 29/01/2019.

³⁷ Interview conducted at SOS Children's Village in Dar es Salaam on 29/01/2019.

³⁸ Railway Children is an international organisation founded in the UK dedicated to addressing the plight of children found in the streets. In East Africa, Railway Children operates in Tanzania and Kenya. For more details of the activities carried out, visit www.railwaychildren.org.uk.

³⁹ Save the Children is an international non-governmental organisation operating worldwide. It has operated in Tanzania mainland since the 1990s. For more details, visit Tanzania.savethechildren.net.

thematic areas: child protection, nutrition, health, child rights, governance, education, food security, livelihood, and emergencies.

A few vivid examples can be drawn from organisations that were visited during field research for this study. Apart from providing homes for children needing alternative care, SOS Children's Village also provides other services, including family strengthening programmes (FSP). This organisation has also started to work for family reunification and reintegration when considered appropriate for the children in their care.⁴⁰ For instance, SOS Children's Village in Mwanza has been carrying out FSP since 2009. At the time of the field research (March 2019), an FSP was being implemented in two districts in Mwanza: Nyamagana (in five Wards) and Ilemela (in one Ward). The programme aimed to strengthen beneficiary families to prevent children from falling out of home care.

In implementing the FSP, SOS Children's Village works with the local government authorities through their social welfare departments, especially in identifying eligible families. One of the criteria used to identify such families is the presence of children at risk. In this programme, a child is considered to be at risk if he or she is being raised by a single parent unable to provide the basic needs for the child, or by chronically ill parents; is in the care of grandparents; or has been abandoned by his or her family. The programme does not aim to provide material support but focuses on basic training in parenting, psychosocial support, and training to engage in economic activities. It also encourages people to create savings and credit groups that would give them financial resources to operate productive activities. In exceptional circumstances, material support may be given to individuals with acute vulnerability.

In the areas where the programme operates, the FSP also focuses on improving health and educational facilities to ensure a child-friendly environment. When the programme started in Mwanza in 2009, the target was to serve 200 children. During the author's field research, the target was to help 1,200 children. To achieve this target, there were about 309 families being served plus 100 youths above 18 years from FSP beneficiary families. In the FSP, the child is the primary beneficiary, and the parents are secondary. The assistance that parents or carers receive is focused on promoting the welfare of the child. One condition that parents must adhere to is to ensure that children can attend school and have the necessities for their studies. Beneficiaries who fail to meet this criterion can be removed from the programme. The FSP respondents further mentioned that the programme is intended to reduce unnecessary placement

⁴⁰ The information on the FSP by SOS Children's Village was obtained during an interview with the FSP officer in Mwanza conducted on 21/03/2019.

of children in alternative care. They said that no more children's villages would be built in Tanzania because they want to focus on strengthening families where possible and reduce the institutionalisation of children.

Normally, children coming into the care of SOS Children's Village would be expected to remain until they age out of care. But this organisation has started to facilitate family reunification and reintegration of children in their care.⁴¹ In appropriate cases, material support may be accorded to the families concerned to help them provide the basic needs of the child and facilitate reunification and reintegration. However, the interviewee said that sometimes parents or families are unwilling to take back their children and may not always cooperate in the reunification process. Children may also not be willing to return to their families, as they tend to consider the environment in the Children's Village far better than the environment in their family homes.

Another organisation, Forever Angels Baby Home in Mwanza also carries out a series of activities to strengthen families and build their capacity to take care of their children.⁴² Here, the respondents noted that sometimes children brought into their care have surviving parents. It is poverty that pushes them to abandon their children or seek placement in children's homes for them. This realisation made Forever Angels change their approach to receiving children into their care. Under the new approach, they make sure that children entering their care do not have parents or willing relatives to care for them. Otherwise, they provide support for parents or relatives to help them care for their children. Forever Angels also provide counselling services for families, and try to raise awareness of the importance of family for the welfare and development of the child.

Village of Hope in Mwanza also have programmes to facilitate family strengthening in order to avoid the placement of children in children's homes.⁴³ In the interview conducted with staff of the Village, they informed me that 35 families received support in the form of loans to enable them to engage in economic and other productive activities. Their family strengthening programme started in 2016. Besides, they also provide family reunification and reintegration services for children in their care whose relatives or parents are traced and found.

⁴¹ The information was obtained during an interview conducted with officers in SOS Children's Village in Mwanza and Dar es Salaam. In Dar es Salaam the interview was conducted on 29/01/2019. The interview in Mwanza was conducted on 19/03/2019.

⁴² Information obtained during an interview at Forever Angels Baby Home in Mwanza on 20/03/2018.

⁴³ Information obtained in an interview at Village of Hope in Mwanza on 23/03/2019.

Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese (PASADA) is another organisation that carries out preventive activities.⁴⁴ PASADA works with families and children infected with HIV/AIDs. The activities are focused on providing legal services, improving shelter, child protection, health care, psychosocial care and support to both children and parents of identified as beneficiary families. At the time of the research, PASADA was operating under the bigger Kizazi Kipya Project (new generation project) initiated by PACT Tanzania, which focuses on education, health, shelter, and the economic strengthening of vulnerable children in Tanzania.

PASADA also has a specific section dealing with Orphans and Vulnerable Children (OVC). Children identified as vulnerable by PASADA are assisted in accessing education and vocational training. Before operating under the Kizazi Kipya Project, PASADA paid tuition fees and provided stationaries and transportation fares for children receiving their services. Nutrition support and renovation of shelters for the identified children is done as an exception depending on the level of vulnerability. Those living with HIV/AIDs receive health care to protect them from related diseases. PASADA aids children in their families or in child-headed households and does not directly engage in providing alternative care. However, where practical, PASADA will make efforts to place children in need of protection with available and willing relatives.

4.2. Placement of children in alternative care (the suitability principle)

Sometimes, the only option left for a child is to enter alternative care. At this juncture, the suitability principle comes into play: a child must be provided with alternative care suitable for his or her welfare and development.⁴⁵ Sec 7(3) of the LCA reflects the suitability principle by requiring state authorities to ensure that a child separated from his or her parents is accorded the most suitable substitute care.⁴⁶ It follows that the placement of a child in alternative care should follow a thorough assessment of the child's circumstances and needs. Thus, in Tanzania, placing children in alternative care should follow the procedures prescribed in the legal framework regulating child protection, as discussed in chapter three.⁴⁷ The placement of children in alternative care should be preceded by an initial and a social investigation and a child protection conference which show that a child cannot be protected by any other means.

⁴⁴ Information obtained during interviews with the orphans and vulnerable children officer at PASADA in Dar es Salaam on 13/02/2019.

⁴⁵ See section 2.5.2.2. of this study for more details.

⁴⁶ See also reg 62(1) of the Child Protection Regulations, 2014 requiring local government authorities to place a child in an appropriate alternative care option.

⁴⁷ See section 3.4 of this study on the principles guiding the protection of children in need of care and protection. Also, section 3.5 on the processes and procedures to be followed when a child is need of care and protection.

Three ways in which the responsible local government authority can place a child in alternative care can be deduced from the Child Protection Regulations, 2014. These ways are removing a child to a place of safety, voluntary care arrangements, and care orders or interim care orders issued by the court following an application by the local government authority. A detailed discussion of these three procedures is provided below.

4.2.1. Removing a child to a place of safety

Reg 3 of the Child Protection Regulations, 2014 and rule 3 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 define a place of safety as “care of a child with a relative, fit person, foster home, a fit institution, or any other place where a child can be safely accommodated pending a decision by the head of the social welfare department or the juvenile court as to future care but excludes any place of detention including a police cell, a retention home, approved school or prison.” The aim of removing a child to a place of safety is to provide immediate care and prevent continuing harm to a child before the child’s case is concluded. The removal of a child to a place of safety is an interim or emergency measure to ensure the protection of a child who is at risk of suffering harm if not removed from the place where he or she lives.⁴⁸

The LCA and part VI of Child Protection Regulations, 2014, provide for the removal of a child to a place of safety. Sec 96(1) of the LCA and reg 22(1) of the Child Protection Regulations provide for powers of a social welfare officer in the company of a police officer to enter, search and investigate any premises where there is a reasonable ground to suspect child abuse or the presence of a child in need of care and protection.⁴⁹ Following this investigation, if it is determined that the child has been abused or is in immediate need of care and protection, the social welfare officer accompanied by the police officer must remove the child to a place of safety for not more than seven days as per sec 96(2) of the LCA and reg 22(2) of the Child Protection Regulations, 2014. Reg 22(3) of the Child Protection Regulations, 2014, further grants powers to the social welfare officer to declare a hospital or any place where a child is accommodated to be a place of safety if removal of the child from such place would put the child at immediate risk.

⁴⁸ See reg 18 of the Child Protection Regulations, 2014 on failure of parents to make a child available during the investigation.

⁴⁹ These provisions can be read together with sec 29(2) of the LCA and rule 111 and 112 of the Law of the Juvenile Court Procedure) Rules, 2016 on search and production orders under which a court may authorise the social welfare officer to remove a child to a place of safety.

Sec 96(3) of the LCA requires the social welfare officer who has removed a child to a place of safety to bring the child before a court within fourteen days for an order to be made. However, the nature of the order to be made by the court is not indicated under this section. Sec 96(4) of the LCA provides that the court may commit the child to an approved residential home or the care of a social welfare officer or any fit person. Reg 22(4) of the Child Protection Regulations, 2014 provides for a slightly different procedure. Under this regulation, the social welfare officer who has removed a child to a place of safety is required to inform the head of the social welfare department about the removal within 24 hours. After the reception of this information, the social welfare department is required to conduct an initial investigation of the case within 72 hours.⁵⁰

Reg 22(5) of the Child Protection Regulations, 2014 provides that the social welfare department must ensure that a child removed to a place of safety is provided with accommodation, either with a relative, foster carer, fit person or if appropriate, in a hospital or as a matter of last resort in an approved residential home.⁵¹ Reg 22(9) of the Child Protection Regulations, 2014 requires the social welfare officer to inform the parents, guardians or carers of the child removed to a place of safety of the whereabouts of the child. The information can only be withheld if there is reasonable cause to believe that informing the parents would place the child at risk of suffering harm. Unless it is not in the child's best interests, the parents, guardians or carers must be granted contact with the child. A parent or guardian may appeal to the juvenile court, or if the juvenile court is not sitting to a court of competent jurisdiction, against the removal of a child to a place of safety and against any refusal to permit contact with such a child. The parental rights and responsibility for a child removed to a place of safety are shared with the local government authority in charge of the child as per reg 22(7) of the Child Protection Regulations, 2014. The head of the social welfare department may limit the parent's exercise of parental responsibility to the extent deemed necessary for the child's protection.

The seven day period within which a child can be kept in a place of safety can be extended following the procedure prescribed under reg 23 of the Child Protection Regulations, 2014. The social welfare officer who removed the child to a place of safety must consult with the head of the social welfare department within 72 hours to decide if there is a need to extend the stay of the child in a place of safety. Reg 23(2) requires that the child's best interests must be a paramount concern in deciding whether to seek an extension or not.⁵² Reg 22(4) of the Child

⁵⁰ See section 3.5.2 of this study for more details concerning the initial investigation.

⁵¹ Reg 3 of the Child Protection Regulations, 2014 defines the word accommodation to mean accommodation that is provided for a continuous period of more than 24 hours.

⁵² Reg 23(3) of the Child Protection Regulations, 2014 mentions aspects to be considered in determining the best interests of the child, including the reasons for removing the child to a place of safety, previous involvement of

Protection Regulations, 2014 provides that if a decision to seek an extension is reached, the social welfare department, on behalf of the local government authority, can make an application to the court in accordance with rule 117 of the Juvenile Court Procedure Rules. Unfortunately, rule 117 of the Juvenile Court Procedure Rules does not apply to extension of a place of safety but to an ex-parte exclusion order.⁵³

The application to extend the place of safety is to be done within five days of the child's removal to this place. If removal of a child to a place of safety is an emergency measure allowing the social welfare officer to protect a child from being subjected to continuing harm while the child's case is being determined, it is not clear why the law should allow extension of the place of safety. Other emergency measures can be taken once a child has been removed to a place of safety, such as applying for a care order or supervision order, within which an interim care order can be applied, permitting the social welfare department to take the child into its care while the main application is yet to be determined.⁵⁴

4.2.2. Voluntary care arrangement

Reg 2 of the Child Protection Regulations, 2014 defines voluntary care as “admission of a child into care of the local government authority with the consent of the parent through an administrative decision by the social welfare department”. It entails agreement between the social welfare officer and the parents on admitting the child into the care of the local government authority. Parental consent for a child to be admitted into care must be formally recorded in writing by the head of the social welfare department.⁵⁵ However, it is shown below that some children, such as those lost or abandoned, can be placed into voluntary care per reg 42 of the Child Protection Regulations. In these circumstances, there are no parents available to give their consent, which is an essential component in the definition of voluntary care arrangement. The question that remains is that can children with unavailable parents be placed in voluntary care since parental consent cannot be obtained? Reg 42 of the Child Protection Regulations, 2014 is silent on the possibilities of dispensing with this requirement. Perhaps the definition of voluntary care arrangement should be modified to remove the word consent of parents to make it practical.

the social welfare department with the child and his family; if an initial investigation has been concluded; and the child's views.

⁵³ See reg 23 of the Child Protection Regulations, 2014 for more details on extension of the place of safety.

⁵⁴ See rule 94 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 on interim care or supervision order.

⁵⁵ Reg 42(6) of the Child Protection Regulations, 2014.

Reg 42(1) of the Child Protection Regulations defines the circumstances and conditions of placing a child in voluntary care. There should be reasonable cause for the social welfare department to believe that a child will be at risk of suffering harm if he or she is not taken into care following a social investigation report as per reg 42(1)(a) of the Child Protection Regulations, 2014.⁵⁶ Reg 26(4)(d) of the Child Protection Regulations, 2014 provides one of the decisions that can be reached after a social investigation of a child: after a social investigation of a child, the intake social welfare officer may decide that the child is suffering harm or is at immediate risk of harm and emergency action is required to safeguard the child. Thus, reg 26(4)(d) reflects the context within which reg 42(1)(a) of the Child Protection Regulations, 2014 may be applied.

Alternatively, as per reg 42(1)(b) of the Child Protection Regulations, 2014, a child may be placed in voluntary care if a child protection conference refers a case back to the head of the social welfare department under reg 37(15) of the Child Protection Regulations, 2014. However, the reference to reg 37(15) of the Child Protection Regulations is incorrect as this provision concerns what the head of the social welfare department can do when the child protection review conference recommends that a child protection plan is no longer needed for the child. The correct provision is reg 37(17) of the Child Protection Regulations, which provides that:

“Where the chairperson of the child protection conference has reasonable cause to believe at any time including the end of the twelve months period of the child protection plan that notwithstanding the child protection plan, the child is suffering or is at risk of suffering harm, he shall refer the case back to the head of the social welfare department.”

Moreover, reg 35(7) of the Child Protection Regulations, 2014 requires the child protection conference to refer the case of a child back to the head of the social welfare department if it concludes that the child is at risk of suffering harm and that the child protection plan is inadequate to safeguard the child. Since this provision is similar to that of reg 37(17) of the Child Protection Regulations, it is not clear why reg 42(1)(b) of the Child Protection Regulations, 2014 does not also refer to reg 35(7) of the Child Protection Regulations, 2014.

⁵⁶ Reg 2 of the Child Protection Regulations, 2014 defines the phrase “reasonable cause to believe” to mean the degree of proof that would cause a person of average caution to believe the evidence is trustworthy.

In either of the two situations above, the head of the social welfare department is required to admit the child into the care of the local government authority. In admitting the child into voluntary care, the head of the social welfare department has to ensure that the parents' consent is obtained. If the child to be taken into voluntary care is lost, abandoned, seeking refuge or is without parental care as per reg 38 of the Child Protection Regulations, 2014, the head of the social welfare department must see that three conditions are fulfilled: the child in question cannot be reunited with the parents, or the parents cannot care for the child for whatever reason, and placing the child with relatives will not be adequate to safeguard the child's welfare.⁵⁷ Besides, reg 42(7) of the Child Protection Regulations, 2014 stipulates that poverty should not be the sole or main reason for admitting a child into voluntary care; instead, such a child may be referred to the Most Vulnerable Children Committee to receive support services. These provisions reflect the importance placed on families in the care and upbringing of children.

Reg 42(2) of the Child Protection Regulations, 2014 requires an assigned social welfare officer to prepare a care plan for the child before admitting the child into the care of the local government authority.⁵⁸ However, if a child is admitted into voluntary care as an emergency action, the care plan must be prepared within 21 days. The rationale of preparing care plans is to map out how the child will be cared for during placement in voluntary care. Reg 42(5) of the Child Protection Regulations, 2014, requires the social welfare officer to agree with the parents on the care plan and stipulates information that must be given to the child's parents.⁵⁹ The social welfare officer has to inform the parents about the effects of the child being received into the care of the local government authority.⁶⁰ The parents must know that 14 days' notice is required to remove a child from a voluntary care arrangement and that the child's removal will be subjected to review. These requirements are not applicable if the child's admission into voluntary care is temporary and for an agreed time.⁶¹ The parents must also know that the local government authority may choose to apply for a care order from the court if it is considered necessary.⁶²

The social welfare officer must explain to the parents that the parental rights and responsibilities are shared between the local government authority and the parents.⁶³ The local government

⁵⁷ Reg 42(1)(b) of the Child Protection Regulations, 2014. See also reg 42(4) of the Child Protection Regulations, 2014 on more conditions for receiving a child into voluntary care.

⁵⁸ See reg 48 of the Child Protection Regulations, 2014 on the contents of a care plan.

⁵⁹ See also reg 48(2) of the Child Protection Regulations, 2014.

⁶⁰ Reg 42(5)(a) of the Child Protection Regulations, 2014.

⁶¹ Reg 42(5)(b) of the Child Protection Regulations, 2014.

⁶² Reg 42(5)(c) of the Child Protection Regulations, 2014.

⁶³ Reg 42(5)(d) of the Child Protection Regulations, 2014.

authority is the one that determines where and with whom the child will live. Arrangements for access between the child and the parents and other persons in the child's life must be explained to the parents.⁶⁴ The social welfare officer must inform the parents that they will be invited to reviews of the care plan.⁶⁵ The need to involve parents in preparing care plans and informing the parents on different issues related to the admission of a child into a voluntary care arrangement reflects the importance of parents and family in the life of a child.

Though parental responsibilities are shared between the parents and the local government authority, a parent whose child is in voluntary care has a right to terminate the arrangement at any time.⁶⁶ The parent is only required to issue 14 days' notice to the head of the department of social welfare. The notice can be made orally or in writing expressing the intention to remove the child from voluntary care. The notice should explain how the circumstances have changed and arrangements for caring for the child after termination. The notice issued by the parents is sufficient to remove the child from voluntary care back into the care of his or her parents. However, the head of the social welfare department may prevent the removal of the child from voluntary care if there is reasonable cause to believe that such removal would be harmful to the child.⁶⁷

As an administrative measure, a voluntary care arrangement provides the department of social welfare with powers to take immediate action to protect any child who is in need of care without going through the court. The parental consent required before a child is admitted into voluntary care signifies the place and importance of parents in a child's life. This is also reflected in the fact that parents can terminate a voluntary care arrangement by giving 14 days' notice. Save for those children whose parents might not be there to give consent, voluntary care arrangements provide a tool for both parents and local government authorities to care for children who are in need of alternative care without the involvement of courts, provided that the child's parents and the local government agree to admit the child into voluntary care and the child's best interests can be served through such an arrangement.

4.2.3. Care orders and interim care orders

Unlike a voluntary care arrangement, which is an administrative decision, care orders and interim care orders result from a judicial decision following care and protection proceedings in court. These are orders issued by the court to remove a child from any situation where he or she

⁶⁴ Reg 42(5)(e) of the Child Protection Regulations, 2014.

⁶⁵ Reg 42(5)(f) of the Child Protection Regulations, 2014.

⁶⁶ Reg 43(1) of the Child Protection Regulations, 2014.

⁶⁷ Reg 43(2) of the Child Protection Regulations, 2014.

is suffering or is likely to suffer significant harm. The orders place a child in the care of the authority applying for such orders. The processes and procedures for applying for care orders are provided for under the LCA, the Child Protection Regulations, 2014 and the Law of the Child (Juvenile Court Procedure) Rules, 2016.

Under the LCA, care orders and interim care orders are provided for under sec 18. The court can issue a care order or interim care order upon application by a social welfare officer. However, there is a slight difference in who can apply for such orders in the subsidiary legislation to the LCA. The Child Protection Regulations say under reg 44(1) and 45(1) that an application for a care or interim care order may be made by a local government authority and make no reference to any other possibility. Rule 91(1) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 is similar to reg 45(1) of the Child Protection Regulations, 2014, requiring that an application for a care order be made by the local government authority of the district in which the child ordinarily resides.

The difference between the LCA and the subsidiary legislation cited above concerning who may apply for a care order is noteworthy. While the LCA is exact on who is to apply, the subsidiary legislation is general, just stating that the local government authority within which the child ordinarily resides is in charge of lodging the application. It is not clear if the application is to be lodged by the social welfare officer on behalf of the local government due to the powers mandated to the social welfare department under regulation 6(2) of the Child Protection Regulations. Or if it is the legal department of the local government that will apply on behalf of the local government authority responsible for the child in question.

An attempt to answer this question through field research was not fruitful. Two resident magistrates in the Juvenile Court situated at Kisutu, Dar es Salaam could not recall whether any application for care orders had ever been lodged in the court. One of them said that the juvenile court rules say the local government authority is the one to lodge such applications. Since such applications are hardly ever made, it was evidently not easy for the magistrates to answer this question with certainty. Moreover, most of the social welfare officers interviewed during the field research were either unaware of these orders or have never used them to place a child in alternative care.

Reg 44(1) of the Child Protection Regulations, 2014 provides grounds for applying for care orders. An application for a care order can be made where a child is suffering harm or is likely to suffer harm due to the behaviour of the parents, or where the child is out of control, and it is determined by the head of the social welfare department that only a care order can safeguard

the welfare of the child.⁶⁸ The law further requires that before the application for a care order is made, the head of the social welfare department should be sure that the capacity and willingness of the parents to care for the child are inadequate to protect the child from harm and likely to impair the child's health and development.⁶⁹ This requirement helps avoid the unjustified removal of a child from the care of his or her parents. It also implies that before applying for a care order, other measures should be explored that could allow the child to remain in the care of his or her own family.

Rule 91 of the Juvenile Court Procedure Rules, 2016, provides the procedures and actions for applying for care orders. The application for a care order has to be filed with several other documents, including an initial statement from a social welfare officer; the care plan for the child; an initial investigation report; and a social investigation report (if the reports have been finalised at the time of the application).⁷⁰ There should also be evidence that the parents, guardians or carers have been informed of the local government authority's intention to apply for a care order. If the application is made on an emergency basis, these documents can be submitted according to the court's directions.⁷¹ Rule 100 of the Juvenile Court Procedure Rules, 2016 gives the criteria to be used by the court in making a care order. The court can only grant a care order if it is satisfied that the child concerned is suffering harm or is likely to suffer significant harm, that such harm or likelihood of harm is attributable to the care or lack of care given by the parents to the child, or that the child is beyond parental control. The court must also be satisfied that granting a care order is in the child's best interests.

Unlike a voluntary care arrangement, a care order transfers parental rights and responsibilities to the social welfare officer as a representative of the local government authority.⁷² The social welfare officer assumes custody of the child and is required to determine the most suitable place for the child, such as an approved residential home, a fit person, an approved foster parent or a parent, guardian or relative.⁷³ However, in the exercise of his or her duty as a holder of parental rights, a social welfare officer is required where reasonable to ascertain the wishes and feelings

⁶⁸ The word harm is defined under regulation 4 of the Child Protection Regulations as ill-treatment or the impairment of health or development, including impairment from seeing or hearing the ill-treatment of another. Reg 4(3) provides that harm may be caused by physical, emotional and sexual abuse and neglect.

⁶⁹ Reg 44(2) of the Child Protection Regulations, 2014.

⁷⁰ Reg 91(4) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 read together with reg 47 of the Child Protection Regulations, 2014.

⁷¹ Reg 91(4) of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

⁷² Sec 18(2) of the Law of the Child Act; See also rule 101 of the Law of the Child (Juvenile Court Procedures) Rules, 2016.

⁷³ Sec 18(3) of the Law of the Child Act; see also reg 60(1) of the Child Protection Regulations, 2014.

of the child, parents and any other person whose wishes may be relevant in the case at hand.⁷⁴ Moreover, in the exercise of parental rights and responsibilities, the local government authority or any person caring for the child is not allowed to change the child's name, religion or consent to the child's marriage as per rule 101(3) of the Juvenile Court Procedure Rules, 2016.

Sec 25 of the LCA stipulates the objectives of a care order. Apart from removing a child from a situation where a child is suffering harm or is likely to suffer harm, a care order also aims at assisting the child and those with whom he or she is living or wishes to live with. It requires that the circumstances that led to the making of the order be examined and that steps be taken to solve or ameliorate the problem and ensure the child's return to the community.⁷⁵

An interim care order is made prior to determination of the main application if removal is required immediately to protect the child's welfare and development.⁷⁶ The length of the proceedings determines the duration of its existence. Once the court grants a care order, the interim care order ceases. On the other hand, the maximum duration of a care order is three years or until such time when the child attains the age of eighteen, whichever is earlier.⁷⁷ A care order can always be extended after the expiry of the first order, provided that the child has not attained eighteen years of age.⁷⁸ Extension of a care order can only be done by lodging an application to the court.

Care orders may be discharged before their expiration upon application to the court. Sec 23 of the LCA stipulates that an application to discharge a care order can be made by a child (through a next friend),⁷⁹ a social welfare officer, a police officer, a parent, guardian or relative of the child, or any person with parental responsibility.⁸⁰ Note that the list of persons able to lodge an application to discharge a care order is more extensive than the list of persons entitled to apply for a care order. The rationale of this discrepancy is based on the importance attached to allowing the child to grow up in the care of his or her family. Thus, if the local government authority does not take steps to lodge an application to discharge a care order, other individuals, including the child concerned, can lodge the application if they consider that the care order

⁷⁴ Reg 59 of the Child Protection Regulations, 2014.

⁷⁵ For more details on care orders, see part III of the Law of the Child Act; also, part X of the Child Protection Regulations, 2014; see also part X of the Law of the Child (Juvenile Court Procedures) Rules, 2016.

⁷⁶ Rule 94(1) of the Law of the Child (Juvenile Court Procedures) Rules, 2016.

⁷⁷ Sec 18(4) of the Law of the Child Act; see also rule 100 of the Law of the Child (Juvenile Court Procedures) Rules, 2016.

⁷⁸ Rule 105 of the Law of the Child (Juvenile Court Procedures) Rules, 2016.

⁷⁹ The Juvenile Court Procedure Rules, 2016 provide that an application to discharge a care order brought by a child by the help of a guardian ad litem instead of a next friend as provided under the LCA.

⁸⁰ See also regulation 75 of the Child Protection Regulations, 2014; Rule 106 of the Law of the Child (Juvenile Court Procedures) Rules, 2016.

should be discharged. An application to discharge a care order may be made where there is reasonable cause to believe that the care order is no longer necessary to protect the child from suffering harm or impairment of health or development.⁸¹ When an application to discharge a care order is lodged by the local government authority, it is essential, among other things, to file together with the application a care discharge plan showing how the care of the child after discharge will be implemented.⁸²

On the basis of reg 59(1) of the Child Protection Regulations, 2014, a child under a care order or interim care order, or a child taken into a voluntary care arrangement, is regarded as being in the care of the local government authority. Also, children who are provided with accommodation due to being lost, abandoned, seeking refuge, or without parental care for whatever reason, as per reg 38 of the Child Protection Regulations, 2014, are considered to be in the care of the local government authority. Though reg 59(1) of the Child Protection Regulations, 2014 does not include children moved to a place of safety, it is the opinion of the author, based on the research for this study, that this group of children ought to be included. Reg 22(5) of the Child Protection Regulations, 2014 requires the social welfare department to provide a child removed to a place of safety with accommodation, either with a relative, foster carer, fit person or if appropriate, in a hospital or as a matter of last resort in an approved residential home. Based on this provision, it is clear that children in a place of safety are children in the care of the local government authority.

As per reg 59(2) of the Child Protection Regulations, 2014, the local government authority is required to safeguard and promote the welfare of children in their care, provide them with suitable accommodation,⁸³ maintain them, and promote their educational achievement and health. Generally, through its social welfare department, the local government authority assumes parental rights and responsibilities in respect of the children in its care. Thus, providing children with the most suitable alternative care as per sec 7(3) of the LCA is essential for the local government authorities to discharge their duties towards children in their care. The following section discusses the alternative care options as stipulated under the legal framework for child protection and as available in Tanzania in practice.

⁸¹ Rule 106(6) of the Law of the Child (Juvenile Court Procedures) Rules, 2016; reg 75(1) of the Child Protection Regulations, 2014.

⁸² Reg 75(3) of the Child Protection Regulations, 2014; Rule 106(5) of the Law of the Child (Juvenile Court Procedures) Rules, 2016.

⁸³ Reg 2 of the Child Protection Regulations, 2014, defines accommodation to mean accommodation that is provided for a continuous period of more than 24 hours. It defines the term accommodation provider to mean a foster parent or an approved residential home. It is not clear why accommodation providers are limited to just foster parents and residential homes.

4.3. Alternative care options available in Tanzania

Reg 7(2)(h) of the Child Protection Regulations requires the head of the social welfare department to ensure adequate alternative family care to meet the needs of the children temporarily or permanently deprived of their families.⁸⁴ The establishment of adequate alternative care options is essential for protecting children who are deprived of their family environment, whether temporarily or permanently. Moreover, adherence to the suitability principle would be possible only if several functioning alternative care options are established to meet the varying needs of children coming into care.

The LCA and the Child Protection Regulations, 2014 contain several provisions concerning the alternative care options that can be established to serve children in care. However, these provisions are not free from ambiguities and lack of clarity in their formulation. For instance, sec 18(3) of the LCA provides that when the court grants a care order, the social welfare officer takes custody of the child. The social welfare officer has to determine the most suitable place for the child, such as an approved residential home, the home of an approved foster parent or fit person, or the home of a parent, guardian or relative. Moreover, sec 24(1) of the LCA provides that:

“A child under a care order or supervision order whose parent, guardian, or relative does not show an interest in the welfare of the child within a period stipulated by the court, may be put up for adoption, with foster parents or place the child in a care of the patron of an approved residential home.”

Sec 24 of the LCA mentions adoption, which is not mentioned under sec 18(3) of the LCA, as a possible option for placing a child under a care order. Secs 18(3) and 24 of the LCA are specific to children under a care order or interim care order, and they do not cover all categories of children needing alternative care. Reg 62(1) of the Child Protection Regulations, 2014 remedies the situation by providing alternative care options for all children needing alternative care and provides that:

“When a child is in the care of a local government authority, the authority shall be under a duty to accommodate the child in an appropriate placement:

- (a) placement with a relative, friend or person connected with the family;
- (b) placement with a foster parent or fit person; or

⁸⁴ See also reg 58 of the Child Protection Regulations, 2014 on the general duty of the local government authority to ensure availability of sufficient accommodation to meet the needs of children in care.

(c) placement in a residential home approved in accordance with the Act.”

The above provisions of the LCA and the Child Protection Regulations, 2014 do not use the terms alternative care or substitute care, unlike sec 7(3) of the LCA, which provides that where children are separated from their parents, they must be provided with the best substitute care available. However, the alternative care options to be established in Tanzania can be deduced from these provisions. The rationale behind the inclusion of parents as a possible placement option for children under sec 18(3) of the LCA is unclear. One wonders why a child should be taken into the care of the local government authority, which then places the same child in the care of a parent.

Five alternative care options can be deduced from the provisions quoted above, these being placement with relatives, foster care, placement with fit persons, placement in residential homes (children's homes), and adoption. The LCA contains specific provisions relating to foster care, adoption, and residential homes. Moreover, specific subsidiary legislation has been enacted to complement the LCA provisions on foster care, adoption and residential homes. A detailed discussion of each of these alternative care options is provided below, based on the law establishing them and how they are implemented in practice. The discussion includes an assessment of the way the suitability principle is applied in caring for children deprived of their family environment.

Neither the LCA nor the ACRWC includes *kafalah* as a possible alternative care option. The reason for this omission is not apparent, in view of the fact that there is a large Muslim population in Mainland Tanzania. This can be contrasted with sec 75 of the Children's Act of Zanzibar, which provides for *kafalah* as one of the alternative care options for children and families professing the Islamic faith as applications for *kafalah* are made to the Kadhi's Court.

The discretionary powers of social welfare officers are reflected in phrases like “the best substitute care available shall be provided for the child” under sec 7(3) of the LCA, “...determine the most suitable place for a child” under sec 18(3) of the LCA, and “...accommodate the child in an appropriate placement...” under reg 62(1) of the Child Protection Regulations, 2014. The law names possible alternative care options but the decision as to which option is chosen for a particular child is left to the social welfare officers, who are required to heed the principles discussed in section 3.4. of this study and to use their professional skills and standards in dealing with children needing care and protection.⁸⁵

⁸⁵ See also section 3.3.1 of this study.

4.3.1. Placement with relatives, friends or persons connected with the family

This kind of placement is provided under sec 18(3)(d) of the LCA and reg 62(1)(a) of the Child Protection Regulations, 2014. Reg 62(2)(a) of the Child Protection Regulations, 2014, requires social welfare officers to give preference to placement with relatives, friends or persons connected with the family over the other options listed under reg 62(1) of the Child Protection Regulations, 2014. However, there is no further clarification or guidance on the placement with relatives, friends or persons connected with the family of children who are in the care of the local government authority. Since informal care by relatives has always been a common practice in Tanzania, as discussed above, it seems that the inclusion of care by relatives, friends and persons connected with the child's family in the list of alternative care options is a step towards formalising this kind of care. The law needs to distinguish between informal and formal placement of a child with relatives or friends, and to clarify the role of the local government authority in respect of a child placed with a relative or family friend.

Based on reg 59(2) of the Child Protection Regulations, 2014 on general duties of the social welfare department towards children in their care, the local government authority has to treat children they place with relatives or friends in the same way it would treat children placed in other forms of alternative care such as foster care or institutional care. When the social welfare department puts a child in the care of relatives or friends, it has the same responsibility towards the child and the carers as it would do if the child were placed in foster care, with a fit person or in a children's home. Moreover, the relatives or friends taking responsibility to care for a child in the care of the local government authority have to be aware of the implications of that kind of placement.

Despite the clarity of sec 18(3)(d) of the Law of the Child Act and sec 62(1)(a) of the Child Protection Regulations, 2014, it is uncertain whether placing a child with relatives or friends is an alternative care option or not. The Child Protection Regulations, 2014 contain some provisions that suggest that care by relatives is an integral part of family care rather than alternative care. For instance, reg 42(4)(c) of the Child Protection Regulations, 2014 requires the head of the social welfare department to ensure, among other things, that there are no relatives who could care for the child and safeguard the child's welfare before receiving any child into voluntary care. Also, reg 44(1) of the Child Protection Regulations, 2014 requires the head of the social welfare department to establish that the capacity and willingness of relatives to protect and provide care for the child are inadequate before applying for a care order or a supervision order. Thus, a child needs alternative care only if there is no relative available and

willing to care for the child. The uncertainty of the position of care by relatives under the LCA needs to be rectified. The state has to decide whether it intends to formalise care by relatives. In that case, it will be necessary to establish a clear framework on the position of care by relatives taking Tanzania's socio-economic and cultural context into account.

4.3.2. Foster care

The provisions of Parts IV and VI of the Law of the Child Act complemented by the Foster Care Placement Regulations, 2012 govern the placement of children in foster care. Since part two of this study is dedicated to the law and practice of foster care in Tanzania, a detailed discussion on foster care is given there.

4.3.3. Placement with fit persons

Placement with fit persons as an alternative care option is provided for under sec 18(3)(b) of the LCA and reg 62(1)(b) of the Child Protection Regulations, 2014. Like placement with relatives or friends, there is no further explanation in the LCA or subsidiary legislation on placement with fit persons as alternative care for children. During the field research for this study in Tanzania, it was discovered that the process of making regulations to guide the implementation of placement with fit persons as a form of alternative care was underway.⁸⁶

Section 3 of the LCA defines a “fit person” as:

“a person of full age who is of high moral character and integrity and of sound mind who is not a relative of the child and capable of looking after a child, and has been approved by a social welfare officer as being able to provide a caring home for a child.”

Reg 2 of the Child Protection Regulations, 2014 adopts a similar interpretation but includes the remark that such a person *may be a foster parent or foster family*. At the same time, sec 52(1) of the LCA provides that any person above the age of twenty-one of high moral character and proved integrity may be a foster parent to a child. Also, sec 52(2) of the LCA provides that a foster parent means a person who is not the parent of a child but is willing and capable to undertake the care, welfare and maintenance of the child. Here, a question arises: what is the difference between placement with a foster parent and placement with a fit person? In chapter six of this study, I answer this question in detail when discussing the challenges associated with implementing foster care in Tanzania.⁸⁷

⁸⁶ Information obtained in an interview with a social welfare officer in the department of social welfare in the ministry, conducted in Dodoma on 05/03/2019, and in an interview with a child protection officer at UNICEF-Tanzania conducted in Dar es Salaam on 21/01/2019.

⁸⁷ See section 6.5. of this study.

It is not easy to understand what is meant by fit persons as an independent alternative care option in Tanzania. The Merriam Webster online dictionary defines fit (when used as an adjective) to mean acceptable from a particular viewpoint (proper) or sound physically and mentally.⁸⁸ Therefore, a fit person interpreted literally would be a proper person or a physically and mentally sound person. However, it would be logical to think that any alternative care option in which a child is placed ought to be provided by a fit person capable of caring for a child in need of alternative care. This argument is also reflected in the two definitions of the LCA and the Child Protection Regulations, 2014 quoted above. Moreover, various provisions of the LCA mentioning placement with a fit person reflect the fact that such placement is not intended to constitute a separate alternative care option. For instance, sec 46(2) of the LCA provides that:

“Where the parent, guardian or any other person with custody of the child ceases to be a fit person, the court of the area where the child is resident may appoint another person to have custody of the child and administer the maintenance order and that person shall act as if he was originally appointed by the court.”

The term fit person as used in this provision clearly means a person who is capable of providing appropriate care for the child. The provision shows that a parent, guardian or any other person having custody of the child may cease to be a suitable person to care for the child.⁸⁹

Unlike other alternative care options under the LCA (save for placement with relatives), which are explained in detail in the law and the subsequent subsidiary legislation, placement with a fit person is merely mentioned in the law. However, placement with a fit person has been used as an alternative care option since 2012 by some local government authorities under the initiative and support of UNICEF.⁹⁰ In the districts where research was conducted, Temeke was one of the early districts in which fit persons were being used to provide care for children in need. During the second phase of field research in 2019, I was informed that the programme was being rolled out in other parts of the country.⁹¹ It was told that, in the absence of subsidiary legislation on fit persons, there are guidelines that have been issued for implementation of the programme. However, an attempt to get these guidelines bore no fruits.

⁸⁸ <https://www.merriam-webster.com/dictionary/fit>.

⁸⁹ See also sec 46(2), 96(1), 104(1), 119(2), 125, 131, 134(2) and 143(3)(d) of the LCA.

⁹⁰ Information obtained in an interview with the child protection officer at UNICEF-Tanzania in Dar es Salaam conducted on 21/01/2019.

⁹¹ Information obtained in an interview with the child protection officer at UNICEF-Tanzania in Dar es Salaam conducted on 21/01/2019. Also, in an interview conducted with a social welfare officer at Temeke in Dar es Salaam on 04/02/2019.

During field research in Tanzania in 2019, I was informed that implementation of the fit person programme is overseen by the social welfare departments in the local government authorities. On the basis of the guidelines given to them, the social welfare officers in the local councils practising this programme oversee the recruitment of fit persons and determine the placement of children with approved fit persons.⁹² The respondents informed me that a maximum of three children can be placed with one fit person at a time. The fit person programme is intended to provide emergency and temporary care for children deprived of their family environment.⁹³ Placement with a fit person can also be used for children in conflict with the law pending the determination of their cases; this avoids the necessity of placing children in retention homes. For instance, a child who is entitled to bail but who has no parent or carer to care for them may be placed with a fit person.⁹⁴

The social welfare officers in Temeke in the Dar es Salaam region, where the programme was initially piloted, believe that the programme is helpful for children in need of alternative care. However, they spoke about the challenge associated with the programme when selected fit persons decide to withdraw or return children placed in their care. Up to February 2019, Temeke had only five families and one single parent acting as fit persons in the district. Originally, there were about ten approved fit persons but the number has decreased over time. One of the reasons for this is that the people who are approved as fit persons may have expectations of benefiting from the programme. When their expectations are not met, they may decide to withdraw. Since 2012 when the programme was rolled out, about 31 children had been placed with fit persons in Temeke.⁹⁵

Generally, from the data obtained during field research, I deduce that the fit person programme is implemented to avoid the prolonged and centralised foster care process under the mandate of the commissioner for social welfare. However, the LCA and its regulations do not provide a clear understanding of the intended use of placement with a fit person and what it actually means.

⁹² Information obtained in an interview with a social welfare officer at Temeke Municipal Council in Dar es Salaam on 04/02/2019, and in an interview conducted with a regional social welfare officer in Mwanza on 13/03/2019.

⁹³ Information obtained in an interview with a social welfare officer in Temeke on 04/02/2019.

⁹⁴ See also sec 104(1) of the LCA. See also rule 28(1) and rule 29(3)(b) of the Law of the Child (Juvenile Court Procedure) Rules, 2016. Sec 119(2)(c) of the LCA shows that placement with a fit person can be used as an alternative sentence following the conviction of a child; this also reflects the unclear use of the word fit person under the LCA.

⁹⁵ Information obtained in an interview with a social welfare officer in Temeke on 04/02/2019.

4.3.4. Placement in a residential home (residential care)

The UN Alternative Care Guidelines for Children defines residential care as care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergencies, and all other short- and long-term residential care facilities, including group homes.⁹⁶ Generally, residential care is care in institutional settings, whether big or small. In Tanzania, this is an alternative care option under sec 18(3)(d) of the LCA and reg 62(1)(c) of the Child Protection Regulations, 2014. Part XI(a) of the LCA provides further details on institutional care and is complemented by the Children’s Homes Regulations, 2012 made according to sec 145 and sec 175 of the LCA.⁹⁷ Before the enactment of the LCA, residential care was regulated by the Children’s Homes (Regulation) Act of 1968 and the Children’s Homes Regulations of 1968. There were also the National Guidelines for the Establishment and Management of Children’s Homes of 2006, which are no longer in force following the enactment of new laws and regulations.

Though the term residential home is used in sec 18(3)(a) of the LCA and reg 62(1)(c) of the Child Protection Regulations, 2014, neither of the two defines the term. However, sec 133(8) of the LCA provides that:

“For purposes of this subpart, the “approved residential homes” or “institution” shall include –

- (a) a children’s home;
- (b) a retention home;
- (c) an approved school;
- (d) a crisis centre; and
- (e) any other establishment designated as such by the commissioner.”

The above list shows that the term residential home can mean different settings depending on the purpose of the establishment. For children deprived of their family environment, a residential home would mean a children’s home. Reg 2 of the Children’s Homes Regulations, 2012 defines a children’s home as:

“An institution other than an approved school and a retention home, where five or more most vulnerable children or children in need of care and protection are received,

⁹⁶ See para 29(c)(iv) of the UN Guidelines for the Alternative Care of Children; see also the definition of residential care in Andrew Dunn, Elizabeth Jareg, and Douglas Webb, *A Last Resort: The Growing Concern about Children in Residential Care (Save the Children’s Position on Residential Care)*, (Save the Children UK, 2007), 1.

⁹⁷ The Children’s Homes Regulations, 2012 were adopted before the enactment of the Child Protection Regulations, 2014. As a result, the Children’s Homes Regulations contain provisions that are now covered under the Child Protection Regulations.

cared for and maintained, either gratuitously or for payment by a person who is not a relative or guardian of the child.”

Based on the Children’s Homes Regulations, 2012, a detailed explanation of residential care in children’s homes is provided below. Due to the important place that residential care holds in practice in protecting children deprived of their family environment, the discussion goes into some detail.

4.3.4.1. Establishment and approval of children’s homes

In Tanzania, children’s homes may be established by the government or any person (which can be an individual or an organisation). Unlike the government, a person or organisation intending to run a children’s home is required by law to seek approval from the commissioner for social welfare.⁹⁸ Procedurally, the application for approval to operate a children’s home does not go straight to the commissioner. The application is submitted to the social welfare officer of the respective local government authority as per reg 5(3) of the Children’s Homes Regulations, 2012. The application has to be supported by an introduction letter from the ward executive officer and certified copies of the constitution and registration certificate if the applicant is an organisation.⁹⁹ The application for approval is made using Form No. 2(a) if the applicant is an individual, and Form No. 2(b) if the applicant is an organisation.¹⁰⁰ If the commissioner for social welfare approves the application, he or she is required to issue a licence to the applicant. The licence is issued in Form No. 3 found in the third schedule to the Children’s Homes Regulations.¹⁰¹

Before the commissioner approves the application and issues a licence to operate a children’s home, a social inquiry report has to be conducted by the respective social welfare officer on the applicant’s suitability to operate a children’s home.¹⁰² The proposed premises for running the home must be visited in order to determine whether they are fit for the purpose. The premises must be inspected by a health officer of the respective local government authority to ensure that they are suitable for protecting the health of children. The health officer is required to prepare and submit an inspection report and his or her recommendation on the proposed children’s home to the respective social welfare officer.¹⁰³

⁹⁸ Sec 133 of the Law of the Child Act; see also reg 5 of the Children’s Homes Regulations, 2012.

⁹⁹ Reg 5(4) of the Children’s Homes Regulations, 2012.

¹⁰⁰ Reg 5(2) of the Children’s Homes Regulations, 2012. The forms are found in the third schedule to the Children’s Homes Regulations, 2012.

¹⁰¹ For more details on the issuance of licences, see reg 6 of the Children’s Homes Regulations, 2012.

¹⁰² Reg 5(5) of the Children’s Homes Regulations, 2012.

¹⁰³ Reg 5(6)(7) of the Children’s Homes Regulations, 2012.

The application is then forwarded by the respective social welfare officer to the commissioner for social welfare for his or her assessment and approval within sixty days from the date the social welfare officer receives the application. The application is forwarded to the commissioner together with the social inquiry report, constitution and registration certificate of the organisation, the health inspection report, information on the maximum capacity of the children's home and a list of staff and a copy of their certificates.¹⁰⁴ The commissioner for social welfare, guided by the requirements of the law provided under reg 7 of the Children's Homes Regulations, 2012, and the recommendation made by the social welfare officer, may approve or reject an application. The decision by the commissioner has to be made within 30 days of receiving the application. Whether the decision is approval or rejection, the commissioner for social welfare has to inform the respective social welfare officer, and the applicant of the decision reached. An approved residential home is then registered in the Children's Homes Register, and a licence is issued to the applicant within 14 days of the decision.

If the application is rejected, the commissioner has to communicate the decision to the applicant within 14 days of making the decision. An applicant whose application is rejected has a right to appeal against the commissioner's decision to the minister responsible for social welfare within 30 days from the date of receiving the commissioner's decision as per reg 6(5) of the Children's Homes Regulations, 2012. The minister is required to review the appeal and decide on the appeal within sixty days of receiving the appeal. The decision of the minister is regarded as final and conclusive.¹⁰⁵ However, an applicant whose application is rejected may re-apply for approval after the expiry of a minimum of twelve months from the previous application.¹⁰⁶

Each approved children's home is required to have a welfare committee responsible for overseeing the running and general administration of the home.¹⁰⁷ The welfare committee has to meet at least four times a year and to undertake on-site visits, during which they are required to speak with both children and staff. The committee is required to issue recommendations to the manager or licensee on issues that need improvement in running the children's home.¹⁰⁸ Apart from the welfare committee, a licensee of a children's home is required to employ qualified and trained staff for the efficient running of the home.¹⁰⁹ In employing staff, the

¹⁰⁴ Reg 5(8) of the Children's Homes Regulations, 2012.

¹⁰⁵ Reg 6(6)(7) of the Children's Homes Regulations, 2012.

¹⁰⁶ Reg 6(8) of the Children's Homes Regulations, 2012.

¹⁰⁷ Sec 134(2) of the Law of the Child Act; see also reg 8 of the Children's Homes Regulations, 2012.

¹⁰⁸ Reg 8(6) of the Children's Homes Regulations, 2012.

¹⁰⁹ Reg 10(1) of the Children's Homes Regulations, 2012.

licensee has to pay attention to the number, gender balance, age, state of health and needs of the children residing in the home. As a minimum, a children's home needs to have a manager responsible for the day-to-day running of the home and a residential social worker (the officer in charge) responsible for the day-to-day care and welfare of the children. The residential social worker is also responsible for the supervision of the care staff. The residential social worker must be the holder of an advanced diploma in social work or a degree in sociology with a minimum of one year professional experience in direct social work with children.¹¹⁰

Other staff to be employed are child care workers and caregivers as provided under reg 10(3) of the Children's Homes Regulations, 2012. These are referred to as care staff. Child care workers must have at least a certificate in social work or child care. Their task is to provide close care, supervision, and guidance to the children. The caregivers must have a minimum of two years experience with children and provide daily care for the children in the institution.¹¹¹ The number of care staff to be employed depends on the number of children accommodated in the home. The Children's Homes Regulations provide a child/staff ratio that guides licensees in the employment of care staff.¹¹²

4.3.4.2. Admission of children in children's homes

An important question is how children are admitted into children homes. Sec 137(1) of the LCA provides circumstances that may lead to a child's admission into a children's home. Sec 137(1) of the LCA provides that:¹¹³

“(1) A child may be admitted to an approved residential home or institution-

- a) pending determination by a court for care and protection of the child;
- b) on the recommendation of a social welfare officer who has determined that the approved residential home or institution is the most suitable for the child;
- c) with the approval of a social welfare officer if the child is an orphan and family care and fosterage are not available.”

Regulation 16(1) of the Children's Homes Regulations, 2012 stipulates that a child cannot be admitted into a children's home without the consent of the child's parent or parents, guardian or relative. The only exception is if the child is placed in a children's home by a social welfare officer who, in this case, will be the one to give consent. Social welfare officers have the power

¹¹⁰ Reg 10(2) of the Children's Homes Regulations, 2012.

¹¹¹ Reg 10(4) of the Children's Homes Regulations, 2012.

¹¹² The Child/staff ratio guide can be found in the first schedule to the Children's Homes Regulations, 2012.

¹¹³ Read together with reg 16(1) of the Children's Homes Regulation, 2012 on conditions for admission.

to place a child in alternative care under the terms of a care order or interim care order in accordance with sec 18 of the LCA or according to section 137(1) of the LCA quoted above. If the procedures for dealing with children deprived of their family environment under the Child Protection Regulations, 2014 are adhered to, any placement of a child in a children's home ought to be done by the social welfare department of the respective local government authority. However, the law acknowledges the realities of children deprived of a family environment and provides an exception to the above admission criteria. In emergencies, a child may be admitted to a children's home even if he or she does not meet any of the criteria as per reg 16(4) of the Children's Homes Regulations, 2012. A child who is brought to the children's home by any person other than a parent, guardian or relative may be admitted.¹¹⁴ A child who presents him/herself to a children's home may also be admitted. In either of these cases, the manager of the children's home is obliged to inform the social welfare officer about the child who has been admitted as soon as possible and not later than forty-eight (48) hours after admitting the child.¹¹⁵ Once the social welfare officer has been informed that a child has been admitted to a children's home, the officer is required to conduct a social investigation within seven days and prepare a social investigation report as per reg 16(6) of the Children's Home Regulations, 2012. If it is clear that the child cannot be returned home, the social welfare officer can then make a recommendation or approve the official admission of the child to the children's home.¹¹⁶

Sec 145 of the LCA vests parental responsibilities for children admitted to approved children's homes with the staff of the institution. The operators of the children's home have to ensure that children in their care enjoy their rights and that their best interests are protected.¹¹⁷ Operators of children's homes are required to provide all the basic needs for the children in their care without any discrimination. In appropriate cases, the court may order a parent, guardian or relative of the child to contribute to the child's maintenance in the children's home.¹¹⁸

The objective of children's homes is to provide temporary care for children who cannot be cared for by their own families with a goal, where appropriate, of reuniting and reintegrating them with their families. Hence, the LCA and the Children's Homes Regulations require children's homes to promote contacts between the children and their parents, guardians, or relatives. Contact is discouraged if it is not in the best interest of the child. Thus, the law requires

¹¹⁴ Reg 16(4) of the Children's Homes Regulations, 2012.

¹¹⁵ Reg 16(5) of the Children's Homes Regulations, 2012.

¹¹⁶ Reg 16(6) of the Children's Homes Regulations, 2012.

¹¹⁷ See reg 4(2) of the Children's Homes Regulations, 2012 on the rights of children placed in children's homes.

¹¹⁸ Sec 139 of the Law of the Child Act.

children's homes to ensure that children and parents can visit each other under proper guidance.¹¹⁹

4.3.4.3. The place and practice of residential care

Residential care holds an important position in the protection of children deprived of their family environment in Tanzania. Though the principles governing placement in alternative care emphasise the use of institutional care as a measure of last resort, in practice institutional care has turned out to be a measure of the first instance. This situation is partly because children's homes are more readily available to receive children as compared to the family-based alternative care options established under the LCA.

In 2011 an assessment of the institutional care situation in Tanzania was completed, in which it was reported that there are about 282 children's homes.¹²⁰ According to this assessment and up to 2019, when the field research for this study was conducted, there is only one state-owned institution, located at Kurasini in Dar es Salaam (Kurasini National Children's Home). The remaining children's homes are owned by non-governmental organisations (NGOs) or community-based organisations (CBOs), or faith-based organisations (FBOs). In a few instances, children's homes are owned by private individuals.¹²¹ Of the nine children's homes visited during field research, two (Hisani and Umra children's homes) are owned by private individuals. Three (SOS Children's Village in Mwanza and Dar es Salaam and Forever Angels Baby Home) are owned by non-government organisations. The remaining four, Msimabazi Centre, Mburahati Centre, Kijiji cha Furaha (all located in Dar es Salaam) and Village of Hope (Mwanza), are owned by faith-based organisations. Since these children's homes were established to provide alternative care to children, subject to their licence conditions, their doors are in most cases open to receive any child in need of alternative care. After all, the existence and survival of these children's homes depend on the number of children in their care. This is true for most donor-funded organisations and more so where funding depends on the number of children accommodated by these institutions.

In an interview with a social welfare officer in Mwanza, the respondent confidently said that any children's home in her district is under her authority. Thus, the operators have no power to refuse to receive a child if a social welfare officer asks them to do so, unless they want their

¹¹⁹ Reg 21 of the Children's Homes Regulations, 2012.

¹²⁰ Department of Social Welfare, Report on the Assessment of the Situation of Children in Institutional Care in Tanzania (Dar es Salaam, 2011), 32.

¹²¹ Department of Social Welfare, 35 on the ownership of children's homes in Tanzania.

licence to be cancelled.¹²² This shows how easy it is to place children in children's homes. Children's homes are expected to admit any child brought to them by the social welfare officer, provided the child meets the criteria for being admitted to the particular home. Most children's homes have criteria in respect of the children who can be admitted, based on age, sex and nature of vulnerability.

The flexibility and convenience that institutional care offers to social welfare officers are the main reasons for the continued use of institutional care. Though the department of social welfare is required to ensure that children in the care of the local government authority are cared for and protected, this responsibility seems to be lightened when a child is placed in institutional care. It is upon the operator of a children's home to ensure that the premises are suitable and to guarantee standard care for the children in the home. Though the social welfare officer is responsible for monitoring the activities of children's homes, this cannot be compared to the tasks that a social welfare officer has to fulfil when a child is placed in foster care or other forms of family-based care.

For instance, a foster carer needs continuous support and guidance from the social welfare officers throughout the child's placement, especially now that provision of foster care services is in the mandate of the department of social welfare alone. In one interview with a social welfare officer at the ministry, the respondent was of the opinion that it is much easier to place a child in a children's home than in foster care, where close and frequent supervision is needed.¹²³ This social welfare officer elaborated further that much time and resources, which are not available, would be needed if a child is placed, for instance, in foster care. In practice, once a child is placed in a children's home, social welfare officers do nothing to monitor the child's progress, even though this is contrary to the law.

During field research in 2018, it was observed that social welfare officers assume that their responsibilities end with placing a child in a children's home. The operators of the children's homes visited said that the social welfare officers seldom engage in the affairs of the child without the initiative of the children's home.¹²⁴ In some cases, it is upon the operators of the children's home to dig into the details of the child and his or her family, a task which the law assigns to the social welfare departments. Some of the respondents in children's homes said

¹²² The interview was conducted on 23/03/2018 at Ilemela District in Mwanza Region during the first phase of field research.

¹²³ The interview was conducted with a social welfare office in the Ministry of Health, Community Development, Gender, Elderly and Children in Dodoma on 03/04/2018.

¹²⁴ This was an issue raised in almost all nine children's homes visited in Dar es Salama and Mwanza.

that they have to beg social welfare officers to provide them with information about certain children.¹²⁵

4.3.4.4. Over-institutionalisation of children and deinstitutionalisation

The government asserts that a policy of deinstitutionalisation is the driving force in providing alternative care services and enhancing protection for children deprived of a family environment. When asked why there is only one state-owned children's home in Tanzania, social welfare officers in the ministry claimed that the government is trying to discourage the institutionalisation of children. For this reason, the government cannot establish more children's homes as it would be acting against its own policy.¹²⁶ However, the government continues to register new children's homes established by non-governmental organisations. Moreover, there have been few practical efforts made by the government to improve and strengthen family and community-based alternative care options to replace the excessive use of institutional care. This is the case despite the principle that family-based care should be preferred over institutional care.¹²⁷

Deinstitutionalisation of alternative care services for children is a global initiative due to the manifest negative impacts on children placed in institutional care. Institutional care is not regarded as the best option for all children in need of alternative care.¹²⁸ The CRC committee has been calling on states parties to minimise institutional care and develop family-based care for children deprived of their family environment. The CRC and the UN Guidelines for the Alternative Care of Children emphasise that institutional care should only be used as a measure of last resort and only in appropriate cases, when the best interests of the child can be better served in an institutional setting rather than in a family-based setting.¹²⁹

The foreseeable danger of having many children's homes owned by non-governmental organisations is the absence of sustainability of these homes. Most of these children's homes rely on funding from donors or private sponsors to operate. In the event that this funding should come to an end, the children's homes would have to close. For instance, the respondents at Kijiji cha Furaha said that they have not received many children in recent years. They pointed

¹²⁵ Information obtained in an interview with care workers at SOS Children's Village in Dar es Salaam on 29/01/2019.

¹²⁶ Information obtained during an interview with a social welfare officer in Dodoma on 03/04/2018.

¹²⁷ See section 3.4.2.1 of this study.

¹²⁸ See also the report by Andrew Dunn, Elizabeth Jareg, and Douglas Webb, *A Last Resort: The Growing Concern about Children in Residential Care* (Save the Children's Position on Residential Care).

¹²⁹ See para 21-23 and part VII(C) of the UN Guidelines for the Alternative Care of Children on residential care.

out that their sponsors are decreasing either by withdrawing or due to death, which has adversely affected the financial capacity of the home to receive and care for more children.¹³⁰

Moreover, the services offered by these organisations depend on the conditions and terms attached to the funds received. The respondents from the SOS Children's Villages in Mwanza and Dar es Salaam informed me that the organisation is not planning to establish more children's homes. They are working towards adopting a new approach focusing on family strengthening and family reunification. This reflects the fact that over-dependence on non-governmental organisations creates difficulties in protecting children deprived of their family environment. If these organisations lack funds or the funders change their interests, the sustainability of these children's homes is at stake.

The absence of state-owned children's homes and ineffective family- and community-based services for children in need of alternative care have contributed to the existence of many children's homes that do not meet the standards stipulated under the law. For instance, social welfare officers at the local government level raised concerns that some children's homes fail to meet legal requirements, especially the registration and admission requirements.¹³¹

Though not in all instances, institutional care is characterised by the absence of permanent and close carers with whom children can develop an attachment. Most institutions have carers who operate on a rotational basis, denying a child the possibility of creating the carer-child bond that is necessary for a child's emotional and intellectual development. With many children in their care, it is not easy for the carers in children's homes to focus on the needs of individual children and meet the responsibilities they are required to discharge. For instance, a social worker at Msimbazi children's home in Dar es Salaam indicated that only children under six months have permanent carers due to their age and need for close monitoring. For other age groups, the respondent said that to avoid problems of handling children when the carers they are used to are absent, they make carers rotate in different rooms. The respondent further explained that carers may have to deal with emergencies or may go on leave, and when children are only used to a specific carer, they may not readily accept a new carer.¹³² Another factor preventing children from developing an emotional and physical attachment to a carer is the large number of children accommodated in children's homes. Usually, the number of carers is not proportional to the number of children in the care of the home.

¹³⁰ An interview conducted at Kijiji cha Furaha located in Mbweni Dar es Salaam on 05/02/2019.

¹³¹ Information obtained in an interview with social welfare officers at Temeke in Dar es Salaam on 04/02/2019.

¹³² An interview conducted at Msimbazi Centre for Children in Dangerous Environment in Dar es Salaam on 18/01/2019.

However, attachment between a child and a carer is possible. A good example of a home that has tried to circumvent this challenge is SOS Children's Villages in Dar es Salaam and Mwanza. In the SOS Children's Villages, the children are divided into groups of ten and each group is allocated a house within the Village. Each house has a mother (mama) who is a permanent carer for the household and lives with the children allocated to her. The mother is assisted by an aunt who comes and leaves daily and may assist if the mother takes some days off. These households are intended to imitate the lifestyle of an average household in the community. This arrangement provides an opportunity for the children and the caregiver to develop an emotional and physical attachment. It is also possible to control and manage the behaviour of the children closely.¹³³

As mentioned above, the Children's Home Regulations, 2012 provide a guide to the care staff/child ratio, which indicates the number of care staff required for a given number of children depending on the time of the day. The regulations require one carer for five children of six years of age during the day and night. For children between the ages of seven and fourteen, one carer is needed during the day for ten children and one carer for twenty children during the night. For the age group between fifteen and seventeen, one carer is required for ten children during the day and one carer for twenty-five children during the night. The basis for this ratio under the regulation is not given.

Though the number of carers indicated in the care staff/child ratio appears to be relatively achievable, not all institutions can achieve this threshold in practice. The capacity of the children's home to employ enough care staff is influenced by their financial ability and the care system adopted. For instance, SOS Children's Villages can achieve this ratio because of the care system adopted and its financial capacities, but they cannot be compared to Hisani children's home in Mwanza, for example, which is owned by an individual. When I arrived at Hisani children's home, I observed that the children accommodated there had no one with whom they could form a close relationship. I saw about twenty children of mixed age groups, including children of three or four years, playing around, and it appeared that only two carers were managing the children. These two carers were also engaged in other activities around the home like cleaning, cooking, and attending to visitors.¹³⁴

¹³³ An interview conducted at SOS Children's Village in Dar es Salaam on 29/01/2019, and an interview conducted at SOS Children's Village in Mwanza on 19/03/2019. I had an opportunity to visit the houses during my visit to the Village in Mwanza.

¹³⁴ I visited Hisani children's home on 19/03/2018 during the first phase of my field research in Tanzania.

4.3.4.5. Impacts of institutional care on children

The quality of care provided in children's homes in Tanzania cannot be generalised because they have different care systems. The financial capacities of the home play an essential role in determining the quality of care. For instance, children accommodated in SOS Children's Villages, where each child has his or her sponsor, are better positioned to enjoy their rights and entitlements than children, say in Hisani or UMRA children's homes, which are operated by individuals and rely significantly on aid from good Samaritans.

Children accommodated in children's homes are in danger of missing the realities of life. Growing up in an institution isolates children from the true picture of life beyond the walls of the home. Institutions like SOS Children's Village provide children with a living environment that may not be available for a child growing up in a typical Tanzanian family. SOS Children's Village houses are equipped with washing machines, electric cookers and a sitting room furnished with lovely sofas and a TV set. I was impressed with the interior and exterior environment of SOS Children's Village. While not advocating for something less, I see the danger that these children are not prepared for the realities of life beyond the Village. In my conversations with the Village operators, the respondents confirmed that children suitable for family reunification sometimes return to the Village after reunification. They tend to miss the good life they had while in the Village, and they prefer to live there rather than in what they regard as the bad homes of their parents or families.¹³⁵

Continuity of the child's upbringing and the child's religious and cultural background, as required by reg 3(2)(d) of the Child Protection Regulations, 2014, is usually not guaranteed in the children's homes. The institutions established in Tanzania receive children from all over the country. It is unrealistic to think that in an institutional setting the cultural background of every child can be maintained.

Children placed in homes owned by faith-based organisations are cared for based on the faith and belief to which the homes subscribe. For instance, five of the children's homes I visited were connected to a particular religion or denomination. Children in UMRA children's home, which is owned by an individual subscribing to the Islamic faith, dress like Muslims regardless of their origin. Though allowed to attend church on Sundays, Christian children are required to participate in activities that relate to the Islamic religion. The justification given for this practice

¹³⁵ An interview conducted at SOS Children's Village in Dar es Salaam on 29/01/2019. During the interview several examples were given of children who were reunited with their families and then returned to the Village. One young man even got married and then decided to go back to the Village because he thought that he could not manage life with his new wife without the Village.

was to avoid discrimination based on religion. The same was the case for Kijiji cha Furaha in Mbwani where all children cared for are required to attend Catholic services and participate in all church activities organised by the home.

In practice, contrary to the national law and policy, institutional care is a permanent measure rather than a temporary measure. In all the children's homes visited during field research, apart from Forever Angels, Msimbazi and Mburahati,¹³⁶ the children are expected to stay in institutional care until they age out of care. Only SOS Children's Village and Village of Hope confirmed that they have recently been moving towards family reunification for those children whose families are traced and found. Otherwise, it is expected that children will stay in the homes until they reach the maximum age for being in care. Apart from Forever Angels, Mburahati and Msimbazi children's homes, all the homes visited have programmes to prepare children for independence when they age out of care.

It can be concluded that, in the absence of other well-established alternative care options, the over-institutionalisation of children in Tanzania has, in practice, outwitted the principle that institutional care is to be used as a measure of last resort. It is certain that every child who appears to be needing alternative care, in the absence of a willing relative to care for the child, will be placed in a children's home whether that is the most suitable substitute care or not. Worse, institutional care is dominated by non-government organisations, with the state playing only a policing role, if at all, in respect of the operators of children's homes.

4.3.5. Adoption

It is acknowledged in several instances that adoption can be used to provide a child in the care of a local authority with a new and permanent family to replace the child's biological family. For instance, sec 24(1) provides that where the parents of a child under a care or supervision order show no interest in the child's welfare, the child may, among other alternatives, be put up for adoption.¹³⁷ Adoption is regulated by Part VI of the LCA and the Adoption of a Child Regulations, 2011. These two pieces of legislation are complemented by the Child Protection Regulations, 2014 and the Foster Care Placement Regulations, 2012. Reg 2 of the Adoption of a Child Regulations, 2011 defines adoption as a measure to provide a child who is deprived of his or her family environment with permanent family care. This definition implies that adoption

¹³⁶ These only take children up to five/six years of age. If it happens that they are not adopted then they will be transferred to other children's homes after reaching the age of six.

¹³⁷ See also reg 49 of the Child Protection Regulations, 2014 providing for freeing a child for adoption where adoption is considered to be in the best interests of the child. See also rule 99 of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

is to be used for children who have no possibility of being cared for by or reintegrated with their families. For such children, permanent alternative family care is more suitable than temporary alternative care.

In Tanzania, adoption can be categorised into two types depending on the relationship between the child subject to adoption and the prospective adopters: adoption by non-relatives¹³⁸ and adoption by relatives, called ‘open adoption’. Adoption by non-relatives is provided for under sec 54(1)(a) and sec 55(1) of the LCA. Moreover, prospective adoptive parents may be citizens of Tanzania (both residents and non-residents)¹³⁹ and foreigners provided they meet the specific requirements stipulated under sec 74 of the LCA.¹⁴⁰ On the other hand, open adoption as per sec 54(3) and sec 55(2) of the LCA is defined as adoption by relatives.¹⁴¹ However, the original and ordinary meaning of open adoption is an adoption where some degree of contact between the biological family and the child is permitted after adoption.¹⁴² Therefore, defining open adoption as adoption by relatives under the LCA is a misconception that might need rectification in the future. Open adoption as defined under the LCA does not lead to severance of ties between the child and his or her birth family as per reg 22 of the Adoption of a Child Regulations, 2011, which is different in the case of adoption by non-relatives as per sec 64(1)(a) of the LCA.

Adopting children in Tanzania is a judicial decision rather than an administrative decision; it is an exclusive mandate of prescribed courts. Social welfare officers or local government authorities have no mandate to place a child with adoptive parents. Thus, a person interested in adopting a child has to lodge an application for adoption with mandated courts. The High Court has the mandate to receive and determine all kinds of adoption applications except for open adoptions.¹⁴³ Applications for adoption by relatives (‘open adoption’) are lodged in the District Court or Resident Magistrate’s Courts.¹⁴⁴ The regulations on adoption provide a template for adoption applications.¹⁴⁵ Secs 55 and 56 of the LCA provide details on who can lodge the

¹³⁸ This includes adoption by a mother or father of the child, either alone or jointly with his or her spouse, see sec 55(1)(b) of the LCA.

¹³⁹ See sec 62 of the LCA and part IV of the Adoption of a Child Regulations, 2011 on adoption by non-relatives.

¹⁴⁰ See sec 74 of the LCA and see also part V of the Adoption of a Child Regulations, 2011 on adoption by foreigners.

¹⁴¹ Sec 3 of the LCA interprets the word relative to mean a grandparent, brother, sister, uncle, aunt or any other member of the extended family. This definition seems to exclude parents as relatives of a child; this is a possible explanation for regarding adoption by a father or mother of a child as adoption by non-relatives.

¹⁴² Megan Smith et al., Review of Benefits and Risks for Children in Open Adoption Arrangements, *Child & Family Social Work* 25, no. 4 (November 2020): 761.

¹⁴³ Sec 54(1) Law of the Child Act; see also reg 4 of the Adoption of a child Regulations, 2011.

¹⁴⁴ Sec 54(1)(b) of the Law of the Child Act; see also reg 4 of the Adoption of a child Regulations, 2011.

¹⁴⁵ The template is found in the schedule to the Adoption of Children Regulations.

application and the conditions to be met by those intending to seek adoption orders. The application for adoption can be lodged jointly or individually by a husband and wife, mother or father of a child with or without her or his spouse. However, the application by one spouse has to be consented to by the other spouse. As per sec 56(1)(a) of the LCA, the applicant for the adoption order has to be at least 25 years old and at least 21 years older than the child to be adopted. If the applicant is a child's relative, he or she has to be above 25 years of age as per sec 56(1)(b) of the LCA.

Sec 57(1) of the LCA read together with reg 5(1) of the Adoption of a Child Regulations, 2011, requires the consent of a parent, relative or guardian of the child before the court grants an adoption order. The court has to ensure that such consent is given and that the person giving consent is well informed of the consequences of child adoption.¹⁴⁶ However, sec 57(2) of the LCA and reg 7(1) of the Adoption of a Child Regulations, 2011 provide circumstances for dispensing with the requirement for consent. The court may dispense with the consent of a parent, guardian or relative if the court is satisfied that: the parent, guardian or relative has neglected or persistently ill-treated the child;¹⁴⁷ or the person cannot be found or is incapable of giving consent or the consent is unreasonably withheld.¹⁴⁸ The consent granted may be withdrawn before the commissioner for oaths or social welfare officer within sixty days from the date the consent was given.¹⁴⁹ No court can grant an adoption order before the expiration of this period.¹⁵⁰ The essence of this grace period is to give consenting persons an opportunity to be sure of their decision due to the consequences associated with an adoption order. The court must also obtain the consent of the child, if the application for adoption concerns a child of or over fourteen years of age and the child is of sufficient maturity to understand the meaning and effects of adoption.¹⁵¹

In addition to the requirement discussed above, the court can only grant an adoption order if it is satisfied that adoption is in the child's best interest.¹⁵² Where appropriate, the court must take into consideration the wishes of the child, who can form an opinion before the adoption order is granted.¹⁵³ In the determination of an application for adoption, the court has to take into

¹⁴⁶ Sec 59(1)(a) of the Law of the Child Act.

¹⁴⁷ Sec 57(2)(a) of the Law of the Child Act and reg 7(1)(a) of the Adoption of a Child Regulations, 2011. Reg 7(1)(a) of the regulations only mentions parents.

¹⁴⁸ Sec 57(2)(b) of the Law of the Child Act and reg 7(1)(b)(c) of the Adoption of a child Regulations, 2011.

¹⁴⁹ Reg 6 of the Adoption of a Child Regulations, 2011.

¹⁵⁰ Reg 13(3) of the Adoption of a Child Regulations, 2011.

¹⁵¹ See sec 59(1)(c) of the LCA and reg 5(3) of the Adoption of a Child Regulations, 2011.

¹⁵² Sec 59(1)(b) of the LCA and reg 13(1) of the Adoption of a Child Regulations, 2011.

¹⁵³ Sec 59 of the Law of the Child Act on conditions for granting an adoption order.

consideration, *inter alia*, the social inquiry or social investigation report for the child prepared by a social welfare officer.¹⁵⁴ Sec 64(1) of the LCA refers to the effects of adoption on parental rights and states as follows:

“64-(1) When an adoption order is made-

- (a) the rights, duties, obligations and liabilities including those under customary law of the parents of the child or of any other person connected with the child of any nature shall cease; and
- (b) the adoptive parent of the child shall assume the parental rights, duties, obligations and liabilities of the child with respect of custody, maintenance and education as if the child was born to the adoptive parent in a lawful wedlock and was not the child of any other person.”

Reg 22 of the Adoption of a Child Regulations, 2011, provides that an order for ‘open adoption’ shall have the same effects, save that the relationship between the birth family and the adopted child may be preserved to some extent, and there should be no change in the family name of the child unless the birth family and the adopted child consent to the change of name.¹⁵⁵ Thus, in most cases, once an adoption order is granted, the ties between the child and his or her biological family are severed. Parental rights and responsibilities in respect of the child are assumed by the adoptive parent(s). As a permanent alternative care option for children deprived of a family environment, adoption should be used when the circumstances of the child are such that he or she cannot be reintegrated into his or her birth family. The priority should always be for a child to retain contacts and ties with his or her birth family. The transfer of parental rights and duties to the adoptive parents, after an adoption order is granted, is the major distinctive feature between adoption and other alternative care options which do not involve absolute transfer of these rights and duties.

Adoption has not been a common practice in Tanzanian societies. The importance attached to family and kinship ties has substantially influenced the practice of adoption in the country. Most Tanzanians still believe that kinship care is the best way to provide support and care for children who, for whatever reason, cannot be cared for by their biological parents. People contend that it is only logical and socially acceptable to care for a relative’s child rather than adopting a child

¹⁵⁴ Reg 7(2) of the Adoption of a child Regulations, 2011.

¹⁵⁵ Reg 22 of the Adoption of a Child Regulations, 2011, due to printing errors, is missing in the English version and it could only be found in the Kiswahili version of the regulations – Kanuni za Kuasili Watoto, 2012 published in the Government Notice No. 164 of 2016.

from a strange background.¹⁵⁶ There is a general assumption that a child whose parents are unavailable or unable to care for them will be cared for by either the maternal or paternal relatives of the parents. However, this assumption can be rebutted by pointing to the many children in institutional care or living on the streets. If kinship care were sustainable and effective, there would be no reason for conducting this study.

The influence on adoption of child care practices and customs in Tanzanian societies is manifested in the reasons that push individuals to adopt. It is rare for Tanzanians to adopt children for the simple reason of providing a child deprived of a family environment with a new permanent family. One of the major reasons Tanzanians adopt is the inability of couples to have their own biological children.¹⁵⁷ After all medical attempts have failed, and when a couple has given up on the possibility of getting their own children, the last resort is adoption. There is selfishness involved here in that those wanting to adopt will have special criteria regarding the kind of child to be adopted. Prospective adoptive parents generally want children who are still infants, preferably between zero and two years. Some go an extra mile and describe the physical features the child should possess. During field research for this study, it was revealed that some adopters even change their place of residence to conceal the fact that the child is adopted.¹⁵⁸

Nevertheless, adoption by relatives has been common and especially involves relatives living abroad (non-resident Tanzanians). The force behind adoption by relatives is the absence of adequate recognition of the role of kinship care in our community. Most relatives are ‘forced’ to adopt the children of their relatives under their care to meet certain legal requirements and procedures necessary for the benefit of the children. For instance, it was asserted by social welfare officers at Temeke Municipal Council that there has been a trend towards adopting relatives’ children so that the children can be covered by the carer family’s health insurance.¹⁵⁹ Under the National Health Insurance Scheme, the insured person can only add his or her spouse and legally recognised children, biological or adopted. In the absence of a spouse or own children, a person can add his or her birth parents. In other instances, one has to prove that an individual to be covered is dependent on the insured person. If a person is taking care of a relative’s child and wants to add the child as a beneficiary, the insurer requires proof of dependence. As explained by the interviewed social welfare officers, it appears that the insurer

¹⁵⁶ Information obtained in an interview with a social welfare officer at Ilala Municipal Council in Dar es Salaam on 29/03/2018.

¹⁵⁷ Barthazar Rwezaura and Ulrike Wanitzek, The Law and Practice Relating to the Adoption of Children in Tanzania, *Journal of African Law* 32, no. 2 (1988): 135–36.

¹⁵⁸ Information obtained in an interview with a social welfare officer at Ilala Municipal Council in Dar es Salaam on 07/02/2019.

¹⁵⁹ An interview conducted at Temeke Municipal Council in Dar es Salaam on 04/02/2019.

advises individuals to secure an adoption order as the only proof that a child is his or her dependant. This is one instance of how relatives can be forced to adopt their relatives' children. If there were another mechanism to recognise care by relatives, there would be no need to force individuals to adopt relatives' children.

The social welfare officers contended that they have been discouraging this practice by advising individuals seeking to adopt relatives' children to take a separate child health insurance which cost 50,400/- Tanzanian shillings per year at the time of this research.¹⁶⁰ However, I find this is not a viable solution as it only leads to unnecessarily increased costs for a person who still has unused slots for beneficiaries on their insurance cover. The best solution would be to develop a way of mainstreaming kinship care in state initiatives. If society appreciates the role of kinship care, ways should be developed to encourage individuals by giving adequate recognition and support to those discharging this duty. Unnecessary and complicated legal or administrative requirements in respect of caring for relatives' children contribute to the weakening of kinship care in the country.

Non-resident Tanzanians adopting children of their relatives are faced with more or less similar challenges. In an interview with a social welfare officer at Ilala District council, I was informed that most adoption cases that the respondent handled involved non-resident Tanzanians adopting children of their relatives.¹⁶¹ This was also revealed in Kinondoni District through perusal of the foster care file by the researcher. Non-resident Tanzanians are forced to adopt their relatives' children to fulfil the migration laws of Tanzania and the countries in which they reside when they want to travel with such children.¹⁶² Some foreign countries in which these Tanzanians live provide child benefits, so they adopt their relatives' children in order to be eligible for the child benefits.¹⁶³ This has, in most cases, led to the adoption of children whose parents are known, available and perhaps capable of taking care of their children. The idea that their children will have a better life abroad is sometimes a strong motivation for parents to consent to the adoption of their children by their relatives.

The motives driving foreigners residing in Tanzania to adopt children in Tanzania were not explored in detail for this study. However, there is no doubt there are those who adopt for reasons similar to those identified above. It was also contended by social welfare officers that

¹⁶⁰ An interview conducted at Temeke Municipal Council in Dar es Salaam on 04/02/2019.

¹⁶¹ Information obtained in an interview conducted at Ilala Municipal Council in Dar es Salaam on 07/02/2019.

¹⁶² See also Ulrike Wanitzek, *Legal Pluralism under the Influence of Globalisation: A Case Study of Child Adoption in Tanzania*, in *Non-State Actors as Standard Setters*, ed. Anne Peters et al. (Cambridge: Cambridge University Press, 2009), 466.

¹⁶³ An interview conducted with a social welfare officer at Ilala Municipal Council in Dar es Salaam on 07/02/2019.

some countries provide grants to individuals adopting children, which motivates some individuals to seek adoption in foreign countries.¹⁶⁴ However, one should also appreciate that there are foreigners who adopt children out of their own generosity and concern for the welfare and development of the children. For instance, the Resident Magistrate at the Juvenile Court at Kisumu shared an example of foreigners who adopted a child just because of the love and concern they had for the child whose mother could not provide appropriate care to the child.¹⁶⁵

The practice of adoption in Tanzania, except in a few cases, is driven by the needs of the adopters more than the needs of the children deprived of their family environment. In practice, the liberty given to the potential adopters to identify the child they would like to adopt cements this argument. The assumption that every child in a residential home is eligible for adoption is, in my opinion, misconceived. Children accommodated in residential homes are there for different reasons and may not all be suitable for adoption. The absence of a pre-determined list of children for whom adoption would be in their best interests and the most suitable alternative care option, also proves the weaknesses in the practice of adoption in Tanzania.

In one instance, a child who was accommodated in Forever Angels Baby Home was placed in foster care for the purpose of adoption.¹⁶⁶ Later it was noted that the mother of the child, who was mentally ill, was still alive, and that the child had other relatives. Thus, the adoption of this child was not successful. This instance shows the flaws in the protection of children deprived of their family environment. If the case of this child had been handled correctly, it would have been evident that she should not have been placed in foster care with the goal of adoption. However, the child was lucky because the prospective adopters requested permission to continue supporting and providing her with the necessary needs for her survival and development.

Adoption, though introduced in Tanzania during British colonial rule, is still developing in Tanzania. There is a need to raise awareness in society that adoption should be driven by child-based interests rather than fulfilling the wishes or interests of the prospective adopters. Since a large part of society is yet to appreciate the vital role of adoption for children who cannot be reintegrated into their families, the state needs to adopt measure to strengthen the alternative

¹⁶⁴ An interview conducted at Temeke Municipal Council in Dar es Salaam on 04/02/2019.

¹⁶⁵ An interview conducted with the presiding Resident Magistrate at the Juvenile Court at Kisumu, Dar es Salaam on 21/02/2019.

¹⁶⁶ A case found in the foster care file at Kinondoni Municipal Council during field research in February 2019 in Dar es Salaam region.

care system and other available options to suit the social, economic and cultural contexts of Tanzanian society.

4.4. Conclusion

As a continuation of chapter three, this chapter unveils the measures that Tanzania has adopted to ensure the protection of children deprived of their family environment and the available options if alternative care is considered necessary. Generally, Tanzania has taken various legislative and administrative measures and initiatives to protect children deprived of their family environment. This is manifested not only by a number of strategies and plans of action, but also through the enactment of laws and regulations to guide the protection of different rights of children deprived of their family environment. These plans of action, strategies, and laws regarding children deprived of their family environment are, at least in their wording, aligned to the principles and standards established under different regional and international instruments on the right to alternative care for children deprived of their family environment. It is interesting to note that most of the interventions in Tanzania adhere to the two basic principles governing the provision of alternative care: the necessity and the appropriateness principles that are derived from the UN Guidelines for the alternative care of children.

The discussion in this chapter also reveals that the LCA and its associated regulations provide for different alternative care options: care by relatives, foster care, placement with fit persons, institutional care, and adoption. Though the law emphasises that family-based alternative care options should be preferred, it is noted in this chapter that in practice, institutional care is the most common alternative care option where a child in need cannot be placed with his or her relatives. Thus, there is limited use of family-based alternative care options, which are highly underdeveloped and sometimes misconceived by society and those in charge of ensuring the provision of alternative care services to children. Against this background, the following chapters explore the law as it relates to foster care, followed by a discussion on the challenges and prospects of implementing foster care in Tanzania. It is one of the under-utilised family-based alternative care options, and it is necessary to explain the factors that contribute to the over-institutionalisation of children in need of alternative care. The nature and character of foster care make it a potential and promising alternative care option if implemented as envisaged in the law, provided due regard is paid to the social, economic and cultural context. The protection of children largely depends on the existence of a wide range of effective alternative care options and services to meet the differing needs and interests of children coming into the care of the state.

PART TWO: FOSTER CARE IN TANZANIA

CHAPTER FIVE: THE LEGAL AND INSTITUTIONAL FRAMEWORK OF FOSTER CARE IN TANZANIA

Foster care, as noted in section 4.3.2. is one of the family-based alternative care options for children who are placed in the care of the local government authority. One of the principles governing the protection of children deprived of their family environment is that family-based alternative care should be preferred over institutional care.¹ However, in practice, institutional care has continued to be the prevalent alternative care option. Therefore, the question is: what hinders the implementation of foster care in Tanzania, which is a family-based alternative care option? In practice, why has foster care continued to be linked to adoption rather than being understood as an independent alternative care option as reflected under sec 18(3)(c) of the Law of the Child Act and reg 62(1)(b) of the Child Protection Regulations? Against this background, part two of this study explores the law and practice of foster care, aiming at unveiling the challenges that hinder the implementation of foster care and how foster care can be improved in Tanzania.

As an opening to this part, this chapter presents a detailed discussion of the law regulating foster care to provide an understanding of what foster care entails in Tanzania. The chapter also reveals the extent to which the law on foster care is in line with the international, regional and national standards and principles related to protecting children deprived of their family environment, as discussed in chapters two and three. The analysis of the law governing foster care in Tanzania is necessary to provide a foundation for the subsequent discussion in chapter six on the compatibility of the law with the pluralistic nature of society in Tanzania in the legal, social, economic, and cultural spheres.

5.1. Background to the legal framework of foster care in Tanzania

Since 2009, the LCA (Part IV titled Foster Care and Placement² and Part VI titled Fosterage and Adoption) provides the framework within which foster care is regulated. The rationale behind this kind of arrangement by the drafters or legislators is not clear. In Part IV of the LCA, which has seven sections, it is only sec 32 that is specific to foster care. In Part VI of the LCA, with 25 sections, only secs 52 and 53 deal specifically with foster care. A close examination of the provisions of these two parts reveals great similarity, but also differences, in the wording of the provisions, creating unnecessary replication and confusion to the readers and those tasked with implementing the Act. In 2012 the Foster Care Placement Regulations of 2012 were made

¹ See section 3.4.2.1 of this study.

² In the original version of the LCA, 2009 Part IV was titled foster care placement though the part contained provisions not relating to foster care only.

in order to expand the provisions of the LCA on foster care placements as per secs 32(6), 53(6) and 157(b) of the LCA. In certain general aspects related to children deprived of their family environment, the Child Protection Regulations, 2014 and the Law of the Child (Juvenile Court Procedure) Rules, 2016 complement the LCA and the Foster Care Placement Regulations, 2012.

Before the enactment of the LCA and its subsidiary legislation, the Children's Homes (Regulation) Act, 1968³ and the Children's Homes Regulations, 1968 regulated foster care services in Tanzania.⁴ The Children's Homes (Regulation) Act, 1968 was repealed by the LCA as per sec 160(1) of the LCA. As per sec 160(2)(c) of the LCA, the Children's Homes Regulations continued to be in force up to 2012 when they were replaced by the new Children's Homes Regulations, 2012. In addition to the 1968 Act and regulations, there were also the National Guidelines for Provision and Management of Foster Care and Adoption Services of 2006.⁵ These short guidelines were an administrative measure aimed at highlighting the procedures to be undertaken by individuals or families intending to become foster or adoptive parents. These guidelines played a guiding role before the enactment of the LCA. Their applicability after the enactment of the LCA is uncertain because the LCA is silent on the position of guidelines existing before its enactment.⁶ Due to great differences between the current legal framework and these guidelines, I think that these guidelines should not be used. However, during my field research, I discovered that some social welfare officers were using these guidelines for fostering and adoption issues.

Where appropriate, a comparison between the current and previous legal framework is provided here to show how the law of foster care has been changing and developing.

5.2. Nature and scope of foster care

Sec 3 of the LCA defines "foster care or fosterage" as:

"a temporary measure provided on voluntary basis by the family and individual who is not related to a child to discharge care and protection to the child."

In comparison, section 1.1. of the 2006 National Guidelines for Provision and Management of Foster Care and Adoption Services defines foster care as:

³ Act No. 4 of 1968 of the Laws of Tanzania.

⁴ Government Notice No. 404 of 1968 made by virtue of sec 10 of the Children's Homes (Regulations) Act, 1968.

⁵ National Guidelines for Provision and Management of Foster Care and Adoption Services adopted in June 2006 by the Department of Social Welfare under the then Ministry of Health and Social Welfare.

⁶ See sec 162(2)(d) of the LCA.

“a temporary measure provided on voluntary basis by the family and or individual who is not related to the infant to discharge care and protection to the infant after the biological parents have failed, [are] unwilling, unable or are dead.”⁷

The above definitions are similar regarding the voluntariness of the carers and that the carers are not related to the child. However, the definition under the 2006 guidelines is more elaborate in that it states that a child placed in foster care is one whose biological parents have failed, are unwilling, unable or are dead.⁸ However, the use of “biological parents” seems to limit the children who can benefit from foster care, excluding for instance adopted children whose adoptive parents are unable, unwilling or have failed to care for them or those children who are in the care of guardians.

From the definition in sec 3 of the LCA, the attributes of foster care can be deduced as explained below. The first attribute is that the foster family or foster parent is not related to the child. It appears that where a child is placed under the care of a relative, even when placed there by a sanctioned authority, such care would not amount to foster care under the LCA. It can be contended that the interpretation of foster care in sec 3 of the LCA seems to be limited in its scope when read together with other provisions of the LCA applicable to foster care and other forms of alternative care. A manifestation of this can be seen in sec 52(2) of the LCA which defines a foster parent as:

“a person who is not the parent of a child but is willing and capable to undertake the care, welfare and maintenance of the child.”⁹

Hence, it would appear that a relative of a child, not being a parent, may be a potential foster carer for such a child. Further, connected to the argument that the definition of foster care is limiting, the LCA allows adoption by relatives (‘open adoption’), and adoption by a father or mother of a child, as provided under sec 54(3) and 55(1)(b) of the LCA. Legally, before the court grants an adoption order, the child to be adopted needs to be under the care of the prospective adoptive parent(s) for at least six consecutive months as per sec 56(3)(b) of the LCA¹⁰. In practice, the six-month care requirement is usually fulfilled through foster care

⁷ Neither the Children’s Homes (Regulation) Act, 1968 nor the Children’s Homes Regulations, 1968 provide a definition of foster care.

⁸ The 2006 Guidelines use the word infant and not child. The 2006 Guidelines define the word infant as a person under 21 years of age, but do not include a person who is has or been married.

⁹ Under sec 3 of the LCA a parent is interpreted to mean a biological father or mother, an adoptive father or mother or any other person to whose care a child has been committed. For a discussion on this, see section 3.2.1 of this study.

¹⁰ See also reg 4(7) of the Adoption of a Child Regulations, 2011. Sec 74(1)(c) provides that if adoption is by a foreigner the child should have been in the care of the adoptive parent for at least three months.

placement though this is not explicitly stated in sec 56(3)(b) of the LCA.¹¹ Since neither the law nor the adoption regulations exempt people intending to adopt children of their relatives from this pre-adoption process, it can be argued that foster care also applies to people who are planning to adopt their relatives' children.¹² The discussion on the limited definition of foster care under the LCA continues below in section 6.1 as one of the legal and practical challenges related to fosterage in Tanzania.

Unlike sec 3 of the LCA, which excludes relatives from fostering, reg 12(3) of the Children's Homes Regulations of 1968 provides that "no licensee shall place any child under any person, other than a relative, without the approval of the Commissioner." This provision suggests that under the former legal framework governing foster care both relatives and non-relatives could foster children in the care of a children's home. Though section 1.1. of the 2006 National Guidelines for Provision and Management of Foster Care and Adoption Services defines foster care as care provided by an individual not related to the infant, another provision shows that a child's father or mother could apply to become a foster carer.¹³ This further shows the controversies around the exclusion of relatives from fostering children.

Voluntariness is another important element contained in sec 3 of the LCA. The prospective foster parent or foster family is willing to care for the child on a voluntary basis. Secs 32(2) and 53(2) of the LCA also reflect the voluntary nature of foster care as individuals willing to become foster carers have to lodge their application with the commissioner for social welfare.¹⁴ Voluntariness of a foster parent or foster family is essential to ensure that a child placed in foster care is in the safe hands of a person who has expressed willingness to provide the child with the care and protection needed. The willingness of foster carers to care for children, though not absolute, enhances the degree of security and safety of the child placed with them. It also improves the smooth operation of foster care placements.

Another notable feature of sec 3 of the LCA is that foster care is a temporary measure. The question that arises is how to measure the temporariness that is envisaged in the definition of foster care. Reg 7(3) of the Foster Care Placement Regulations says that a foster care placement can be temporary or long-term. Reg 7(3) of the Foster Care Placement Regulations, 2012 states that:

¹¹ However, for adoption by foreigners, sec 74(1)(c) specifically says that the prospective adopter must have fostered the child for at least three months.

¹² Reg 21 of the Adoption of a Child Regulations, 2011.

¹³ See section 2.1.1. of the National Guidelines for Provision and Management of Foster Care and Adoption Services of 2006.

¹⁴ See also reg 4(1) of the Foster Care Placement Regulations, 2012.

“The register of foster parents provided under sub-rule (1) above may be used by the Commissioner to place any child in foster care to provide temporary custody of the child as provided for under sec 53(7) of the Act or in longer-term foster care as provided under sec 32(4) of the Act.”

Sec 53(7) of the LCA provides that:

“Notwithstanding any provision of this section, the Commissioner may, by deed, place any child under foster care for temporary custody.”

At the same time, sec 32(4) of the LCA provides that:

“Where the Commissioner is satisfied that an applicant for foster parent is a person who can take care and maintain the child and is otherwise satisfied that the best interest of the child will be taken care [of], the Commissioner shall grant the permission for the child to be in the foster care of the applicant.”

From reg 7(3) of the Foster Care Placement Regulations, 2012, it can be seen that foster care may be for temporary custody or long-term placement. Neither sec 53(7) of the LCA nor reg 7(3) of the Foster Care Placement Regulations, 2012 stipulates the circumstances in which a child may be placed in foster care for temporary custody by the Commissioner for social welfare. An inference can be made from sec 104 of the LCA that the children envisaged under section 53(7) of the LCA are children in conflict with the law who have been granted bail but have nowhere to go and are placed in the custody of the Commissioner for social welfare or remanded into the custody of the Commissioner.¹⁵ A child placed in foster care for temporary custody has to remain in foster care until the determination of the case against such a child. Thus, termination of the placement would depend on the criminal proceedings against the child in conflict with the law or the orders granted by the court in relation to the child. Nevertheless, reg 7(3) of the Foster Care Placement Regulations assumes that the placement should be temporary unlike other foster care placements under the LCA. Since foster care placements under sec 53(7) of the LCA are by way of a deed, it can be assumed that the deed describes the terms and conditions of the placement, including the time for which the placement will last.

On the other hand, long-term foster care is envisaged under reg 7(3) of the Foster Care Placement Regulations, 2012. With respect to longer-term foster care placements, reference is made to placement sanctioned under section 32(4) of the LCA. It is not clear why reference is

¹⁵ Sec 104 of the Law of the Child Act; reg 40 of the Child Protection Regulations, 2014; and rules 28 and 29(3)(c) of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

only made to section 32(4). The question is whether, and if so why, this implicitly excludes placements under section 53(1) of the LCA, which also provides for foster care placements. No further clarification or guidance is given to determine what length of time would amount to long-term placement. It can be deduced from secs 32(1) and 53(1) of the LCA and reg 8(1) of the Foster Care Placement Regulations, 2012 that long-term foster care depends on the circumstances which led the child to be placed in foster care. For instance, for a child who is placed in foster care based on a care order, the length of the foster care placement would depend on the time in which the care order remains in force.¹⁶

Alternatively, in other circumstances, the foster placement can last until a permanent care solution for the child is obtained or when a foster child attains 18 years of age.¹⁷ The permanent care solution may include family reunification, guardianship or adoption.¹⁸ The child's age when the child enters foster care may also influence and determine the duration in which the child will be in foster care. As per reg 18(7) of the Foster Care Placement Regulations, 2012, a foster child is not required to remain in the care of a foster parent after attaining 21 years. Thus, defining foster care as a temporary measure seems to be a narrow understanding of foster care.¹⁹

Another important feature of foster care in Tanzania is that the placement has to be sanctioned by an authorised authority as per sec 32 and 53 of the LCA. The law vests the Commissioner for social welfare with the power to place children in foster care.²⁰ The Commissioner for social welfare oversees the registration of potential suitable foster carers and the eventual placement of children in the care of such registered foster carers. However, the Commissioner can delegate or direct a social welfare officer to approve foster care placements.²¹ The law does not specify which kind of social welfare officers may be directed to approve foster care placements, whether those in the service of the local government authorities or those employed in the department of social welfare at the ministry level.²² However, in practice, as observed during field research, the social welfare officers that the Commissioner can require to approve foster care placements are those in the service of the department of social welfare at the ministerial

¹⁶ See reg 18(1)(c) of the Foster Care Placement Regulations, 2012. Sec 18(4) of the LCA provides that the maximum duration of a care order is three years or until such time when the child attains the age of 18 years, whichever is earliest.

¹⁷ Reg 18(1)(a)(c), 18(7)(8) and 14(1)(4) of the Foster Care Placement Regulations, 2012.

¹⁸ Reg 17(2)(f) of the Foster Care Placement Regulations, 2012.

¹⁹ See section 3.4.2.2 on the principle that placement of children be permanent rather than temporary.

²⁰ Sec 32(1) and 53(1) Law of the Child Act; see also reg 8(5) of the Foster Care Placement Regulations, 2012.

²¹ Reg 8(6) of the Foster Care Placement Regulations, 2012.

²² See section 3.3.1. of this study for an explanation of the department of social welfare.

level. Based on the findings of this research, the centralisation of foster care services has partly contributed to the limited implementation of foster care, as discussed in section 6.6.

From the definition of foster care and other provisions on foster care, it is clear that the law on foster care in Tanzania does not cover any informal childcare arrangements made between parents and non-relatives. A care arrangement for a child qualifies as foster care in the sense of the law if the foster carer is registered and the placement is sanctioned by the Commissioner for social welfare or any other authorised social welfare officer in accordance with the LCA and the Foster Care Placement Regulations, 2012. Anything short of this does not legally qualify as a foster care placement.

5.3. The two facets of foster care

The LCA and the relevant regulations on foster care and adoption show that foster care as alternative care has two major facets. On the one hand, foster care is intended to be used as a complete or independent form of alternative care.²³ On the other hand, it is to be used and is used as a door to adoption because the law governing adoption requires a prospective adoptive parents to foster a child for a specified period before the court grants an adoption order.²⁴ Moreover, even where a foster care arrangement starts off as an absolute alternative care option, not inspired by the desire to adopt, such an arrangement can end up in adoption of the foster child, especially where the possibility of reuniting the child with his or her biological family is not a possible option.²⁵

The discussion in this regard is necessary to untie the presumed connection between adoption and foster care as alternative care options under the LCA. During fieldwork, it was observed that there is a likelihood of social welfare officers connecting foster care automatically to adoption. In practice, foster care is likely to occur where an individual or a couple has expressed a desire to adopt a child. However, while adoption cannot generally occur without foster care involvement, foster care can take place without necessarily ending in the foster child's adoption. The relationship between adoption and foster care can be summed up by saying that while all adoptions must go through a foster care arrangement, not all foster care placements must end up in adoption.

As a complete alternative care option, foster care can be used to provide a child with care while efforts are being made to find a permanent solution for the child. Moreover, sec 18(3)(c) of the

²³ See sec 18(3)(c) of the LCA and reg 62(1)(b) of the Child Protection Regulations, 2014.

²⁴ Secs 56(3)(b) and 74(1)(c) of the Law of the Child Act read together with reg 4 of the Adoption of a child Regulations, 2011.

²⁵ Reg 11(6) and 12(4) of the Foster Care Placement Regulations, 2012.

LCA and reg 62(1)(b) of the Child Protection Regulations, 2014, show that foster care can be used as one of the alternative care options for children needing alternative care. That is why the law regulating foster care presupposes a register of foster carers with whom a child in need of alternative care can be placed if it is decided that foster care is a suitable option for the child.²⁶

On the other hand, foster care has been used for a long time as a pre-adoption requirement to assess the compatibility of the prospective adoptive parents with the child to be adopted.²⁷ A person intending to adopt a child has to approach the social welfare officer to express his or her intention of adopting a child. In this case, he or she will be taken through the foster care process before an application to adopt a child can be lodged. Neither the law regulating adoption nor the law regulating foster care provides a separate procedure for foster care placements initiated by individuals whose intention *ab initio* is to adopt a child.²⁸ At the same time, there is no guarantee that the court will grant an application for adoption by an individual who fosters a child with the sole intention of adopting. Where an adoption application is not granted, the adoption regulations direct that the child should remain where it was prior to the application for adoption.²⁹ In this case, the question arises whether remaining in the care of a foster parent whose initial motive was to adopt a child is the most suitable option for that child. A better approach would be for the law to state that the department of social welfare will determine the best care option for the child after assessing the continuing suitability of the prospective adoptive parents as foster parents.

5.4. Objectives for foster care placements

The law regulating foster care does not explicitly name the objectives of foster care placements for children deprived of their family environment. The overall aim of foster care placements is to give a child without family care alternative care in a family setting to ensure the full and harmonious development of the child.³⁰ Foster care as an alternative care option reduces the unnecessary and generalised placement of children in residential care without considering the differing needs and circumstances of such children.

Moreover, the placement of a child in foster care aims to provide a child with care while efforts are made to find a permanent solution for the child. If the whereabouts of the child's family are

²⁶ Reg 7 of the Foster Care Placement Regulations, 2012. A detailed discussion on foster carers register in practice is provided for in part 6.4 of chapter six.

²⁷ Sec 56(3)(b) and 74(1)(c) of the Law of the Child Act; see also reg 4(7) of the Adoption of a child Regulations, 2011. See also, sec 4(6) of the repealed Adoption of Children Act, Chapter 335 of the Laws of Tanzania R.E. 2002.

²⁸ Compare with sec 75(5) of the Children's Act of Zanzibar.

²⁹ Reg 13(4) of the Adoption of a child Regulations, 2011.

³⁰ Reg 11 read together with Form No. 6 of the Foster Care Placement Regulations, 2012.

known, efforts are to be made by the foster parents and responsible social welfare officers to assess and promote the possibilities of reintegrating and reuniting the child with his or her biological family.³¹ Foster parents should not hinder the children in their care from meeting their parents or original family and should offer such children the chance to be reunited with their original family. Social welfare officers are expected to take measures to ensure, where possible, that a child is reunited with his or her parents by addressing the problems that led to the removal of the child from the care of the parents.³²

The possibility of adoption needs to be assessed where reunification of a child with his or her family is not a suitable or possible option. Otherwise, depending on the age of the child in foster care, there should be efforts and plans to prepare the child for independent living.³³ Reg 11(6) and para 2 of reg 12(4) of the Foster Care Placement Regulations, 2012 provide that foster parents have a right to apply for adoption of the child they have fostered after six months of fostering a child. Depending on the status of the parents of the child in foster care, allowing foster parents to apply for adoption after six months may inhibit the possibilities of a fostered child being reunited with his or her family. Very often, making a child's family suitable for reunification requires more than just six months.³⁴ Allowing foster parents to adopt children after six months in their care could pose a danger, especially in Tanzania, where most foster parents are driven by an initial desire to adopt a child. It may also create conflicts and tension between the foster family and the birth family of the child in foster care.

Foster care is also used to assess the suitability of prospective adoptive parents. Under the adoption law of Tanzania, foster care is one of the pre-adoption requirements which needs to be fulfilled before the court grants an adoption order. For an adoption order to be granted, there needs to be proof that the prospective adoptive parent(s) has/have been caring for the child for not less than six months consecutively before applying for adoption.³⁵ The fostering period for adoption by foreigners is at least three months.³⁶ The fostering period by prospective adoptive parents aims at protecting the child's best interests and welfare by ensuring that the prospective adoptive parents are suitable carers for the child to be adopted.

³¹ Reg 11(1)(a)(b) and 17(1) of the Foster Care Placement Regulations, 2012.

³² Reg 17(1) of the Foster Care Placement Regulations, 2012.

³³ Reg of the 14(4) of the Foster Care Placement Regulations, 2012.

³⁴ See also Brenda D. Smith and Stella E.F. Donovan, Child Welfare Practice in Organisational and Institutional Context, *Social Service Review* 77, no. 4 (2003): 541.

³⁵ Sec 56(3)(b) read together with sec 59(5) of the Law of the Child Act; see also reg 4(7) of the Adoption of a child Regulations, 2011.

³⁶ Sec 74(1)(c) of the Law of the Child Act.

Generally, foster care as an alternative care option in Tanzania aims at ensuring that children without family care who are suitable to be placed in family-based alternative care, are not necessarily placed in residential care. Foster care adds and expands the alternative care options for children without parental or family care to meet the different needs of these children.³⁷

5.5. Legal procedures and conditions governing foster care placement

The placement of children deprived of their family environment in any form of alternative care needs to be guided by the legally prescribed process to ensure the promotion and protection of the welfare and interests of these children. The process is essential to ensure adherence to the necessity and suitability/appropriateness principles envisaged in the UN Guidelines for the Alternative Care of Children. Correspondingly, the placement of children in foster care in Tanzania is guided by procedures legally prescribed to ensure that such placement will enhance the welfare and interests of the children. Ideally, the legal process ensures that such placement is necessary and suitable for the child and the particular needs of the child.

The Foster Care Placement Regulations, 2012, were adopted before the Child Protection Regulations, 2014, which provides for general processes and procedures to be followed when a child is regarded as needing care and protection, including those children deprived of their family environment. For this reason, the Foster Care Placement Regulations, 2012, provide for procedures such as social investigation and preparation of care plans and reviews. These are replicated in the Child Protection Regulations, 2014. Ordinarily, no child should be placed in foster care without following the procedures described in the Child Protection Regulations, 2014, as discussed in section 3.5 of this study. The discussion below is primarily based on the Foster Care Placement Regulations, 2012, the specific regulations expanding the provisions of the LCA on foster care.

5.5.1. Competent and mandated authorities related to foster care placement

The UN guidelines for the alternative care of children emphasise the need for having a competent authority that oversees the process of placing children in alternative care.³⁸ The guidelines further provide that decision-making on alternative care ought to take place through a judicial, administrative or other adequate and recognised procedure based on rigorous assessment, planning and review through established structures and mechanisms.³⁹

³⁷ See also Colton and Williams, *Global Perspectives on Foster Family Care*, 99–100; Colton and Williams, *The World of Foster Care*, 288–91.

³⁸ Para 55 of the UN Guidelines for the Alternative Care of Children.

³⁹ Para 57 of the UN Guidelines for the Alternative Care of Children.

In that spirit, the law governing foster care in Tanzania establishes authorities mandated with overseeing the process of foster care placements. The Commissioner for social welfare, the head of the social welfare department at the national level, is at the core of the whole process of foster care placement. As discussed below, the Commissioner has the mandate to recruit and admit suitable individuals who apply to be foster parents.⁴⁰ Notably, the power to place children in foster care is also vested in the Commissioner as per reg 7(3) of the Foster Care Placement Regulations, 2012. However, the Commissioner for social welfare can delegate an approved social welfare officer to authorise foster care placements.⁴¹ Under the former legal framework, the licensees of children's homes were responsible for receiving applications from individuals wanting to foster children and place children with approved foster carers.⁴²

In Mainland Tanzania, unlike in Zanzibar, which allows the possibility of delegating the task of recruiting foster carers to an appropriate agency or body, the recruitment and admission of foster carers are fully vested in the Commissioner for social welfare with no possibility of delegating this task, not even to social welfare officers at the level of local government authorities.⁴³ As the head of the social welfare department, the Commissioner for social welfare not only oversees welfare issues concerning children in need of care and protection but all aspects of the social welfare of the whole nation. Thus, it seems that concentrating all recruiting powers in the Commissioner could affect the recruitment of foster carers, which is an essential component in any given foster care system.⁴⁴

Social welfare officers in the service of local government authorities play an assistant role to the Commissioner for social welfare. The social welfare officers are tasked with conducting assessments of individuals who lodge applications to become foster carers.⁴⁵ They play an essential role in conducting social investigations and prepare reports following such investigations.⁴⁶ They also play an advisory role by recommending to the Commissioner for social welfare children who need alternative care, when foster care seems to be the most suitable option for them. This task is performed in conjunction with the patrons or managers of approved residential homes.⁴⁷ However, a recommendation to place a child in foster care may also be

⁴⁰ Sec 32(2) and 53(2) of the Law of the Child Act; see also reg 4 and 6 of the Foster Care Placement Regulations, 2012.

⁴¹ Reg 8(6) of the Foster Care Placement Regulations, 2012.

⁴² Reg 11(1) of the Children's Homes Regulations of 1968.

⁴³ Reg 4(2) of the Foster Care Regulations, 2017, Legal Notice No. 71 of 2017 (Zanzibar).

⁴⁴ This is one of the challenges inhibiting the implementation of foster care in Tanzania and is discussed in section 6.3 of this study.

⁴⁵ Reg 6(1) Foster Care Placement Regulations, 2012.

⁴⁶ Reg 8(2)(b) and 9 of the Foster Care Placement Regulations, 2012.

⁴⁷ Sec 32(1) of the Law of the Child Act; see also reg 4(3) of the Foster Care Placement Regulations, 2012.

sent directly to the Commissioner for social welfare by patrons or managers of approved residential homes.⁴⁸

Furthermore, social welfare officers play an important supervisory role in foster care placements to ensure that the child's best interests are upheld and that foster care remains suitable for the child.⁴⁹ To this effect, social welfare officers are to visit children placed in foster care to monitor their progress as per reg 16(1)(3) of the Foster Care Placement Regulations, 2012. In certain circumstances, social welfare officers may also terminate foster care to protect the child's welfare as per reg 16(5) of the Foster Care Placement Regulations, 2012.⁵⁰

The process and procedures related to foster care, discussed in detail below, are administrative rather than judicial. The involvement of courts in foster care placements is necessary where child protection orders such as exclusion orders, interim care orders or care orders are needed to ensure the protection of the child placed in foster care.⁵¹ These orders are issued and regulated by courts only. For instance, if a child is placed in foster care through a care order or an interim care order, the terms of the foster care will be regulated partly by the conditions attached to the care order, especially in respect of its duration. Other institutions and personnel involved include the police, medical officers and child protection professionals who may assist the social welfare officers in their duties towards children placed in foster care.

5.5.2. Eligibility to become a foster parent/foster family

Sec 52 of the LCA defines persons who can foster children as follows:

“(1) Any person above the age of twenty-one of high moral character and proved integrity may be a foster parent to a child.

(2) ‘A foster parent’, as used in this Part, means a person who is not the parent of a child but is willing and capable to undertake the care, welfare and maintenance of the child.”

Reg 5 of the Foster Care Placement Regulations, 2012 expands the provisions of sec 52 of the LCA on persons who are eligible to foster children. Reg 5(1) of the Foster Care Placement Regulations, 2012 provides that:

⁴⁸ Reg 4(3) of the Foster Care Placement Regulations, 2012.

⁴⁹ Reg 16 of the Foster Care Placement Regulations, 2012 read together with reg 63 of the Child Protection Regulations, 2014 on the duty of assigned social welfare officers to visit a child in care placement.

⁵⁰ See section 5.10 for more details concerning termination of foster care placements.

⁵¹ See section 3.5.5 on different kinds of orders that courts may grant to ensure the protection of children in need of care and protection.

“(1) The following persons may apply to be a foster parent: -

- (a) a husband and wife, who are citizens of Tanzania, ... but if a man has more than one wife, the name of the wife to be the foster mother [shall] stated in the application;
- (b) a single person who is a citizen of Tanzania;
- (c) a foreign husband and wife, and in this case, one of the applicants has stayed in Tanzania for at least two and a half consecutive years prior to making the applications; and
- (d) a foreigner who has stayed in Tanzania for at least two and a half consecutive years prior to making the application.”

From these provisions, it can be deduced that eligibility to become a foster parent is determined by age, ability to care for and maintain a child, marital status, nationality of the applicant and moral character. These conditions for eligibility are necessary to ensure that a child in need of care is placed in a safe environment that promotes his or her welfare and best interests.

In terms of age, the law sets 21 years as the minimum and sixty-four as the maximum age limits for fostering a child.⁵² Reg 5(3) of the Foster Care Placement Regulations, 2012 states that a person of the apparent age of 65 is not allowed to foster a child. At the same time, reg 5(4) of the Foster Care Placement Regulations says that a person of 65 years and above may be allowed to foster a child under certain circumstances. The regulations do not state the circumstances that may be considered reasonable to let a person of 65 years and above foster a child. However, this is good because it gives the responsible authority an opportunity to determine on a case-by-case basis when this exception can be invoked. It can be argued that the rationale of setting 64 years as maximum age of eligibility is to ensure that only those who are physically and economically capable are admitted as foster parents. Considering the life expectancy and retirement age in Tanzania, the majority of people aged 65 years and above would be living on pensions or being taken care of by their children or relatives. At this age a person may lack the necessary requirements to ensure suitable care is provided to a child until the child is grown up and capable of maintaining himself or herself.

The person's ability to maintain the child in their care is an essential factor in determining the eligibility of potential foster parents. Secs 32(5) and 53(3) of the LCA read together with reg 11(1) of the Foster Care Placement Regulations, 2012, place the parental rights and

⁵² Sec 52(1) Law of the Child Act and reg 5(2)(3) of the Foster Care Placement Regulations, 2012. However, reg 5(2) of the Foster Care Placement Regulations states; “A person shall below the age of 21 years be allowed to foster a child”. I think there is an editorial or grammatical error in this provision.

responsibilities in the foster parents. Foster parents are expected to provide the children in their care with their daily needs in terms of food, shelter, education, guiding the children's behaviour, and so on. Therefore, foster parents need financial, social, physical and psychological capability to discharge their fostering responsibilities. Against this background, the law requires an assigned social welfare officer to conduct a thorough assessment of the suitability of the persons applying to be a foster parent before any person is admitted as a foster parent.⁵³

Marital status is another determinant factor that can be deduced from reg 5 of the Foster Care Placement Regulations, 2012. Both married and single individuals are allowed to foster children. As per reg 5(1)(a)(b) of the Foster Care Placement Regulations, a husband and wife may make a joint application to become foster parents. However, if the husband has more than one wife, he is required to indicate in the application the wife who will be the foster mother as per reg 5(1)(a) of the Foster Care Placement Regulations. This requirement is necessary to ascertain who, among the wives, is responsible for looking after a child placed under the care of a male foster parent in a polygamous marriage.

Moreover, the law allows singles, both males and females, to become foster parents as per reg 5(1)(b)(d) of the Foster Care Placement Regulations, 2012. There are no further limitations on the placement of children with singles concerning sex or age of children to be placed with single foster carers.⁵⁴ Reg 5 of the Foster Care Placement Regulations, 2012 is silent on the eligibility of divorcees or widows to become foster parents. It is not clear if the term single in reg 5(1)(b) of the Foster Care Placement Regulations, 2012 includes a divorcee and a widow and whether such people may be potential foster parents.

Regarding nationality, reg 5(1) of the Foster Care Placement Regulations, 2012, says that both Tanzanians and non-Tanzanians, married and non-married individuals, are eligible to be foster parents. However, there is an additional condition for foreigners aspiring to become foster parents in Tanzania. Foreigners, both married and singles, are eligible to become foster parents if they have stayed in Tanzania for at least two and a half consecutive years before making an application to become foster carers. However, it is not clear if the continuing presence of foreign foster parents in the country is a compulsory requirement after a foster care placement is made. It appears that the law intends that fostering by foreigners should take place within the country. This can be deduced from the requirement for foster parents to obtain written permission from

⁵³ Reg 6 of the Foster Care Placement Regulations, 2012.

⁵⁴ Compare with reg 6(1)(b) of the Foster Care Regulations, 2017 (Zanzibar) which limits fostering by singles to females.

the Commissioner for social welfare to take a foster child outside Tanzania.⁵⁵ The need for supervision visits by social welfare officers during foster placements also supports the idea that a child under the care of foreign foster parents is expected to remain in Tanzania.⁵⁶

Reg 6 of the Zanzibar Foster Care Regulations, 2017 reveals a better approach to the question of fostering by foreigners. Reg 6(1) of these Regulations provides that:

“The following persons may apply to be foster parents:

- (a) a husband and wife, who are ordinarily resident in Zanzibar, but if a man has more than one wife, the name of the wife who is to be a foster parent shall be clearly stated in the application;
- (b) a single female who ordinarily resides in Zanzibar.”

And reg 6(3) states that:

“A person shall be considered an ordinary resident of Zanzibar if he has lived in Zanzibar for at least five years and intends to remain in Zanzibar.”

Thus, in Zanzibar, long-term residence rather than nationality, among other factors, determines the eligibility of individuals to become foster parents. I think this is an approach that ought to be adopted under reg 5(1)(c)(d) of the Foster Care Placement Regulations, 2012, which refers to foreigners and how long they must have been in Tanzania before applying to become foster carers. Moreover, reg 6(3) of the Zanzibar Foster Care Regulations, 2017, emphasises the potential foster carer’s intention to remain in Zanzibar, and including this condition would rectify the silence of reg 5 of the Foster Care Placement Regulations, 2012 on this issue.

5.5.3. Application to become a foster parent/foster carer

The law requires that a person eligible and willing to become a foster parent lodge an application to the Commissioner for social welfare.⁵⁷ The application is made in Form No. 1 found in the schedule to the Foster Care Placement Regulations, 2012. The application form is to be used by both Tanzanian and foreign applicants. The application to become a foster parent can be made individually or jointly by spouses. The application to become a foster parent or foster carer may be general or for a specific child.⁵⁸ The application is general when there is no pre-identified child who the applicant wishes to foster. On the other hand, the application is specific when the applicant has indicated particulars of a specific child that he or she would like

⁵⁵ Reg 11(2) of the Foster Care Placement Regulations, 2012.

⁵⁶ Reg 16 of the Foster Care Placement Regulations, 2012.

⁵⁷ Secs 32(2) and 53(2) of the Law of the Child Act read together with reg 4 of the Foster Care Placement Regulations, 2012.

⁵⁸ Reg 6(7) read together with para 4.4. of F.C Form No. 1 of the Foster Care Placement Regulations, 2012.

to foster. However, even where the application is general, the applicant is required to indicate the kind of children he or she would prefer to foster in terms of sex, age range or special needs.⁵⁹

5.5.4. Determination of the application to become a foster carer

As has already been indicated, the power to determine the applications of potential foster carers is vested in the Commissioner for social welfare based on the recommendation made to him or her by social welfare officer(s) on the suitability of the applicant(s) to become foster carers.⁶⁰ The Commissioner for social welfare is required by the regulations, within seven days of receiving the application, to instruct a relevant social welfare officer to conduct an assessment of the applicant(s).⁶¹ Based on this assessment, the Commissioner then decides whether or not to admit the applicant as a foster carer.

Once the designated social welfare officer receives the application from the Commissioner, he or she is supposed to make a thorough assessment of the persons applying to be foster parents or carers. The essence of the assessment is to establish the capability of the applicant(s) to provide a caring home for a child.⁶² The regulations further provide guidance on the aspects to be taken into consideration in the assessment, including the conditions of the home, views of any children residing with the applicant(s), criminal record status of the applicant(s) and medical status of the individuals living with the applicants.⁶³

To facilitate the assessment of the applicant(s) by the social welfare officer, the applicants need to provide the social welfare officer with three written references vouching for the good character and suitability of the applicant(s).⁶⁴ The referees should be persons who have known the applicant(s) for a period of not less than three years. One of the referees should be a close relative, and the other two immediate neighbours or local government officers such as ward executive officer, village executive officer or 'mtaa' executive officer. However, where necessary, the social welfare officer may require additional references, and in cases deemed appropriate, a written reference from the employer of the applicant may be required. In the absence of any specific provision on foreign applicants, it appears that the same kind of references would be required to support applications by foreign applicants.

The social welfare officer is required to complete this assessment within 60 days from the date of the lodging of the application. Once the assessment is completed, the social welfare officer

⁵⁹ See paras 4.4, 4.6 and 4.7 of F.C Form No. 1 of the Foster Care Placement Regulations, 2012.

⁶⁰ Sec 32(3) of the Law of the Child Act and reg 6(8) of the Foster Care Placement Regulations, 2012.

⁶¹ Reg 6(1) of the Foster Care Placement Regulations, 2012.

⁶² Reg 6(2) of the Foster Care Placement Regulations, 2012.

⁶³ Reg 6(3) of the Foster Care Placement Regulations, 2012.

⁶⁴ Reg 6(4) of the Foster Care Placement Regulations, 2012.

must submit the assessment report to the Commissioner in Form No. 2 found in the schedule to the Foster Care Placement Regulations, 2012.⁶⁵ Where the application concerns a specific child, the social welfare officer is required to submit, together with the assessment, a social investigation report of the child.⁶⁶ The time limit for these two reports appears to be the same, as they have to be submitted together to the Commissioner. Otherwise, reg 6 of the Foster Care Placement Regulations, 2012, is silent on the time allowed to conduct and complete the child's social investigation report. It can only be assumed from reg 6(7) of the Foster Care Placement Regulations, 2012 that the assessment and the investigation report should be done simultaneously. The silence on time limits might be problematic if the assessment of the applicant and the social investigation of the child is to be done by the same social welfare officer who might be overloaded to conduct both tasks within the same time.

After receiving the report of the assessment of the applicant conducted by the social welfare officer, the Commissioner is required to assess the application and make a final decision on whether the applicant(s) are to be admitted as foster carer(s).⁶⁷ The decision made by the Commissioner has to be communicated to the applicant(s) and the social welfare officer who carried out the assessment. The Commissioner is required to decide on the application within 90 days from the date on which the application was received. Thus, determination of the application to become a foster carer may take a maximum period of three months once the application is lodged.

Approved applicants are to be entered in the register of foster carers. Each approved foster carer or foster couple in the case of a joint application is required to have a unique serial number. These serial numbers are to be used in the registers at the national and district levels and in all documents related to foster care placements. There must be an up to date foster carers' register kept at the district level, a copy of which is to be submitted to the Commissioner for social welfare on a monthly basis.⁶⁸ This requirement seems to suggest that foster carers are determined and approved at the district level. However, as shown above, approval of applicants is done by the Commissioner at the national level, who informs the respective social welfare officers of all decisions.

⁶⁵ Reg 6(5) read together with F.C. Form No. 2 of the Foster Care Placement Regulations, 2012.

⁶⁶ Reg 6(7) read together with reg 9(1)(a) of the Foster Care Placement Regulations, 2012.

⁶⁷ Sec 32(4) of the Law of the Child Act and reg 6(8) of the Foster Care Placement Regulations, 2012.

⁶⁸ Reg 6(10) and 7 of the Foster Care Placement Regulations, 2012 provide information on the registration of foster carers.

Under the current legal framework, the application process by those willing to become foster carers is based on a top-down approach. Applications are to be lodged with the Commissioner for social welfare, an officer at the national level, who then transfers the application to the respective social welfare officer for assessment before deciding to approve or reject it. This process creates unnecessary to-and-fro procedures that are cumbersome and time-consuming. Under the previous Children's Homes Regulations, 1968 and the 2006 Guidelines on Foster Care and Adoption Services, applications to become foster parents were based on a bottom-up approach, starting from the social welfare officer or licensee of a children's home and ending with the Commissioner.⁶⁹

5.6. Children subject to foster care placement

As discussed in section 4.3.1 of this study, children needing alternative care can be placed in foster care, where foster care is considered the most suitable option for such children.⁷⁰ Based on sec 18(3) of the LCA read together with reg 62(1) of the Child Protection Regulations, 2014, children under a care order or interim care order, those in a voluntary care arrangement, or those accorded accommodation by the social welfare department as per reg 59(1) of the Child Protection Regulations, 2014 may be placed in foster care. Ideally, the needs and interests of the children, determined on a case-by-case basis, would determine the appropriateness of using foster care as an alternative care option.

Despite the above general position, the LCA and the Foster Care Placement Regulations, 2012 give categories of children who may be placed in foster care. These categories are given under secs 32(1) and 53(1) of the LCA as general provisions regarding foster care read together with reg 8(1) of the Foster Care Placement Regulations, 2012. Generally, these provisions point to the fact that foster care is one alternative care option for different kinds of children deprived of their family environment. For instance, reg 8(1) shows that children under a care order or interim care order or those in residential homes may be placed in foster care. However, secs 32(1) and 53(1) of the LCA and reg 8(1) of the Foster Care Placement Regulations, 2012, are equivocal on the nature of children who may be placed into foster care and when foster care can be used as an alternative care option.⁷¹ Therefore, due to the ambiguities in the formulation

⁶⁹ See reg 11 of the Children's Home Regulations, 1968 read together with section 2.2.2. of the National Guidelines for Provision and Management of Foster Care and Adoptions Services, 2006.

⁷⁰ See sec 18(3)(c) of the LCA read together with reg 62(1) of the Child Protection Regulations, 2014.

⁷¹ These provisions can be contrasted with reg 9 of the Foster Care Regulations, 2017 (Zanzibar) which specifies who can be fostered and when foster care can be used as an alternative care option for children.

of these provisions and the resulting challenges,⁷² I postpone discussing these specific provisions of the LCA and Foster Care Placement Regulations to section 6.2.2. of this study.

5.7. Pre-placement conditions and legal safeguards

The Foster Care Placement Regulations, 2012 provide several conditions to be met before a child is placed with a foster carer. These conditions are necessary to ensure the protection of the child in need of alternative care. Before any placement of a child with a foster carer, the social welfare officer has to make sure that the following conditions are fulfilled: the foster carer is registered; there is a complete social investigation report concerning the child; the foster carer has signed an undertaking to care for and support the child; the parents or guardians have given their consent; and that the wishes of the child have been ascertained as far as possible (child participation). Reg 8(2)(3) of the Foster Care Placement Regulations, 2012 provides for these pre-placement conditions and safeguards.

5.7.1. Registration of foster parents and foster care placements

A child in need of alternative care cannot be placed in foster care unless the prospective foster parents are registered foster carers.⁷³ The law requires that each approved foster carer or foster parent be registered and given a specific serial number through which the foster parents or foster carers are identified.⁷⁴ The rationale behind this requirement is to ensure children are placed in the care of individuals who have been assessed, screened and approved as suitable for caring for children. It is also necessary to register foster care placements. A register of foster care placements must be established in which all placements are registered and given a unique serial number.⁷⁵ The importance of registering foster care placements is to facilitate record-keeping, which is necessary for national planning and handling children deprived of their family environment. The registration of placements also simplifies follow-up of the progress of the children concerned. The register must clearly indicate the particulars of the child and those of the foster parents, including the start and end date of the placement. Generally, the registration of foster parents and foster care placements helps officials to know which child is with which carer, where the child is located and for what reason the child has been placed in foster care. The Foster Care Placement Regulations, 2012 provide templates for a foster carer register and a foster care placement register. These templates are found in the schedule to the Foster Care

⁷² The ambiguous formulation of secs 32 and 53 of the LCA read together with reg 8(1) of the Foster Care Placement Regulations is identified in this study as one of the legal challenges influencing the limited implementation of the law on foster care in Tanzania.

⁷³ Reg 8(2)(a) and 7(1) of the Foster Care Placement Regulations, 2012.

⁷⁴ Reg 6(9) of the Foster Care Placement Regulations, 2012.

⁷⁵ Reg 7(6)(7) of the Foster Care Placement Regulations, 2012.

Placement Regulations, 2012 as F.C Form No. 3 for foster carers and F.C Form No. 4 for foster care placements.

5.7.2. Social investigation report

Before placing any child in foster care, a social welfare officer has to conduct a social investigation.⁷⁶ The essence of the social investigation is to assess the necessity and suitability of foster care for this child. The social investigation report further facilitates ascertainment of the best interests of the child. In carrying out the social investigation, the social welfare officer should assess the child's status and family.⁷⁷ This is important to uphold and protect family integrity. Assessing the status of the child's family entails ascertainment of the social and economic conditions of the family and the family's ability to provide the necessary care for the child before deciding to place the child in alternative care. The assessment also considers whether there is any support available to the parents to enable them to provide the desired care for the child. Where placement is inevitable, the assessment of the child's status and the child's family helps establish whether it may be possible to reintegrate the child in his or her family after some time. Where appropriate, the assessment should indicate the steps that might need to be taken to return the child to his or her family. In addition to assessing the status of the child and that of his or her family, an assessment also has to be made of the suitability of the child for a foster care placement and the suitability of the foster parents to foster the child subject of the social investigation.

In carrying out the investigation, the social welfare officer may find it necessary to conduct discussions or meetings with police or medical officers who may assist in assessing the child's status and his or her family or providing any other information that may be necessary to complete the investigation.⁷⁸ For instance, where the child's parents are deceased or cannot be found, the social welfare officer has to obtain a police report confirming this.⁷⁹ After the social investigation is complete, the social welfare officer who conducts the investigation has to prepare a report. The report must be in the format prescribed in F.C Form No. 7 in the schedule to the Foster Care Placement Regulations, 2012. There is no further guidance under the law to help the social welfare officer in conducting the investigation. The particulars of F.C. Form No. 7 can serve as a guide for the social welfare officer when deciding what to focus on during the investigation.

⁷⁶ Reg 8(2) and 9 of the Foster Care Placement Regulations, 2012.

⁷⁷ Reg 9(2)(a) of the Foster Care Placement Regulations, 2012.

⁷⁸ See paras 2.3 and 2.4 of FC Form No. 7 of the Foster Care Placement Regulations, 2017.

⁷⁹ Reg 9(5) of the Foster Care Placement Regulations, 2012.

There is no time frame within which the social welfare officers are required to conclude the social investigation and submit the report to the Commissioner. The law leaves the social welfare officer with free hands to conclude the social investigation report in a timely manner.⁸⁰ What amounts to a timely manner would perhaps depend on subjective factors like the workload on the desk of the social welfare officer and the accessibility of individuals necessary to complete the investigation. The lack of exact time limits to conduct and finish the social investigation and the report, on the one hand, gives the social welfare officer great flexibility. On the other hand, it may lead to unnecessary delays that may affect the interests of the child who is the subject of the investigation.

5.7.3. Consent of parents or guardians of the child

Before a child is placed in foster care, the social welfare officer is required to obtain consent from the child's parents or guardians as per reg 8(3) of the Foster Care Placement Regulations, 2012. In securing the consent, the social welfare officer is responsible for informing the child's parent(s) or guardian(s) of the purpose and legal effects of foster care placement. The rationale behind the consent requirement is partly to prevent conflicts that may arise after the child's placement and make the parent(s) or guardian(s) aware of the changes in their relationship with the child that may be associated with foster care placement. Depending on the circumstances which led to the child needing alternative care, parental consent is necessary to protect family integrity and prevent unnecessary intervention in the family affairs of the child. The consent requirement can provide room for parents or guardians to assess their capacity to take responsibility for their child.

Not all children for whom foster care is a suitable alternative care option have parents or guardians whose whereabouts are known by the responsible authorities, or have parents willing to give their consent. In such instances, it may not always be possible to secure the consent of parents or guardians before placing the child in foster care. As a remedy, reg 8(4) of the Foster Care Placement Regulations, 2012 provides several circumstances where the requirement of parental or guardian consent may be dispensed with to protect the interests and welfare of the child. The circumstances in which parental consent may be dispensed with include cases where the child has been neglected or persistently ill-treated by the parents.⁸¹ Obtaining the consent of a parent or guardian who neglects or ill-treats his or her child is not as important as protecting

⁸⁰ Reg 9(7) of the Foster Care Placement Regulations, 2012.

⁸¹ Reg 8(4)(a) of the Foster Care Placement Regulations, 2012.

the child's life. And if such a parent or guardian is unwilling to provide his or her consent, dispensing with the requirement of consent is a logical action to protect the child.

Other instances include failure to locate the parents or cases where the parents or guardians cannot give their consent due to physical or mental sickness as per reg 8(4)(b)(c) of the Foster Care Placement Regulations, 2012. The consent requirement may also be dispensed with where consent is unreasonably withheld by one or both parents and foster care placement is deemed to be in the child's best interest.⁸² The power to dispense with parental or guardian consent is vested with the Commissioner for social welfare. The provisions on the need for consent before placing a child in foster care are intended to balance the conflicting interests of the child and those of his or her parents or guardians. From another perspective, the consent requirement provides control over the power of the state to intervene in the affairs or integrity of a family in discharging its duty to protect children.

5.7.4. Foster carer's undertaking

Another requirement attached to the placement of a child in foster care is the need to obtain an undertaking by the foster carer to care for and support the child placed in his or her care as per reg 8(2)(c) of the Foster Care Placement Regulations. Once a child is placed in foster care, the foster carers, during the entire time of the placement, assume responsibilities in respect of the child as if he or she is the natural parent of the child.⁸³ The foster carer's undertaking is to be in the format provided in F.C Form No. 5, available in the schedule to the Foster Care Placement Regulations, 2012. In this undertaking, foster carers commit themselves to discharge care and maintenance responsibilities in respect of the child in their care as per reg 11 of the Foster Care Placement Regulations, 2012. The undertaking is essential to define the extent of the foster carers' responsibilities and powers during the child's placement. However, the foster carers' undertaking cannot be used to force foster carers to continue caring for a child if they are not willing to continue for any reason. Reg 7(5) of the Foster Care Placement Regulations, 2012 allows a foster carer not interested in continuing fostering to inform the social welfare officer.

5.7.5. Child participation

The right of children to participate in processes that impact their lives is an important principle of international children's rights.⁸⁴ Child participation is one of the four basic principles enshrined in the Convention on the Rights of the Child and the African Charter on the Rights

⁸² Reg 8(4)(d) of the Foster Care Placement Regulations, 2012.

⁸³ Secs 32(5) and 53(3) of the Law of the Child Act read together with reg 11 of the Foster Care Placement Regulations, 2012.

⁸⁴ See section 2.5.1.4 of this study.

and Welfare of the Child. The principle is further reflected in the UN Guidelines on Alternative Care for Children. Reg 8(2)(d) read together with reg 13(4) of the Foster Care Placement Regulations, 2012 identify child participation as one of the core principles guiding the placement of children in foster care.⁸⁵ Child participation or involvement is necessary to ascertain the child's wishes and views concerning the proposed placement. The child's views and wishes are to be given due consideration in the decision-making process depending on the child's age and maturity.⁸⁶ To achieve this, the processes related to foster care placement should be child-friendly, giving children the opportunity to freely and without fear express their views and concerns about foster care, as discussed in section 2.5.1.4 of this study.

When carrying out the social investigation, based on which the decision to place the child into foster care is made, the social welfare officer should ascertain the child's views provided that the child can express his or her views.⁸⁷ For the child participation process to be meaningful, there need to be strategies and mechanisms developed to facilitate the process, depending on the age and maturity of the child. Personnel assigned to ascertain the child's view should be trained in understanding the ways in which children express their views. Children's ability to express their views may be influenced by their age, maturity, education level, and the social and economic conditions to which they are exposed. An understanding of these factors and others that are likely to affect child participation is necessary for the preparation of a meaningful child participation process.⁸⁸

Child participation is not only a pre-placement condition. It is a process that needs to take place during the entire time of placement, if a final decision is made to place the child in foster care.⁸⁹ This ensures that ascertainment of the child's best interests is not done in isolation from the child's views, in the mistaken belief that adults know what is best for children.

5.8. Placement of children in foster care

Reg 7(3) of the Foster Care Placement Regulations, 2012 provides that the Commissioner for social welfare may use the register of foster carers to place any child in foster care for temporary custody or in long-term foster care. The decision to place a child in foster care can be made either by the Commissioner or by a social welfare officer directed by the Commissioner to approve foster care placements as per reg 8(6) of the Foster Care Placement Regulations, 2012.

⁸⁵ See also section 3.4.1 of this study on general principles governing the child care and protection issues in Tanzania as provided for under the LCA and the Child Protection Regulations, 2014.

⁸⁶ Reg 8(2)(d) of the Foster Care Placement Regulations, 2012.

⁸⁷ Reg 9(4)(a) of the Foster Care Placement Regulations, 2012.

⁸⁸ See also para 134 of the General Comment No. 12 (2009) on the right to be heard.

⁸⁹ Reg 13(4) of the Foster Care Placement Regulations, 2012.

The decision to place the child in foster care needs to be made within 30 days from the date of receiving the child's social investigation report, together with other required supporting documents as per reg 8(5) of the Foster Care Placement Regulations, 2012. Though not stated explicitly in the law, the other supporting documents, as shown in the above discussion, should include parental/guardian consent or a police report where the parents are deceased or cannot be found, the undertaking of the prospective foster parent, and a medical report on the child's physical and mental condition.⁹⁰ In addition, a foster care plan must be submitted together with the social investigation report as per reg 17(2) of the Foster Care Placement Regulations,.

Reg 9 of the Foster Care Placement Regulations, 2012 names three ways in which children may be placed in foster care. First, a specific child may be identified in an application to become a foster carer. In this instance, it appears that the application plays a double role: it is an application to be a foster carer and an application for foster care placement at the same time.⁹¹ This kind of placement is mainly linked to individuals interested in adopting a child. Since children to be adopted are not always those found in the care of the local government authorities, and since fostering is a pre-condition for adoption, individuals interested in adopting a child may name a specific child they want to adopt when they lodge their application to become foster carers.⁹²

Second, a child may be placed in foster care where a child has been identified as potentially suitable for foster care by the head of an approved residential home or institution.⁹³ The last way is when a social welfare officer identifies a child as potentially suitable for foster care as per reg 9(1)(c) of the Foster Care Placement Regulations, 2012. In these two last instances, it appears that what leads a child to be placed in foster care is a recommendation rather than an application to place the child in foster care. For instance, where the head of an approved residential home or institution identifies a child as suitable for foster care placement, he or she is required to make a recommendation to the respective social welfare officer or directly to the Commissioner.⁹⁴ Furthermore, where the social welfare officer has identified a child as suitable for foster care, he or she can make a recommendation to the Commissioner for social welfare.⁹⁵

⁹⁰ Reg 8(3), 8(2)(c), 9(5) and 15 of the Foster Care Placement Regulations, 2012.

⁹¹ Reg 9(1)(a) of the Foster Care Placement Regulations, 2012.

⁹² Information obtained in an interview conducted with a social welfare officer at Ilala Municipal Council in Dar es Salaam on 29/03/2018.

⁹³ Reg 9(1)(b) of the Foster Care Placement Regulations, 2012.

⁹⁴ See reg 4(3) of the Child Protection Regulations, 2012.

⁹⁵ See reg 8(1)(d) of the Foster Care Placement Regulations, 2012.

In the last two scenarios discussed above, a recommendation made to the Commissioner for social welfare that a child is suitable for foster care initiates the process of placing the child in foster care. Such a recommendation leads to a social investigation and a search for a suitable foster carer, presumably from the register of foster carers, which is yet to be established or maintained in Tanzania.⁹⁶ Generally, the presence of a child in need of alternative care as per reg 59(1) of the Child Protection Regulations, 2014 can initiate the placement of a child in foster care if this is considered the most suitable option for the child as per sec 18(3) of the LCA and reg 62 of the Child Protection Regulations.⁹⁷

Reg 5(5) of the Foster Care Placement Regulations, 2012, says that a person is not allowed to foster more than three children at once without the written permission of the Commissioner. This rule is important to ensure that the foster parents are not overwhelmed with care responsibilities by having many children placed in their care. It may also enhance the quality of care provided to children placed with foster parents. On the other hand, allowing a person to foster more than three children with the written permission of the Commissioner enables the possibility of placing siblings together when they are more than three and a suitable foster family is available to care for them.

5.9. Rights and obligations associated with foster care placement

Placement of a child in foster care engenders rights and obligations which are necessary to ensure that the welfare and interests of the child are upheld during the entire time of the placement. The law prescribes these rights and obligations to ensure that all interested parties and key players (foster child, foster carers, foster child's family and the department of social welfare) are aware of what is expected of them once a foster care placement is made.

5.9.1. Obligations and rights of the department of social welfare

The Commissioner for social welfare at the national level and the social welfare officers at the level of local government authorities play an essential role in the whole process of foster care. The Commissioner's responsibilities related to approving foster carers and placing children in foster care have been discussed in detail in section 5.5.1. This section dwells on the rights and obligations of social welfare officers at the local government level regarding foster care placements. The social welfare officers play important roles from the initial stage of recruiting foster carers until the foster care placement is terminated. Several of these roles, including

⁹⁶ See section 6.4 of this study for more details.

⁹⁷ For more details, see section 4.3 of this study. See also reg 8(2)(b) of the Foster Care Placement Regulations, 2012.

conducting the social assessment of those applying to become foster carers, and the social investigation of children to be placed in foster care, have already been discussed in detail. Here, the focus is on the obligations and rights of social welfare officers ensuing from the placement of children in foster care.

5.9.1.1. Development and review of foster care plans

In the spirit of the UN Guidelines for the Alternative Care of Children,⁹⁸ the Foster Care Placement Regulations, 2012 of Tanzania require the preparation of a foster care plan before a child is placed in foster care.⁹⁹ The foster care plan is to be prepared by a social welfare officer, presumably the one who conducted the social investigation of the child. The rationale of preparing a foster care plan is to map the handling of the child during placement with the focus of obtaining a permanent care solution and planning for the child's future.¹⁰⁰

Reg 17(2)(a) of the Foster Care Placement Regulations, 2012, requires that the foster care plan should identify the reasons for placing the child in foster care in order to be able to determine the kind of support the child will need while in care and to find a permanent solution for the child. The plan should also provide information on the child's health, educational and psychosocial history, and special needs.¹⁰¹ It should set out the support to be provided by a social welfare officer to the foster child and the foster parent as per reg 17(2)(c) of the Foster Care Placement Regulations, 2012. Where family reunification is contemplated, the care plan should indicate the steps to be taken to promote reunification with the biological parents.¹⁰² Where family reunification is not a considered option, the care plan should identify and assess the options for a permanent care placement, including adoption by the foster parents, for the child.¹⁰³ The care plan also has to indicate the level of contact that the foster child can have with his or her biological family as per reg 17(2)(e) of the Foster Care Placement Regulations, 2012. These requirements articulated under reg 17(2) as to the contents of the foster care plan are minimum requirements. Reg 17(5) of the Foster Care Placement Regulations, 2012 requires the Commissioner for social welfare to develop procedures and forms to guide social welfare officers in preparing foster care plans. However, according to my researches, it is not clear whether the commissioner has issued such guidance on the preparation of foster care plans.

⁹⁸ Para 61-63 of the UN Guidelines for the Alternative Care of Children.

⁹⁹ Reg 17(1)(2) of the Foster Care Placement Regulations, 2012.

¹⁰⁰ See reg 17(1) of the Foster Care Placement Regulations, 2012.

¹⁰¹ Reg 17(2)(b) of the Foster Care Placement Regulations, 2012.

¹⁰² Reg 17(2)(d) of the Foster Care Placement Regulations, 2012.

¹⁰³ Reg 17(2)(f) of the Foster Care Placement Regulations, 2012.

Sometimes there may be changes in the child's circumstances and conditions while he or she is in foster care. These may directly or indirectly impact the quality and nature of the care provided to the child. For this reason, the law requires social welfare officers to review and update the foster care plan every two months to ensure that it continues to meet the foster child's needs.¹⁰⁴ In preparing, developing, or reviewing a foster care plan, the social welfare officer needs to consult the foster child, where he or she can express his or her views, the foster parent, and, where possible and practical, the biological parents or guardians of the child.¹⁰⁵ The consultation requirement is necessary to provide an opportunity to all interested parties to say what they consider best for the development and welfare of the child.

The obligation of the social welfare officer to develop a foster care plan underscores the importance of conducting a social investigation and preparing a report before placing any child in foster care. The social investigation, if diligently done, can provide the social welfare officer with information concerning the child's life and circumstances and the situation of the child's family that is necessary for planning the child's future and permanent care.

5.9.1.2. Conducting supervision visits

In line with the requirement to make foster care plans, the social welfare officer needs to conduct supervision visits to the foster family in which a child is placed.¹⁰⁶ These supervision visits are necessary to ensure the continuing suitability of the foster care placement for the foster child.¹⁰⁷ Such visits also facilitate reviewing and updating the foster care plan, which must be done every two months as per reg 17(3) of the Foster Care Placement Regulations, 2012. Notably, such visits may help the social welfare officer to determine any additional support necessary for the foster carer and the foster child as per reg 16(6) of the Foster Care Placement Regulations, 2012.

Reg 16(1) of the Foster Care Placement Regulations specifies the time intervals at which supervision visits are to be carried out. There are two types of supervision visits, initial visits and subsequent visits. Initial visits are those conducted immediately after the placement of a child in a foster family. Depending on the age of the child, the time of conducting this initial visit differs. If the child is under the age of two years, the initial visit should take place within two weeks after the placement date.¹⁰⁸ The initial visit for a child above two years should take

¹⁰⁴ Reg 17(3) of the Foster Care Placement Regulations, 2012.

¹⁰⁵ Reg 17(4) of the Foster Care Placement Regulations, 2012.

¹⁰⁶ Reg 16 of the Foster Care Placement Regulations, 2012.

¹⁰⁷ Reg 16(5) of the Foster Care Placement Regulations, 2012.

¹⁰⁸ Reg 16(1)(a) of the Foster Care Placement Regulations, 2012.

place within one month after the placement date.¹⁰⁹ In all cases, subsequent visits need to take place every two months after the initial visit.¹¹⁰

However, there are some exceptions. In certain instances, emergency supervision visits may be necessary. For example, a social welfare officer may receive a report of child abuse, or information from the foster child, a foster parent, or any other person that necessitates a visit.¹¹¹ A supervision visit must take place immediately following a report of child abuse, as per sec 96 of the LCA which calls for an investigation by the social welfare officer. If information is received from the foster child, foster parent, or any other person and the social welfare officer considers it necessary to conduct a visit, the visit should take place no later than one week after receiving such information.¹¹²

During the supervision visit, the social welfare officer has a right and duty to meet the foster child privately, provided that the child is capable of expressing his or her own views.¹¹³ The rationale of meeting the child in private is to give the social welfare officer an opportunity to ascertain the views of the child concerning his or her treatment by the foster carer. Further, the social welfare officer has an obligation to prepare a written report after every visit. The report, which must be placed in the child's file, should contain the observations of the social welfare officer as to the child's welfare, progress, conduct and any changes which have occurred in the circumstances of the foster family.¹¹⁴

Implicitly, the obligation to conduct supervision visits gives the social welfare officer a right to enter the premises of the foster family for the purpose of conducting a supervision visit.¹¹⁵ The social welfare officer should prepare a supervision visit plan which should be known to the foster carer, and where practical the foster child, in order to avoid any inconveniences that might arise in connection with such visits. This would help to ensure smooth conduct of the supervision visits. The regulations require that the Commissioner for social welfare should develop guidance and forms for undertaking and reporting on supervision visits as per reg 16(7) of the Foster Care Placement Regulations, 2012. However, I was not able to discover the existence of any such guidance and forms regarding supervision visits.

¹⁰⁹ Reg 16(1)(b) of the Foster Care Placement Regulations, 2012.

¹¹⁰ Reg 16(1)(a)(b) of the Foster Care Placement Regulations, 2012.

¹¹¹ Reg 16(1)(c)(d) of the Foster Care Placement Regulations, 2012.

¹¹² See reg 16(1)(d) of the Foster Care Placement Regulations, 2012.

¹¹³ Reg 16(2) of the Foster Care Placement Regulations, 2012

¹¹⁴ Reg 16(3) of the Foster Care Placement Regulations, 2012.

¹¹⁵ See reg 11(1)(c) of the Foster Care Placement Regulations, 2012 requiring foster carers to permit social welfare officers to visit their homes.

5.9.1.3. Support of foster carers and foster children

The responsibility to arrange for the care of children in need of appropriate alternative care, where they can't be maintained in their families, is primarily vested in the state. In Tanzania, based on sec 94 of the LCA, this state obligation is to be discharged by local government authorities. This task is delegated to the social welfare departments established at different local government levels.¹¹⁶ It is the responsibility of the social welfare officers to ensure that good quality alternative care services are established and regulated for the benefit of the children in need of alternative care as per reg 59(2) of the Child Protection Regulations, 2014.

Accordingly, the Foster Care Placement Regulations, 2012 place an obligation on the social welfare officers, in collaboration with any organisation, to make necessary arrangements for the support of foster carers and foster children.¹¹⁷ As per reg 14(1) of the Foster Care Placement Regulations, 2012, the support to be provided to foster carers includes providing written information on fostering, the legal requirements of foster care placements, and the legal rights of foster carers, foster children and biological parents. Training on meeting the psychosocial needs of foster children and counselling during the foster placement also need to be provided. Counselling needs to be provided at different stages of the placement to assist both the foster carer and the foster child in adjusting to the changing conditions of the placement. For example, reg 14(2) of the Foster Care Placement Regulations, 2012, requires social welfare officers to support and counsel the foster child in adjusting to the foster care placement. Reg 14(3) requires the social welfare officers to provide counselling to the foster child if the placement is to be terminated. The social welfare officer is also required to support children going out of care after 18 years of age. The regulations require the social welfare officer to support the child in finding accommodation and employment or further education to prepare the child for independent living.¹¹⁸

Interestingly, reg 14(1) of the Foster Care Placement Regulations, 2012 (on arrangements for the support of foster parents and foster children) uses a cautious expression, “the social welfare officer shall as far as practicable and in collaboration with any organisation,” to qualify the kind of support to be offered. This support is not absolute. Instead, it is subjected to practicability, which means the availability of human and financial resources and the extent of demand for the available resources. The encouraging thing is that the social welfare officers can collaborate with any organisation in supporting foster parents and foster children. There is no provision in

¹¹⁶ Reg 6 and 7 of the Child Protection Regulations, 2014.

¹¹⁷ Reg 14 of the Foster Care Placement Regulations, 2012.

¹¹⁸ Reg 14(4) of the Foster Care Placement Regulations, 2012.

the Foster Care Placement Regulations, 2012, regarding financial support, which is an essential component of successful foster care placements.¹¹⁹

It can be summed up that a social welfare officer in charge of a foster care placement can be regarded as the heart or driver of that placement. The achievement of the placement objectives largely depends on the role played by the social welfare officer in dealing with the foster child, the foster carers and, where practical, the child's family.

5.9.2. Rights and obligations of foster carers

Placement of a child in foster care creates vast responsibilities for the foster carers. Foster parents or foster carers assume responsibility for maintaining the foster child as if he or she were their own child.¹²⁰ However, the parental responsibilities assumed by the foster carer(s) are not absolute, as the discharge of their responsibilities is under the supervision of the social welfare officer to whom the child's placement is assigned. Moreover, placement of a child in foster care does not change the legal parent-child relationship that existed before placement.

Depending on the reason for which the placement is made, it is important to clearly define the rights and obligations of foster carers to enable them to freely discharge their responsibilities within the expected limits. Expanding on secs 32(5) and 53(3) of the LCA, the Foster Care Placement Regulations stipulate the rights and responsibilities of foster carers in more specific terms.¹²¹

5.9.2.1. Rights of foster carers

Foster carers have the right to take all day-to-day decisions necessary for the care, upbringing and development of the foster child.¹²² However, as mentioned above, this right is not absolute, just as the foster carer's parental responsibilities are not absolute. In exercising this right, the foster carer has to cooperate and consult with the respective social welfare officer. If the decisions to be made may have a significant impact on the foster child as per reg 12(2) of the Foster Care Placement Regulations, 2012, consultation with the social welfare officer is necessary in order to obtain the views of the biological parents, where practical and convenient.

¹¹⁹ See section 6.9, section 7.2.4.2 and section 7.3.3 of this study for more details on financial support for foster placements.

¹²⁰ Sec 32(5) and 53(3) of the Law of the Child Act.

¹²¹ The responsibilities are found under reg 11 read together with F.C Form No. 5 (Undertaking by foster parents) in the schedule to the Foster Care Placement Regulations. The rights are stipulated under reg 12 of the Foster Care Placement Regulations. Reg 11(1) mistakenly refers to F.C Form No. 6 which is for the consent of parents or guardians.

¹²² Reg 12(1) of the Foster Care Placement Regulations, 2012.

Foster carers have the right to be informed by the social welfare officer of any fact or occurrence that is likely to substantially affect the child's placement.¹²³ This includes termination of the placement, a change in the duration of a care order or in the medical condition of the foster child, and any change or adjustment in the foster care plan.¹²⁴ Ensuring that the foster carer is well informed of facts or occurrences that may substantially affect the placement helps the foster carer to develop coping mechanisms.

Notably, the foster carer has the right to reasonable privacy of home life free from unnecessary interventions, harassment, threats and undue instructions from the biological parents, family members of the foster child or any other person.¹²⁵ The requirement of parental or guardian consent is vital to protect foster carers from unnecessary disruptions or interventions, since the child's family may otherwise feel excluded from the whole foster placement process or not be aware of the impacts associated with placement of their child in foster care. Further, the requirement of setting out in the foster care plan the level of contact that a foster child should have with his or her biological family is necessary to protect the privacy of the foster carer. Where contact is permitted between the foster child and his or her original family, this should be clearly articulated and known to the foster carers, the foster child and the child's biological family.

In accordance with reg 14 of the Foster Care Placement Regulations, 2012 on arrangements for the support of foster parents by social welfare officers, foster carers have a right to continuing support and advice from the social welfare officers.¹²⁶ Continuing support and advice are necessary to enable the foster parent to care for the foster child effectively and to cooperate with the child's biological family where contact of the child with the biological family is permitted. However, the extent of the support available to the foster carers will depend on the availability of resources and organisations willing to support foster placements as per reg 14(1) of the Foster Care Placement Regulations, 2012.

Foster carers have the right to apply for adoption after six months of foster care.¹²⁷ A foster carer who wants to exercise this right must notify the social welfare officer of the intention to

¹²³ Reg 12(4) of the Foster Care Placement Regulations, 2012.

¹²⁴ Reg 12(6) of the Foster Care Placement Regulations, 2012 provides the kind of information that the foster carer is entitled to and the rationale of giving such information to the foster carer.

¹²⁵ Reg 12(3) of the Foster Care Placement Regulations, 2012.

¹²⁶ Reg 12(5) of the Foster Care Placement Regulations, 2012.

¹²⁷ Reg 12(4) para 2 of the Foster Care Placement Regulations, 2012.

adopt a foster child.¹²⁸ Whether giving foster carers the right to adopt a child they have fostered is appropriate is a point of discussion, depending on the angle from which foster care is being viewed. The right of a foster carer to adopt a child in his or her care would be, on the face of it, an appropriate solution if the child in foster care cannot be reunited with his or her biological family.¹²⁹ Where there is a possibility of the child returning to his or her biological family, a foster parent showing interest in adopting the child may give rise to tensions between the foster family, the foster child, and the foster child's biological family as there is a likelihood of significant conflicting interests.

For the law to simply mention that foster parents have a right to adopt a child they have fostered for six months without any further guidance or conditions is a dangerous formulation. It creates an assumption that all foster care placements open the door to adoption without safeguards. The absence of a distinction between fostering for adoption and fostering as an independent alternative care option may have led to the incautious creation of the right to adopt by foster parents. Moreover, depending on the circumstances that led to the child's placement in foster care, the period of six months may not be enough to take steps towards reintegrating the child in his or her biological family. Not all children placed in foster care are orphans or abandoned or neglected. Thus, what appears to be the absolute right of foster parents to adopt a child after six months defeats the real purpose of foster care.

5.9.2.2. Obligations of foster carers

One of the most important responsibilities of foster carers is providing the foster child with his or her daily needs.¹³⁰ The child's day-to-day needs include education (if the child is of school-going age),¹³¹ medical care and attention,¹³² food, shelter and whatever may contribute to the child's general development socially, psychologically, mentally and physically.¹³³ In the discharge of this duty the foster parent or carer should behave as if the child were his or her own.¹³⁴ However, the foster carer or parent has to act in accordance with the foster care plan created as per reg 17 of the Foster Care Placement Regulations, 2012. Moreover, reg 11(5) of

¹²⁸ Re 11(6) of the Foster Care Placement Regulations, 2012. However, the exercise of this right to adopt a foster child is not automatic; the foster carer has to comply with the provisions of the law regulating adoption as stipulated under part VI of the LCA and the Adoption of a Child Regulations, 2011.

¹²⁹ For instance, if the child has been freed for adoption by a court in accordance with reg 49 of the Child Protection Regulations and rule 99 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 it would be in the child's best interest to be adopted by the foster parents.

¹³⁰ Reg 11(1) of the Foster Care Placement Regulations, 2012.

¹³¹ Reg 11(1)(d) of the Foster Care Placement Regulations, 2012.

¹³² Reg 11(1)(g) of the Foster Care Placement Regulations, 2012.

¹³³ Reg 11(1)(g) of the Foster Care Placement Regulations, 2012. See also the terms included in the Undertaking by Foster Parents in the schedule to the Foster Care Placements Regulations, 2012.

¹³⁴ Reg 11(1)(j) of the Foster Care Placement Regulations, 2012.

the Foster Care Placement Regulations, 2012 prohibits foster parents from delegating the daily care of the foster child to any other person for a continuous period of more than one week without the permission of the social welfare officer.

The foster parent or foster carer must permit the social welfare officer to visit his or her home and access the child concerned as per reg 11(1)(c) of the Foster Care Placement Regulations, 2012. This is necessary to facilitate the supervision visits by the assigned social welfare officer. Reg 11(1)(b) of the Foster Care Placement Regulations, 2012 requires the foster parent or foster carer to cooperate with the social welfare officer to promote reunification and reintegration of the child with his or her biological parents or relatives if reunification is in accordance with the foster care plan. It is also the foster carer's responsibility not to obstruct contact between the foster child and the biological family members or other interested people if such contact is not prohibited as provided by reg 11(1)(a) of the Foster Care Placement Regulations, 2012.

Further, if the child has a cultural, linguistic or religious background that is different from that of the foster carer, the foster carer should help the child to maintain links with his or her culture, language, or religion.¹³⁵ I find this to be one of the most demanding responsibilities of foster carers. Depending on the child's age and the place where the foster placement is taking place, it may not always be easy to help the child to maintain his or her cultural links. This challenge is greater if contact with the child's biological family is prohibited, or the placement is in a completely different geographical setting. As a remedy, reg 10(1) of the Foster Care Placement Regulations, 2012 requires a child to be placed with a foster parent of the same religion, but where the religion of the child is unknown, then the child may be raised in accordance with the religion of the foster parent.¹³⁶ Generally, the foster parent must respect the child's right to worship in accordance with his or her religious denomination.¹³⁷

Reg 11(2) of the Foster Care Placement Regulations provides that "a child under foster care shall not be taken or travel the country without the written permission of the Commissioner for social welfare." Though the formulation of this provision seems grammatically incorrect, it suggests that a foster child may not travel out of the country without the foster parent obtaining permission from the Commissioner first. The rationale behind the duty of the foster parents not to take the foster child out of the country without permission is based on the responsibility of social welfare officers to monitor and supervise foster placements. Moreover, reg 11(3) of the Foster Care Placement Regulations, 2012 requires foster parents to notify the responsible social

¹³⁵ Reg 11(1)(i) of the Foster Care Placement Regulations, 2012.

¹³⁶ Reg 10(2) of the Foster Care Placement Regulations, 2012.

¹³⁷ Reg 10(1) of the Foster Care Placement Regulations, 2012.

welfare officer immediately of any change of address within the district of residence. The foster parent has to give reasonable notice of intention to move out of the district of residence or outside the country not less than sixty days before the proposed move.¹³⁸

Reg 11(4) of Foster Care Placement Regulations, 2012 requires the foster parent to notify the social welfare officers of any material changes of living circumstances, and state how such changes will affect the child.¹³⁹ The notice has to be given within twenty-one days from the date of occurrence of the changes. This helps the social welfare officer to assess the suitability of the placement and determine if there is any support that can be given to sustain the placement.

5.9.3. Rights and obligations of a foster child

The rights of the foster child are articulated under reg 13 of the Foster Care Placement Regulations. The fundamental right is provision of the child's day-to-day needs by the foster parent as provided under reg 13(1) of the Foster Care Placement Regulations, 2012. As discussed above, the foster parents are responsible for maintaining the foster child by providing the basic needs for the development and welfare of the child. Related to this is the right of the foster child to access primary education and attend school regularly, provided that the child has attained the appropriate age to attend school. As far as is possible, the child also has the right to access further education and vocational training as per reg 13(3) of the Foster Care Placement Regulations, 2012.

Beyond the right to provision of daily needs, a foster child has the right to continuous contact with members of his or her biological family or other persons unless the court or social welfare officer prohibits such contact.¹⁴⁰ This right is essential for purposes of facilitating family reunification and reintegration. Foster care is not meant to be a permanent alternative care option. The main objective is to provide a temporary solution while efforts are being made to find suitable permanent care for the child, the permanent solution being either reuniting the child with the biological parents or relatives or adoption. However, in some cases, children may remain in foster care until they have aged out of care. If it is considered possible that the child can be reunited with his or her family, allowing contact between the child and his or her biological family is one of the ways that can facilitate the reunification process. The right to continuous contact with biological parents or family is also important to enable children to

¹³⁸ Reg 11(3) of the Foster Care Placement Regulations, 2012.

¹³⁹ Reg 11(4) of the Foster Care Placement Regulations, 2012.

¹⁴⁰ Reg 13(2) of the Foster Care Placement Regulations, 2012.

remain in touch with their cultural, linguistic, ethnic and religious backgrounds, which is one of the things to be considered when a child is being provided with alternative care.¹⁴¹

Another important right is the right to an opinion and the views of the foster child should be respected in all decisions affecting him or her.¹⁴² This right is closely connected to the right of the child to participate in all decisions concerning his or her alternative care.¹⁴³ The foster child needs to be given an opportunity to participate and air his or her views or opinion at all stages of the process of placement in foster care. Depending on the child's age, maturity, and individual circumstances, a suitable environment ought to be established to enable the child to express his or her opinions and concerns. To enhance and promote this right, the regulations on foster care placement emphasise the child's participation in different decisions relating to placement in foster care.¹⁴⁴ Further, the foster child has a right to communicate freely with social welfare officers and any other relevant authorities about his or her placement, care and treatment as per reg 13(4) of the Foster Care Placement Regulations, 2012. The right to an opinion implies the right to be well informed of all the necessary facts relating to the case.

Though foster children are not in the care of their own families, they are legally entitled to enjoy all the rights enjoyed by other children in the care of their own families. The vulnerability of children in alternative care makes it necessary to emphasise certain specific rights of fostered children. For this reason, reg 11(1)(j) of the Foster Care Placement Regulations states that foster parents have to ensure that the child in their care is treated in a manner substantially similar to other children living in the same household, except where the special need of that child or any other child in the household requires otherwise.¹⁴⁵

5.9.4. Rights and obligations of the child's biological family

Though not stated in the law, a child's placement in foster care does not sever the parent-child relationship. The child's parents, if available, retain their parentage rights. For this reason, if decisions having a significant impact on the life of a foster child, such as change of name or of religion, are to be made, the child's parent(s) must be consulted as per reg 12(2) of the Foster Care Placement Regulations, 2012. Apart from this, the Foster Care Placement Regulations do

¹⁴¹ Art 20(3) of the UN Convention on the Rights of the Child, 1989 and art 25(3) of the African Charter on the Rights and Welfare of the Child, 1990.

¹⁴² Reg 13(4) of the Foster Care Placement Regulations, 2012.

¹⁴³ See reg 3(b) of the Children's Homes Regulations, 2012.

¹⁴⁴ Child participation is emphasised during social investigation, preparation of foster care plans, and supervision visits after placement. See reg 9(4)(a), reg 17(4)(a) and reg 16(2) of the Foster Care Placement Regulations, 2012 respectively.

¹⁴⁵ See also item 1 of the Undertaking by Foster Parents in F.C. Form No. 5 of the Foster Care Placement Regulations, 2012.

not have any specific provision on the rights or responsibilities of the child's biological parents or child's family. However, several rights and obligations can be inferred from various provisions of the LCA and its regulations. The enjoyment of rights and discharge of the responsibilities vested in the biological parents or child's family members largely depend on the circumstance that led to the child's placement in foster care and the willingness of the parents or relatives to be involved in the affairs of the child. The biological parents or family members have the right to maintain reasonable contact with the child. Unless it is contrary to the child's best interests, there should be a plan or arrangement to establish how the biological parents or family of the child can maintain contact with their children without disrupting the placement.¹⁴⁶

The biological parents also have a right to give their views on the placement of their children in foster care. This can be inferred from the need of consulting with the parents of the child, where their whereabouts are known, during the conduct of a social investigation under reg 9(4)(b) of the Foster Care Placement Regulations, 2012. On the other side, the biological parents have a right to participate and give their views on major decisions with a significant impact on the child's life.¹⁴⁷ Implicitly, the biological parents also have a right to be reunited with their child if there is evidence that reunification is not contrary to the child's best interests.¹⁴⁸ On this basis, the social welfare officers have to take necessary measures to assess the possibility of the child being reunited with his or her parents when preparing a foster care plans as per reg 17(2)(d) of the Foster Care Placement Regulations, 2012. In line with this, the foster parents are not to obstruct any efforts towards family reunification or reintegration as provided under reg 11(1)(a) of the Foster Care Placement Regulations, 2012.

Concerning responsibilities, biological parents, if available, are required to refrain from any acts or conduct that may interfere with foster placements. This responsibility establishes the rationale for parental consent before a child is placed in foster care. For this reason, the biological parents or guardians must be informed of the possible impacts of placement of the child in foster care before they give their consent.¹⁴⁹ The foster child's biological parents or guardians are to restrain from harassing the foster parents with whom their child is placed. They are expected to cooperate with the foster parents and responsible social welfare officers in order to achieve the objectives of foster care placement.

¹⁴⁶ Reg 11(1)(a) of the Foster Care Placement Regulations, 2012.

¹⁴⁷ Reg 12(2) of the Foster Care Placement Regulations, 2012.

¹⁴⁸ See reg 11(1)(b) of the Foster Care Placement Regulations, 2012.

¹⁴⁹ See reg 8(3) of the Foster Care Placement Regulations, 2012.

Generally, achieving the objectives associated with the placement of children in foster care requires respect and working towards realising the rights and responsibilities of each interested party. On the other hand, diligent fulfilment of the responsibilities assigned to all parties creates a smooth path towards successful foster care placement. A right vested in one person creates an obligation for another person. It is important to respect this symbiotic relationship that needs to be established between social welfare officers, foster carers, foster children and the biological families of foster children. Valuing one of these parties and disregarding the others paves the way to a failing foster care placement.

5.10. Termination of foster care placements

Foster care placements are not made with the intention of them lasting forever. Since foster care is mainly used as a temporary measure to provide a home for children deprived of their family environment, it is essential to have legal guidance on the termination of foster care placements. The circumstances, conditions, and procedures for terminating foster care placements should be provided for in the legal framework to avoid potential conflicts and complications from unregulated termination. Depending on how well the foster parents, the foster child and, where applicable, the child's family have been informed about the conditions of the foster placement, clashes may be inevitable when it comes to termination. In Tanzania, while the power to authorise foster care placements is vested in the Commissioner for social welfare,¹⁵⁰ the power to terminate a foster care placement lies with the social welfare officers.¹⁵¹ Reg 18(1) of the Foster Care Placement Regulations, 2012 articulates the grounds and procedures for termination of a foster care placement, as recapitulated below.

5.10.1. Grounds for termination

One of the grounds for termination is evidence of child abuse or suspicion that a foster child needs care and protection following the social welfare officer's investigation into allegations of child abuse.¹⁵² It is not impossible that the child in foster care may be subjected to abuse by his or her foster parents or others in the household. Where the social welfare officer receives information or suspects that the child is being abused, he or she is required to conduct an investigation as per sec 96 of the LCA. If the allegations or suspicions are proved to be true, the child may be immediately removed from the care of the foster parents, and such removal automatically terminates the placement.

¹⁵⁰ Sec 32(1) and 53(1) of the Law of the Child Act; see also reg 8(5) read together with reg 7(3) of the Foster Care Placement Regulations, 2012

¹⁵¹ Reg 18(1) of the Foster Care Placement Regulations, 2012.

¹⁵² Reg 18(1)(a) of the Foster Care Placement Regulations, 2012. See also sec 96 of the Law of the Child Act.

The possibility of reuniting the child with his or her biological parents or family provides another ground for termination as per reg 18(1)(b) of the Foster Care Placement Regulations, 2012. This may apply if the child came into the care of foster parents due to the temporary inability of the biological parents or family to care for the child. A good example where this ground may be invoked would be where a child is placed in foster care after being admitted into a voluntary care arrangement as per reg 42 of the Child Protection Regulations, 2014. If the child's parent issues a notice to terminate the voluntary care arrangement as per reg 43 of the Child Protection Regulations, 2014 and the social welfare officer believes that the child can finally be reunited with his or her parents or family, the foster placement can be terminated.¹⁵³

Expiry of a care order or interim care order is another ground for termination of a foster care placement.¹⁵⁴ A child may have been placed in foster care following a care order or interim care order issued by a court. In Tanzania, unless extended by the court following an application by a social welfare officer on behalf of the local government authority, a care order remains in force for three years or until the child attains the age of 18 years, whichever is attained earlier.¹⁵⁵ Related to this is termination of the placement when the foster child reaches 18 years of age as per reg 18(7) of the Foster Care Placement Regulations, 2012. Such a child cannot be forced to remain in foster care unless staying in foster care is necessary for the child's educational or vocational training, in which case the child can continue being in foster care until he or she attains the age of 21 years.¹⁵⁶

Foster care placement can also be terminated if the placement is no longer in the child's best interest.¹⁵⁷ Connecting this to the suitability principle, if the placement no longer serves the child's interests, there is no rationale for keeping up the placement. Factors like a change in the social, mental or physical condition of the foster parent or the foster child may mean that the placement is no longer in the child's best interests. For instance, the Foster Care Placement Regulations, 2012 identify a change in the marital status or residence of the foster parent as a factor that may necessitate assessment by the social welfare officer of the continuing suitability of the placement.¹⁵⁸ This further justifies the need for the foster parent to inform the social

¹⁵³ See section 4.2.2 of this study on voluntary care arrangements.

¹⁵⁴ Reg 18(1)(c) of the Foster Care Placement Regulations, 2012.

¹⁵⁵ Sec 18(4) of the Law of the Child Act. See also reg 61(1) of the Child Protection Regulations, 2014 and rule 104 of the Law of the Child (Juvenile Court Procedure) Rules, 2016. See rule 94(3)(4) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 on the duration of interim care order.

¹⁵⁶ Reg 18(8) of the Foster Care Placement Regulations, 2012.

¹⁵⁷ Reg 18(1)(d) of the Foster Care Placement Regulations, 2012.

¹⁵⁸ Reg 18(5)(9)(10)(11) of the Foster Care Placement Regulations, 2012.

welfare officer of any changed material condition that may significantly affect the foster placement.¹⁵⁹

Another ground for terminating a foster placement, though not envisaged under reg 18 of the Foster Care Placement Regulations, is when the foster carer is no longer interested in continuing with the child's fostering. This can be inferred from reg 7(5) of the Foster Care Placement Regulations, 2012. The foster carer cannot be forced to continue fostering the child, no matter how important the placement is to the child. The law requires a foster parent who is no longer interested in fostering to inform the social welfare officer. If this person has a child in his or her care, the consequence is termination of the placement. Another place must be found for the child.

5.10.2. Procedure for termination

Before the decision to terminate foster placement is effected, the social welfare officer is required to ascertain the views of the foster child on the termination. This will depend on the age and maturity of the child, but the views of the child must be given due weight. This implies that the child needs to be fully aware and informed of the necessary facts leading to the decision to terminate the placement. However, the child's views must only be considered in cases of termination for purposes of family reunification, or where the social welfare officer decides that the placement is no longer in the child's best interest.¹⁶⁰

In all cases, the social welfare officer is required to notify the foster parents and the foster child of the decision to terminate the placement.¹⁶¹ The notification to the foster parents should be in writing, while the foster child must be orally notified in a manner that enables the child to understand the notification. The notification is required if the grounds leading to termination relate to the expiry of a care order or interim care order, family reunification or when it is determined that the placement is no longer in the child's best interest. The notification has to be given within a minimum of ten days before the termination of the placement.¹⁶²

It is interesting to note that if the ground leading to termination relates to child abuse or that the child needs care and protection, there is no requirement to ascertain the child's view or notify the foster parents and the child of the decision to terminate the placement.¹⁶³ This implies that in instances of abuse of the child in foster care, the social welfare officer has the power to take

¹⁵⁹ See reg 11(3)(4) of the Foster Care Placement Regulations, 2012.

¹⁶⁰ Reg 18(2) read together with reg 18(1)(b)(d) of the Foster Care Placement Regulations, 2012.

¹⁶¹ Reg 18(4) of the Foster Care Placement Regulations, 2012.

¹⁶² Reg 18(4) of the Foster Care Placement Regulations, 2012.

¹⁶³ See the formulation of reg 18(2)(4) of the Foster Care Placement Regulations, 2012.

immediate action, including removing a child to a place of safety as per sec 96(2) of the LCA read together with reg 22 of the Child Protection Regulations, 2014. In such instances, what is important is the safety and protection of the child. Moreover, where termination of placement is due to child abuse, the foster parent will be removed from the register of foster carers and will no longer be allowed to foster children.¹⁶⁴

If the social welfare officer determines that it is necessary to terminate the placement, he or she is required to record the grounds that necessitated termination of the placement and the views of the child regarding the termination, and place these documents in the child's file.¹⁶⁵ Perhaps inadvertently, the regulations do not contain the requirement to notify the Commissioner for social welfare on termination of the placement. Nevertheless, reg 18(12) of the Foster Care Placement Regulations, 2012 requires the Commissioner for social welfare to develop guidance, procedures and forms governing the termination of foster care placements. In the course of conducting this study, I did not come across any such guidance or forms providing more details on the termination of foster care placements.

5.10.3. Complaints and appeals against termination of a foster care placement

Judicial or administrative processes relating to termination may result in unsatisfying results for one of the parties affected by the decision or the procedures involved in reaching the decision. Though not comprehensively, the regulations create an avenue for foster parents to challenge the decision of the social welfare officer to terminate the placement. However, the possibility of challenging such a decision is limited to terminations due to the placement not being in the child's best interest as provided under reg 18(1)(d) of the Foster Care Placement Regulations. In such a case, the foster parent should have fostered the child for a period exceeding six months, and the foster parent should believe that removal is not in the child's best interest.¹⁶⁶ There is a possibility that what the social welfare officer determines to be in the child's best interests might not be viewed to be so by the foster parent. The subjectivity or relativity of the concept of the child's best interests justifies the position of the law in allowing appeals by foster parents against such a decision.

In such instances, the regulations give the foster parent an opportunity to appeal to the Commissioner for social welfare. The appeal, made in writing, should be lodged within ten days from the date the decision to terminate the placement is communicated to the foster parent. The

¹⁶⁴ Reg 7(9) of the Foster Care Placement Regulations, 2012.

¹⁶⁵ Reg 18(3) of the Foster Care Placement Regulations, 2012.

¹⁶⁶ Reg 18(6) of the Foster Care Placement Regulations, 2012.

regulations do not specify the format in which the appeal may be lodged, so probably a letter stating the grounds of appeal and necessary particulars of the placement would suffice. The foster parent is also required to notify the social welfare officer of the lodged appeal as per reg 18(6) of the Foster Care Placement Regulations, 2012. The regulations are silent on the need to notify the foster child and, if available, the child's family, of the appeal made by the foster parents.

Once the appeal is lodged with the Commissioner for social welfare and the responsible social welfare officer is informed of the appeal, the social welfare officer is supposed to immediately submit a copy of the child's file, including justifications for the decision to remove the child from the care of the foster carer to the Commissioner for purposes of review.¹⁶⁷ Within 15 days of receiving the appeal from the foster parent, the Commissioner is to decide on whether the foster placement will be terminated and communicate the decision to the foster parents and the social welfare officer.¹⁶⁸ During the entire time of the appeal, the child should remain in the foster parent's care until the Commissioner has decided on termination of the placement.¹⁶⁹ It appears that the decision of the Commissioner is final as the regulations do not provide for another avenue to challenge the Commissioner's decision.

As discussed above, foster parents can only appeal against the decision to terminate foster care if the termination is on the ground that the foster care placement is no longer in the child's best interests as per reg 18(1)(d) of the Foster Care Placement Regulations. But it seems justified to ask why it is not possible to appeal against termination on the other grounds provided under reg 18(a-c) of the Foster Care Placement Regulations. The regulations do not answer this question; however, an attempt can be made to give possible reasons for such limitation. For example, if foster care is terminated following evidence of child abuse or other child protection concerns caused by the foster carer, one of the possible reasons for not allowing an appeal by foster parents would be that the termination is caused by the action of the foster parents themselves against the child's interests. Moreover, termination under this ground would require further administrative or judicial actions to determine the matter, and the foster parents would have an opportunity to defend or make their case as per sec 96 of the LCA.

Termination of a foster care placement following the expiration of a care order or interim care order is beyond the powers of the Commissioner or social welfare officers. As shown above, care orders or interim care orders are granted by the court, and the orders are granted for a

¹⁶⁷ Reg 18(6)(a) of the Foster Care Placement Regulations, 2012.

¹⁶⁸ Reg 18(6)(b) of the Foster Care Placement Regulations, 2012.

¹⁶⁹ Reg 18(6)(b) of the Foster Care Placement Regulations, 2012.

prescribed period. In most cases, the foster parent will have been informed that the child would be in his or her care for a given period as prescribed in the care order or interim care order by the court.

5.11. Conclusion

Foster care as an alternative care option in Tanzania is regulated and governed by the law, which stipulates the authorities, processes and procedures applicable to the placement of children in foster care. The law further articulates the rights and obligations emanating from foster care placement. The law governing foster care tends to be in line with the principles of the necessity and appropriateness of alternative care, as discussed in chapter two. Requirements like the assessment of applicants to become foster carers, the social investigation of children before placement, and the preparation of foster care plans reveal adherence to the international, regional and also national principles of providing alternative care to children deprived of their family environment.

In this chapter I have pointed out some weaknesses in the legal provisions for foster care in Tanzania. In the next chapter, a deep analysis of the effectiveness and efficiency of the law on foster care in actual practice is presented, showing why foster care, as a family-based alternative care option, is underutilised to protect children needing alternative care. The analysis based on data obtained from field research helps pinpoint the challenges and prospects of implementing foster care as provided for under the law. All this leads to the achievement of the goal of finding ways, from legal and practical perspectives, that would help facilitate the smooth implementation of foster care in the social, economic, and cultural context of Tanzania.

CHAPTER SIX: LEGAL AND PRACTICAL CHALLENGES AFFECTING FOSTER CARE IN TANZANIA

After presenting and examining the legal and institutional framework regulating foster care in Tanzania in the preceding chapter, this chapter attempts to answer why foster care is underdeveloped and limited in its use as an alternative care option for children. Thus, this chapter identifies and analyses the challenges impeding the implementation of foster care in Tanzania. These challenges were identified in the course of analysing the law on foster care and on the basis of findings obtained by conducting field research in the selected areas. The challenges presented below are discussed, bearing in mind the economic, social and cultural context of Tanzania, which cannot be ignored in discussions related to protecting children deprived of their family environment. The chapter is built on the premise that foster care in Tanzania is entangled with legal and practical challenges that need to be addressed holistically to implement and establish an effective foster care system. The challenges are therefore considered in the light of the entire policy, legal and institutional framework regulating the protection of children, since foster care, as an alternative care option, constitutes an essential component of the child protection system, which is considered as a whole.

6.1. The limited interpretation or definition of foster care

The definition or interpretation attached to foster care under the LCA is limited and does not reflect the social realities of Tanzanian society.¹ The definition of foster care under sec 3 of the LCA² is limited and narrow for two major reasons: it regards foster care as a temporary measure and limits foster care to care by individuals not related to the child, thus excluding foster care by relatives. Defining foster care as a temporary measure limits the objectives of foster care because it can be used to provide long-term alternative care for children who cannot be reunited with their families or those who cannot be adopted before ageing out of care.³ The phrase *temporary measure* found under sec 3 of the LCA should be replaced by *a short-term or long-term measure*, or simply the words *a form of alternative care* could be used instead.

The second interpretational limitation on foster care is that the family or individual providing foster care should not be related to the child. In a country like Tanzania, where relatives have

¹ See section 5.2. of this study on the nature and scope of foster care in Tanzania.

² The provisions of sec 3 of the LCA are quoted in section 5.2. of this study.

³ See also Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers* (Family for Every Child, 2015), 8–9. See also the discussion in section 3.4.2.2 of this study concerning the principle that placement be permanent rather than temporary.

always been in the forefront of informal care for children who cannot be cared for by their parents, what is the reason for excluding relatives from fostering? Could open adoption, defined as adoption by relatives under sec 54(3) the LCA, be a possible reason for excluding relatives from fostering?⁴ It could be argued that since people are allowed to adopt their relatives' children, allowing relatives to be foster carers or foster parents would be an unnecessary replication of alternative care forms. Nevertheless, not every person willing to care for a relative's child would want to adopt, and not every child in need of alternative care would be suitable for adoption. Moreover, open adoption requires a time-consuming judicial action in contrast to foster care, which is an administrative action.

As discussed in sections 4.3 and 4.3.1 of this study, reg 62(1) of the Child Protection Regulations, 2014 and sec 18(3) of the LCA list care by relatives as an alternative care option. However, there are no further directions on the implementation of care by relatives as an alternative care option. Ideally, it would be proper to expand the definition of foster care to include relatives as potential foster carers in the appropriate circumstances. Foster care by relatives is allowed and practised in some other countries like Ghana and South Africa.⁵ The inclusion of relatives as potential foster carers increases the pool of potential foster carers.⁶ It would also remove the need to adopt another legal framework to regulate the placement of children with relatives, which has not so far been done. The long-standing practice of caring for one's relatives' children, which primarily takes place informally, justifies the need to expand foster care to include care by relatives.

Though not indicated in the law, it can be assumed the child's need for special care and support is one possible reason for placing a child in need of alternative care with a relative as per reg 62 of the Child Protection Regulations, 2014 and sec 18(3) of the LCA. Such children may include those with developmental needs requiring a carer who has undergone training to care for such needs. In such circumstances, even when a relative willing to care for the child is available, the protection of the child might not be sufficient if the child is not taken into the care of the local government authority and train the relative to meet the needs of such a child.⁷ Scrutiny of different provisions of the LCA and the subsidiary legislation on the protection of children in need of alternative care tempts one to think that placement of a child with relatives

⁴ See also the discussion on open adoption in section 4.3.5 of this study.

⁵ Sec 64(2) of the Ghana Children's Act No. 560 of 1998 as amended by the Children's (Amendment) Act, 2016; see also sec 180(3)(b) of the South Africa Children's Act No. 38 of 2005 as amended.

⁶ Cf. Colton and Williams, *The World of Foster Care*, 285.

⁷ This information was obtained in an interview conducted with a social welfare officer at Kinondoni Municipal Council in Dar es Salaam on 16/01/2019.

does not put obligations on the state in the same way as when a child is placed in other forms of alternative care. Therefore, instead of care by relatives being classified as a separate alternative care option, it could instead be regarded as a sub-category of foster care to be used in appropriate cases.

Moreover, the lack of formal recognition of care provided by relatives has forced people to seek open adoption of relatives' children in their care in order to be able to enjoy certain statutory benefits. A vivid example is the increasing incidence of individuals making inquiries about open adoption procedures so that they may be able to include their relatives' children in their policy under the National Health Insurance Scheme regulated by the National Health Insurance Fund.⁸ Thus, in the absence of formal recognition of care by relatives, it is clear that people adopt their relatives' children because circumstances force them to do so. Social welfare officers make efforts to explain to these individuals the implications of adoption, which in most cases results in discouraging them from pursuing the adoption of their relatives' children.⁹ Formal recognition of care by relatives would prevent people from adopting relatives' children whom they would not ordinarily have adopted.

The need to broaden the definition of foster care, for the reasons discussed above, can be emphasised in the words of George and others in their article 'Foster Care beyond Crossroads: Lessons from an International Comparative Analysis':

"The definition of foster care should be wide, elastic and inclusive. A narrow, rigid and exclusive definition will prove to be unproductive and unable to accommodate new development and challenges to children and families."¹⁰

The definition of foster care should be broad enough to capture and accommodate new developments and challenges and consider the social and cultural practices related to child care. Disregarding the social and cultural realities of child care contributes to the weak implementation of the law on foster care. From the legislative history of the LCA, it is not easy to deduce the justification for limiting foster care to non-relatives in a community where kinship care already plays an integral part in providing care to children deprived of their family environment.

⁸ This information was obtained in an interview conducted with a social welfare officer at Temeke Municipal Council in Dar es Salaam on 04/02/2019. See also section 4.3.5 of this study.

⁹ This information was obtained in an interview conducted with a social welfare officer at Temeke Municipal Council in Dar es Salaam on 04/02/2019.

¹⁰ Shanti George, Nico Van Oudenhoven, and Ekha Wazir, Foster Care Beyond the Crossroads: Lessons from an International Comparative Analysis, *Childhood* 10, no. 3 (August 2003): 345.

6.2. Lack of clarity on the objectives of foster care

As provided under the LCA, the primary objective of foster care is to provide care for children in need of alternative care for whatever cause.¹¹ Beyond this general purpose of foster care, the place of foster care within the continuum of alternative care services must be made clear. The legal framework regulating foster care in Tanzania does not provide the desired clarity. Further, the interrelationship between foster care and other alternative care options is also unclear. In the absence of clear guidelines or practice notes on the provision of foster care, the LCA and its subsidiary legislation leave room for conflicting interpretations in respect of how and when to use foster care, as shown below. The critical question that guides this discussion is: Is foster care an independent and stand-alone alternative care option for children needing alternative care?

6.2.1. Equivocal provisions of the law for child placement in foster care

Sec 32(1) and sec 53(1) of the LCA read together with reg 8(1) of the Foster Care Placement Regulations, 2012 provide conditions or circumstances for placing children in foster care. While reg 62(1)(b) of the Child Protection Regulations, 2014 identifies foster care as one of the alternative care options for children in the care of the local government authority; the placement of children in foster care should be done following the legal framework regulating foster care placement.¹² To make it easier to follow the discussion below, I reproduce the provisions on the conditions for placement of children into foster care.

Sec 32(1) of the LCA on conditions for foster care states that:

“Where a child has been committed to an approved residential home or institution under a care order or supervision order, the social welfare officer, in conjunction with the warden or manager of the approved residential home or institution[,] may make recommendation to the Commissioner to place the child with a person who is willing to be a foster parent.”

Sec 53 of the LCA on conditions for foster care placement states that:

“(1) Where-

(a) a child has been committed to an approved residential home or an institution under a supervision order;

¹¹ See section 5.4 of this study on the objectives of foster care.

¹² See sec 18(3)(c) of the LCA which says that a child under a care order can be placed in foster care in accordance with the foster care placement rules made under the LCA.

(b) a recommendation has been made by a social welfare officer that an approved residential home or an institution is the most suitable place for [the] child; or

(c) a child has been placed in an approved residential home or an institution by any person,

the Commissioner may place that child with a foster parent.”

Reg 8 of the Foster Care Placement Regulations, 2012 on the conditions for foster placement provides that:

“(1) A child may be placed with a foster parent if that child:-

(a) is under a care order or interim care order, under sec 18(1) of the Act;

(b) has been committed to an approved residential home or institution under a care order or supervision order, under sec 32(1) or sec 53(1)(a) of the Act;

(c) has been placed in an approved residential home or an institution by any person, under sec 53(1)(c);

(d) has been recommended by a Social Welfare Officer to be kept in an approved residential home or an institution as the most suitable place for him under sec 53(1)(c);¹³ or

(e) requires temporary custody [u]nder a foster care placement in accordance with sec 53(7) of the Act.”

Though it is not clear why the LCA contains two separate provisions on the conditions for foster care, sec 32(1) and sec 53(1) of the LCA are the primary provisions regulating the placement of children in foster care.¹⁴ However, the formulation of these two provisions is equivocal regarding how and when foster care can be used as an alternative care option. For instance, the formulation of sec 32(1) of the LCA makes it look as if foster care can only be used if a child has been placed in a residential home or institution under a care order or supervision order. I do not dispute that children in residential homes or institutions can be placed in foster care; however, a child’s placement in a residential home should not be the only criterion for placing children in foster care. One wonders why these provisions do not include children who are received into care through voluntary care arrangement under reg 42 of the Child Protection

¹³ The reference to sec 53(1)(c) of the LCA in this para seems to be an error as the correct reference is sec 53(1)(b).

¹⁴ See section 5.1. of this study on the background of the legal framework on foster care.

Regulations, 2014 or simply children needing alternative care for whatever reason.¹⁵ Foster care can be a means of providing alternative care for children in many different circumstances.¹⁶

Another misleading thing in the above-quoted provisions is the placement of children under a supervision order in foster care as provided under sec 32(1) and 53(1)(a) of the LCA. As discussed in section 3.5.5 of this study, a child under a supervision order is not a child needing alternative care. Once a supervision order is issued, the social welfare officer who applied for the order has to supervise the child while the child remains in his or her family home as per sec 19(2) of the LCA. Legally, a child under a supervision order cannot be placed in alternative care without obtaining a care order from the court. Therefore, it is not clear why sec 32(1) and 53(1)(a) allows placement of children under a supervision order in foster care.

Another issue arising from sec 53(1)(b) of the LCA and reg 8(1)(d) of the Foster Care Placement Regulations, 2012 relates to the placement of children in foster care where placement in a residential home or institution is deemed the most suitable alternative care for the child. Children needing alternative care should be placed in the most suitable alternative care option that meets their needs and interests. The formulation of the above provisions of the LCA and the Foster Care Placement Regulations, 2012 raises the question of why a child should be placed in foster care if it has been determined that placement in a residential home or institution is the most suitable option? Perhaps this was an oversight on the part of the drafters.

Sec 53(7) of the LCA contains another unclear point concerning the placement of children in foster care when it states that:

“Notwithstanding any provision of this section, the Commissioner may, by deed, place any child under foster care for temporary custody.”¹⁷

Neither the LCA nor the Foster Care Placement Regulations, 2012 provides further clarification on this provision. However, reg 7(3) and reg 8(1)(e) of the Foster Care Placement Regulations, 2014 refer to this provision. It is not clear what placement by deed means or what temporary custody entails in this provision. An attempt to discover the meaning of this provision during field research was not fruitful, as most of the respondents were not aware of this provision due to the limited use of foster care in Tanzania. However, an inference can be made that sec 53(7) of the LCA relates to children in conflict with the law placed in the care of the Commissioner

¹⁵ See also reg 22(5) of the Child Protection Regulations, 2014 which states that a child removed to a place of safety can be placed with a foster carer.

¹⁶ See for instance sec 73(1) of the Children’s Act of Zanzibar on consideration for foster parent and reg 9(1) of the Foster Care Regulations, 2018 of Zanzibar on when a child may be placed with a foster parent.

¹⁷ See also reg 7(3) and reg 8(1)(e) of the Foster Care Placement Regulations, 2012.

as per sec 104 of the LCA read together with reg 40 of the Child Protection Regulations, 2014 and rule 28 and 29 of the Law of the Child (Juvenile Court Procedure) Rules, 2016.¹⁸ In dealing with a child in conflict with the law, the court may, before determination of the case, place the child in the custody of the Commissioner instead of remanding the child¹⁹. This also applies where the child is entitled to bail, but has no one to care for them.²⁰ In such cases, the Commissioner, through the respective local government authority, can place the child in foster care as one of the alternative care options as per sec 53(7) of the LCA.²¹

6.2.2. Foster care as a prerequisite to adoption

The need for prospective adoptive parents to first foster the children they wish to adopt is another important aspect in discussing foster care as an independent and stand-alone alternative care option. Among other requirements, any person willing to adopt a child is required, as per sec 56(3)(b) and sec 74(1)(c) of the LCA, to prove that the child has been continuously in the care of the applicant for at least six months for Tanzanians, or three months for foreigners, before applying for adoption. In practice, foster care is used to discharge this requirement. Thus, a person intending to adopt will be required to lodge an application to be a foster carer; if approved, an identified child will be placed with this prospective adoptive parent. Undisputedly, evidence from the field and existing literature reveals that the initial intention of most of those fostering children in Tanzania is to adopt.²² However, the law requires prospective adopters to foster children before applying for an adoption order, so individuals are forced to become foster carers in order to fulfil the six-month or three-month fostering period.

Consequently, it is not surprising that most of the social welfare officers interviewed during field research believed that no one would foster a child if they did not intend to adopt it. The phrase *'no foster care without intention to adopt'* can be used to summarise the understanding of foster care by the social welfare officers interviewed in the course of this project.²³ However, the phrase *'no adoption without foster care'* should be used to capture the intention of the law. While all prospective adoptive parents must foster the child they intend to adopt, foster carers

¹⁸ Beside the Commissioner, the court can order that such a child be placed in the care of a fit person or institution.

¹⁹ See rule 29(3)(c) of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

²⁰ See sec 104 of the LCA, reg 40 of the Child Protection Regulations, 2014 and rule 28(1) of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

²¹ Reg 40(2) of the Child Protection Regulations, 2014 and rule 28(2) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 provides that where a child is placed in the custody of the Commissioner, the Commissioner must delegate the care of the child to the head of the social welfare department of the district in which the child ordinarily resides or where the child was arrested if the child has no fixed place of abode.

²² Rwezaura and Wanitzek, *The Law and Practice Relating to the Adoption of Children in Tanzania*, 134–36.

²³ Almost all social welfare officers interviewed during field research share the belief that foster care is practised only by those intending to adopt a child.

are not obliged to adopt the child in their care. However, the law grants foster carers a right to adopt a child they have fostered for a period of at least six months.²⁴ In my opinion, this right can be falsely interpreted to mean what is happening in practice: that foster carers must adopt children they have fostered after a period of six months. There need to be explicit provisions in the law describing the relationship between foster care and adoption.²⁵ In chapter seven, a recommendation is made to make a clear distinction between fostering for adoption and fostering that is not motivated by the desire to adopt a child.²⁶

6.2.3. Generalised, concealed and limited purposes of foster care

Colton and Williams state that the primary purpose of foster care is what it has always been: to care for abandoned, abused and neglected children.²⁷ From this general purpose of foster care, more specific purposes can be deduced depending on the needs of the children concerned and the available foster carers. Over time, foster care has been expanding and getting new functions to meet the needs of foster children and their families. The focus is no longer only on the child but also on the child's family, with reunification and reintegration being the primary aim wherever possible. Foster carers are no longer regarded as substitute families but as complementary families working together with the biological families of the children in their care and addressing the issues that have led to separation.²⁸

Different kinds of foster care services have been developed and established in other countries with different purposes depending on the needs of the children coming into care and the needs of their families.²⁹ Therefore, it follows that a clear stipulation of the nature and forms of foster care to be developed in a country is necessary to establish and develop an effective foster care system. Different kinds of foster care fulfil different and unique purposes. Thus, it is important for the law or administrative directives to specify the nature and purpose of the foster care system. This helps determine the resources needed in implementing the law on foster care.

²⁴ Reg 12(4) of the Foster Care Placement Regulations, 2012. However, a foster parent who wants to adopt a child under his or her care must follow the prescribed procedures for adoption under the LCA and the Adoption of a Child Regulations, 2011.

²⁵ For instance, see sec 77(5) of the Children's Act of Zanzibar which uses the term pre-adoptive placement to refer to fostering for adoption.

²⁶ See section 7.3.2.3 of this study.

²⁷ See also Colton and Williams, *The World of Foster Care*, 289; Colton and Williams, *Global Perspectives on Foster Family Care*, 99.

²⁸ See also Colton and Williams, *The World of Foster Care*, 288, 290.

²⁹ Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 9–11 on different kinds of foster care services depending on the needs of the child and the child's family.

Defining the nature and forms of foster care would also facilitate the recruitment of foster carers and matching children with potential foster carers.

The LCA and the Foster Care Placement Regulations, 2012 are too general on the purpose and nature of foster care and lack a definition of the specific objectives of foster care. In my opinion, this lack contributes to the misconceptions and underutilisation of foster care services in Tanzania. Reg 7(3) of the Foster Care Placement Regulations, 2012 states that the Commissioner can use the register of foster carers to place any child in foster care to provide temporary custody or longer-term foster care. Beyond this regulation, there is no further clarification of the purpose and nature of foster care. Depending on the reasons and circumstances that have led a child to need alternative care, different kinds of foster care services may be required to meet the specific needs of the children in question. For instance, from the discussion above, three types of foster care could be established: adoption fostering, kinship fostering and remand fostering.³⁰

6.3. Recruitment of foster carers

The availability of foster carers or foster families willing to care for children in need of alternative care is one of the influential factors in the success or failure of the foster care system.³¹ Field research conducted during this study reveals a scarcity of foster carers or foster families in Tanzania. In all the five local government authorities in which research was done, it was impossible to get exact statistics on the number of foster carers or foster families available. This was also the case at the social welfare department of the Ministry of Health, Community Development, Gender, Elderly and Children. The only rough statistics that were produced at the Ministry concerned the number of applications to become foster parents and the number of such applications that had been approved. However, it was impossible to get exact statistics on the number of children who were being fostered. Though the Foster Care Placement Regulations, 2012 require an updated register of foster carers to be kept at both district and national levels,³² at the time of this study, the interviewed social welfare officers at the national and district levels revealed that there was no foster carers' register maintained at either level.

³⁰ See also Mary Baginsky et al., *The Fostering System in England: Evidence Review: Research Report* (UK: Quest Research and Evaluation Ltd, 2017), 44–54 on different types of foster care. Also, Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 9–11.

³¹ See also Department for Education, *Fostering Better Outcomes: The Government Response to the Education Select Committee Report into Fostering and Foster Care in England July 2018*, 2018, 24.

³² Reg 7 of the Foster care Placement Regulations, 2012.

The table below shows the number of individuals who applied to become foster carers and those approved from 2014 to March 2018 in the whole country.³³

Year	Number of Applicants	Approved Applicants
2014	91	39
2015	104	56
2016	114	56
2017	79	15
2018 (Jan-Mar)	27	1

Table 1: Statistics on applications to become foster carers between 2014 and March 2018 in Tanzania (Source: Ministry of health, community development, gender, elderly and children).

Kinondoni Municipal Council is the only council among the five councils visited that gave access to files related to children needing alternative care. The foster care files consisted of unsorted documents, including applications to become a foster carer, and correspondence between the Commissioner and the municipal director on the applications and the eventual placement of a child with approved applicants. Most of these applications were from people who wanted to adopt a child. In all the districts, the common response to questions on foster care was that foster care is only carried out where individuals have shown an interest in adopting the child. Some of the social welfare officers in the districts visited believed that there was no possibility of placing a child with a foster carer or foster family if the intention was not to adopt the child.

The LCA does not elaborate on the question of how foster carers or foster families are obtained. Sec 32(2) and 53(2) of the LCA require any person willing to be a foster carer to apply to the Commissioner for social welfare.³⁴ Do these provisions of the LCA mean that the role of the department of social welfare is to sit and wait for willing individuals to come forth with their applications? Reg 7 of the Child Protection Regulations, 2014 sheds some light on this issue. This regulation describes the duties of the head of the social welfare department established under reg 6 of the Child Protection Regulations, 2014. Reg 7(1) of the Child Protection Regulations, 2014 stipulates that the head of the social welfare department in each district must ensure that necessary measures are taken to protect children within the district from all forms of harm.³⁵ Thus, the head of the social welfare department is required under reg 7(2)(f) of the Child Protection Regulations, 2014 to “establish and maintain the delivery of fostering services and organise the recruitment, training and monitoring of the foster parents or families.”³⁶

³³ Information obtained in an interview with a social welfare officer in the department of social welfare in the Ministry in Dodoma on 03/04/2018.

³⁴ See more details on applying to become a foster carer in section 5.5.3 of this study.

³⁵ This duty emanates from sec 94 of the Law of the Child Act.

³⁶ See also reg 7(2)(h) of the Child Protection Regulations, 2014.

From this regulation, it can be deduced that recruiting foster carers is the responsibility of the social welfare departments established in each district. This task goes beyond waiting for willing individuals to lodge applications to become foster carers or foster families. Broadly construed, reg 7(2)(f) of the Child Protection Regulations, 2014 says that the social welfare department ought to take deliberate steps to raise awareness in society of the general understanding and purposes of foster care and encourage capable and willing individuals in their districts to lodge applications to become foster carers or foster families.³⁷ Individuals cannot be forced to become foster carers or foster families. However, people should be educated, made aware and encouraged to become foster carers or foster families. The social welfare officers need to be well informed about the functions of foster care and understand the independence of foster care as an alternative care option. Society needs to be informed that foster care does not necessarily require the foster child's adoption; however, adoption could take place if it is deemed to be the best permanent care option for the child.

Related to this question of the recruitment of foster carers is the role of private agencies or NGOs in foster care practices. As discussed in section 3.4.4 of this study, private agencies and non-government organisations complement the government's efforts and initiatives to strengthen families and provide alternative care services for children who cannot remain with their families. The role of private agencies and non-government organisations in providing foster care services is somewhat limited compared to their establishment and operation of children's homes. It appears that the government intends to be the sole provider of foster care services by not allowing non-governmental organisations or private agencies to provide such services. In responding to a question on allowing non-governmental organisations and private agencies to provide foster care services, the social welfare officers in the department of social welfare at the ministerial level asserted that the government has no plan to do so.³⁸ The justification for this is the fear that foster care may be turned into a business rather than a service to help children and families in need. This position seems to be contrary to the spirit of the law on child protection, which allows the head of the social welfare department to enter into an agreement with registered non-governmental organisations to provide some of the services listed under reg 7(2) of the Child Protection Regulations, 2014.³⁹

³⁷ See also EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, EveryChild (UK: London), 2011), 27.

³⁸ An interview conducted with a Social Welfare Officer at the department of social welfare in the Ministry of Health, Community Development, Gender, Elderly and Children in Dodoma on 03/04/2018.

³⁹ Regulation 7(3) of the Child Protection Regulations, 2014.

The department of social welfare is overwhelmed by its responsibilities and functions as it does not only deal with issues related to child protection. While the Child Protection Regulations, 2014 require the establishment of a department of social welfare to be responsible for children in the district, in practice, the existing departments of social welfare deal with all welfare and social services, including marriages, the elderly, community health insurance, and children's affairs, to mention just a few.⁴⁰ These tasks are many and make it difficult for the department to meet the standards established under the Child Protection Regulations, 2014 in protecting children. As discussed below, most social welfare officers have a limited knowledge of protecting children deprived of their family environment and the available alternative care options. Amidst the limited human and financial resources, it is not surprising that the department of social welfare waits for interested individuals to come and lodge applications to become foster carers without taking initiatives to encourage potential applicants. Moreover, the few individuals who apply to become foster carers on their own initiative are primarily interested in adopting children, resulting in the continuing practice of adoption fostering.

Allowing private agencies or non-government organisations to operate foster care services that meet the established standards could assist in recruiting foster carers and providing foster care services.⁴¹ Non-government organisations and private agencies are more likely to have the resources and capacity to operate foster care services than the department of social welfare, which practically deals with the whole population. An example could be borrowed from the way SOS Children's Villages operate. Individuals are employed to live with children in the Villages on a permanent basis. Some of the women recruited as carers have children of their own families.⁴² However, they take up the job of caring for children in the Village and 'forego' their own family life. Of course, one could argue that it is for the financial benefits that they get, but this also shows that private agencies would be in a better position to operate foster care services besides the department of social welfare because they invest in the services they provide.

I do not think that the argument that allowing private agencies and non-government organisations to operate foster care service amounts to trading child welfare holds water. There is a need to develop standards and regulations allowing private agencies and non-government

⁴⁰ See United Republic of Tanzania, Muongozo wa Majukumu ya Maafisa Ustawi wa Jamii, on the responsibilities of the department of social welfare officers at different government levels. See also section 3.3.1 of this study.

⁴¹ See also Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 19.

⁴² For instance, during a visit to the children's village in Mwanza on 19/03/2019, an aunt in one of the houses visited stated that she had a child but she took up the job in the Children's Village as her child was in the good care of her parents.

organisations to provide foster care services. If non-government organisations and private agencies are permitted to establish children's homes to accommodate children needing alternative care, it is hard to find a solid reason to inhibit their involvement in foster care services. Ghana is one of the countries that have reformed the policy and legal framework of foster care that is reflected in the 2016 amendment to Ghana's Children's Act of 1998. Sec 63 of the Children's Act of Ghana, as amended by the Children's (Amendment) Act of 2016, allows the department of social welfare to accredit agencies wishing to provide foster care services.⁴³ These agencies recruit and train potential foster carers and place children needing alternative care with them under the supervision and coordination of the local government authorities. In practice, the state authorities responsible for foster care services recruit their foster carers, and the private agencies recruit other foster carers. When the local government authorities cannot find a suitable foster carer for a child, they can always turn to the private agencies who, in most cases, have enough approved foster carers. Thus, government authorities and private agencies work together to ensure the provision of foster care services to children who cannot remain in the care of their parents.⁴⁴

However, the decision to allow non-government organisations to provide foster care services should be made cautiously to ensure the sustainability of foster care services over a long period of time. The responsible state authorities would be required to develop a regulatory framework to ensure that non-government organisations have the capacity and resources to provide sustainable foster care services. As noted in section 4.3.3.4 above, children's homes run by non-government organisations depend on donations for their continued existence,⁴⁵ and foster care services by non-governmental organisations may also succumb to this challenge if not well regulated. However, the worldwide campaign to deinstitutionalise care services for children provides hope for the availability of funds from organisations supporting reforms in alternative care systems around the world.⁴⁶

6.4. Lack of a register of foster carers and a register of foster child placements

“The law does not require us to have a standby register of foster carers from which placement can be done when need arises.” This was the response of a social welfare officer to a question

⁴³ See also reg 7 of the Ghana Foster Care Regulations of 2018 for more details of the roles of foster care agencies. Also, Republic of Ghana, Foster Care Operational Manual (UNICEF Ghana & Department of Social Welfare of the Ministry of Gender, Children and Social protection, 2018), 24. See also reg 4(1)(2) of the Zanzibar Foster Care Regulations, 2017 on the duty to recruit foster parents.

⁴⁴ See also Department for Education, *Fostering Better Outcomes: The Government Response to the Education Select Committee Report into Fostering and Foster Care in England July 2018*, 37.

⁴⁵ See section 4.3.4.4 of this study.

⁴⁶ See section 7.1.1. of this study for more details.

about the availability of a foster carers' register in the second round of interviews conducted at the department of social welfare at the ministerial level.⁴⁷ Another respondent in an earlier interview with the department of social welfare in the ministry stated:

“Actually, we do not keep a register of foster carers in the format prescribed by the regulations. The practice is that as applications to foster come, we record the application and indicate if the applicant was approved and got a child to foster.”⁴⁸

Reg 7 of the Foster Care Placement Regulations, 2012 provides for two kinds of registers to be maintained at the district and national levels.⁴⁹ The first is the register of approved foster carers.⁵⁰ The second is the register of foster care placements as per reg 7(6) of the Foster Care Placement Regulations, 2012. The Foster Care Placement Regulations, 2012, provide the formats of both registers as shown in the schedule to the regulations. My research reveals that these two registers are not maintained at both district and national levels as required by the Foster Care Placement Regulations, 2012.

If foster care is to function as a reliable and independent alternative care option, then the importance of the requirement of having standby approved foster carers cannot be understated. It is from the register of approved foster carers that suitable foster carers can be found for a child in need of foster care. The lack of standby foster carers also explains why almost every child in need of alternative care will be placed in a children's home even where the option does not suit the needs and interests of the child. There are no evident efforts taken by the state authorities to increase the recruitment of foster carers. This failure on the part of the state authorities justifies the responses of the social welfare officers quoted above.

In this current state of affairs, foster care practice continues to rely on the availability of individuals whose general intention is to adopt children. These individuals wishing to adopt children are forced to foster because they cannot adopt a child before they have fostered them for at least six months before lodging the application to adopt a child with the court. One respondent in the department of social welfare in the ministry stated that foster care and adoption are two different practices that may not be discussed together as they are in the jurisdiction of two different authorities: foster care is under the social welfare departments

⁴⁷ Interview conducted in the Ministry of Health, Community Development, Gender, Elderly and Children in Dodoma on 05/03/2019.

⁴⁸ The interview was conducted in Dodoma with a social welfare officer in charge of foster care and adoption on 03/04/2018.

⁴⁹ See section 5.7.1. of this study for more details.

⁵⁰ Reg 7(1) of the Foster Care Placement Regulations, 2012.

while adoption is under the jurisdiction of the courts.⁵¹ While not disputing this assertion by the social welfare officer, I believe that there is a huge difference between a person who fosters a child to fulfil the adoption requirement of fostering a child for at least six months, and a person who fosters a child because they want to provide the child with a safe home.

Though the social welfare officers claim that the law does not require them to maintain a register of approved foster carers, it is doubtful whether this view is compatible with reg 7 of the Foster Care Placement Regulations, 2012. The absence of standby approved foster carers with whom children needing alternative care can be placed defeats the principle of placing children deprived of their family environment in the most suitable substitute care available. Further, it raises questions regarding state initiatives to progressively reduce the institutionalisation of children in need of care by strengthening their natural families and, where necessary, placing children in family-based alternative care options like foster care.

There is a need to develop viable mechanisms and strategies to facilitate the recruitment of foster carers. Countries like the UK that have been practising foster care for a long time are struggling with recruiting foster carers.⁵² New mechanisms like the use of social media are being adopted to enhance the recruitment of foster carers. Such initiatives are needed even more in a country like Tanzania, where most people are unaware of foster care and what it means in terms of the protection of children in need of care.

6.5. Placement with a fit person – foster care in disguise

Limited understanding of the objectives and purposes of foster care is the essential explanation of the underdevelopment of foster care services in Tanzania. In a society where it is believed that foster care can only be used if the result is the child's adoption, it is not surprising to see the duplication of foster care in the fit person programme.⁵³ It is argued here that the fit person programme being implemented in Tanzania is a disguised version of foster care. Some provisions from the Law of the Child Act and Child Protection Regulations are quoted below to explain this point:

Sec 18 of the LCA under the heading “care order of court to be of benefit to child,” provides that:

⁵¹ Information obtained in an interview conducted in Dodoma on 03/04/2018.

⁵² Department for Education, *Fostering Better Outcomes: The Government Response to the Education Select Committee Report into Fostering and Foster Care in England July 2018*, 35.

⁵³ See section 4.3.3 on placement with fit persons.

“(3) The social welfare officer shall take custody of the child and determine the most suitable place for a child which may be –

- (a) an approved residential home;
- (b) a fit person;
- (c) an approved foster parent in accordance with the foster care placement rules made under this Act; or
- (d) at the home of a parent, guardian or relative.”

Reg 62 of the Child Protection Regulations, 2014, under the heading “placement of a child,” provides that:

“(1) When a child is in the care of a local government authority, the authority shall be under a duty to accommodate the child in an appropriate placement.

- (a) placement with a relative, friend or person connected with the family;
- (b) placement with a foster parent or fit person; or
- (c) placement in a residential home approved in accordance with the Act.”

From the above provisions, it is clear that placement with a fit person is one of the alternative care options alongside foster care. At this junction, the question is what a fit person under the laws quoted above is.

The Law of the Child Act, 2009 defines fit person under sec 3 to mean:

“a person of full age who is of high moral character and integrity and of sound mind who is not a relative of the child and capable of looking after a child, and has been approved by a social welfare officer as being able to provide a caring home for a child”

Further, the Child Protection Regulations, 2014 offer another definition of fit person under reg 2 to mean:

“A person of the age of majority, who is of high moral character and integrity and of sound mind and is not a relative of the child, and may be a foster parent or foster family capable of looking after a child who has been approved by a social welfare officer as being able to provide a caring home for the child”

The definition of foster care or fosterage as provided under sec 3 of the Law of the Child Act, 2009 is:

“ ‘Foster care or fosterage’ means a temporary measure provided on voluntary basis by the family and individual who is not related to a child to discharge care and protection to the child”

Further sec52 of the LCA under the heading “persons who can foster” provides that:

“(1) Any person above the age of twenty-one of high moral character and proved integrity may be a foster parent to a child.

(2) ‘A foster parent’[,], as used in this part, means a person who is not the parent of a child but is willing and capable to undertake the care, welfare and maintenance of the child.”

The classification of placement with a fit person as a separate alternative care option under the Law of the Child Act, 2009 and its regulations as quoted above is an unnecessary replication of foster care. Any person with whom a child is being placed for purposes of alternative care ought to be a fit or suitable person in the literal meaning of the word.⁵⁴ As shown in the definition of fit person under reg 2 of the Child Protection Regulations, 2014, a foster carer is a fit person. A child can only be placed with a person who is fit to provide the appropriate care needed by the child.

The ongoing implementation of the fit person programme in its current form inhibits the growth and implementation of foster care services in Tanzania. Much effort is being put into operationalising the fit person programme in all local authorities in the country, which in my opinion is just a subset of the larger set of foster care. Apart from the differences in the authorities involved in the recruitment of foster carers and fit persons, and the duration of placing children with fit persons or foster carers, foster care and fit persons are designed to fulfil the same function, i.e. providing family-based care to children in need of alternative care for a determined period of time. In the current practice, a child can only be placed with a fit person for a period not exceeding six months.⁵⁵ The placement of a child with a foster carer can be longer than six months, depending on the reason leading to the child’s placement in care.

A social welfare officer in charge of the fit person programme in one of the local government councils in Dar es Salaam thought that efforts are being made to operationalise the fit person programme because the processes involved are less complicated when compared to foster care,

⁵⁴ See sec 52(1)(2) of the LCA on who can be a foster parent.

⁵⁵ Information obtained during an interview conducted with a social welfare officer at Temeke Municipal Council in Dar es Salaam on 04/02/2019. Also, an interview conducted with a child protection officer at UNICEF-Tanzania in Dar es Salaam on 21/01/2019.

the mandate for which is vested in the Commissioner for social welfare.⁵⁶ The department of social welfare, established by the local government authorities, has a full mandate for the fit person programme. This makes implementation easier compared to foster care, which requires the involvement of the Commissioner for social welfare in all the procedures related to foster care.

To all intents and purposes, foster care, as defined in the Law of the Child Act, 2009 and the Foster Care Placement Regulations, 2012, fulfils the same functions as the fit person programme, although the latter are presumed to be unique. The interviewed social welfare officers at the local and central government authorities, complemented by the UNICEF child protection officer, contended that the fit person programme plays an essential role in providing emergency care for children in a family setting.⁵⁷ Though I agree with their assertions, I believe that foster care, not restricted in its functions and objectives, could discharge this function in a broader framework of providing foster care services.

In a country challenged with limited human and financial resources, implementing the fit person programme and foster care as two different alternative care options can be regarded as a duplication, leading to wasting resources. For instance, the operationalisation of the fit person programme requires investment of financial and human resources to train social welfare officers on the use of fit persons. With UNICEF's support, the government has conducted training, which is still ongoing, on the fit person programme for the social welfare officers of the local and central government authorities.⁵⁸ Since both the law and practice treat foster care and the fit person programme as distinct alternative care options, it would also be necessary to invest more resources in terms of finances, human resources and time for the implementation of foster care as an independent alternative care option, i.e. not as a prerequisite for adoption. If there were a broader understanding of foster care as a form of alternative care for children, the government could find a way to integrate the fit persons programme into the broader foster care system. This would save the resources that would be injected if the state decided to operationalise foster care in its move to deinstitutionalise services for children in need of alternative care. Additionally, integrating the fit person programme into foster care would

⁵⁶ An interview conducted with a social welfare officer at Temeke Municipal Council in Dar es Salaam on 04/02/2019. The same concern was shared by the child protection officer at UNICEF in an interview conducted in Dar es Salaam on 21/04/2019.

⁵⁷ An interview conducted with a child protection officer at UNICEF-Tanzania in Dar es Salaam on 21/01/2019.

⁵⁸ An interview conducted with a child protection officer at UNICEF-Tanzania in Dar es Salaam on 21/01/2019.

provide relief to the overburdened social welfare department as foster care and fit person would be regarded as a single alternative care option.

The involvement of the Commissioner for social welfare in the recruitment of foster carers and in directing the placement of children with foster carers has been pointed to as one of the reasons for preferring fit person over foster care.⁵⁹ Since the fit person programme remains in the powers of the respective local government, its implementation is considered by the social welfare officers to be less bureaucratic and less complicated. However, the process of recruiting foster carers and fit persons and the placement of children with foster parents or fit persons involve similar procedures, including social assessment of the prospective foster parents or fit person, social investigation of the child, and the regular supervision and review of child placement. Technically, save for the overseeing authorities, foster care and the fit persons programme play the same role for children in need of alternative care.

If the procedures related to foster care are considered complex and complicated, an argument I do not subscribe to, efforts should be made to reform the procedure rather than implementing another form of alternative care to overcome the presumed procedural and implementation hurdles. For instance, if the role of the Commissioner for social welfare in receiving and approving applications to become foster carers is an encumbrance, then decentralisation of foster care services should be considered to allow the social welfare officers to take reasonable control of the foster care services. Decentralisation of the Commissioner's powers regarding foster care would be in line with part VIII of the LCA, which places the responsibility of safeguarding and promoting the welfare of children with the local government authorities.⁶⁰

Generally, the law on the recruitment and approval of foster carers involves unnecessary complications, which could be addressed through reforms in the law rather than introducing a similar practice under a different name. There is a need to evaluate the interconnectedness of foster care and the fit person programme and synchronise these two alternative care options. This would avoid unnecessary multiplication of alternative care services and investment of resources that could be used to strengthen the provision of such services. Treating the fit person programme as different from foster care only serves to justify the limited use of foster care as a prerequisite for adopting children rather than as an independent alternative care option.

⁵⁹ Information obtained in an interview conducted with a social welfare officer at Temeke Municipal Council in Dar es Salaam on 04/02/2019.

⁶⁰ See also part III of the Child Protection Regulations, 2014 on the general duties of the social welfare department towards children.

6.6. Numerous and uncoordinated child protection regulations

The Law of the Child Act is one of the Acts with numerous pieces of subsidiary legislation in Tanzania.⁶¹ At the time of this research, there were five pieces of subsidiary legislation related to protecting children deprived of their family environment. These include the Foster Care Placement Regulations, 2012, the Adoption of a Child Regulations, 2011 and the Children's Homes Regulations, 2012, specific to some available alternative care options.⁶² The others are the Child Protection Regulations, 2014 and the Law of the Child (Juvenile Court Procedure) Rules, 2016, which are more general regulations on child protection.⁶³ The regulations and rules made under the LCA provide a solid and detailed framework in respect of the enjoyment of children's rights and their protection in Tanzania. *Prima facie*, these regulations appear to adhere to the international and regional principles on the enjoyment and implementation of children's rights. However, the challenge associated with these numerous regulations is their lack of coherence and coordination when read together.

The Child Protection Regulations, 2014 and the Law of the Child (Juvenile Court Procedure) Rules, 2016, appear to be the umbrella subsidiary legislation expanding on all general issues related to child care and protection as provided under the LCA.⁶⁴ The regulations and rules provide directions and procedures for handling child protection issues, including alternative care provisions for children deprived of their family environment. However, the Child Protection Regulations, 2014, and the Law of the Child (Juvenile Court Procedure) Rules, 2016, were made after most specific regulations for alternative care options were made in 2011 and 2012. My opinion of the Child Protection Regulations, 2014 and the Law of the Child (Juvenile Court Procedure) Rules, 2016 is that these regulations and rules ought to have been made earlier than the specific regulations. I will draw some examples from the Foster Care Placement Regulations, 2012 and the Child Protection Regulations, 2014 to illustrate this point. The Law of the Child (Juvenile Court Procedure) Rules, 2016, will also be referred to when necessary.

6.6.1. Social investigation of the child

Both the Child Protection Regulations, 2014 and the Foster Care Placement Regulations, 2012 contain provisions related to the social investigation of a child needing protection. The Child Protection Regulations, 2014 call for social investigation of a child whose initial investigation

⁶¹ Ten pieces of subsidiary legislation under LCA can be traced in the form of regulations or rules addressing specific issues. These include regulations pertaining to apprenticeship, child retention homes and day care centres. For more details, see section 2.1. of the list of legal instruments, laws and policy documents in the preliminary pages above.

⁶² See section 3.1.3 of this study for more details.

⁶³ See section 3.1.3 of this study for more details.

⁶⁴ See section 3.5 of this study for more details.

reveals reasonable cause for concern.⁶⁵ At the same time, the Foster Care Placement Regulations, 2012 demand social investigation of a child before foster care placement.⁶⁶ The question is whether it is necessary to mention the need for a social investigation under both regulations. If the provision of any alternative care to children follows the procedure articulated under the Child Protection Regulations, 2014, which is the umbrella regulation on child protection issues, I argue that the provisions on social investigation under Foster Care Placement Regulations, 2012 are unnecessary.

There is a need to synchronise the Foster Care Placement Regulations, 2012 and the Child Protection Regulations, 2014 to avoid overburdening the social welfare department and misuse of financial and time resources with double investigations for the same child. An ideal way would be to remove the provisions on social investigation in the Foster Care Placement Regulations, 2012 and keep those in the Child Protection Regulations, 2014, to which reference should be made.⁶⁷ The provisions on the social investigation of a child in the Child Protection Regulations, 2014 are more detailed and elaborate than those in the Foster Care Placement Regulations, 2012. The above suggestion makes sense if the Child Protection Regulations, 2014 are properly adhered to.

6.6.2. Preparation and review of care placements

A social investigation may lead to a decision to place the child in alternative care for the child's welfare and safety.⁶⁸ Such a decision demands the preparation of a care plan.⁶⁹ While reg 48 of the Child Protection Regulations, 2014 provides for care plans, reg 17 of the Foster Care Placement Regulations, 2012 provides for foster care plans.⁷⁰ However, these plans, regardless of their names and the fact that they are provided for under different regulations, serve similar purposes.

Whether it is a care plan or a foster care plan, the overall aim is to describe the manner of providing the child with services necessary for his or her education, health and social, emotional

⁶⁵ See part V read together with reg 24 of the Child Protection Regulations, 2014, on initial investigation and section 3.5.2 of this study. See section 3.5.3 of this study for more details on social investigation.

⁶⁶ Reg 9 of the Foster Care Placement Regulations, 2012. See also section 5.7.2 of this study for more details.

⁶⁷ A good example is the way the Law of the Child (Juvenile Court Procedure) Rules, 2016 makes reference to the Child Protection Regulations, 2014 when social investigation is needed for a child involved in court proceedings. See rule 89(5) and 91(5) of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

⁶⁸ See section 4.3.1 of this study for more details on the placement of children in alternative care.

⁶⁹ See reg 42(2) of the Child Protection Regulations, 2014 (on voluntary care arrangements) and reg 47(b) of the Children's Protection Regulations, 2014 (on children under a care order). See also reg 16(9-11) of the Children's Homes Regulation, 2012 (on care plans for children placed in a children's home). See also section 4.2. of this study.

⁷⁰ See section 5.9.11 of this study on the development of foster care plans.

and physical development.⁷¹ If a care plan under the Child Protection Regulations, 2014 is made in accordance with the social investigation report of the child and reg 48 of the Child Protection Regulations, 2014, there is no valid reason to demand the social welfare officers to prepare a foster care plan. An ideal care plan ought to specifically set out the nature of the placement most suitable for the child and how such placement will be implemented. Table 2 below provides a comparative overview of the two kinds of plans.

Preparation and content of care plans and foster care plans		
	Care plan (Child Protection Regulations, 2014)	Foster care plan (Foster Care Placement Regulations, 2012)
When is it made?	-Made when a decision is reached that a child needs alternative care through a voluntary arrangement or care order [reg 42(2) and reg 47(b)].	-Made when a decision is reached that foster care is the most suitable option for a child in need of care [reg 17(1)].
Who makes it?	-Assigned social welfare officer at the local government authority [reg 42(2) and reg 47(b)].	-Assigned social welfare officer at the local government authority [reg 17(1)].
What are the contents?	-Arrangements to meet the child's needs, i.e. health education and training, emotional and behavioural development, identity (religious persuasion, racial origin, cultural and linguistic background), family and social relationships and the extent of contact [reg 48(1)(a)(i-v)]. -The long-term plan for the child's upbringing (permanency options available for the child) [reg 48(1)(b)]. -The contact that the child can have with the parents and other important persons in the child's life. [reg 48(1)(c)]. -The nature of the child's placement, i.e. how and where it will take place. -Identify the roles and responsibilities of professionals and relatives in the placement of the child.	-Identify reasons for foster care placement [reg 17(2)(a)]. -Provide information on the child's health, educational and psychological history and needs [reg 17(2)(b)]. -Set out the support to be provided by the social welfare officer to the foster child and the foster parent [reg 17(2)(c)]. -If reunification with biological parents is possible, set out the steps that shall be taken to promote reunification [reg 17(2)(d)]. -Set out the level of contact between the foster child and his or her biological family [reg 17(2)(e)]. -Identify and assess the options for a permanent care placement, including adoption [reg 17(2)(f)].
Are there other persons involved/consulted in the preparation or review of the plans?	Yes; so far as is reasonably practicable, a care plan has to be agreed by: -A parent/guardian or carer [reg 48(2)(a)]. -The child, if he or she is of sufficient age and maturity [reg 48(2)(b)].	Yes: a) The foster child, if he or she can express his or her views [reg 17(4)(a)]. (b) The prospective foster parent(s) [reg 17(4)(b)]. (c) The biological parents, where possible and not contrary to the child's best interests [reg 17(2)(c)].
Are reviews of the plans needed?	Yes, care plans may be reviewed to reflect any change in the circumstances of the child's needs [reg 48(3)].	Yes, foster care plans need to be reviewed and updated to ensure that the plan continues to meet the needs of the foster child [reg 17(3)].
Are there any specific periods for review?	-Not explicitly, though the initial care plan has to set a date for first review [reg 48(4)(b)].	Yes, foster care plans need to be reviewed and updated every two months as part of the periodic visits to the child in foster care [reg 17(3)].
Is there any format or guidelines for preparing the plans?	The Commissioner for social welfare is required to issue guidance on the preparation of care plans [reg 48(1)].	The Commissioner for social welfare is required to develop guidance,

⁷¹ See reg 48(1) of the Child Protection Regulations, 2014 and reg 17(1) of the Foster Care Placement Regulations, 2012.

Preparation and content of care plans and foster care plans		
	Care plan (Child Protection Regulations, 2014)	Foster care plan (Foster Care Placement Regulations, 2012)
		procedures and forms for the foster care plans [reg 17(5)].
	Note: I have not been able to discover if the Commissioner for social welfare has issued guidance on care plans or foster care plans. At least none was found during field research.	

Table 2: A comparative overview of care plans and foster care plans derived from the Child Protection Regulations, 2014 and Foster Care Placement Regulations, 2012.

As shown in the table, both care plans and foster care plans need to be reviewed after a certain period.⁷² The foster care plans need to be reviewed after every two months as per reg 17(3) of the Foster Care Placement Regulations, 2012.⁷³ On the other hand, there is no specific provision under the Child Protection Regulations, 2014, indicating specific times for reviewing the care plan. Reg 48(4)(b) of the Child Protection Regulations, 2014, states that a care plan has to set out the date for the first review for it to be deemed final. The reviews for both foster care plans and care plans are based on periodic supervision visits that are to be conducted by the designated social welfare officer. In addition to the periodic visits, a review of care plans under the Child Protection Regulations, 2014 can also be made following regular review meetings⁷⁴ to be conducted for the children looked after by the local government authorities as per reg 66 of the Child Protection Regulations, 2014.⁷⁵ The Foster Care Placement Regulations, 2012 and the Child Protection Regulations, 2014 provide for times to conduct the visits, resulting in reviews of the care plans for a child in care. The visitation intervals are slightly different in the two regulations, as shown in Table 3 below.

Based on the discussion above, there is also a need to synchronise the provisions related to preparing and reviewing care plans under the Foster Care Placement Regulations, 2012 and the Child Protection Regulations, 2014. The provisions on foster care plans could be amended to simply indicate that a child should not be placed in foster without a care plan prepared in accordance with the requirements of the Child Protection Regulations, 2014. Rule 91(4)(b) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 provides a good example in this respect. Rule 91 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 on an application for care and supervision order provides that:

“(4) The following documents shall be filed with the application –

⁷² See reg 17(3)(4) of the Foster Care Placement Regulations, 2014 and reg 48(3) and Part XII [reg 66(2)(6) and 74] of the Child Protection Regulations.

⁷³ See more details in section 5.9.1.1. of this study.

⁷⁴ Reg 66(4) of the Child Protection Regulations, 2014 requires the first review meeting to take place not later than 28 days after the child enters into the care of the local government authority.

⁷⁵ See reg 66(2)(6) of the Child Protection Regulations, 2014.

(b) the care or supervision plan for the child, containing information as set out in the Child Protection Regulations;”⁷⁶

Since the Foster Care Placement Regulations, 2012 were made before the Child Protection Regulations, 2014, it would have been important to consider the provisions of the Foster Care Placement Regulations, 2012, to determine their compatibility and coherence regarding children needing care and protection.

Periodic intervals for placement visits		
	Visits under the Child Protection Regulations, 2014	Visits under the Foster Care Placement Regulations, 2012
First visit	Visit: not later than seven days after the placement of the child [reg 63(3)(1)].	Visit: -Within two 2 weeks after placement for a child under two years [reg 16(1)(a)]. -Within one month after placement for a child above two years [reg 16(1)(b)].
Subsequent and emergency visits and reviews	-Not later than 28 days after the first visit [reg 63(1)(b)]. -Not less than once every three months [reg 63(1)(c)]. -At any time that the designated social welfare officer deems it necessary to visit or when requested to do so by the child [reg 63(1)(d)].	-Once in every two months for all children regardless of age [reg 16(1)(a)(b)]. -Not later than a week after receiving information from the child, a foster parent or any other person which indicates the need for a visit [reg 16(1)(d)]. -Immediately if there is any report of child abuse [reg 16(1)(c)].

Table 3: Periodic intervals of placement visits and reviews based on reg 66 of the Child Protection Regulations, 2014 and reg 17 of the Foster Care Placement Regulations, 2012.

6.7. Social welfare officers as street-level bureaucrats

“As a social welfare officer, if foster care was operating in Tanzania in the way you are explaining it, I would still not choose foster care over a children’s home because foster care places more responsibilities on the social welfare officer than institutional care does.”⁷⁷

“There is no way a person can just foster a child without the intention of finally adopting the child he or she fosters.”⁷⁸

“Foster care is not easy to implement because one issue that arises in its implementation is the aftermath of the children leaving care.”⁷⁹

⁷⁶ See also reg 105(3)(c) of the Law of the Child (Juvenile Court Procedure) Rules, 2016.

⁷⁷ This is a quotation from an interview conducted with a social welfare officer in the department of social welfare at the Ministry of Health, Community Development, Gender, Elderly and Children in Dodoma on 03/04/2018.

⁷⁸ A quotation from an interview with a social welfare officer at Kinondoni Municipal Council in Dar es Salaam on 16/01/2019.

⁷⁹ A quotation from an interview conducted with a social welfare officer in the Department of Social Welfare in the Ministry of the Health, Community Development, Gender, Elderly and Children in Dodoma on 03/04/2018.

The existence of an apparently good law is no guarantee of a successful and functioning foster care system in Tanzania. Besides, the law raises the question of implementation. A good law that is not implemented is as good as no law at all. Further, questions can be raised as to the advantages of a law that is implemented contrary to its objectives. At this juncture, it may be interesting to reflect on the role and influence of social welfare officers as the central implementers of the law related to children deprived of their family environment, and foster care in particular. In building the arguments in this discussion, I borrow from a sociological theory, “the theory of street-level bureaucracy”, which was developed by Michael Lipsky in the USA in 1969.⁸⁰ One of the main arguments developed by Lipsky in this theory is that:

“The decision of the street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively become the public policies they carry out. Public policy is not best understood as made in legislatures or top-floor suites of high-ranking administrators. These decision-making arenas are important, of course, but they do not represent the complete picture. To the mix of places where policies are made, one must add the crowded offices and daily encounters of street-level workers.”⁸¹

By street-level bureaucrats, Lipsky refers to those public service workers who interact directly with citizens in the course of their jobs and who have substantial discretion in the execution of their work.⁸² This category of workers is employed in different government agencies such as police, schools, welfare departments, lower courts and other agencies whose workers interact with the public and have wide discretion over the dispensation of benefits or the allocation of public sanctions.⁸³ These government agencies or offices are what Lipsky refers to as street-level bureaucracies. Lipsky further argues that most citizens encounter government through the street-level bureaucrats, and not through the letters of the Congressmen or by attendance at the school board meeting, but through their teachers and their children’s teachers and through policeman on the corner or in the patrol car. Further, each of these encounters between the citizens and the street-level bureaucrats represents an instance of policy delivery.⁸⁴ It is not possible to mention all aspects of the street-level bureaucracy theory in this study, but Lipsky’s

⁸⁰ Michael Lipsky, *Towards a Theory of Street-Level Bureaucracy* (IRP Discussion Papers No. 48-69), (Annual Meeting of the American Political Sciences Association, Commodore Hotel: Institute for Research on Poverty, University of Wisconsin, 1969), 1–45.

⁸¹ Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, 30th anniversary expanded ed (New York: Russell Sage Foundation, 2010), xiii.

⁸² Lipsky, 3.

⁸³ Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service*, 2010, xi, 3.

⁸⁴ Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service*, 2010, xi, 4.

arguments are used to explain the role of social welfare officers in the local government authorities as street-level bureaucrats in the implementation of the law on foster care in Tanzania.

The social welfare officers employed in the social welfare departments of the local government authorities represent the position and initiatives of the central government to protect children deprived of their family environment. Children deprived of their family environment and their families experience the government through the social welfare officers who determine their fate, rather than the laws and policies which formulate the abstract rights and obligations of the involved parties, which may not be known beyond the actual practice of the implementers of these laws and policies.

As discussed in the previous chapters, the Commissioner of social welfare and the social welfare officers in the local government authorities are in charge of implementing the law on foster care and ensuring the actual practice of foster care in Tanzania. Thus, the success or failure of foster care depends extensively, though not exclusively, on the social welfare officers who are charged with the provision of alternative care services. The influence of the social welfare officers, as street-level bureaucrats, on the practice of foster care in Tanzania can be analysed from different perspectives as discussed below.

6.7.1. The understanding of foster care among social welfare officers

In view of the centrality of social welfare officers in the implementation of foster care, they need to possess a clear and full understanding of foster care practices. The functions of the social welfare officers with regard to foster care include determining the situation of a child in need of care and protection, recruitment of foster carers, assisting the biological family, supervising the placement of a child with foster parents, and finally termination of the foster care placement in appropriate circumstances.⁸⁵ Beyond this, they are expected to work with the foster child, the foster carer(s), and the child's biological family to achieve the goal of securing permanent care for the child without compromising the interests of all involved parties. These functions must be fulfilled before, during and after placement of the foster child.⁸⁶

For many social welfare officers, foster care is a process that prospective adopters have to go through before they qualify to adopt a child. Thus, most of them consider that a child cannot be placed with foster carers who are not intending to adopt the child. This limited understanding

⁸⁵ See also Jake Terpstra, The Rich and Exacting Role of the Social Worker in Family Foster Care, *Children and Adolescent Social Work* 4, no. 3 & 4 (1987): 12–29.

⁸⁶ See section 5.9.1. of this study on the obligations and rights of social welfare officers in foster care.

of foster care by the social welfare officers serves to a large extent to explain the underutilisation of foster care and preference of placement with a fit person as an alternative care option. As key players in the implementation of foster care, social welfare officers ought to understand its scope and functions. Further, as implementers, the social welfare officers need to understand the circumstances and challenges associated with foster care. This is necessary to facilitate the adoption of practical approaches in the implementation of foster care. A full understanding of foster care and their responsibilities in its implementation would enable social welfare officers to develop the skills and knowledge necessary to discharge their responsibilities in fulfilling the objectives of foster care as articulated in the law.

Beyond the question of understanding foster care as an alternative option, it is important to understand the law on foster care. The law on foster care in Tanzania is hardly known or understood by social welfare officers. Generally, the knowledge of social welfare officers on the Law of the Child Act is limited and narrow. As observed during field research in Tanzania, the majority of them are aware of the Act and the regulations made to complement the Act; however, the social welfare officers interviewed had a limited knowledge of the contents of this law. Even where the law is known, there is little reference to it in the day-to-day practices of the social welfare officers in their dealings with children deprived of their family environment. However, as discussed in section 6.2 above, the challenges associated with the law may explain the limited understanding of the law by the social welfare officers.

In some local government authorities visited during field research, social welfare officers continued to use repealed laws or outdated regulations related to foster care. When asked about the laws or regulations that social welfare officers used in handling foster care cases, one social welfare officer showed the National Guidelines for Provision and Management of Foster Care and Adoption Service, 2006 and was not aware of the Foster Care Placement Regulations, 2012 made under the Law of the Child Act, 2009.⁸⁷ Further, during the perusal of the foster care placement file in a municipal council in Dar es Salaam, I discovered that forms used by applicants were those provided under the repealed regulations dating back to 1968 made under the Children's Homes (Regulations) Act of 1968. One of the possible contributing factors to this practice is that most subsidiary legislation under the LCA was adopted a long time after the

⁸⁷ Information obtained in an interview with a social welfare officer at Kinondoni Municipal Council in Dar es Salaam on 16/02/2019.

enactment of the LCA.⁸⁸ Moreover, the dissemination of these laws and training of social welfare officers was still going on at the time of field research in Tanzania.⁸⁹

Listening to social welfare officers talking about how they handle cases of children in need of alternative care, one notes a sort of ‘self-legalised’ practice in the social welfare departments. If the child’s family is not found or known, the first option is always to send this child to one of the available children’s homes for care.⁹⁰ Before implementing the fit person programme, children in need of alternative care whose families/relatives cannot be found or whose families are not suitable for the child’s welfare are placed in institutional care as a matter of the first instance. In most cases, once a child is placed in a children’s home, there is hardly any follow up on the child's progress if the recipient children’s home makes no further contact with the responsible social welfare department.⁹¹

Amidst the unclarity of the provisions of the LCA on foster care, especially part VI of the LCA titled “fosterage and adoption,” the majority of social welfare officers see foster care placement only as a means of enabling prospective adoptive parents to adopt a child. However, the social welfare officers cannot be blamed for this ignorance of the foster care law. Since the social welfare officers are not professional lawyers, they need training on the laws vesting implementing powers in them. Further, mechanisms should be put in place to disseminate information relating to changes made in the laws that touch the social welfare officers. For instance, almost all the social welfare officers interviewed, both in the central government and in the local government authorities, had a strong belief that it is not the responsibility of the social welfare department to recruit and maintain a register of potential foster carers. This understanding is contrary to the Child Protection Regulations, 2014 and the Foster Care Placement Regulations, 2012, which place the obligation to recruit foster carers and maintain a register of foster carers in the mandate of the department of social welfare. As indicated above, efforts are ongoing to train social welfare officers in the local government authorities on the child protection policy and legal framework.

In the above circumstances, I contend that the practice of foster care in Tanzania is highly influenced by the understanding of foster care and the law related to it possessed by the social welfare officers as the key implementers. As propounded by Lipsky, public policy, in this case,

⁸⁸ See section 3.1.3 and section 6.6 of this study.

⁸⁹ Information obtained from a Resident Magistrate (a chief trainer of the LCA to judicial officers and social welfare officers) on the child protection legal framework in an interview conducted on 28/02/2019.

⁹⁰ An interview conducted with a social welfare in Mwanza on 22/03/2018.

⁹¹ This was a finding in all interviews with respondents operating children’s homes in Mwanza and Dar es Salaam regions.

foster care law, is not best understood as made in the legislation, which itself has weaknesses, as shown above, but rather in the crowded offices and daily encounters of social workers, as street-level bureaucrats.⁹² What the social welfare officers believe or understand as foster care is what is practised and implanted in the individuals interested in fostering regardless of what the law stipulates.⁹³ Thus, the limited understanding of foster care and the related law account for the narrow implementation of the law on foster care in Tanzania.

6.7.2. Discretion in fulfilment of their tasks

One key characteristic of street-level bureaucrats noted by Lipsky is the significant independence in decision-making in their daily job.⁹⁴ He further contends that street-level bureaucrats exercise wide discretion in decisions concerning citizens with whom they interact, and their individual actions add up to agency behaviour.⁹⁵ However, the discretion possessed by street-level bureaucrats does not mean that they operate in a complete absence of rules, regulations and directives from higher authorities, or of norms and practices in their occupational group.⁹⁶

As discussed above,⁹⁷ in protecting children deprived of their family environment, social welfare officers in Tanzania have considerable discretion in determining the appropriate alternative care for a child in need. While the law stipulates what they ought to do and the options available, it does not dictate which option should be chosen in any particular case. It is at the complete discretion of the social welfare officers, based on their professional experience and skills, to determine the most suitable form of care for a child. Thus, there is no obligation for the social welfare officers to place the child in foster care or institutional care or any other alternative care option. The discretion possessed by the social welfare officers, coupled with their limited understanding of the scope and functions of foster care, affects the implementation of foster care in Tanzania.

Moreover, as revealed in the statement quoted above,⁹⁸ social welfare officers consider the obligations attached to foster placement to be too much for them. The social welfare officers regard the processes involved in foster care, such as recruiting foster carers and supervision of

⁹² Lipsky, *Street-Level Bureaucracy*, xiii.

⁹³ Lipsky, *Street-Level Bureaucracy*, 12.

⁹⁴ Lipsky, *Street-Level Bureaucracy*, 3.

⁹⁵ Lipsky, *Street-Level Bureaucracy*, 14.

⁹⁶ Lipsky, *Street-Level Bureaucracy*, 14; See also Akosa and Asare, *Street-Level Bureaucrats and the Exercise of Discretion*, 3.

⁹⁷ See sections 3.3.1, 3.6 and 4.3. of this study for more details.

⁹⁸ See the first quote in section 6.7 above.

placements, as too demanding and time-consuming.⁹⁹ They prefer to use their discretion by placing children in alternative care options that they consider fit and convenient for them. In the absence of standby foster carers, it is easy to justify the placement of children in children's homes, contrary to the government policy that advocates for family-based alternative care.

6.7.3. The working conditions of the department of social welfare

“People often enter public employment, particularly street-level bureaucracies, with at least some commitment to service... yet the very nature of this work prevents them from coming even close to the ideal conception of their jobs. Large classes or huge caseloads and inadequate resources combine with uncertainties of method and the unpredictability of clients to defeat their aspirations as service workers.”¹⁰⁰

The above quote, which refers to the USA, is to some extent also valid for the situation or working conditions of the social welfare department in Tanzania.¹⁰¹ The social welfare officers work in conditions that are unfriendly and unmotivating. During field research in Tanzania, I observed that some of the social welfare officers in one of the councils I visited complained about their office space, which was indeed too small, located in an old building. Besides, they have limited financial, human, and organisational resources to fulfil their responsibilities.¹⁰² One social welfare officer in Mwanza complained about insufficient funds to facilitate family tracing and placement visits.¹⁰³ In such circumstances, the social welfare officers are forced to adopt coping mechanisms to help them function and fulfil the expectations of the government and the clientele they are serving.

As shown in section 3.3.1 of this study, the social welfare officers in Tanzania are charged with various responsibilities ranging from family issues, children's development, the elderly and people living with disabilities. Generally, they oversee all matters related to the general welfare of society. The department is charged with handling family conflicts, affiliation and child maintenance cases, child protection, including providing alternative care services to children deprived of their family environment, services for the elderly, and the list goes on. The responsibilities of the department are quite overwhelming. The situation is even more

⁹⁹ See also Brenda D. Smith and Stella E.F. Donovan, Child Welfare Practice in Organisational and Institutional Context, *Social Service Review* 77, no. 4 (2003): 541–63 on how the actions of social workers are influenced by the legal, institutional and organisational environment they are working in.

¹⁰⁰ Lipsky, *Street-Level Bureaucracy*, xiv.

¹⁰¹ See United Republic of Tanzania, Assessment of the Social Welfare Workforce in Tanzania (Final Report), (Ministry of Health, Community Development, Gender, Elderly and Children (Department of Social Welfare), 2012), on the situation of social welfare work force in Tanzania up to 2012.

¹⁰² Lipsky, *Street-Level Bureaucracy*, 29. See also chapter 3 of this book on the challenges associated with street-level bureaucrats.

¹⁰³ An interview conducted with a social welfare officer in Ilemela Municipal Council in Mwanza on 23/03/2018.

challenging because of the uneven and inadequate distribution of resources to facilitate the fulfilment of all these tasks.

In these circumstances, it is easy to see justification for the claim made by most social welfare officers that foster care is used to facilitate adoption rather than being an independent alternative care option. In instances where an individual client expresses an interest in adopting a child, the social welfare officer can be sure that the person will cooperate in the processes leading to successful adoption. In most cases, clients wanting to adopt a child help the social welfare officers to conduct an assessment of their eligibility, investigation of a child if needed and all that is required for successful adoption.

During field research, interviewees frequently said that the law requires them to conduct visits for purposes of investigation or assessment. However, it is difficult for the social welfare officers to fulfil these requirements because of limited resources, which inhibit their flexibility and mobility.¹⁰⁴ Some social welfare officers are forced to spend from their own pockets to discharge their official duties in certain instances.¹⁰⁵ For example, in an interview with a social welfare officer in one of the councils in Mwanza, I was told that she had to use her own money to facilitate communication for tracing a relative of a lost child.¹⁰⁶ Foster care requires considerable investment in terms of human, time and financial resources for successful child placements. The resources are needed for recruiting foster carers, training foster carers, and the supervision of placements. The demand for resources to fulfil these tasks cannot be compared to the resources needed for placing a child in a children's home, where the responsibilities are transferred to the managers of such homes.¹⁰⁷ Nor can this demand be compared to the placement of a child with a relative where it is usually assumed that the relative, as an ideal person to care for the child, is to bear all the costs related to the child's care without strict follow-up by the social welfare officers. Logically, the social welfare officers, in their current working conditions, always give priority to alternative care options that make fewer demands on their limited resources.

The social welfare department needs enough resources in terms of finance and qualified staff to discharge these numerous responsibilities. There is a need to synchronise and harmonise the functions of the department and attach importance to all its duties. The issues raised here are

¹⁰⁴ An interview conducted with a social welfare officer at Ilala Municipal Council in Dar es Salaam on 29/03/2018.

¹⁰⁵ An interview with a social welfare officer at Ilala Municipal Council conducted on 07/01/2019.

¹⁰⁶ An interview conducted with a social welfare officer at Ilemela Municipal Council in Mwanza on 23/03/2018.

¹⁰⁷ See part V of the Children's Homes Regulations, 2012 on admission, care planning and treatment and care of children in children's homes.

not unique to the implementation of foster care alone; the challenges identified are relevant to all aspects of protecting children deprived of their family environment and their accruing right to alternative care.

6.8. The influence of culture and traditions on foster care

Alternative care options established by the state should pay attention to cultural and traditional practices related to the child's care and upbringing. The beliefs of the people on child care influence the implementation of the alternative care system adopted. If the alternative care system adopts options and mechanisms that are alien to society, society may impede their implementation.¹⁰⁸ This brings us back to the question of limiting foster care to care by non-relatives as defined under the Law of the Child Act.¹⁰⁹ It has been noted in chapter three that children belong to the entire family, and caring for a child is the responsibility not only of the natural parents but of the entire family in its extended sense.¹¹⁰

In Tanzanian society there is a general understanding that a child belongs to the family in which he or she is born.¹¹¹ Thus, protecting the sense of belonging to one's original family is crucial to the child and the family itself. The value attached to the child by the family explains the collective caring of the child once born. For this reason, relatives have always played an important role in caring for children whose parents are unavailable or unable to care for them.¹¹² It is an alien concept for a child to be cared for outside the family by strangers.¹¹³ Prior to the challenges that have affected the traditional safety net for orphans, relatives would have made sure that no child in their family is exposed to a lack of family care.¹¹⁴ Efforts would have been made to ensure that a child remained in the secure circle of the extended family in times of stress.

Today, the question arises, on the one hand, whether families are willing to let their children be fostered in the families of strangers. On the other hand, are families or individuals ready to foster children belonging to another family? If individuals who cannot have children of their

¹⁰⁸ See also Tamsen J Rochat et al., Public Perceptions, Beliefs and Experiences of Fostering and Adoption: A National Qualitative Study in South Africa, *Children & Society* 30, no. 2 (March 2016): 124.

¹⁰⁹ See section 6.1. on the limited interpretation of foster care.

¹¹⁰ See section 3.2.2. of this study on the role of members of extended family. See also Julie Sloth-Nielsen, Modern African Childhoods: Does Law Matter? in *Law and Childhood Studies: Current Legal Issues 2011*, ed. Michael D. A. Freeman, Current Legal Issues, v. 14 (Oxford: Oxford University Press, 2012), 4.

¹¹¹ Lauren Gaydosh, Does It Take a Village? Kin Coresidence and Child Survival in Tanzania, *Social Forces* 97, no. 4 (June 1, 2019): 1665–67.

¹¹² See section 3.2.2 of this study.

¹¹³ See also Chibwana, Foster Care Ontologies: A Qualitative Study in Zimbabwe, 120–21.

¹¹⁴ See also Bart Rwezaura, The Changing Role of the Extended Family in Providing Economic Support for an Individual in Africa, *Warwick Working Law Papers* 7, no. 4 (1985): 1–4.

own are sceptical about adopting children due to different cultural and traditional beliefs, is it realistic to hope that foster care as articulated under the Law of the Child Act will eventually be implemented? As shown above in section 5.2., under the former legal framework governing foster care, the foster parents should, as a general rule, be relatives of the child. Non-relatives could only foster a child after approval by the Commissioner for social welfare.¹¹⁵ Thus, excluding relatives from fostering children is a distinctive feature of foster care under the LCA. It is not clear why the law decided to take this approach, given the childcare practices in Tanzania. Maybe one could argue that the inclusion of adoption by relatives, known as open adoption under the LCA, explains the exclusion of relatives from fostering. Nevertheless, the differences between foster care and open adoption in terms of procedure and the implications of each process would defeat this assumption.¹¹⁶

The cultural traditions relating to childcare practices may influence the recruitment of foster carers and the placement of children in foster care. The idea of caring for children outside the original family is uncommon. This has always been associated with negative ideas concerning unknown ancestral roots and backgrounds, especially among people who are still strongly attached to their customs and traditions.¹¹⁷ Moreover, a family that has failed to care for their child, for whatever reason, may not be willing to let the child be cared for in another family, even where such out-of-family care is considered by the authorities to be in the child's best interest. A family's failure to care for their child is traditionally regarded as a failure to value the child.¹¹⁸

The traditional importance of the extended family in caring for children may also explain the reluctance of social welfare officers to take measures to increase the recruitment of foster carers. Having grown up in a society where children are cared for by the extended family makes it difficult for them to imagine the practicability of a child being brought up in a family of strangers. It also justifies the argument expressed by some interviewed social welfare officers that foster care is only used if the prospective foster parents are interested in adopting the child.¹¹⁹ Nevertheless, the implementation of the fit person programme, which is also a temporary measure in which children are cared for by non-relatives, shows that social welfare

¹¹⁵ Reg 12(3) of the Children's Homes Regulations of 1968.

¹¹⁶ See section 4.3.5 for more details of open adoption.

¹¹⁷ See Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of The Evidence for Those Designing and Delivering Foster Care Programmes*, (Family for Every Child, 2015), 9.

¹¹⁸ Rwezaura, *This is Not My Child: The Task of Integrating Orphans into the Mainstream of the Society in Tanzania*, 415–16.

¹¹⁹ See section 6.7.1. of this study.

officers are starting to appreciate the role of non-relatives in caring for children needing protection.

Despite the discussion above on the influence of culture and traditions on the implementation of foster care, it is crucial to lift the veil and face the reality of culture in the contemporary era. Culture as a holistic way of life of a given group of people is not static. The culture of any given society changes over time to reflect the changing conditions that affect the daily lives of the members of that society.¹²⁰ One of the common excuses, which I do not fully subscribe to, given by African states for not fulfilling their obligations arising out of different human rights instruments, can be summed up as *this is not in accordance with the African customs and traditions, or this idea is Western rather than African*. I am not suggesting that African customs and traditions should be transformed to reflect the culture of the Western world; I am saying that what are believed to be African customs and traditions should not be used to condone failure to enable the citizens of African states to enjoy their rights and better services.

While it is true that kinship care or care by relatives has continuously played an important role in providing care for children who cannot be cared for by their natural parents, the state and society should not continue to hide behind the veil of our customs and traditions to justify the failure to develop an alternative care system that suits the current conditions in Tanzanian society. Both the government and society appreciate the factors that have affected the efficiency of kinship care over time, leaving many children to grow up in a children's home or on the streets. Factors like HIV/AIDs, poverty, migration and globalisation have all affected the traditional and customary ways of caring for children. Moreover, families, especially those in urban areas, are slowly becoming more nuclear due to increasing living costs in these areas. If attention is not paid to these changing conditions, there is a danger of relying on dormant or extinct customs and traditions, in the belief that they define who we are as a society.¹²¹

On the one hand, the law on foster care should be designed to accommodate the culture and traditions related to the care of children. For instance, the law could be amended to adopt a wider definition of foster care to include care offered by relatives, to reflect society's long tradition of caring for children within the extended family. This would be ideal, especially

¹²⁰ See also Chuma Himonga, *The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa*, in *The Future of African Customary Law*, ed. Jeanmarie Fenrich, Paolo Galizzi, and Tracy E Haggins (Cambridge: Cambridge University Press, 2011), 32–33. She discusses official customary law versus living customary law which tends to reflect on the changing nature of culture to accommodate new developments.

¹²¹ Bart Rwezaura et al., *Parting the Long Grass: Revealing and Reconceptualising the African Family*, *The Journal of Legal Pluralism and Unofficial Law* 27, no. 35 (January 1995): 25–26; See also Gaydosh, *Does It Take a Village?* 1665–67.

where the law dictates that a child in the care of the local government authorities should be placed with relatives as per sec 62(1)(a) of the Child Protection Regulations, 2014.¹²² On the other hand, measures should be taken to raise awareness and sensitise society on the changing patterns of life that influence society's capacity to care for children.

An assumption that customs and traditions are static and stagnant should be avoided for the common good of all children in need of alternative care. While some children will have relatives willing to care for them, others will not have such relatives.¹²³ And in our contemporary society, there are some individuals who will only care for children they are related to, while others are willing to care for children they are not related to. Thus, it is crucial to have a legal framework that takes into consideration all these realities accommodating the customs and traditions and at the same time taking into consideration the changing nature of society.

6.9. Poverty as a socio-economic challenge

Financial and material poverty in Tanzania plays a double role; on the one hand, it contributes indirectly to the increasing number of children likely to be deprived of their family environment.¹²⁴ On the other hand, a lack of financial resources generally accounts for the underdevelopment of the alternative care system. The absence of proper and adequate prevention mechanisms to retain children in their families and the overreliance on institutional care dominated by the private sector and NGOs are evidence of the adverse effects of lacking financial resources on the child protection system.¹²⁵

Unlike institutional care, where great responsibility is carried by the operators of children's homes, implementing foster care would require a more active role of the state, especially now that foster care services are under the control of the state through the department of social welfare. Financial resources are needed to facilitate recruitment and retention of foster carers, training of foster carers and social welfare officers, and support the foster care placements. Moreover, more resources would also be needed to raise public awareness and understanding of foster care services.¹²⁶ In the current economic situation of Tanzania, it is difficult to see how

¹²² See section 4.3.1 of this study on placement with relatives.

¹²³ See also Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes*, 12; Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 15.

¹²⁴ See UNICEF, *Is Tanzania a Better Place for Children?* (Dar es Salaam, Tanzania: UNICEF, 2014), 23; See also "SOS Children's Village Tanzania, A Snapshot of Alternative Care Arrangements in Tanzania - Based on SOS Children's Villages Assessment of a State's Implementation of the UN Guidelines for the Alternative Care of Children" (Austria: SOS Children's villages international, 2013).

¹²⁵ See section 4.3.4.5 of this study.

¹²⁶ See also EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 34–36.

foster care could be successfully implemented. For instance, as the law on foster care stands now, there is no provision for financial support to facilitate foster placements. Reg 14(1) of the Foster Care Placement Regulations, 2012 provides that:

“The social welfare officer shall as far as practicable and in collaboration with any organisation, support the foster parent to fulfil his or her responsibilities, including by providing written information that explains fostering, the legal requirements of foster care placements, and the legal rights of foster parents, foster children and biological parents, and by providing training on meeting the psychosocial needs of foster children and counselling during the foster care placement.”

This implies that individuals capable of fostering should be financially capable of providing the necessary needs for the child. The foster carers are expected to carry the full responsibility of the child without any financial support from the state. The law and practice of foster care in Tanzania tend to contrast with what is happening, for instance, in Ghana. Following the amendments to the Ghana Children’s Act in 2016, the law requires the establishment of a foster care fund for the purpose of supporting foster parents in the maintenance of a foster child and for the administration of foster care processes.¹²⁷ During my field research, in an interview with the social welfare department in the Ministry of Health, Community Development, Gender, Elderly and Children, I asked whether there was any financial support available for foster placements. In response, the social welfare officer explained:

“There is not any financial support to foster carers or to facilitate foster placements as we are afraid of turning children services into business or source of income for those wanting to foster children. We do not want to turn vulnerable children into commodities... As it stands now, the government is not planning to provide foster care grants or allowances.”¹²⁸

If this is the position of the government regarding financial support to facilitate foster placements, then the only assumption left is that foster care is reserved for a small portion of Tanzanian society. Only rich and middle-class Tanzanians, perhaps with no children of their own under their care, can aspire to be foster carers. In the current state of affairs, fostering a child means that the foster carer is responsible for the child’s shelter, clothing, education and health without any support from the government. It is doubtful if an average Tanzanian family

¹²⁷ See secs 72, 73 & 75 of the Ghana Children’s Act as amended by the Children’s (Amendment) Act of 2016.

¹²⁸ An interview conducted with a social welfare officer in Dodoma at the Department of Social Welfare in the Ministry of Health, Community Development, Gender, Elderly and Children in 04/04/ 2018.

can afford to take on such responsibilities, especially if they are also caring for children of their own. Due to their financial status, most Tanzanians in rural and urban areas would not be able to take on such a great responsibility without guaranteed support from the state or some other body. When the fit person programme was started, attempts were made to provide financial support to fit persons caring for children under the programme. However, this support was stopped for fear of attracting unsuitable individuals.¹²⁹

The question arises as to what is the role of the state concerning children in care. Ideally, the state assumes parental responsibility for children deprived of their family environment by ensuring that the most suitable alternative care is found for such children.¹³⁰ Thus, the responsible state authorities are required to budget for children deprived of their family environment amid all their other responsibilities.¹³¹ The government of Tanzania, which is a developing country, may raise the defence of limited resources to provide material or financial support for foster carers and children in care. The struggles to improve the national economy and reduce poverty have not benefited the people due to limited investment in improving social welfare services, let alone foster care services. In its fight against poverty, the government emphasises improving infrastructure, education and health issues, rather than services related to children in need of alternative care.¹³² Apart from the supervisory role that the state plays, the provision of alternative care services is dominated by non-governmental organisations that do not depend on the state for financial support to operate the services they provide to children deprived of their family environment. Though the government claims to be working towards deinstitutionalisation, it may take a while to reduce the over-reliance on children's homes which do not burden the government budget.

The realisation of the right to alternative care relies on the available resources and the willingness of the state to invest its resources in this sphere. A country like Tanzania which has so many problems, including poor infrastructure, diseases, and a poor economy, would not prioritise establishing a proper foster care system while there are private children's homes that

¹²⁹ Information obtained in an interview with a social welfare officer at Temeke Municipal Council in Dar es Salaam on 04/02/2019. The same information was also obtained in an interview with a child protection officer at UNICEF in Dar es Salaam on 21/01/2019.

¹³⁰ Sec 7(3) of the LCA and reg 59(2) of the Child Protection Regulations, 2014. See Rwezaura, *This is Not My Child: The Task of Integrating Orphans into the Mainstream of the Society in Tanzania*, 413. See also section 3.2.3 on the role of the state in respect of children deprived of their family environment.

¹³¹ See also Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 24.

¹³² See United Republic of Tanzania, *The Tanzania Development Vision 2025*, which hardly mentions children and families. Moreover, the annual ministerial speeches of the Ministry of Health, Community Development, Gender, Elderly and Children presented to Parliament are more concerned with health issues and less with the other responsibilities of the ministry. The speeches can be found on the ministry website: www.jamii.go.tz.

do not require national resources to operate. To change the current situation, where only the government can provide foster care services, there is a need to adopt mechanisms that would allow non-governmental organisations to provide such services. Reg 7(3) of the Child Protection Regulations, 2014 allows the head of the social welfare department at the local government level to reach an agreement with registered non-government organisations to provide, among others, alternative care services.

Poverty at both the national and the individual level thus provides justification for the emphasis placed on fostering for adoption that has been common over the years. Since the majority of prospective adopters are childless couples aspiring to have children they can regard as their own, it is unlikely that such individuals would expect financial or material support from the government during their fostering period before applying for adoption of the child they have fostered. The prospective adopters aim to prove to the state authorities that they are capable of providing the child with the best family environment to grow and develop.

6.10. Conclusion

This chapter has discussed the challenges that affect the implementation of foster care in Tanzania. These challenges emanate from the law regulating foster care which, as shown above, is misleading and open to misunderstanding on the use of foster care. Apart from the narrow and limited understanding of foster care under the LCA, the existence of two separate parts (part IV and VI) of the LCA dealing with foster care is problematic and misleading. For instance, the arrangement of part VI titled Fosterage and Adoption could explain why, in practice, foster care is mainly used as a pre-adoption process to enable prospective adopters to fulfil the adoption requirements, rather than a complete alternative care option. Moreover, the classification of placement with a fit person as a separate alternative care option under the LCA reflects the limited understanding of the functions and objectives of foster care as an alternative care option.

Beyond the weaknesses of the law regulating foster care, other legal challenges emanate from the broader legal framework in respect of child protection. Though the LCA was enacted in 2009, the subsidiary legislation providing further guidance on implementation of the LCA was not adopted until 2011-2016. The outstanding feature of the subsidiary legislation is that it is uncoordinated and incoherent. The Child Protection Regulations, 2014, the general regulations on child protection, are not aligned with the specific regulations, especially those enacted before it. By comparing the Child Protection Regulations, 2014 and the Foster Care Placement Regulations, 2012, this chapter has shown how the unnecessary replication of different

processes and procedures might complicate foster care practice and inhibit the protection of children needing alternative care. The lack of coordination and incoherence under these regulations manifests the importance of synchronising and harmonising these regulations for easy understanding and implementation.

In practice, the role of social welfare officers as street-level bureaucrats poses another hurdle that affects the implementation of foster care in Tanzania. Based on the data obtained from the field, it is clear that most social welfare officers have a limited understanding of foster care as an alternative care option and a limited knowledge of the law regulating foster care. Moreover, examination of the influence of Tanzanian culture and traditions reveals a need to raise public awareness of the changing socio-economic circumstances that are affecting traditional childcare practices. I argue that culture and tradition cannot be used as excuses for failing to let children enjoy their rights. It is time to question the practicability of traditional childcare practices and to look for new ways of providing children deprived of their family environment with family-based care.

Amidst the legal and practical challenges presented and discussed in this chapter, one wonders if there is hope for a functioning foster care system in the continuum of services for children deprived of their family environment in Tanzania. Against this background, the following chapter explores the prospects of an effective foster care system in Tanzania.

CHAPTER SEVEN: THE PROSPECTS OF FOSTER CARE: IS THERE HOPE FOR FOSTER CARE IN TANZANIA?

The troubling question, and perhaps one that is not answered with certainty in this study, relates to whether there is hope for a functioning foster care system in Tanzania as envisaged under the Law of the Child Act? The legal and practical challenges unravelled in the previous chapter may lead to a hasty conclusion that foster care has no place in the protection system for children deprived of their family environment. Yet, the identified challenges provide a foundation on which foster care can be built and strengthened. Discovering and understanding the nature and cause of the problem paves the way to solving the problem. In this chapter, aspects that are important in projecting the prospects of foster care as an essential care option for children deprived of their family environment in Tanzania are revealed and explained.

Further, the chapter briefly discusses the general attributes or components necessary for establishing a working foster care system. This forms the basis for recommendations on what Tanzania can do to develop the foster care system. The essential attributes of a successful foster care system are deduced from foster care practices in various countries worldwide to provide a basis for identifying necessary reforms of the foster care framework in Tanzania. However, it is crucial to appreciate that there are no hard and fast rules determining the nature and types of foster care for any particular state.¹ Besides the general attributes of a foster care system, each country has to determine the specific situation and needs of children deprived of their family environment and the state's socio-economic situation in establishing a foster care system.²

7.1. Determinants of the future and hope for foster care in Tanzania

Nationally and worldwide, there are aspects of protecting children deprived of their family environment and their right to alternative care which give promising hopes for the development and visible place of the foster care system in Tanzania. These aspects include the call to deinstitutionalise alternative care services,³ the requirement to adopt a case-by-case approach in analysing the needs of the children in need of care,⁴ and the absence of hard and fast rules

¹ See Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 8, 25.

² EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 11, 18, 38.

³ See paras 21 and 23 of the UN Guidelines for the Alternative Care of Children; see also section 3.4.2.1 of this study.

⁴ See para 7 of the UN Guidelines for the Alternative Care of Children. See section 3.5 of this study on the child protection processes and procedures involving the individual assessment of a child in need of care and protection.

for establishing a foster care system.⁵ On the basis of these aspects, as discussed in the following sections, I argue that there is hope for a stable and effective foster care system in Tanzania.

7.1.1. The campaign to deinstitutionalise the care system

In 2005 the Committee on the Rights of the Child conducted a day of general discussion dedicated to art 20 of the CRC on children without parental care. In this discussion, the Committee was critical of the systematic institutionalisation of children around the world. Subsequently, the Committee called on states parties to adopt family-based alternative care options to reduce the institutionalisation of children deprived of their family environment.⁶ Moreover, the UN Guidelines for the alternative care of children emphasise family-based alternative care and advocate limiting the use of institutional care.⁷ Thus, the ongoing worldwide campaign calls for the deinstitutionalisation of care services for children deprived of their family environment by establishing community-based care services and family-based alternative care options.⁸ The institutionalisation of children needing care has been associated with negative impacts on children, especially problems related to their emotional, psychological and mental development due to the general lack of focus on the specific needs of the individual children in care.⁹

In response to this international campaign, Tanzania has adopted a deinstitutionalisation policy in its legal and policy framework for dealing with children deprived of their family environment. As indicated in chapter three of this study, one of the principles to be adhered to in dealing with children needing alternative care is that family-based care should be preferred over institutional care.¹⁰ Thus, implementing this principle implies establishing and expanding the range of alternative care options available in the country. Institutional care cannot be a measure of last resort if it is the only reliable or readily available care option.

The adoption by the government of the principle that institutional care is a measure of last resort provides hope for the establishment and strengthening of community-based care services and

⁵ See Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes*, 37.

⁶ See paras 660-661 and 665-666 of the UN Committee on the Rights of the Child, Report on the Fortieth Session (Geneva, 12-30 September 2005), (Geneva: United Nations, 17/03/2006).

⁷ See paras 53-54 of the UN Guidelines for the Alternative Care of Children.

⁸ See also Daphne Programme et al., *De-Institutionalising and Transforming Children's Services: A Guide to Good Practice* (Birmingham: University of Birmingham, 2007), 34–35.

⁹ Hope and Homes for Children, *End of Silence: The Case for the Elimination of Institutional Care for Children*. (Hope and Homes for Children, n.d.), 18; See also Kim Maclean, *The Impact of Institutionalisation on Child Development*, 15 (2003): 853.

¹⁰ Sec 137(1)(c) of the LCA read together with reg 3(2)(a) of the Child Protection Regulations, 2014 and reg 3(d) of the Children's Homes Regulations, 2012. See also section 3.4.2.2. of this study.

family-based care options, including foster care. The recent ongoing implementation of placement of children needing alternative care with fit persons¹¹ validates this argument. Generally, the deinstitutionalisation of children's services calls for an overall reshuffle of the alternative care system in Tanzania. Care by relatives, which has played, and continues to play, a significant role in informally caring for children needing alternative care, is not always available or suitable for every child. Therefore, Tanzania needs to expand the range of family-based care options, especially those already recognised in the law and by the customs and traditions of the people of Tanzania and give them full implementation.¹²

7.1.2. The need for a case-by-case analysis of children's needs

Case-by-case analysis to determine the needs of children needing alternative care is a pivot of the suitability principle, which calls for placing a child in a care option that suits their interests and needs best.¹³ Case-by-case analysis emphasises avoiding generalisation of children's needs. Children deprived of their family are in different circumstances and conditions, making it impossible to have a 'one size fits all' care option for all. There needs to be established, among others, a range of alternative care options and services to ensure that an individual child's needs are best served and protected.

Sec 7(3) of the LCA adopts this principle by stipulating that where a competent authority determines that it is in the child's best interest to separate him or her from his or her parents, the best substitute care available shall be provided for the child.¹⁴ On the one hand, this provision entails that determination of the needs of children in need of alternative care is to be done on an individual basis. On the other hand, sec 7(3) of the LCA recognises the existence of different alternative care options that would serve children with differing care and protection needs. The need for social welfare officers to conduct a social investigation of any child before deciding on the best alternative care option underscores the importance of a case-by-case analysis of the child's needs and interests.¹⁵

Tanzania cannot fulfil the requirement of placing children in a care option that best suits their needs if there are no efforts to expand the range of alternative care options available beyond institutional care, such as adoption, placement with fit persons, informal care by relatives or

¹¹ See section 4.3.3. of this study.

¹² See also Eurochild, *Deinstitutionalisation and Quality Alternative Care for Children in Europe: Lessons Learned and the Way Forward* (Working Paper), 25.

¹³ See para 57 of the UN Guidelines for the Alternative Care of Children. See also section 2.5.2.2. of this study.

¹⁴ See also sec 18(3) of the LCA and reg 62(1) of the Child Protection Regulations, 2014.

¹⁵ See sections 3.5.3 and 5.7.2 of this study for more details on social investigation. Reg 26 of the Child Protection Regulations, 2014 provides for the procedures to be followed in making a social investigation of a child. See also reg 9 of the Foster Care Placement Regulations, 2012.

kinship care. As the government is taking initiatives to assess and improve the quality and quantity of alternative care options and reduce institutionalisation of children in need of alternative care, measures must be taken to acknowledge the role and potential of foster care in the continuum of care services for children. Without expanding the continuum of alternative care services available in the country, there is no justification for conducting a case-by-case analysis of the needs of children deprived of their family environment.

7.1.3. The absence of hard and fast rules for foster care

In the literature it is repeatedly pointed out that there is no one blueprint of universal elements for successful foster care programmes, and emphasis is placed on the need to consider the specific local context and adapt programmes accordingly.¹⁶ Apart from the general agreed components of what constitutes foster care (the components are discussed below in section 7.2.), there are no hard and fast rules for determining what foster care is and how it should be operated. Save for countries like the USA, where the term foster care is defined to include all forms of alternative care options,¹⁷ the majority of countries use the term foster care to refer to a type of family-based care placement of a child taking place in the home of the carer under the mandate of the authorised authority.¹⁸

The absence of strict rules for foster care systems allows state authorities to establish foster care in the manner which best suits their social, economic and cultural context. Though some respondents believe that foster care as understood by the Western world is yet to find a place in Tanzania,¹⁹ this study provides the basis for an expectation that foster care could work in Tanzania if the foster care system were customised to fit the local context and needs of society. While there could be lessons to be learnt from developed or other developing countries in enhancing the implementation of foster care in Tanzania, what matters most is what it would take to establish a foster care system to serve the interests of children and families in Tanzania.

7.2. Attributes of a successful foster care system

Before discussing the attributes of a successful foster care system, it is essential to remember that foster care is a sub-system embedded within a broader child protection system. As indicated throughout this study, adopting a systems approach in a discussion intended to determine and

¹⁶ Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes*, 8; Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 8; EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 6, 10.

¹⁷ See Font and Gershoff, *Foster Care and Best Interests of the Child*, 6.

¹⁸ See EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 7; See also Colton and Williams, *The World of Foster Care*, 285–88.

¹⁹ Information obtained in an interview with a practitioner of family and child law in Dar es Salaam on 18/01/2019.

make projections on the development of foster care in Tanzania is essential.²⁰ Foster care cannot be discussed in isolation or ignorance of the interaction of different systems and sub-systems related to child protection. A report prepared for the Family for Every Child Alliance notes that “Foster care is not an answer in itself, rather it is part of the answer... Foster care is only of value and in the best interests of the child if properly supported and considered a part of the wider range of care choices.”²¹ Moreover, the Education Committee of the House of Commons in the UK recommends the following in its report on fostering:

“The Government must ensure that its review of the foster care system is considered in the context of the wider children’s social care landscape. The value of the work the Government has undertaken so far on different forms of care will be undermined if they are not viewed and considered as part of a whole, interlinked system. The government should conduct a fundamental review of the whole care system, recognising the relationships between different types of care, addressing wider underpinning issues and ensuring that the care system is fulfilling its purpose.”²²

An attempt to implement the law on foster care and the eventual establishment of a foster care system in Tanzania requires adopting a thorough and holistic approach considering the entire protection system for children deprived of their family environment. Family preservation and strengthening initiatives, other alternative care options in place, and reducing factors that create the pool of children deprived of their family environment are essential aspects to consider. The interactions and influences of all these aspects determine the success or failure of each aspect. For instance, if Tanzania should manage to comply with all the established attributes of foster care in disregard of other key components of the child protection system, it is not unlikely that foster care would still fail even then. Wulczyn and others note that:

“All systems are nested within other systems. That is, a given system has embedded within its boundaries other systems... With respect to child protection systems, actors at each level (child, family, community, etc.) play a vital role in shaping what the system looks like in its totality. Moreover, the strength of the system depends on effective interaction across various system levels.”²³

²⁰ See also part 6.1 of the General Comment No. 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening for Child Protection (African Committee of Experts on the Rights and Welfare of the Child, 2018).

²¹ Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 12.

²² Education Committee, *Fostering: First Report of Session 2017-19*, (UK: House of Commons, 2017), 9.

²³ Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations*, 11.

Thus, a discussion on the attributes or components of a successful foster care system needs to be built on the understanding that the success or failure of foster care depends on the existence of other child protection systems that are interdependent and interconnected. Therefore, the ability of the foster care system to embrace and adapt to the influences generated by these other sub-systems is crucial for its success. For instance, family preservation and strengthening systems may have a significant effect on the efficiency and stability of the foster care system as the former determines the entry of children into the care of the state and their eventual reintegration in their families. Likewise, other well-established alternative care options help in reducing tension and pressure on the foster care system. Against this background, the discussion below on the attributes of a successful foster care system is built on the understanding that foster care is just part of the solution. Therefore, its success depends on the other parts of the entire alternative care system for children.

7.2.1. A robust and coordinated legal and policy framework

The importance of a legal and policy framework as an attribute of foster care cannot be overemphasised. The framework provides a foundation on which the foster care system is built and developed. It must map out the whole picture of the foster care system that the state or given authority is willing to establish while taking into account the local practices and realities of childcare in the society. The framework should, in clear terms, articulate the purposes and objectives of the foster care system and the interaction between foster care and other systems related to the protection of children deprived of their family environment. Also, the legal and policy framework needs to specify the individuals and authorities in charge of implementing the framework, their duties and the relations between the implementers and other involved, interested individuals and authorities.²⁴ Generally, the legal and policy framework needs to explicitly deal with all aspects of foster care, including pre-placement, placement, and aftercare services.

The legal and policy framework of foster care in Tanzania, discussed in chapter five, provides necessary directions on implementing the foster care system. The framework answers questions related to what amounts to foster care, who is charged with its implementation, and the manner of placing children in foster care. However, chapter six provides a detailed discussion of the challenges associated with this legal and policy framework. The major challenge is the absence of clarity on the specific purposes and objectives of foster care in Tanzania, making it difficult

²⁴ See Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 21; See also Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations*, 19–20.

to determine the place of foster care in the continuum of care. For instance, it should be made clearer that foster care is intended to be used as an independent alternative care option rather than being used only when the carer is interested in adopting the child, as in the present practice.²⁵

Moreover, as shown in chapter six, the foster care legal and policy framework is disconnected from the general regulations for child protection laid down under the Child Protection Regulations, 2014 on issues relating to social investigation, care plan and review of placement. In addition, the framework lacks clear direction on the recruitment and retention of foster carers, which resulted in the absence of standby foster carers with whom children in need could be placed.²⁶ Though reg 7(2)(f) of the Child Protection Regulations, 2014 shows that the head of the social welfare department is responsible for the recruitment of foster carers, this is not specified in the LCA or the Foster Care Placement Regulations, 2012. Since the Child Protection Regulations were adopted after the Foster Care Placement Regulations, it is unsurprising that the social welfare officers interviewed during field research believe that it is not their responsibility to recruit and retain foster carers. From my analysis of the legal and policy framework of foster care in Tanzania, it is clear that the framework falls short in several respects, as noted above, making the implementation of foster care difficult.

Thus, there is a need for Tanzania to review its legal and policy framework on foster care with a view to establishing a robust and coordinated framework that pays due regard to other laws related to child protection, and to the local context and practices related to childcare provided these are not contrary to the best interests of the children concerned. For instance, the LCA, which provides the framework of foster care, lacks a mandated body to deal with the implementation of the LCA. Most of the obligations arising under the LCA related to children deprived of their family environment are vested in the local authorities through their social welfare departments, which are essentially unaware of the extent of their obligations arising out of the LCA.²⁷ It is about ten years down the road since the enactment of the LCA, and it should be possible to assess the successes and failures of the foster care system and to determine aspects that need to be changed or added in the law related to foster care. Though the LCA was

²⁵ See section 6.2 of this study.

²⁶ See section 6.3 of this study.

²⁷ See section 7.3.2. for more details.

revised in 2019, the revised edition contains no substantive changes other than incorporating the amendments since its enactment and some editorial changes.²⁸

7.2.2. Competent and sufficient social service workforce

Social workers, or in the case of Tanzania social welfare officers, play a pivotal role in foster care placements. Their activities are essential to determining the success or failure of foster care placements.²⁹ They work with foster families, biological families and foster children. Therefore, they must have the capacity and ability to balance the interests of all these interested parties.³⁰ In addition, they must possess competencies and skills in foster care practices and a knowledge of the legal framework governing the provision of foster care services. Terpstra, in his article, has the following to say in his conclusion:

“The child welfare worker is the central person in the drama that is played out with the child, parents, foster parents and possibly others. The worker must keep in touch with each of them and know how they are interacting with each other. While the worker needs the participation from all those parties in developing a case plan, implementation primarily is the responsibility of the worker.”³¹

The above quotation reveals the centrality of social workers or, in the case of Tanzania, social welfare officers, in foster care placements. Social welfare officers are expected to assess the situation of children in need and their biological families, to determine whether the children need to be removed from the care of their families, and to prepare care plans for children placed in the care of local government authorities.³² On the other hand, social welfare officers are required to assess the eligibility of foster carers, recruit and train foster carers, determine suitable families for children in need of foster care, supervise placements, and determine permanency strategies for children in foster care.³³ In view of the kind of responsibilities vested in the social welfare officers regarding foster care, it is not enough to indicate that they have to

²⁸ The amendments resulted from the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 which amended some provisions in part IX and XIII of the LCA, and also from the Written Laws (Miscellaneous Amendments) Act No. 9 of 2017 which amended part I of the LCA. The editorial changes were made based on the powers vested in the Attorney General under sec 8 of the Laws Revision Act, Chapter 4 of the Laws of Tanzania R.E. 2015. Though most of the editorial changes seem to have been made deliberately in the exercise of the powers vested in the Attorney General, some of these changes had negative implications. For instance, see sec 8(4) of the 2019 version where the word ‘not’ which was in the 2009 version is removed.

²⁹ See generally, Terpstra, *The Rich and Exacting Role of the Social Worker in Family Foster Care*, 28; And also, section 5.9.1 of this study on the roles of social welfare officers in relation to foster care deduced from the legal framework governing foster care in Tanzania.

³⁰ Terpstra, 28.

³¹ Terpstra, 28.

³² See sections 5.5 and 5.7 of this study for more details.

³³ See section 5.5.4 on determination of the suitability of foster carers and section 5.9.1.2 on supervision visits.

discharge these responsibilities. Deliberate efforts must be taken to ensure that these people understand the nature of their responsibilities and acquire competencies and skills related to the discharge of their duties arising out of foster care placements.³⁴

For a foster care system to thrive, it needs a competent and skilled social workforce aware of the ins and outs of foster care as an alternative care option and the legal and policy framework within which foster care is provided and regulated. Moreover, beyond the question of competency and skills is the size or quantity of the workforce charged with the provision of foster care services. The smaller the workforce, the more are the complications related to the provision of foster care. There should be enough social workers or social welfare officers to avoid overwhelming them with heavy caseloads, which would affect their effectiveness and efficiency in providing foster care services.

7.2.3. A pool of foster carers

The foster care system can thrive if there is a sufficiently large pool of foster carers with whom children in need of alternative care can be placed.³⁵ By way of analogy, I suggest that while the social workers can be regarded as the drivers of the foster care system, the foster carers are the fuel without which a car cannot start. The situation in Tanzania can be used to prove the validity of this assertion. The lack of standby foster carers has contributed to the institutionalisation of most children entering the state's care and limitation of the use of foster care as a prerequisite to adoption.³⁶

Foster carers play an essential and unique role in enhancing and protecting the lives of children placed in their care by assuming the day to day care of such children. Foster carers are expected to assist the children in their care to recover from the bad experiences that led to their being placed in foster care.³⁷ Foster carers are to manifest love, care and affection to the children placed with them and give them new hope of living a happy life without the care of their parents or families. Sometimes, depending on the problems of the children brought into their care, these tasks may be challenging and overwhelming for foster carers. Thus, state authorities and the

³⁴ See section 6.7.1 of this study for more details.

³⁵ See Sinclair, *Fostering Now*, 101–14; See also Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes*, 16.

³⁶ See section 4.3.4.4. on over-institutionalisation of children needing alternative care.

³⁷ See section 5.9.2.2. on the obligations of foster carers in Tanzania.

community at large need to recognise and appreciate the nature of this task and give foster carers the support they need to discharge their responsibilities.³⁸

The recruitment and retention of foster carers continue to be a big challenge in many foster care systems worldwide. This problem is also acutely felt by countries whose foster care systems were developed much earlier than the Tanzanian system, such as the UK.³⁹ Thus, a state intending to establish an effective and efficient foster care system ought to adopt strategies and initiatives to recruit and retain foster carers. It is necessary to understand the factors that may influence or affect the readiness of individuals or families to become foster carers and to remain as foster carers once recruited.⁴⁰ For a country like Tanzania, whose foster care system is still at its conception stage, strategies are needed to ensure the recruitment and retention of foster carers. It is important to know individuals who could be targeted as possible foster carers and develop mechanisms of reaching out and attracting them to become foster carers. Raising awareness of the importance of foster care and the demand for foster carers to protect children in need of alternative care is one of the important initiatives that can be taken.⁴¹

The recruitment of foster carers requires a clear understanding of the kind of foster care services to be provided by the state. It is essential to know whether foster care is to be used as respite care, emergency care, short- or long-term care, or otherwise, in order to develop appropriate strategies for recruiting foster carers. Individuals interested in fostering children may be open to offering one kind of care but not another. For instance, some may be willing to provide only short-term care, while others may be willing and ready to provide children with long-term care.⁴² Moreover, strategies to recruit foster carers must be aligned with the needs of children needing alternative care, and with society's social, cultural and economic circumstances. Recruitment of foster carers must meet the needs of children needing foster care services, as such children usually have differing needs beyond food, clothing and education.⁴³

³⁸ See also EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 27–28.

³⁹ See Baginsky et al., *The Fostering System in England*, 70–73.

⁴⁰ See also Kwabena Frimpong-Manso, Ishmael Tagos, and Stella Mawusi Mawutor, Experiences of Formal Foster Parents in Ghana: Motivations and Challenges, *Southern African Journal of Social Work and Social Development* 32, no. 1 (2020): 6–10.

⁴¹ See Martin Narey and Mark Owers, *Foster Care in England: A Review for the Department for Education, Independent Report* (UK: Department for Education, 2018), 49–57, on the need for strategies to recruit foster carers.

⁴² See also Jennifer C. Davidson et al., Developing Family-Based Care: Complexities in Implementing the UN Guidelines for the Alternative Care of Children, *European Journal of Social Work* 20, no. 5 (September 3, 2017): 759–63.

⁴³ See also EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 28.

Strategies to recruit foster carers need to go hand in hand with strategies aimed at retaining foster carers. In the absence of mechanisms to retain recruited foster carers, the foster care system is likely to suffer a continuous shortage of foster carers, making the placement of children in foster care difficult. In the discussion below, it is shown that support for foster carers is essential if they are to be retained. There should be a continuous inquiry into the challenges facing foster carers and possible solutions to mitigate the identified challenges. Generally, foster carers need to feel needed and secure, and that their place in the foster care system is appreciated and valued.

7.2.4. Support services for foster care placements

“Children who are in foster care are special because they are not living with their own families. They come with a history of experiences, some of which may not be known. The objective for foster carers and social workers is to make life as normal as possible for the foster child, bearing in mind that knowledge about his or her history may not be full or complete.”⁴⁴

Foster care placements give rise to new complex relationships and associations that need to be supported and fostered for successful placements.⁴⁵ It is not easy to explain the complexity of the relationships associated with foster care placements. However, the number of involved persons could provide a starting point for acknowledging these complexities. In most cases, foster care placements would include the involvement of at least four parties that need to interact and coordinate to ensure successful placements. The parties usually include the foster children, the foster carers or foster families, the children’s families, and the providers of foster care services who might be the state or non-state agents, the latter not being currently provided for in Tanzania.⁴⁶ The interactions between these parties are not always smooth due to their different and sometimes conflicting roles and expectations.⁴⁷

In view of these complex relationships, solid support strategies and mechanisms need to be in place to facilitate meeting the objectives of foster care placements. Support services should be oriented to meet the varying needs, roles, and expectations of the involved parties. In this section, the focus is on the support services needed by the foster carers, the foster children, and

⁴⁴ East Sussex Council, *Your Fostering Handbook*, 2018, 11.

⁴⁵ See Atalia Mosek, *Relations in Foster Care*, *Journal of Social Work* 4, no. 3 (December 2004): 323; also, the article by Rosina Mnisi and Petro Botha, *Factors Contributing to the Breakdown of Foster Care Placements: The Perspective of Foster Parents and Adolescents*, *Social Work/Maatskaplike Werk*, July 2016, which reflects the complexities of relations in foster care.

⁴⁶ See section 5.9 of this study.

⁴⁷ See also George, Van Oudenhoven, and Wazir, *Foster Care Beyond the Crossroads*, 351–52.

the children's families. These three groups are likely to be the most affected due to the changes in their ordinary relationships. For instance, sometimes biological families and children to be fostered may have negative perceptions of the placement, complicating the place of foster carers in caring for the child.⁴⁸ In other instances, foster carers may misconceive the nature of their role, ending up inhibiting contact between the child and his or her biological family or sometimes rejecting the involvement of social workers during placement supervision. Thus, support services are needed to foster successful placements and harmonious co-existence of the new relationships.⁴⁹

7.2.4.1. Training and support for foster carers

The responsibilities that foster carers are expected to discharge go beyond those that apply to caring for their own children. In addition to their own families, foster carers have to deal with the foster children placed in their care, social welfare officers, and the children's birth family. Foster carers are likely to be caught up in the middle of conflicting interests that need to be met and balanced to achieve the purpose for which foster care placement is intended.⁵⁰ The devotion of foster carers to caring for the children of strangers should not be underestimated or taken for granted. This task is noble and complex, which calls for collaboration and support from all those involved in fostering services.⁵¹

The provision of training on foster care services is one of the important support services that need to be made available to foster carers. Especially in countries where the practice has been less common, foster carers need to be trained on the general understanding of foster care and the objectives intended to be achieved by placing children in foster care. Foster carers need to be trained on how foster care operates, especially on the state's supervision of foster care placements. Supervision and home visits may be considered by some foster carers as an intrusion into their privacy and family life.⁵² Thus, it is essential to train people on what to expect and what not to expect once they decide to take up the role of foster carers. Training and counselling of foster carers should be a continuous activity beginning before placement is done

⁴⁸ See Mosek, *Relations in Foster Care*, 326–27.

⁴⁹ See also Mosek, *Relations in Foster Care*, 324–25.

⁵⁰ See also Linda Nutt, *The Lives of Foster Carers: Private Sacrifices, Public Restrictions* (New York, NY: Routledge, Taylor & Francis Group, 2006), 31.

⁵¹ See, Education Committee, *Fostering: First Report of Session 2017-19*, 21; Also, Narey and Owers, *Foster Care in England: A Review for the Department for Education*, 25.

⁵² Teresa Toguchi Swartz, *Mothering for the State: Foster Parenting and the Challenges of Government-Contracted Carework*, *Gender & Society* 18, no. 5 (October 2004): 580–81.

and throughout the placement's duration or throughout the time the person remains a foster carer.⁵³

On another level, training should include imparting a knowledge of the legal and policy framework regulating foster care in the given jurisdiction to provide foster carers with the necessary understanding of their legal rights and responsibilities. Foster carers need to have a basic knowledge of the laws regulating foster care as the laws provide guidance and direction on how foster care is to be conducted. Moreover, foster carers should be made aware of the dispute settlement mechanisms that are put in place to handle foster care placement disputes when they occur.⁵⁴ However, the current legal framework of foster care in Tanzania does not contain any concrete dispute settlement mechanism for foster care placements.⁵⁵

In addition to this kind of training, foster carers need to be given support during the entire process of caring for foster children. Though foster carers are expected to care for the children placed in their care as they would care for their own children, it is important to appreciate that some of the children placed with foster carers are likely to have a difficult background and special care needs. Thus, sometimes foster carers will require psychological and emotional support from other foster carers or persons more specialised in dealing with such children. Based on acceptable social and traditional practices, it is crucial to have forums where foster carers can seek assistance and share experiences when their caring role becomes overwhelming or challenging.⁵⁶ In some countries, foster carers associations are formed to provide foster carers with an avenue to meet and share their care experiences and learn from each other or even relieve the stress they may accumulate in caring for their fostered children.⁵⁷ State authorities or agents have to understand the importance of establishing support systems to provide a conducive environment for foster carers to discharge the difficult task of providing children in need of care with a home and caring environment.⁵⁸

⁵³ See EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 27, 30.

⁵⁴ See Department for Education, *Fostering Better Outcomes: The Government Response to the Education Select Committee Report into Fostering and Foster Care in England July 2018*, 27.

⁵⁵ Reg 18(6) of the Foster Care Placement Regulation, 2012 provides only that a foster parent can appeal to the Commissioner for social welfare following the termination of a foster placement.

⁵⁶ See also Frimpong-Manso, Tagos, and Mawutor, *Experiences of Formal Foster Parents in Ghana: Motivations and Challenges*, 10–12.

⁵⁷ The National Foster Parent Association in the USA formed in 1972, more details at <https://nfpaonline.org/>. There is also the Australian Foster Care Association, see <https://www.fostercare.org.au/>; and the National Foster Care Association Malta, more details at <http://nfcam.org/about/>.

⁵⁸ For more on foster carers' support, see Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes*, 24–25.

A common and accepted practice in foster care is providing financial support to foster carers to enable them to fulfil the material needs of children in need of alternative care.⁵⁹ In some countries, foster carers receive an allowance as appreciation for their dedication to helping the state to provide care for children in need of alternative care.⁶⁰ The rationale for providing foster carers with financial support can be seen from two connected angles. In the first place, in Tanzania, as per art 20 of the CRC and art 25 of the ACRWC, the responsibility for children in need of alternative care lies with the state authorities. Thus, the state authorities are expected to invest resources to ensure that the best interests of the children in need of care are protected and enhanced. The other argument that can be used to justify financial support for foster carers is that in most cases they are individuals or families who open the doors of their homes to care for children in need. These people should not be expected to incur expenses for the children they welcome in their homes without support. Foster carers should not be ‘punished’ by having to pay all the costs of looking after children who are ordinarily not their responsibility.⁶¹

There has been fear on the part of governments in many countries that providing financial support would turn children into commodities and foster care services into a business.⁶² The argument has been that many individuals would seek to become foster carers to increase their sources of income rather than because of their desire to provide care for children in need.⁶³ For instance, Wehrmann and others state that:

“In the United States, there has been a great deal of ambivalence about providing financial support services for foster parents. In the past, professionals have argued that providing payments might lead foster parents to care for children ‘for the money’ rather than for more appropriate altruistic motives. This mindset continues to influence the level of reimbursement provided to foster parents, who are not compensated sufficiently for the costs of maintaining children in their care.”⁶⁴

This argument would be even more valid in a developing country like Tanzania. As shown above,⁶⁵ in Tanzania, the law on foster care is silent on providing financial support to facilitate

⁵⁹ EveryChild, *Fostering Better Care: Improving Foster Care (Positive Care Choices: Working Paper 2)*, 31.

⁶⁰ See Clive Sellick, United Kingdom, in *Global Perspectives on Foster Family Care*, ed. Matthew Colton and Margaret Williams (UK: Russell House Publishing, 2006), 82.

⁶¹ See secs 32(5) and 53(3) of the LCA read together with reg 11(1) of the Foster Care Placement Regulations, 2012 on the responsibilities of foster parents to care for foster children. See also Education Committee, *Fostering: First Report of Session 2017-19*, 21–22.

⁶² See Colton and Williams, *Global Perspectives on Foster Family Care*, 115.

⁶³ Swartz, *Mothering for the State*, pt. 1 on the motivation of foster parents.

⁶⁴ Kathryn Wehrmann, Yvonne Unrau, and Judy Martin, United States, in *Global Perspectives on Foster Family Care*, ed. Matthew Colton and Margaret Williams (UK: Russell House Publishing, 2006), 94.

⁶⁵ See section 6.9 of this study.

foster care placements.⁶⁶ Based on an interview with a social welfare officer in the ministry, it appears that the government is not ready to reconsider this situation.⁶⁷ Perhaps the position of Tanzania regarding foster care grants can be explained by the fact that foster care is closely linked to the adoption of children. However, financial support to facilitate foster care placements is a critical aspect to be considered carefully in establishing a functioning foster care system. State authorities must develop ways of addressing the challenges, as discussed above, rather than ruling out the possibility of providing such support when placements are done.⁶⁸

7.2.4.2. Support for foster children and their biological families

Due to their background, most children placed in foster care tend to have needs beyond the mere presence of carers to give them a home and meet their basic needs like food, clothing, and education. Sometimes these children, who might have been subjected to harsh conditions such as neglect, abuse and maltreatment, come into foster care with trauma and feelings of rejection. If appropriate support is not provided, the success of foster care placements may be challenged.⁶⁹ Therefore, the framework developed to establish a foster care system must consider the need to support children placed in foster care.

Placement in foster care often is a whole new experience that might not be easy for children to adapt to. Support mechanisms, including psychosocial or emotional support, and counselling, especially for those children who enter foster care when they are a bit older or are of considerable maturity and understanding, are necessary to assist children in adjusting to new environments with new people who were not in their lives before.⁷⁰ Helping children to understand why they have been removed from their original place of residence is essential if they are to appreciate the importance of their foster placement.⁷¹ In turn, this allows the foster carers to discharge their role without severe resistance from the children.

⁶⁶ Reg 14 of the Foster Care Placement Regulations, 2012 on support of foster parents and the foster child does not say anything about financial support.

⁶⁷ An interview conducted in Dodoma on 03/04/2018.

⁶⁸ See Christopher Hearle and Kanchana N. Ruwanpura, Contentious Care: Foster Care Grants and the Caregiver–Orphan Relationship in KwaZulu-Natal Province, South Africa, *Oxford Development Studies* 37, no. 4 (December 2009): 434–434; see also Colton and Williams, *Global Perspectives on Foster Family Care*, on how different countries have dealt with the controversies of financial support for foster parents.

⁶⁹ See James G. Barber and Paul H. Delfabbro, *Children in Foster Care* (London; New York: Routledge, 2004), chap. 6; Also, EveryChild, *Fostering Better Care: Improving Foster Care* (Positive Care Choices: Working Paper 2), 30.

⁷⁰ See also Mnisi and Botha, *Factors Contributing to the Breakdown of Foster Care Placements*, 232–34.

⁷¹ See Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes*, 22.

Some foster children may need support to help them accept that it may not always be possible to maintain regular contact with their siblings or other family members, including their parents. Therefore, programmes should be developed for the provision of such support services, including allowing children and adolescents in care to form associations so that they can meet and share experiences of being in care. In addition, appropriate forums need to be established to allow foster children to raise their voices and be heard on issues concerning their foster placement.⁷² Depending on a given country's specific social, cultural and economic context, support services for foster children can be provided by child caseworkers, foster parents, siblings, and peers, each playing a unique role in the child's life.⁷³

Another important aspect of support services for foster children is preparing them to leave care. In some cases, children in alternative care lack a stable and permanent home before ageing out of care, hence the need to prepare them for independent living. As in other forms of alternative care, foster care systems need to incorporate aftercare support services for children leaving foster care. Some children leave foster care due to adoption by another family or reunification with their families; others must learn to live independently after ageing out of care. The transition to independent living is not always easy.⁷⁴

In most cases, children ageing out of care are still in need of parental guidance and support, of which they are deprived, unlike children in the care of their own parents. As discussed above (section 5.10.1.), in Tanzania, a child can only remain in care up to 18 years,⁷⁵ after which he or she is expected to start living independently. However, at the age of 18 years, children in the care of their own parents or relatives are often still dependent on their families, and many are students not able to sustain themselves. Being aware of this challenge, the UK has put in place a service known as 'staying put', allowing children ageing out of care to remain in the care of their foster carers if they both agree to such an arrangement.⁷⁶ In view of such realities, it is surprising to expect that children ageing out of foster care can take care of themselves and be independent without appropriate support services established by the state or the community.

⁷² See sections 3.4.1. and 5.9.3 of this study. See also Annabel Goodyer, *Child-Centred Foster Care: A Rights-Based Model for Practice* (London; Philadelphia, PA: Jessica Kingsley Publishers, 2011), 140–43.

⁷³ See also Education Committee, *Fostering: First Report of Session 2017-19*, 11–17.

⁷⁴ See also Family for Every Child, *Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes*, 28–30.

⁷⁵ An exception is provided under reg 18(8) of the Foster Care Placement Regulations, 2012 where a child may remain in foster care until 21 years of age for educational or vocational training reasons.

⁷⁶ Department for Education, Department for Work and Pension, and HM Revenue and Customs, *Staying Put: Arrangement for Care Leavers Aged 18 and above to Stay on with Their Former Foster Carers*, (Crown, UK, 2013).

The birth families of children placed in foster care are another group of players essential to the success of foster placements. Supporting the child's birth family is necessary where the foster placement is done with a view to reunifying or reintegrating the child with his or her family.⁷⁷ When the child's parents or family fail to understand the nature and essence of their child's placement in foster care, the parents' response may not always be positive, and they may pose a challenge to foster carers and the foster children. It is not always easy to accept that your children are placed in the care of a stranger, even when it is clear that the parents could not provide the desired and expected care for their children. Thus, it is also important to establish support services for biological families to facilitate successful foster placements.⁷⁸

Support services for biological parents or families need to be provided based on the child's needs and the causes that led to the removal of the child from their care. Like foster children and foster families, birth families are also subjected to new relationships once their children are placed with foster carers. It may not always be easy to adjust to and accept such new relationships. The freedom of the biological parents to decide on matters concerning their children changes, and they are subjected to terms arising out of the newly established relationships. Biological families need support services that can help them become accustomed to these new dynamics to avoid disruptions of the placement.

Though biological families may be seen as having failed because their children have been placed in the care of the state, their position and relevance in foster care placements should not be ignored.⁷⁹ It is essential, where consistent with the child's best interests, to provide families with information to understand their rights and obligations towards their children once placed in foster care. The biological families of foster children need to be mainstreamed and acknowledged in all processes related to foster care without labelling them having failed their children.⁸⁰

The importance of support services for foster carers, foster children and biological families cannot be overemphasised. In many cases, foster care systems have suffered failure or limited achievement of their objectives and goals due to inadequate or non-existing support services. Foster carers, foster children, and the children's birth families, where appropriate, need to be

⁷⁷ See Sandra Bass, Margie K Shields, and Richard E Behrman, Children, Families and Foster Care: Analysis & Recommendation, *The Future of Children* 14, no. 1 (2004): 15–16.

⁷⁸ See Sinclair, *Fostering Now*, 89.

⁷⁹ D. Chateaufneuf, D. Turcotte, and S. Drapeau, The Relationship between Foster Care Families and Birth Families in a Child Welfare Context: The Determining Factors, *Child & Family Social Work* 23, no. 1 (February 2018): 72.

⁸⁰ For more details on the need for support for child's family, see Baginsky et al., *The Fostering System in England*, 140–57.

supported and encouraged to work together to enhance the welfare and interests of the children.⁸¹ In appropriate cases, it is important to spell out the nature and kind of support services for foster carers in the legal and institutional frameworks on which foster care is built.

7.3. Building a functioning foster care system in Tanzania

At this juncture, despite the legal and practical challenges involved in the implementation of foster care, it is clear that foster care constitutes an essential component in the child protection system in Tanzania. After the analysis and findings of this study on the protection of children deprived of their family environment, and the practice of foster care in particular, the question is: what should Tanzania do to improve the law and practice of foster care? In the light of the attributes of foster care discussed above, there are a number of legal and practical aspects that Tanzania must address in order to establish a functioning foster care system.

7.3.1. Investing in extensive research to assess the provision of alternative care services

Littell and Shlonsky, in one of their articles, reach the following conclusion:

“Decision-makers need comprehensive, reliable and unbiased syntheses of credible evidence to make well-informed choices. They need to know about the accuracy of the decision-making tools and the impacts of child welfare services for various problems, populations and settings.”⁸²

This quotation underscores the role and relevance of research evidence in protecting children deprived of their family environment and providing alternative care services to such children. Benda-Beckmann, in her study on the practice of care among the Ambonese, contends that lack of understanding of local arrangements for social security, care and help contributes to the development of social security and safety nets that do not necessarily reflect the realities of the societies for which they are intended.⁸³

Therefore, without research-based evidence of the needs of children deprived of their family environment, there is a danger of formulating policies and adopting practices that do not meet the needs of these children, and which will lack support by the community in which they are to be implemented. One of the problems encountered during this study was the absence of reliable data or information on children deprived of their family environment in recent years in

⁸¹ See Mnisi and Botha, Factors Contributing to the Breakdown of Foster Care Placements, 241–42.

⁸² Julie Littell and Aron Shlonsky, Towards Evidence-Informed Policy and Practice in Child Welfare, *Research on Social Work Practice* 20, no. 6 (2010): 725.

⁸³ Keebet von Benda-Beckmann, The Practice of Care: Social Security in Moslem Ambonese Society, in *Remaking Maluku: Social Transformation in Eastern Indonesia*, ed. David Mearns and Chris Healey, Special Monograph 1 (Darwin: Northern Territory University: Centre for South East Asian Studies, 1996), 121, 134.

Tanzania. Consequently, it has not been easy to discern the current situation of such children and the measures adopted to ensure their protection and the enjoyment of their right to alternative care. For Tanzania to establish a functioning foster care system, investing in research related to issues surrounding and affecting children needing alternative care and their protection is inevitable. Below, I discuss two main areas that would require research to facilitate the establishment of an effective foster care system.

7.3.1.1. The situation and profile of children deprived of their family environment

It is impossible to effectively protect children deprived of their family environment without a clear understanding of their specific circumstances and needs. There appears to be an unconscious assumption that placing vulnerable children in children's homes is sufficient to protect them. In most cases, the realities of the children deprived of their family environment remain unknown or superficially understood, hindering the possibility of establishing an effective protection system. There is a need to invest in research to ascertain the profile of children deprived of their family environment in Tanzania. Research is essential to create up-to-date disaggregated statistics and data on these children showing their age, causes of deprivation, family status and ensuing needs. These factors play an important role in determining the appropriate alternative care option for each child depending on his or her circumstances and realities.⁸⁴ For instance, it is not enough to assume that children are deprived of their family environment due to parents' death, poverty, abandonment, neglect or abuse without details to explain the extent to which these factors have contributed explicitly to such deprivation. There should be a national research initiative aimed at gaining a more profound understanding of these problems.

In Tanzania, research on children deprived of their family environment has been limited. Even where research has been done, it has hardly influenced the formulation of policies and practices related to such children. It is high time to give more attention to research in this area. National research on the situation and profile of children deprived of their family environment or those at risk of losing their family environment will provide a research-based foundation for assessing and reforming the existing child protection system to ensure appropriate protection of these children. In conducting this kind of research or any other research related to children deprived

⁸⁴ See paras 48-50 of the CRC Committee General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child (art 4, 42, 44 para 6) of 2003. Also, part 6.4 of the African Committee of Experts on the Rights and Welfare of the Child General Comment No. 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (art 1) and Systems Strengthening for Child Protection of 2018.

of their family environment, it is essential to involve them and invite them to share their experiences of the alternative care system.⁸⁵

7.3.1.2. The effectiveness and sufficiency of the existing alternative care options

It is not uncommon to hear people wondering why one would devote one's time to making a case for foster care to protect children deprived of their family environment in Tanzania. The majority of Tanzanians strongly believe that care by relatives is the best solution for children whose parents cannot take care of them. This mentality is very common despite the fact that this traditional care system for children has changed over time due to changing family and economic circumstances, as discussed above.⁸⁶ Furthermore, one respondent during field research asserted that foster care as known in the Western world could not be implemented in Tanzania due to the different cultural, social, political, and economic contexts.⁸⁷ There is a need for concrete research-based evidence to inform policy makers and implementers, and to examine whether these assertions have any basis in the current times. Alber and others, in their book on child fostering⁸⁸ in West Africa, state:

“Changing phases in peoples’ life-courses usually go along with changes in their social positioning. Such changes often make people change their attitudes towards child fostering. (...) child fostering is embedded not only in individual life-courses but also in specific social contexts and historical times.”⁸⁹

Further, there is a need to conduct exploratory and empirical research at the national and local levels on the effectiveness and sufficiency of the existing alternative care options and their place in enhancing the protection and enjoyment of the rights of children needing alternative care. For instance, I find it compelling to have national-wide research to assess the current situation of kinship care as this is often used as an excuse for not developing other family-based

⁸⁵ See Rwezaura, *The Value of a Child Marginal Children and the Law in Contemporary Tanzania*, a research that marginalised children were involved as respondents.

⁸⁶ See section 3.2.2 of this study.

⁸⁷ Interview conducted with a practitioner in the field of family and child law in Dar es Salaam on 18/01/2019.

⁸⁸ Erdmute Alber, Jeannett Martin, and Catrien Notermans, Introduction, in *Child Fostering in West Africa: New Perspectives on Theory and Practices*, ed. Erdmute Alber, Jeannett Martin, and Catrien Notermans (Boston and Leiden: BRILL, 2013), 5. The authors use the term child fostering to mean “a social practice allowing or obliging children to move to a household other than that of their biological parent(s) and to stay there for long periods of time.”

⁸⁹ Alber, Martin, and Notermans, 11, 12. See also a detailed discussion of the influence of life-courses and social changes in care practices in Franz von Benda-Beckmann and Keebet von Benda-Beckmann, *Coping with Insecurity*, in *Coping with Insecurity: An “Underall” Perspective on Social Security in the Third World*, ed. Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Hans Marks, 2nd ed. (Indonesia & Netherlands: Pustaka Pelajar & Focaal Foundation, 2000), 7–31.

alternative care options.⁹⁰ Through research, we can assess the strengths and weaknesses of care by relatives in the present age. Research would also provide a basis for evaluating the validity of beliefs or assertions on the place of kinship care or the viability of other forms of family-based care. Also, comprehensive research on the quality of care and sufficiency of places in children's homes is needed to ascertain the care situation in these homes.

While this study has examined the law and practice of foster care under its legal and policy aspects, there is also a need to conduct sociological research on foster care to ascertain society's willingness and opinion in order to implement foster care effectively. Foster care cannot be implemented without having families ready to become foster carers and open the doors of their homes to welcome children needing alternative care. Sociological research would help to reveal the degree of understanding and readiness of non-relatives to foster children, and to identify the prospects of foster care by relatives under the supervision of relevant state authorities.

Research also needs to be conducted beyond the borders of Tanzania to learn from experiences of the law and practice of foster care in other parts of the world, especially in other African countries.⁹¹ This study has revealed a limited understanding of foster care as an alternative care option in Tanzania; hence its use only to fulfil the requirements for adoption. Legal and sociological research in other countries⁹² would help reveal the multiple uses of foster care and the emerging dimensions of foster care as an alternative care option and determine what would be viable in the context of Tanzania. Moreover, learning from the successes and failures/challenges of other countries that practice foster care would assist Tanzania in developing effective frameworks for establishing foster care. For instance, Malta has managed to implement foster care amidst challenges, some of which are similar to those in Tanzania, which were once regarded as obstacles to practising foster care.⁹³ In Malta, kinship care and the large size of Maltese families, *inter alia*, were regarded as reasons for the limited use of foster

⁹⁰ See for instance Rwezaura, *The Value of a Child: Marginal Children and the Law in Contemporary Tanzania*, a similar study done for a few selected areas in Tanzania.

⁹¹ A comparative study of the law and practice of foster care in Mainland Tanzania and in Zanzibar is essential.

⁹² Or the identification and use of existing research, where available. For instance, see the following studies from Ghana, South Africa and Zimbabwe: Kwabena Frimpong-Manso, Ishmael Tagos, and Stella Mawusi Mawutor, *Experiences of Formal Foster Parents in Ghana: Motivations and Challenges*, *Southern African Journal of Social Work and Social Development* 32, no. 1 (2020): 1–18; Annelie Böning and Sandra Ferreira, *An Analysis of, and Different Approach to Challenges in Foster Care Practice in South Africa*, *A Professional Journal of the Social Worker* 49, no. 4 (2013): 519–43; Douglas Gasva and Ngoninzashe Mutanana, *An Exploration of Challenges Faced by Foster Children in Hwange District of Matebeleland North Province in Zimbabwe: Quest for Improved Care for Children in Foster Care*, *North Asian International Research Journal of Social Science and Humanities* 2, no. 4 (2016): 3–17; George A Muchaniko, Memory Mpambela, and Taravinga Muzingili, *The Time for Reflection: Foster Care as a Child Protection Model in Zimbabwe*, *African Journal of Social Work* 8, no. 2 (2018): 38–45.

⁹³ Olivia Galey-Seychell, *The Development of Foster Care within the Maltese Islands: Understanding the Local Scenario*, *Symposia Melitensia* 9 (2013): 124.

care. However, through some reforms, Malta now practices foster care for children deprived of their family environment.⁹⁴

Research into the alternative care system of Tanzania needs to adopt a holistic approach focusing on all services aimed at protecting and supporting children deprived of their family environment. An inquiry into the weaknesses and strengths of such services is the necessary foundation of any reform of the alternative care system. I cannot express the importance of research in this field in better words than those used by Patrick McCarthy (the then vice president responsible for system and service reform of the Annie E. Casey Foundation) in his foreword to a book on child protection:

“This kind of longitudinal survey and analysis is essential if we want to develop more effective programs and policies for the children and families served by child protection agencies and their community partners. These agencies must have current, high-quality data and research as well as the capacity to use them. Research must inform the education and training of frontline workers, supervisors and managers. Policymakers, parents, community members, advocates and researchers require accurate information about children and families and which approaches are most effective.”⁹⁵

7.3.2. Reforming the legal framework on alternative care

As discussed above (section 7.2.1.), the legal framework is an essential component in protecting children deprived of their family environment and enhancing their right to alternative care. Wulczyn and others use the following words to explain the significance of a normative framework in child protection:

“The framework (normative) helps define the formal boundaries of the system and legitimate the work of the system in a given social, political and economic context. The framework also establishes the basis for accountability and forms the basis for making claims of duty bearers on behalf of children. The normative framework also connects the child protection system to the broader system of social protection by drawing attention to the interdependence.”⁹⁶

⁹⁴ Galey-Seychell, 128–39.

⁹⁵ Ron Haskins, Fred Wulczyn, and Mary Bruce Webb, eds., *Child Protection: Using Research to Improve Policy and Practice* (Washington, D.C: Brookings Institution Press, 2007), vii–viii.

⁹⁶ Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations*, 26.

This study has extensively described the legal and institutional frameworks regulating the protection of children deprived of their family environment generally; and it has specifically described and analysed the framework regulating foster care services.⁹⁷ The study has unveiled these frameworks' strengths and weaknesses, revealing the need to reform them to enhance the protection of children deprived of their family environment. Based on the findings of this study which show the need for a holistic approach, I am making a call to reform the legal and institutional framework of the whole alternative care system and not of foster care alone. In view of the challenges relating to the legal framework of foster care discussed in chapter six, it is unlikely that foster care as envisaged in the law and analysed in this study will find a place in the continuum of alternative care services provided in Tanzania. Thus, deliberate efforts and initiatives are required to reform the legal and institutional framework regulating alternative care services for children.

7.3.2.1. Concretising the right to alternative care under the LCA

The analysis in this study of the legal framework for child protection shows that Tanzania lacks any concrete provision in the law on the right to alternative care for children deprived of their family environment. Yet, in other African countries like South Africa, Kenya and Uganda, this right is enshrined in the bills of rights in their Constitutions.⁹⁸ While the bill of rights of the Tanzanian Constitution contains no group rights, part II of the LCA provides for the rights and welfare of the child. However, this part of the LCA (on the Rights and Welfare of the Child) lacks a concrete provision on the right to alternative care for all children deprived of their family environment. Therefore, there is a need to amend sec 7 of the LCA (on the right to grow up with one's parents) to explicitly state that a child deprived of his or her family environment for any reason has a right to appropriate alternative care provided by the state. Sec 7(2)(3) of the LCA, which implicitly embraces the right to alternative care for children, is narrow in scope because it only deals with those children separated from their parents or guardians by a court or a competent authority.⁹⁹ This provision leaves out children without family care due to abandonment, being lost or the parents' death, as discussed in this study.

Moreover, the LCA should be clearer on the circumstances in which a child needs alternative care or when a child should be placed in alternative care. Reg 59(1) of the Child Protection Regulations, 2014 tends to fill this gap by giving categories of children in the care of a local government authority. However, it is unclear whether a child removed to a place of safety under

⁹⁷ See chapters three to five of this study.

⁹⁸ See section 3.1.1 of this study.

⁹⁹ See sections 3.2.3. and 4.3. of this study for more details on sec 7 of the LCA.

reg 22 of the Child Protection Regulations, 2014 is a child in alternative care, since reg 59(1) of the Child Protection Regulations, 2014 does not include it.¹⁰⁰ An unequivocal provision on children in alternative care like sec 167 of the Children’s Act of South Africa¹⁰¹ is needed in the LCA, the principal legislation on children’s rights and protection. Sec 167 of the South Africa Children’s Act states as follows:

“167. Alternative care

- (1) A child is in alternative care if the child has been placed-
- (a) in foster care;
 - (b) in the care of a child and youth care centre following an order of a court of this Act or the Criminal Procedure Court Act, 1977 (Act 51 of 1977); or
 - (c) in temporary safe care.”

This provision gives a clear statement of what is alternative care in South Africa. This provision can be compared with sec 18 of the LCA (titled: “care order of [the] court to be of benefit to [the] child”) which provides:

“(3) The social welfare officer shall take custody of the child and determine the most suitable place for the child[,] which may be-

- (a) an approved residential home;
- (b) a fit person;
- (c) an approved foster parent in accordance with the foster-care placement rules under this Act; or
- (d) at [the] home of a parent, guardian or relative.”

As noted above in section 4.3, the provisions regarding alternative care options in the laws of Tanzania should be amended to clarify the ambiguities discussed in this study. It is challenging to protect children needing alternative care without explicit legal provisions on the right to alternative care and the available alternative care options. Moreover, there should also be provisions in the laws on early intervention to prevent the entrance of children into alternative care by providing appropriate support services to families and children.¹⁰²

¹⁰⁰ In this study a child removed to a place of safety is regarded as a child in need of alternative care. See part 4.2.1 of this study.

¹⁰¹ Children’s Act 38 of 2005 as amended (South Africa).

¹⁰² See an example under sec 26 of the Children’s Act, 2011 of Zanzibar.

7.3.2.2. Creating coherence and bridging the laws on the alternative care system

Section 6.6 of this study points out that the lack of coherence and coordination among the laws and regulations related to alternative care services is one of the challenges affecting foster care. Therefore, it is crucial to revisit and harmonise the LCA and its regulations to create coherence and a common goal in protecting children needing alternative care. For instance, the LCA lacks general principles to guide all actions related to child protection, necessitating the inclusion of these principles in specific subsidiary regulations such as the Child Protection Regulations, 2014 and the Children's Homes Regulations, 2012.¹⁰³ It is important to amend the LCA to include general principles to guide persons, institutions and authorities in charge of child protection.¹⁰⁴ For instance, most of the contents of part II (general principles and standards) of the Child Protection Regulations, 2014 should have been in the principal legislation instead of putting it in the subsidiary legislation. The absence of these principles in the LCA has contributed to their being included in several pieces of subsidiary legislation.¹⁰⁵

Moreover, amendments to the LCA and the subsidiary legislation related to the alternative care system are necessary to reduce the replication of various processes necessary for protecting children deprived of their family environment. Sections 6.6.1 and 6.6.2 show the complexities associated with the provisions on social investigation and care plans in the Foster Care Placement Regulations, 2012 and the Child Protection Regulations, 2014. It is essential to reassess the provisions related to the protection of children needing alternative care, to determine which processes and actions apply to all children before their eventual placement in appropriate alternative care, and to include them in one instrument. It is upon the state to decide where such processes should be placed, either under the LCA or in the Child Protection Regulations, 2014, which is the umbrella subsidiary legislation on child protection. However, I would recommend keeping the provisions on these general issues in the principal legislation rather than in the subsidiary legislation to give them the weight they deserve. Generally, the processes described in section 3.5 of this study ought to have been in the LCA.¹⁰⁶

In addition to the suggestions given in section 7.3.2.1, the LCA should be restructured and rearranged by including a part titled "alternative care".¹⁰⁷ This part should provide for all specific matters relating to children in alternative care, such as what circumstances may lead to placing a child in alternative care, how to handle a child deprived of a family environment, and

¹⁰³ See section 3.4. of this study.

¹⁰⁴ For example, see chapter 2 (General Principles) of the Children's Act of South Africa.

¹⁰⁵ See reg 3 of the Child Protection Regulations, 2014 and reg 2 of the Children's Homes Regulations, 2012.

¹⁰⁶ Chapter 9 (child in need of care and protection) of the Children's Act of South Africa offers a good example.

¹⁰⁷ For instance, see chapter 11 (Alternative Care) of the Children's Act of South Africa,

so on.¹⁰⁸ The various parts of the LCA on different alternative care options could be made sub-parts of the general part on alternative care. Amendment and restructuring of the LCA in the manner suggested would help to create coherence and harmony between the existing alternative care options. For instance, the provisions related to placing a child in a particular alternative care option would no longer be necessary in the parts dealing with specific alternative care options. The logic behind this is the necessity principle which requires a child deprived of his or her family environment to be placed in the most suitable alternative care option.

7.3.2.3. Reshuffling the legal and institutional framework on foster care

In chapter six, while discussing the challenges affecting the implementation of foster care in Tanzania, I made proposals for necessary changes in the law. These include not limiting foster care to care provided by non-relatives, defining the objectives of foster care in the LCA, and specifying the types of foster care services that Tanzania wishes to establish and implement.¹⁰⁹ Based on the findings of this study, three types of foster care can be suggested: non-kinship foster care, kinship foster care and fostering for adoption.¹¹⁰ The first two types could be short- or long-term foster care, depending on the child's foster care needs. This would be one way of incorporating placement with a fit person into the framework of foster care.¹¹¹ Simultaneously, including fostering for adoption as one type would help break the unnecessary linkage between foster care and adoption.¹¹² These recommendations would necessitate reforming and amending the provisions of LCA on foster care. For instance, there is a need to reduce part IV (foster care and placements)¹¹³ and part VI (fosterage and adoption) to only one part on issues related to foster care. Chapter 12 of the Children's Act of South Africa provides a good illustration of this. It contains provisions clarifying what amounts to foster care,¹¹⁴ different forms of foster care¹¹⁵ and the purposes of foster care.¹¹⁶

Thus, the law on foster care should be amended with the aim of establishing a solid institutional framework for the foster care system. As indicated in section 5.5.1, the Commissioner for social

¹⁰⁸ For instance, most of the provisions of part XI of the Child Protection Regulations, 2014 could form part of the LCA.

¹⁰⁹ See sections 6.1. and 6.2 of this study.

¹¹⁰ For instance, sec 77(5) of the Children's Act (Zanzibar) uses the term "pre-adoptive placement" for fostering for adoption. Such a provision makes a clear distinction between fostering for adoption and foster care as a stand-alone alternative care option.

¹¹¹ See section 6.5. of this study on the problem of placement with a fit person as a distinct alternative care option.

¹¹² See section 6.2.2 of this study. Under sec 77(5) of the Children's Act of Zanzibar this kind of fostering is referred to as pre-adoptive placement.

¹¹³ Under the original 2009 version of the LCA this part was titled Foster Care Placement; it is not certain if the title foster care and placements under the 2019 revised edition was intended or not.

¹¹⁴ Sec 180(1)(2) of the Children's Act of South Africa.

¹¹⁵ Sec 180(3) of the Children's Act of South Africa.

¹¹⁶ Sec 181 of the Children's Act of South Africa.

welfare and the social welfare departments in the local government authorities are mandated to implement foster care services. However, this study has revealed that this current institutional framework is inadequate, as the law (the LCA and the Foster Care Placement Regulations, 2012) is unclear regarding some functions, such as those related to recruitment and retention of foster carers.¹¹⁷ Moreover, the law delegates all the tasks related to foster care, such as recruiting foster carers, determining foster placements, social investigations, supervision of foster placement and termination of placements, to the social welfare departments without clarifying who does what. This situation is likely to compromise the quality of foster care services. Therefore, there is a need to establish a new framework that attributes different functions to particular persons or institutions.

Let me use the 2016 amendments to the Children's Act of Ghana to illustrate this point.¹¹⁸ These amendments reform the law on foster care in Ghana by, among other things, establishing a new foster care institutional framework that was not in the Children's Act of 1998. At the national and regional level, the department of social welfare has overall responsibility; however, the law requires that there should be a special section within the department to deal with foster care services. At the national level, the law requires the establishment of the Foster Care Services Unit,¹¹⁹ which is composed of three parts: a secretariat,¹²⁰ an interdisciplinary committee to provide foster care related services,¹²¹ and a multi-disciplinary review committee which is the highest complainant body.¹²² At the regional level, the law requires the establishment of a Foster Care Placement Committee, which is in charge of handling foster issues, including recommending the suitability of eligible foster parents to foster a child, determining the eligibility of a child to be fostered, and addressing issues related to the placement.¹²³ Moreover, the law also allows accreditation of foster care agencies to provide certain prescribed foster care services, such as training foster parents, or supervising and monitoring the performance of foster families.¹²⁴ Generally, the current law regulating foster

¹¹⁷ See section 6.3 of this study.

¹¹⁸ The Children's Act 560 of 1998 of Ghana was amended by the Children's (Amendment) Act 937 of 2016.

¹¹⁹ See sec 70(1) of the Children's Act of Ghana.

¹²⁰ Sec 70(2)(a) of the Children's Act of Ghana.

¹²¹ Sec 70(2)(b) of the Children's Act of Ghana. See reg 58 of the Foster Care Regulations, 2018 (Ghana) on the composition and reg 59 of the Foster Care Regulations, 2018 (Ghana) on the functions.

¹²² Sec 70(2)(c) of the Children's Act of Ghana. See reg 60 of the Foster Care Regulations, 2018 (Ghana) on composition and reg 61 of the Foster Care Regulations, 2018 (Ghana) on the functions.

¹²³ See secs 67 and 68 of the Children's Act of Ghana. See also reg 15 of the Foster Care Regulations, 2018 of Ghana on more functions of the committee.

¹²⁴ Sec 63(1) of the Children's Act of Ghana. See also reg 7-11 of the Foster Care Regulations, 2018 of Ghana.

care in Ghana provides a reasonably comprehensive institutional framework with a clear distribution of functions and responsibilities of each body.¹²⁵

One thing to learn from the Ghanaian example is that the foster care service, if not all alternative care services, can be decentralised. As described above in chapter five,¹²⁶ the provision of foster care services in Tanzania is highly centralised and adopts a top-down approach, where the Commissioner for social welfare is in charge of major activities such as applications by potential foster carers and placement of children with foster parents. The law should be amended to empower the social welfare departments at the local government level to receive applications and determine the eligibility of foster parents. The Commissioner for social welfare could retain the power to issue approval of eligible foster parents following the recommendation of the local social welfare departments.¹²⁷ Moreover, the social welfare departments at the local government level should also be given powers to handle the placement of children with foster parents. Decentralisation of foster care services would be one step towards mainstreaming placement with a fit person within the foster care system. One reason for implementing the fit person programme, which I have regarded in this study as ‘foster care in disguise’, is the need to circumvent the powers concentrated in the Commissioner for social welfare regarding foster care services.¹²⁸

7.3.3. Establishing foster care grants and related support services

As discussed above in section 7.2.4.2, the law on foster care is silent on the question of financial support to facilitate foster care placements. However, there is a need to provide foster care grants to facilitate the care and maintenance of children placed in foster care and this is an essential component of building a successful foster care system.¹²⁹ The law should be amended to include a provision on how foster families are to be assisted in providing the day-to-day needs of children placed in their care. Sec 72 of the Children’s Act of Ghana requires the establishment of a foster care fund to provide support for foster parents and cover the costs of foster care processes.¹³⁰ Sec 75 of the Children’s Act of Ghana specifies possible sources of money for the fund:

¹²⁵ For more details, see Republic of Ghana, Foster Care Operational Manual. Also, the Foster Care Regulations, 2018 of Ghana provides a detailed description of the functions of these institutions and their relationship.

¹²⁶ See section 5.5. of this study.

¹²⁷ See reg 12-15 of the Foster Care Placement Regulations, 2018 of Ghana on application to become a foster parent. And reg 17 of the Foster Care Placement Regulations, 2018 of Ghana on the function of the national department responsible for social welfare to issue licences to eligible foster parents.

¹²⁸ See section 6.5 of this study for more details.

¹²⁹ See sec 8 of the Social Assistance Act No. 13 of 2004 of South Africa which provides for foster child grants.

¹³⁰ Sec 73 of the Children’s Act of Ghana. See also sec 73 on the uses of the fund to achieve its objectives. See also regs 74-75 of the Foster Care Regulations, 2018 (Ghana) for more details on the foster care fund.

“The sources of money for the fund are

- (a) moneys provided by the Minister responsible for finance;
- (b) moneys received from internally generated funds;
- (c) moneys received from funding raising activities;
- (d) moneys received from non-governmental organisations;
- (e) donations, grants and gifts; and
- (f) any other moneys approved by Parliament.”

Such a provision in the law is important to add weight to the need to support foster care placements. It can also influence implementation on the part of institutions charged with management of the fund.

Reg 14 of the Foster Care Placement Regulations, 2012 needs to be amended to concretise support for foster families, foster children¹³¹ and, where possible, the children’s families to ensure successful foster placements.¹³² For instance, there is a need to include training of foster carers before approval and, where necessary, training should continue throughout the placement to equip foster carers with information and knowledge about fostering.¹³³ Generally, the provisions of the law on the support of foster placements should be amended to concretise the nature of support services for all interested parties, i.e. foster families, foster children and the children’s biological families.¹³⁴ As discussed above in section 7.2.4, support of foster care placements is an essential attribute of a successful foster care system.

7.3.4. Sensitisation and awareness-raising on foster care

As noted above,¹³⁵ foster care cannot be implemented or practised without families or individuals willing to open the doors of their homes to children in need of alternative care.¹³⁶ Thus, recruitment of foster carers is one of the key elements of a foster care system. However, successful recruitment of individuals to become foster carers depends on the extent of their understanding of the importance of these services and the need to protect and support children deprived of their family environment. Unfortunately, besides the limited knowledge of foster

¹³¹ See reg 53 of the Foster Care Regulations of 2018 (Ghana) on support for a child in foster care, including sponsored education and coverage under the national health insurance scheme.

¹³² See reg 53 of the Foster Care Regulations, 2018 (Ghana) on support services to foster children, foster parents and the child’s family.

¹³³ See reg 16 and 17 of the Foster Care Regulations, 2018 (Ghana).

¹³⁴ See regs 52 and 53 of the Foster Care Regulations, 2018 of Ghana on support services and support for a child in foster care respectively. See also reg 39 of the Foster Care Regulations of Ghana on the support to be provided to children to prepare them for independent living.

¹³⁵ See section 7.2.3 of this study.

¹³⁶ See also Family for Every Child, Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programmes, 9.

care by the social welfare officers who are in charge of implementing foster care, it also came out clearly during field research that the Tanzanian society is not aware of foster care.

Any efforts taken to establish and provide foster care services need to go hand in hand with strategies to sensitise the general public not only on foster care but also on the existence of children deprived of their family environment and the need to protect them.¹³⁷ Informal conversations that I had with friends, family and colleagues during my field research revealed that there is still a limited understanding of this issue, and a belief that there cannot be children without parental care who have no relatives to care for them. Therefore, initiatives are necessary to raise awareness and understanding among the general public of the nature and multifaceted needs of children deprived of their family environment. For instance, I find it necessary to start educative and awareness-raising programmes to help society understand that not every child who is deprived of the care of his or her parents automatically secures a place with a relative to fill the space left by the parents. In other instances, care by relatives or kinship care may not be the most suitable alternative care to meet the needs of the child. In short, society must understand that such children have different needs, and that different services are required to meet their needs without unnecessary generalisations. Society needs to be made aware of the available care options, and how these options differ, interact and complement each other.

Society needs to be made aware of the importance of having foster care and other family-based care options in the continuum of care services already existing in Tanzania, and that individual members of society need to become foster carers in order to make foster placements possible. Individuals need to understand what is associated with or expected from foster carers and the legal implications of foster care. Importantly, the nobility of the role of foster carers needs to be made clear, together with information concerning the kind of support that those interested in becoming foster carers are likely to get. Information on the procedures involved in the recruitment and approval of foster carers should be made accessible to members of the public through different platforms, such as the website of the ministry, or the offices of local authorities and other organisations engaged in activities related to the care of children deprived of their family environment.¹³⁸

There are many ways to reach different members of society and to raise awareness and understanding of the need to protect children deprived of their family environment. For instance, local government authorities and non-governmental organisations could initiate

¹³⁷ Family for Every Child, 9.

¹³⁸ See also Frimpong-Manso, Tagos, and Mawutor, *Experiences of Formal Foster Parents in Ghana: Motivations and Challenges*, 13.

community outreach programmes to educate society on the services needed to enhance and protect the welfare of children deprived of their family environment. Special TV and radio programmes could also be organised for the same purpose. Online platforms, including social media forums, could help to raise awareness of these issues. It would also be possible to create a national foster care or alternative care month, day or week during which campaigns and programmes would be organised to raise awareness of children deprived of their family environment and their right to alternative care.¹³⁹

7.3.5. Political will to invest in foster care

Art 20 of the CRC and art 25 of the ACRWC require states to ensure the provision of alternative care services to children deprived of their family environment.¹⁴⁰ Regarding foster care in Tanzania, the pressing question is how willing is the government to support and invest in the establishment of foster care services? The provision of formal alternative care services is mainly left to non-state organisations which are funded by donors and private individuals in and outside Tanzania.¹⁴¹ The government's actions regarding the protection of children needing alternative care are limited to adopting legislative and administrative measures to regulate and coordinate the direct provision of alternative care services. The government, both central and local, is not active in establishing alternative care options in the country; it is only recently that the government has accepted the placement of children with fit persons as a family-based alternative care option.¹⁴² Apart from the one national children's home established in Kurasini¹⁴³ and adoption-related foster care services, the role of the government in the provision of alternative care services is limited.

The government's political willingness to invest in establishing a functioning foster care system in Tanzania is essential for several reasons. Resources are needed to facilitate different activities related to foster care, including raising community awareness, recruiting foster carers, and supporting foster care placements. The question is, is the government willing to substitute children's homes with family-based alternative care services like foster care? While children's

¹³⁹ See also UNICEF and Better Care Network, *An Analysis of Child Care Reform in Three African Countries: Summary of Key Findings*, (Better Care Network and UNICEF, 2015), 15,19.

¹⁴⁰ See sections 2.1.4 and 2.2.2 of this study.

¹⁴¹ See section 4.3.4 of this study.

¹⁴² See section 4.3.4 of this study.

¹⁴³ In 2020/21 the National Children's Home at Kurasini had 75 children (33 boys and 42 girls) as noted by the Minister of Health, Community Development, Gender, Elderly and Children in the budget speech to Parliament. See Hotuba ya Waziri wa Afya, Maendeleo ya jamii, Jinsia, Wazee na Watoto Mh. Ummu Ally Mwalimu, Kuhusu Makadirio ya Mapato na Matumizi ya Fedha kwa Mwaka 2020/21, April 2020 Dodoma at p.141. The speech (in Kiswahili) is available at <https://www.moh.go.tz/en/budget>.

homes are mainly financed by non-state organisations, an effective foster care system would require the investment of government resources.

The establishment and adoption of services necessary to protect the right to alternative care depend on the extent of the resources mobilised. Unless foster care services are regarded as essential by the government, there is little chance of mobilising sufficient resources in terms of time, personnel and funding. If it reaches a point where foster care or other family-based alternative care options are given priority over children's homes, it would not be hard to explore feasible ways of establishing foster care services.

As discussed above (section 6.9), reg 7(3) of the Child Protection Regulations, 2014 states that the head of the social welfare department may reach an agreement with registered non-governmental organisations for the provision of children's services, including fostering services, and organise the recruitment, training and monitoring of foster parents and families. This provision of the Child Protection Regulations reveals that the government is not expected to discharge all the responsibilities alone. Similar to the way children's homes are operated by non-governmental organisations, such organisations could also provide foster care services, since the law allows government authorities to make agreements with registered non-governmental organisations to provide such services on their behalf. Therefore, the government needs to explore this option and adopt an appropriate regulatory framework to allow non-governmental organisations to provide foster care services.¹⁴⁴

A lot of what it takes to establish a foster care system relies on the role played by the government. Appropriate legal and institutional frameworks to regulate the implementation of foster care can be put in place by a willing government that is able to see the strengths and weaknesses of the current frameworks and call for necessary reforms. Raising public awareness and understanding of foster care also depends on the willingness of state authorities to take the measures required in collaboration with members of the society. Without the necessary political will to appreciate the role of foster care in the protection of children deprived of their family environment, it will be hard to establish a functioning foster care system. It all starts with acknowledging the need for well-established services to promote and enhance the rights of children deprived of their family environment.¹⁴⁵

¹⁴⁴ See reg 7-11 of the Foster Care Regulations, 2018 of Ghana on foster care agencies and the extent of their involvement

¹⁴⁵ See also Family for Every Child, *The Place of Foster Care in the Continuum of Care Choices: A Review of the Evidence for Policy Makers*, 18.

7.3.6. Professionalising, training, and strengthening the social service workforce

The UNICEF Guidelines to Strengthen the Social Service Workforce for Child Protection note that a strong social service workforce with a clear mandate to protect children is a vital element of the child protection system.¹⁴⁶ The guidelines go further to remind those involved in child protection that no system can function effectively without the individuals who make that system come to life.¹⁴⁷ This makes it clear that an effective child protection system requires a qualified, dedicated and well-supported workforce to discharge the challenging tasks associated with the protection of vulnerable children. The centrality of social welfare officers in providing alternative care services and protecting children deprived of their family environment makes a compelling case to advocate for improving the competencies and understanding of this workforce if foster care is to be established successfully in Tanzania.

Tanzania needs to take deliberate strategic measures to improve the competency and quality of the social welfare workforce charged with protecting children in need of care and protection. As it appears in the current practice, there is a lack of specialisation in the social welfare departments.¹⁴⁸ Social welfare officers are expected to master all the tasks that are under the mandate of the social welfare department. Contrary to the requirements of the Child Protection Regulations, which require local governments to establish social welfare departments to safeguard and promote the welfare of children in need of care and protection, the existing social welfare departments deal with all affairs relating to social welfare.¹⁴⁹ This practice has led to the absence of social welfare officers or social workers who are well trained in the protection of children deprived of their family environment and the related alternative care services. Social welfare officers are superficially trained on issues relating to child protection and care, let alone issues relating to foster care. Most of them learn about children protection services while discharging their duties after being employed.¹⁵⁰

More education and training strategies should be developed to create a pool of social workers or social welfare officers with appropriate skills and competencies to deal with children deprived of their family environment and to improve essential services for protecting and caring

¹⁴⁶ UNICEF, Guidelines to Strengthen the Social Service Workforce for Child Protection, (UNICEF, New York, 2019), 4.

¹⁴⁷ UNICEF, Guidelines to Strengthen the Social Service Workforce for Child Protection, 5.

¹⁴⁸ See section 6.7 of this study.

¹⁴⁹ Reg 6 of the Child Protection Regulations, 2014. See also Ministry of Health, Community Development, Gender, Elderly and Children, Muongozo wa Majukumu ya Maafisa Ustawi wa Jamii, on the responsibilities of the social welfare department at different levels of government.

¹⁵⁰ Interview with a social welfare officer at Bunju Ward in Kinondoni Municipal Council in Dar es Salaam conducted on 09/01/2019.

for this group of children. Long- and short-term strategies for educating and training the social welfare workforce, both professionals and paraprofessionals, need to be developed to build a strong and competent workforce for foster care and other alternative care services. In addition, universities and colleges should take initiatives to introduce specialised and intensive courses or programmes on child protection and care, including components or modules with a focus on children deprived of their family environment and alternative care services.¹⁵¹

Limited training in social work and social welfare, which has led to the recruitment of other professionals, especially from sociology, to perform social work tasks, underscores the need for short preparatory courses to equip them with the necessary social work skills.¹⁵² Some of these short courses should focus specifically on protecting children deprived of their family environment and services necessary for their protection, including foster care. Continuing training for all those engaged in the provision of these services should be designed to ensure understanding of the law and provide updates on the laws, regulations and principles governing the protection of children and provision of alternative care services.¹⁵³

The UNICEF Guidelines to Strengthen the Social Service Workforce for Child Protection identify planning, developing, and supporting the social service workforce as key strategies for ensuring its improvement.¹⁵⁴ Adopting these strategies entails assessing the strengths and weaknesses of the current social welfare workforce in charge of child protection and determining what needs to be done to develop and support the workforce in the given context. Therefore, Tanzania needs to assess the current workforce regarding its adequacy and effectiveness in protecting children and providing essential services, including foster care. Without ascertaining the current situation of the workforce in terms of its strengths and weaknesses, it might not be easy to provide appropriate support to the social welfare officers in charge of children deprived of their family environment.

Moreover, efforts need to be taken to recruit more social welfare officers and parasocial workers to be able to discharge the duties vested in them with the expected quality and standards. The limited number of social welfare officers has resulted in overloading the members of this workforce, making it difficult for them to function effectively.¹⁵⁵ Efforts to improve their

¹⁵¹ See also United Republic of Tanzania, *Assessment of the Social Welfare Workforce in Tanzania (Final Report)*, 23–24.

¹⁵² Most of the social welfare officers interviewed during field research were not professional social workers.

¹⁵³ See also United Republic of Tanzania, *Assessment of the Social Welfare Workforce in Tanzania (Final Report)*, 36.

¹⁵⁴ UNICEF, *Guidelines to Strengthen the Social Service Workforce for Child Protection*, 7.

¹⁵⁵ See the discussion in section 6.7.3.

competency and skills should go hand in hand with the recruitment of new social welfare officers or social workers and create room for specialisation within the workforce. Today social welfare officers are jacks of all trades in their departments, due to their insufficient number, which inhibits the possibility of having social welfare officers specifically in charge of child protection services.¹⁵⁶

These remarks apply to the entire social welfare workforce charged with child protection, and not specifically to foster care, due to the interconnectedness of child protection services and the need for strengthening the whole social welfare workforce. Empowering the entire workforce would have an impact on foster care services: efforts to strengthen and support the provision of foster care can be made in the broader framework of improving the social services workforce for the child protection system. In a working paper by Better Care Network and Global Social Services Workforce Alliance, it is stated that:

“A critical piece of care reform is an accountable, knowledgeable, skilled, and well supported social service workforce including a range of actors from the national to the community levels. Simply put, care reform cannot happen without a workforce that is aligned with the changes and competent to help carry them out, from national legislators and policymakers to educators and service implementers who provide direct care to children and their families.”¹⁵⁷

Thus, steps to promote and improve the practice of foster care in Tanzania must go hand in hand with measures to enhance the competency and skills of the social service workforce in charge of protecting children in need of alternative care.

7.4. Conclusion

The place and future of foster care in Tanzania depends on several factors, as elaborated above. It will take reforms in the legal and institutional framework to establish robust and promising foster care services within the alternative care system for children deprived of their family environment. The reforms also need to consider and factor in the challenges posed by the social, economic and cultural context of Tanzanian society. However, the state’s willingness to develop and strengthen foster care services stands at the core of all initiatives that need to be taken.

¹⁵⁶ Interview with a social welfare officer at Ilala Municipal Council in Dar es Salaam on 29/04/2018.

¹⁵⁷ Better Care Network and Global Social Service Alliance, Working Paper on the Role of Social Service Workforce Development in Care Reform, (IntraHealth International, 2014), 3.

Any reforms needed to establish a working foster care system depend on how far the government is willing to invest the required resources. If a point is reached where the government considers foster care an essential service to enhance the protection of children deprived of their family environment, that will be light at the end of the tunnel and the foundation of a strong foster care system in Tanzania. The findings of this study on the nature of foster care practices worldwide show that it all depends on the government and society to decide what kind of foster care services they want to establish and practise in Tanzania provided the basic principles and standards for providing alternative care to children are adhered to.

CHAPTER EIGHT: GENERAL CONCLUSIONS

The need for children to grow up in a family environment in an atmosphere of happiness, love and understanding has been the driving force for this study. The irrefutable reality that some children are either temporarily or permanently deprived of their family environment substantiates the need to recognise their right to alternative care as formulated in various international, regional and national legal instruments. Thus, the provision of appropriate alternative care constitutes an essential component of any child protection system and any initiative to promote children's rights. For children deprived of their family environment, alternative care services are at the core of any efforts to rescue them from such a plight and to enable them to enjoy their other rights.

This study was inspired by the over-institutionalisation of children deprived of their family environment in Tanzania and the limited use of family-based alternative care options, especially foster care. Thus, the study set out to assess to what extent the right to alternative care is anchored in the legal and policy frameworks of child protection in Tanzania, with a specific focus on foster care. The international and regional principles and standards guiding the provision of alternative care and the protection of children deprived of their family environment guided the analysis made in this study. This approach was adopted due to the obligation of states to protect children deprived of their family environment as formulated in the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), to which the United Republic of Tanzania is a state party. The United Republic of Tanzania is a union of two countries i.e. Mainland Tanzania (formerly Tanganyika) and Zanzibar. In this study, unless stated otherwise, the name Tanzania is used to refer to Mainland Tanzania only. However, the study, where necessary, makes reference to the laws of Zanzibar on the protection of children deprived of their family environment.

Fulfilment of the obligations emanating from these international instruments states parties must follow the principles and standards developed under these instruments or any other complementary guides or initiatives. Therefore, the analysis in this study necessitated starting with the international and regional principles and standards governing the provision of alternative care and the general protection of children deprived of their family environment. Besides this, Tanzania's economic, social and cultural realities were taken into account in analysing the legal framework regulating the provision of alternative care services to children. The entire study is built on the premise that providing children deprived of their family

environment with alternative care calls for a holistic approach towards child protection, taking the legal, economic, social and cultural factors of the given context into account.

8.1. The right to alternative care: international and regional standards and principles

The principles and standards related to children's right to alternative care are presented and analysed in chapter two. For this purpose, a study was made of the legal instruments which Tanzania has signed, ratified and domesticated: the CRC and the ACRWC. These two instruments reflect the generally accepted principle and practice that every child has a right to grow up in the care of his or her parents and family unless such care is not in the child's best interests. Moreover, states are required to ensure that parents and families are accorded the necessary support to enable them to discharge the responsibilities vested in them towards the children they beget. Thus, separation or removal of children from the care of their families should be a measure of last resort when all efforts to keep the child in his or her family have failed.

The right to alternative care, as captured under art 20 of the CRC and art 25 of the ACRWC and elaborated further in the UN Guidelines for the Alternative Care of Children, is a right aimed at ensuring the safety and protection of children who cannot remain in the care of their families or whose families are unavailable or unwilling to care for them. The right to alternative care is a remedy for children deprived of their family environment, which is essential for their growth, survival and development. The centrality of the family in children's development and welfare has led to the development of two main principles which can be derived from the UN Guidelines for the Alternative Care of children.

A child should only be placed in alternative care when necessary, and the alternative care option chosen should be the one that best suits their interests and needs. These are the necessity and suitability principles which must be considered when providing alternative care for children. These principles reflect the need to have a continuum ranging from prevention services to protection services and to establish various alternative care options to meet children's varying needs. In addition to these two key principles of alternative care, realisation of the right to alternative care requires adherence to further, more general principles, such as the child's right to life, survival and development, the best interests of the child, non-discrimination and child participation.

In providing alternative care for children who cannot remain in the care of their families, efforts should be made to ensure that alternative care provides children with a family-like substitute environment. Consequently, in providing alternative care, preference should be given to family-

based alternative care options over institutionalised care, which is associated with negative impacts on children's development and welfare. In principle, institutionalised care ought to be used as a measure of last resort and only if considered to be in the child's best interests. The deinstitutionalisation of alternative care services has been the subject of a continuing campaign demanding states to establish and maximise the use of family-based alternative care options such as foster care, kinship care, *kafalah* and adoption.

Generally, the discussion in chapter two on the right to alternative care under the international and regional child's rights framework reflects the need to adopt a holistic approach in realising the right to alternative care. Realisation of the right to alternative care requires establishing various alternative care options and adopting preventive and supportive measures to ensure that children do not unnecessarily enter and remain in out-of-home care. An ideal alternative care system for children should be part of a broader child protection system. It should include components to enhance family preservation as well as reunification and reintegration services for children who have entered out-of-home care.

8.2. The child protection system in Tanzania: legal and institutional framework

The conclusion in chapter two that the protection of children deprived of their family environment requires adopting a systems approach or a holistic approach sets the foundation for chapter three, which presents the child protection system in Tanzania. The legal framework governing child protection in Tanzania, in line with the CRC and ACRWC, acknowledges the place of families (parents and relatives) as the primary providers of care for their children. Based on the social and cultural context of Tanzanian society, the study shows the shared roles of parents and members of the extended family in childcare and upbringing. Thus, so long as it is not sanctioned by state authorities, it is clear that care of a child by relatives is family care. Therefore, a child being cared for by relatives should not be regarded as a child deprived of his or her family environment, unless such care is not in the child's best interests. Care by relatives is a long-standing practice based on the customs and traditions of the people of Tanzania, but its role and place is gradually diminishing. Chapter three therefore presents the national guidelines and plans of action showing the state's intended role in providing the necessary support for families in their childcare responsibilities.

Chapter three further presents the principles embedded in the legal framework on child protection in Tanzania, contained mainly in the Child Protection Regulations, 2014 and the Children's Homes Regulations, 2012 made under the Law of the Child Act (LCA). The emphasis of these principles is on preventing the placement of children in alternative care

through family support services. The framework emphasises, among other things, that children should be placed in family-based care rather than in institutional care, paying due regard to continuity in a child's upbringing and continuity of the child's ethnic, cultural, religious and linguistic background. In adherence to the necessity and suitability principles, the Child Protection Regulations, 2014 lay down a set of processes and procedures aimed at ensuring that a child enters care only when it is necessary and that a child is placed in a care option that is most suitable to cater for the child's needs and interests. Despite the challenges discussed in this study concerning the protection of children deprived of their family environment, the child protection framework of Tanzania echoes most of the principles and standards of the CRC and ACRWC regarding the protection of children deprived of their family environment.

8.3. The alternative care system in Tanzania: measures and implementation

As a continuation of chapter three, chapter four presents and discusses the way the alternative care system works in practice in Tanzania. Here, the concrete measures and initiatives adopted in Tanzania to protect children deprived of their family environment are analysed. The chapter shows that since independence, Tanzania has been adopting initiatives to enhance the social and economic welfare of the people, which can be regarded as the primary prevention level to avoid situations where children are deprived of their family environment. In addition, there are also specific initiatives to support and empower vulnerable families in their childcare responsibilities. These initiatives include identifying these families and children, assessing their needs and linking them to appropriate service providers.

This chapter reveals the centrality of the department of social welfare (both at the central and local government levels) in providing prevention and protection services to vulnerable families and their children. In addition, the role of non-governmental organisations in supporting families and children is discussed. Where it is not possible to preserve a family environment for children, these organisations provide alternative care in children's homes. Despite the various measures and initiatives manifested in the laws, action plans, guidelines and strategies, Tanzania is faced with implementation challenges. In practice, there are limited concrete support services to prevent unnecessary placement of children in alternative care.

Chapter three provides a detailed analysis of the available alternative care options based on the law and practice related to protecting children deprived of their family environment. There are three main ways for children to enter alternative care: removal of a child to a place of safety, voluntary care arrangements, which are an administrative action, and care orders issued by courts. As provided for in the LCA and the Child Protection Regulations, 2014, local

government authorities are responsible for caring for all children needing alternative care in their jurisdictions.

Though not with the required level of clarity, the legal framework for child protection provides various alternative care options, these being placement with relatives, placement with a ‘fit person’, foster care, adoption and institutional care. However, the study demonstrates the state's over-reliance on institutional care (the placement of children in children’s homes which are mainly owned by non-governmental organisations). Thus, in practice, the principle that family-based care should be preferred over institutional care is not adhered to in providing alternative care for children in need. The limited use of family-based care, especially foster care, is what inspired this enquiry into foster care. This chapter also reveals the incoherence and inconsistencies of the legal framework guiding the various alternative care options and realisation of the right to alternative care. It is argued in this study that realisation of this right is not explicitly guaranteed in the current legal framework.

8.4. The legal and institutional framework of foster care in Tanzania

Based on the LCA and the Foster Care Placement Regulations, 2012, chapter five unpacks the legal and institutional framework governing foster care services. It shows that the two parts of the LCA with provisions on foster care (part IV on “foster care and placement” and part VI on “fosterage and adoption”) are not consistent in all aspects, nor are they fully consistent with the regulations. Based on the definition given in the LCA, foster care in Tanzania is temporary care of a child provided voluntarily by a family or an individual not related to the child. The study further shows that foster care plays a double role: on the one hand, it is an alternative care option in its own right and on the other hand it is a prerequisite for adoption. The law on adoption requires prospective adopters to foster the children they want to adopt before applying for an adoption order. In practice, foster care as a stand-alone alternative care option does not exist, while fostering for adoption is prevalent.

The Commissioner for social welfare (the head of the department of social welfare at the central government level) and the social welfare officers at the local government level are the key implementers of foster care services. They are in charge of various processes related to foster care, including recruiting eligible foster carers, placement of children with foster carers, supervision and termination of foster care placement. The law adopts a top-down approach by requiring applications to become a foster carer to be made to the Commissioner for social welfare. Moreover, the law vests power in the Commissioner to place children in foster care on his or her own initiative or following a recommendation from social welfare officers or

managers of children's homes. However, in determining the suitability of applicants to become foster carers and placing children with foster carers, the Commissioner for social welfare relies on the assessment and investigation reports prepared by the social welfare officers in the local government authorities. The social welfare officers have full powers in the supervision of placements and termination of foster care placements.

A precondition for placing a child in foster care is that the parents or guardians must give their consent, although the Commissioner for social welfare can decide to dispense with this requirement. This requirement acknowledges the significant relationship between parents and their children, and is aimed at preserving this relationship where possible. The law places parental responsibility on the foster carers once a child is placed in foster care, and foster carers have the right to make decisions necessary for the foster child's daily care, upbringing, and development. However, the parental responsibility of the foster carers is not absolute as they operate under the supervision of the social welfare officers. Foster carers are not allowed to make significant decisions affecting the foster child without consulting the social welfare officer in charge of the placement and obtaining the views of the child's parents, if this is not contrary to the child's best interests.

The social welfare officers have the responsibility, as far as practicable, to provide support to foster parents to enable them to fulfil their duties towards children in their care. They are also required to provide support and counselling to assist foster children in adjusting to their placement, and to prepare them for placement termination and independent living. The chapter also presents the grounds for termination of a foster care placement, including reunification with the child's biological family.

8.5. The place of foster care in Tanzania: legal and practical challenges

Chapter six unveils the challenges affecting the implementation of foster care. The challenges identified emanate from the law regulating foster care and the provision of alternative care services generally. One of the significant legal challenges associated with foster care is the ambiguity of the law on whether foster care is to be used as an independent alternative care option. The LCA, the Child Protection Regulations, 2012 and the Foster Care Placement Regulations, 2014 have contradicting provisions on the place of foster care. Some provisions suggest that foster care can only be used after a child has been placed in a residential home or when a child is to be adopted. However, other provisions tend to suggest that foster care can be used as a stand-alone care option as long as it is considered suitable for the child concerned, a position adopted by the author of this study. Generally, the law lacks any clear statement on the

objectives and purposes of foster care in protecting children deprived of their family environment, which has led to a limited understanding of foster care. These challenges have contributed significantly to the continuing use of foster care as a prerequisite for adoption and implementation of the placement with 'fit persons' programme, which in my opinion can be regarded as foster care in disguise, while in the field research areas there were no foster care placements at all in practice. The study shows that preference for the 'fit person' programme is a way to circumvent the top-down approach adopted in foster care, as the social welfare officers at the local government level have full mandates in all processes related to placements under the 'fit persons' programme.

Another legal challenge identified in this study is numerous and uncoordinated laws with replications of certain procedures related to foster care, such as social investigation reports, care plans and placement supervision visits, as provided for in the Child Protection Regulations, 2014 and the Foster Care Placement Regulations, 2012. Such replications create a lack of clarity for the social welfare officers and double their work if they are to follow the requirements of both regulations. These replications may be due to the fact that the Child Protection Regulations, 2014, which are the umbrella regulations, were enacted after the more specific Foster Care Placement Regulations, 2012, without synchronising them.

Beyond the legal challenges that have contributed to the limited use of foster care, the influence of social welfare officers as 'street-level bureaucrats' is one of the practical challenges affecting the implementation of foster care. In addition to the discretion of social welfare officers to determine appropriate care for children, their limited knowledge of foster care and the law governing foster care in Tanzania has contributed significantly to the limited use of foster care by mainly linking it to adoption. Interviews revealed that for most social welfare officers, foster care can only be used when the ultimate goal of the carers is to adopt the children placed in their care. This position is a misconception of foster care as an option for the protection of children deprived of their family environment.

Moreover, social, cultural and economic context of Tanzanian society has directly or indirectly contributed to the limited use of foster care. Most people in Tanzania tend to assume that every child whose parents are unavailable, unable or unwilling to care for them will be cared for by either parent's relatives; and that, therefore, there is no need for other forms of family-based care such as foster care. On the other hand, poverty not only contributes to the increasing numbers of children needing alternative care but also influences the capacity of individuals to

foster children without financial support to enable them to provide the daily needs of children placed in their care.

8.6. The prospects of foster care in Tanzania: a call for legal reforms

The challenges identified in chapter six provide a foundation for chapter seven, where recommendations are made for necessary reforms to establish a functioning foster care system. Chapter seven identifies three areas which affect the prospects of foster care in Tanzania: the worldwide deinstitutionalisation campaign, the need for case-by-case analysis of the child's needs before placement in alternative care, and the absence of hard and fast rules on foster care, making it necessary for each country to decide what works for it in its specific context. In Tanzania with its tradition of kinship care, the support of families caring for their relatives' children would be an important preventive measure to reduce the number of children needing alternative care. The deinstitutionalisation of alternative care for children requires expanding family-based alternative care options, especially foster care. Likewise, the need for a case-by-case analysis of the child's needs is meaningless if there is no range of alternative care options to cater for the children's varying needs.

Based on foster care practices in different countries, both developed and developing, chapter seven articulates the attributes of a successful foster care system. These include a robust legal framework, a competent social workforce, a pool of foster carers and support services for foster care placements. However, the study emphasises the importance of adopting a holistic approach in any initiative to establish foster care because foster care is not an answer on its own. The success of foster care depends on the influence of other components in the alternative care system and the child protection system taken as a whole. Thus, prevention services, other alternative care options and reintegration or reunification services need to be taken into consideration in any initiative to improve foster care. The success or failures of other alternative care components directly influence the foster care system.

Based on the attributes of a successful foster care system mentioned above and on foster care laws and practices in Ghana and South Africa, the study makes recommendations for the establishment of a functioning foster system in Tanzania. One of the recommendations is the need to reform the legal and institutional framework governing foster care and the general provision of alternative care services by concretising the right to alternative care, creating coherence, and bridging the laws on alternative care. Further, the study makes a call to reshuffle the legal framework on foster care by including the objectives of foster care and the types of foster care that Tanzania wants to establish. Moreover, the study recommends creating a new

institutional framework with precise distribution of powers and functions instead of the current framework, which concentrates all activities related to foster care on the Commissioner for social welfare and the social welfare officers at the local government level. For instance, there should be institutions to handle the recruitment of foster carers and placement of children in foster care separate from those related to the supervision of foster placements and settling disputes arising from foster care placements.

The study further recommends including in the law the need for financial support to facilitate foster care placements as the current legal framework is silent on the matter. Financial support is one of the essential components of support for foster carers to enable them to maintain the children in their care. Despite the ambivalence surrounding financial support, the study emphasises the need to carefully determine how to incorporate financial support for foster carers without compromising society's social and cultural values on childcare. Generally, the provisions of the Foster Care Placement Regulations, 2012 on arrangements for support need to be amended to make such support by state authorities concrete.

However, the reforms needed to improve foster care largely depend on the political will to take necessary steps to address the challenges identified. The state's role in enhancing services for children deprived of their family environment, be it foster care or other alternative care options, is central. The state must set the pace and mobilise resources needed to bring the necessary improvements. The state needs to go beyond the mere adoption of uncoordinated and incoherent laws, guidelines and plans of action and take practical initiatives to improve and protect the welfare of children deprived of their family environment. Through established departments and agencies and in cooperation with the international community, the state must play a role in raising awareness in society of the changing nature of kin relations and the growing need to supplement kinship care by alternative care. Foster care as an alternative care option can play a significant role in protecting children deprived of their family environment if the state and society are ready to understand and embrace its potentials and devote the required resources to its establishment and development.

Most importantly, measures and initiatives to establish a functioning foster care system must specifically consider Tanzania's social, cultural and economic realities. These determine what can or cannot work in the context of Tanzania. In addition, the absence of uniform rules and standards in the foster care practices around the world offers Tanzania an opportunity to assess its context and decide what kind of foster care would suit the situation in the country without diminishing the potentials of foster care. Thus, though the essential attributes of foster care can

be deduced from the existing literature on foster care practices globally, customising them to the given local context is vital. For this reason, this study recommends further research, especially sociological research, to determine the viability of foster care in the social, cultural and economic context of Tanzania.

8.7. Concluding remarks

As a family-based alternative care option provided for in the child protection framework of Tanzania, foster care has great potential for protecting children deprived of their family environment. The challenges involved in the practice of foster care in Tanzania can be an empowering tool for the state and society to assess the strengths and weaknesses of the existing approaches and modify them or adopt new strategies. Children deprived of their family environment have a right to be cared for and protected by the state and society at large for their survival and development. This should not be regarded as a favour granted to them at the will of the state and society, and the state should avoid adopting tokenistic approaches in protecting children deprived of their family environment.

Although Tanzania has adopted several laws and strategies to protect children needing care and protection services, this study has shown a continuing failure to transform them into reality. The establishment of a functioning foster care system in Tanzania depends on the willingness of the state authorities, in cooperation with society and organisations dealing with children, to acknowledge the potential of foster care and to invest the necessary resources to establish an effective system in the social-economic context of Tanzanian society. As the saying goes, where there is a will, there is always a way.

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List of interviews conducted

I conducted a total of 36 interviews with 39 interviewees. Interview No. 23 was done with three interviewees, and interview No. 29 involved two interviewees.

1. Department of social welfare – central government level (Ministry of Health, Community Development, Gender, Elderly and Children)

1. Interview with a social welfare officer (in charge of the foster care and adoption desk) in Dodoma on 03/04/2018 and 04/04/2018
2. Interview with the Commissioner for social welfare in Dar es Salaam on 21/02/2019
3. Interview with a second social welfare officer (in charge of foster care and adoption desk) in Dodoma on 05/03/2019
4. Interview with a social welfare officer in Dodoma on 05/03/2019
5. Interview with a legal officer at the Ministry of Health, Community Development, Gender, Elderly and Children (responsible for the community development section) in Dodoma on 05/03/2019

2. Department of social welfare – local government level

2.1. Dar es Salaam region

6. Interview with a regional social welfare officer on 15/02/2019
7. Interview with a regional health social welfare officer at Dar es Salaam on 07/02/2019

2.1.1. Kinondoni municipal council

8. Interview with a social welfare officer on 04/01/2019
9. Interview with a social welfare officer on 09/01/2019 and 17/01/2019
10. Interview with a social welfare officer on 16/01/2019 and 06/02/2019
11. Interview with a para-social worker in Kinondoni Municipal Council (Bunju ward) in Dar es Salaam on 17/01/2019

2.1.2. Temeke municipal council

12. Interview with a social welfare officer on 07/01/2019
13. Interview with a social welfare officer on 04/02/2019

2.1.3. Ilala municipal council

14. Interview with a social welfare officer on 29/03/2018 and 07/02/2019

2.2. Mwanza region

15. Interview with a regional social welfare officer on 13/03/2019

2.2.1. Mwanza city council

16. Interview with a social welfare officer on 22/03/2018 and 18/03/2019

2.2.2. Ilemela municipal council

17. Interview with a social welfare officer on 23/03/2018 and 15/03/2019

3. Children's homes

3.1. Dar es Salaam region

18. Interview with a social worker at Msimbazi Centre for Children in Dangerous Environment on 18/01/2019

19. Interview with the head of Mburahati children's home (Missionaries of Charity) in Dar es Salaam on 30/01/2019

20. Interview with the sponsorship secretary at SOS Children's Village in Dar es Salaam on 29/01/2019

21. Interview with a social worker at SOS Children's Village in Dar es Salaam on 29/01/2019

22. Interview with a child care worker at Umra orphanage centre in Dar es Salaam on 30/01/2019

23. Interview with three child care workers at Kijiji cha Furaha children's home in Dar es Salaam on 05/02/2019

3.2. Mwanza region

24. Interview with the child care worker at Hisani children's home on 19/03/2018

25. Interview with the manager of Forever Angels Baby Home on 21/03/2018

26. Interview with the sponsorship officer at SOS Children's Village on 19/03/2019

27. Interview with a child care worker at Village of Hope on 20/03/2019

4. Non-governmental organisations

28. Interview with a child protection specialist at UNICEF in Dar es Salaam on 21/01/2019

29. Interview with two SOS Children's Village officers in charge of the Family Strengthening Programme in Mwanza on 21/03/2019

30. Interview with a former social worker (who had dealt with vulnerable children) at Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese (PASADA) in Dar es Salaam on 13/02/2019

31. Interview with an officer in charge of orphans and vulnerable children at Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese (PASADA) in Dar es Salaam on 13/02/2019

5. Judicial officers and advocates

32. Interview with a resident magistrate in charge at the Juvenile Court at Kisutu in Dar es Salaam on 08/03/2018
33. Interview with an advocate dealing with, among other things, family and adoption cases in Dar es Salaam on 18/01/2019
34. Interview with a resident magistrate at the Juvenile Court at Kisutu in Dar es Salaam on 21/02/2019
35. Interview with a resident magistrate (who acts as a trainer of trainers on the Law of the Child Act) stationed at the High Court in Dar es Salaam on 28/03/2019
36. Interview with the principal judge of the High Court in Dar es Salaam on 01/03/2019

List of tables

Table 1: Statistics on foster carers' applications between 2014 and March 2018 in Tanzania (Source: Ministry of Health, Community Development, Gender, Elderly and Children).

Table 2: A comparative overview of care plans and foster care plans derived from the Child Protection Regulations, 2014 and Foster Care Placement Regulations, 2012.

Table 3: Periodic intervals of placement visits and reviews based on reg 66 of the Child Protection Regulations, 2014 and reg 17 of the Foster Care Placement Regulations, 2012.