Chapter 18

Article 20: Rights Concerning Children Deprived of Their Family Environment

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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.

What Did Children Say?

They should help children to return to their family home if possible. (*Eastern Europe*)

Children that are living without parents should be given a special support. Governments should do as much as possible to avoid sending children to orphanages. (*Eastern Europe*)

(continued)

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They should be placed somewhere that helps them be healthy and develop their potential, for as short a time as possible and they should stay with their brothers and sisters. (*Eastern Europe*)

Overview

Article 20 provides protection for children, who, for whatever reasons, are deprived of a family environment. It applies to both temporary and permanent needs for alternative care, to situations where no extended family care is available, and to all possible reasons as to the causes for separation (Office of the United Nations High Commissioner for Human Rights and Rättsrådet (Society: Sweden), 2007, pp. 526–527). While other articles, including Articles 7, 8, 18, and 27, obligate States Parties to provide the necessary support to families to enable them to care for their children, Article 20 requires that if, despite those measures, children are unable to be cared for by their own families, they are entitled to special protection and assistance from the state.

International law has long recognised the importance of the family for children's healthy development and well-being. As stated in Article 16(3) of the Universal Declaration of Human Rights, 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Article 23 of International Covenant on Civil and Political Rights and Article 10 of International Covenant on Economic, Social and Cultural Rights similarly underline the importance given to the family. The 1924 and 1959 Declarations on the Rights of the Child acknowledged the need for protection of children without parents or whose parents were unable to care for them. The preamble of the Convention on the Rights of the Child also states that the child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding.' Unsurprisingly, therefore, the text of Article 20 was one of the first articles of the Convention that was discussed, and it was adopted without much disagreement by the Working Group.

There is a considerable body of jurisprudence in international law, including both the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, regarding children deprived of a family environment.¹ The Committee has afforded significant attention to Article 20 through both its General Comments² and Concluding Observations. In addition, the United Nations Guidelines for the Alternative Care of Children (stemming from a recommendation from the Committee's Day of General Discussion on Children Without Parental Care in 2005), provide detailed interpretation and guidance for States Parties on the implementation of Article 20 (UN General Assembly, 2010).

¹ See Relevant Treaties section for additional examples.

² All General Comments have a section on children deprived of family environment.

General Principles

Article 2 The United Nations Guidelines for the Alternative Care of Children (paragraph 10) outlines a number of discrimination grounds that can give rise to relinquishment, abandonment, or removal of a child from their family such as poverty, ethnicity, religion, sex, mental and physical disability, HIV/AIDS or other serious physical or mental illnesses, migration status, birth out of wedlock, parents' marital status, criminal status, socio-economic status, and all forms of violence, among others. The Convention on the Rights of Persons with Disabilities, Article 23, paragraph 5 (alternative care in family environment), General Comment no. 11 on Indigenous Children, General Comment no. 6 on Unaccompanied and Separated Children, and the latest General Comments on migrant children and children in street situations, along with growing number of jurisprudences,³ all outline linkages and state obligations with respect to Article 20 and prohibition of discrimination.

Article 3 Article 20 is one of the Convention articles where the best interests principle is explicitly referred to. However, in Article 20 best interests is 'the determining factor', not just 'a primary consideration' as in Article 3. Read with Article 9 of the Convention, it is clear that care outside of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration. General Comment no. 14 provides non-exhaustive guidance for States Parties to enable the assessment and determination of best interests in situations such as the removal of a child from their family:

- The child's views—the 'best interests' of the child cannot be defined without consideration of the child's views
- The child's identity
- Preservation of the family environment and maintaining relations
- Care, protection, and safety of the child
- Situation of vulnerability
- The child's right to health
- The child's right to education.

Article 6 The Committee, in almost all its concluding observations to States Parties, underlines the importance of right to life and development of children in alternative care settings. It also urges countries to develop social policies to help families support their children by ensuring that adequate human, technical, and financial resources are allocated to relevant child protection services and alternative care centres in local and national agencies, in order to provide children with an adequate

³See for example, Concluding observations, Republic of Moldova (2017a); Concluding observations, Lebanon (2017b); Nencheva and Others v. Bulgaria, 18 June 2013, European Court of Human Rights; Chbihi Loudoudi and Others v. Belgium, 16 December 2014, European Court of Human Rights, among others.

standard of living, remove any barriers to their positive development, such as overcrowding, and facilitate their rehabilitation and social reintegration of children to the greatest extent possible.⁴

Article 12 General Comment no. 12 (paragraph 97) on child participation clearly outlines States Parties' obligations in terms of Article 20 and Article 12:

- Through legislation, regulation and policy directives, the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family
- Legislation providing the child with the right to information about any placement, care and/or treatment plan and meaningful opportunities to express her or his views and for those views to be given due weight throughout the decision-making process
- Legislation ensuring the right of the child to be heard, and that her or his views be given due weight in the development and establishment of child-friendly care services
- Establishment of a competent monitoring institution, such as a children's ombudsperson, commissioner, or inspectorate, to monitor compliance with the rules and regulations governing the provision of care, protection or treatment of children in accordance with the obligations under Article 3. The monitoring body should be mandated to have unimpeded access to residential facilities (including those for children in conflict with the law), to hear the views and concerns of the child directly, and to monitor the extent to which his or her views are listened to and given due weight by the institution itself.

Effective mechanisms should also be established to enable representative councils of the children, of all genders, in residential care facilities, with the mandate to participate in the development and implementation of the policy and any rules of the institution.

Articles Related to or Linked to Article 20

Article 20 should be read with and linked to:

Combined reading of **Articles 7, 8, 9, 18, 26, and 27** require States Parties to provide guarantees and measures for children to facilitate staying with their families and placement as a matter of last resort only.

Article 21 provides for nature and conditions of adoption as an issue of the right of the child.

⁴See, for example, Concluding observations, Denmark (2017c).

Article 16 provide protection from arbitrary interference with privacy, family, and home for children deprived of family environment.

Combined reading of **Articles 22, 23, 30, 34, 35, 36, and 37(c)** provide for protection against discrimination in relation to deprivation of family environment.

Article 25 requires States Parties to set up legal and other measures to guarantee periodic review of placement of each and every child to avoid unnecessary placement and, potentially, facilitate speedy return to family environment.

Relevant Instruments

UN Convention Relating to the Status of Refugees (1951)

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 (1987)

UN Convention on the Rights of Persons with Disabilities (2006), Article 23 (5) Respect for home and the family

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996)

European Convention on Human Rights (1950), Article 8 (respect for private and family life)

UN Guidelines for the Alternative Care of Children (2009)

Council of Europe Recommendation on the rights of children living in residential institutions (2005)

Council of Europe Recommendation on deinstitutionalisation and community living of children with disabilities (2010)

Attributes

Attribute One: Provision of Special Protection and Assistance

Article 20(1) addresses States Parties' express and comprehensive obligation to provide 'special protection and assistance' to any child temporarily or permanently deprived of their family environment, in order to protect their well-being.

Accordingly, States Parties' must establish a legal and administrative framework with competent bodies and qualified professionals for alternative care systems for such times when it is necessary for the child's best interest to be placed in an alternative care setting than their family environment. The Human Rights Committee's General Comment no. 17 on the rights of the child describes this system a set of 'measures of protection adopted to protect children who are abandoned or deprived

of their family environment in order to enable them to develop in conditions that most closely resemble those characterising the family environment’ (UN Office of the High Commissioner for Human Rights (OHCHR), 1989, para. 6). Such a system must have procedural safeguards for ‘the child’s full and harmonious development’ (UN General Assembly, 1959). Fundamentals of alternative care systems are clearly outlined in the UN Guidelines for the Alternative Care of Children, which explicitly demand from the States Parties that all alternative care options should be supported with clear legislative and policy framework and adequate financial conditions as enshrined in Articles 3 and 4 of the Convention, as a part of the ‘special care and protection.’

Attribute Two: Standards of Care

This attribute focuses on standards of care provision such as contact of the child with their parents, quality of care, continuity of care, quality of carers, and all other forms of legal, policy, and financial conditions made available for the quality-of-care provisions. States Parties are under international obligations to establish vigorous sets of standards of quality care regulated by law and policy, in order to ensure the well-being and protection of the child placed in alternative care, whatever the type or nature of this care placement, in accordance with the Article 3(3) of the Convention. Although such standards of care include systematic monitoring and inspection of care placement orders and settings, this component is dealt with under Article 25 of the Convention, later in this part.

Alternative care decisions should be temporary, made with the participation of the child, the parents, and the extended family, at a last resort, and for the shortest possible timeframe. States Parties are responsible for creating conditions for maintaining the child’s contact with their parents, the wider family, and the community (UN Committee on the Rights of the Child, 2013, paras. 60, 65; UN General Assembly, 2010, para. 81).

Because separation from parents must be justified in terms of the best interest of the child, the standards of alternative care should be an improvement for the child from the situation the child was separated from, in terms of the quality of physical and emotional care (Sandberg, 2019, p. 204). These standards should include ensuring and maintaining the quality of care through rigorous training of staff and carers of residential care settings, foster carers, social workers, and others directly or indirectly involved in the care of the child (UN General Assembly, 2010, para. 71). It is also vital for the best interest of the child that the standards of care should include legal and policy frameworks to enable the best possible participatory transition out of alternative care, either back to their family environment or to an independent life (UN General Assembly, 2010, paras. 131–136).

Attribute Three: Nature of Care

This attribute deals with alternative care settings and nature of care placement. Although the Article specifically mentions ‘foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children’, the list of care settings is open-ended, leaving States Parties a generous margin of appreciation to find the best possible care placement for the child according to their needs and to cultural, linguistic, and religious background, in order to ‘develop in conditions that most closely resemble those characterising the family environment’ (UN Office of the High Commissioner for Human Rights (OHCHR), 1989).

Although the placement decision must be made by a competent authority in accordance with national laws, it may be formal or informal, temporary or permanent, and public or private with the extended family, with community members previously known to the child, with foster placement, with family style or other forms of residential care, with kafalah of Islamic law, or adoption. Adoption is discussed in Article 21, as it represents the most permanent form where parental ties with the child are severed. The UN Guidelines for the Alternative Care of Children outline the nature of alternative care extensively in paragraph 29 (b and c), and exceptions to such care in paragraph 30, namely children in conflict with the law.

The UN Guidelines for the Alternative Care of Children also underline the obligation of the States Parties to prioritise family and community-based care amongst a wide range of best possible alternative care options (UN General Assembly, 2010, para. 53). The Guidelines also point out that the States Parties should have a ‘deinstitutionalization strategy,’ as they move away from large residential care options to foster care, ‘individualised small group care’ and other family-based and community-based care options (UN General Assembly, 2010, paras. 21, 23). Moreover, Article 20 stresses the obligation of States Parties to consider the child’s ethnic, religious, cultural, and linguistic background so as to ensure the continuity of a child’s upbringing, as also enshrined in Articles 5 and 29(1)(c).

Whatever the nature of care placement, ‘the necessity and suitability’ of care placement ‘must be monitored and regularly reviewed, in consultation with the child and his or her family’ (Cantwell and Holzscheiter, 2007, p. 64), against a clear set of legal standards in alternative care systems.

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