



Master Thesis – LLM International and European Union Law

# STATE OBLIGATION OF PROTECTING CHILDREN AGAINST VIOLENCE IN ALTERNATIVE CARE INSTITUTIONS A CRITICAL ANALYSIS

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# Preface

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The process of writing this thesis has been a long and difficult journey, not only because the topic at hand hits home hard, since I have also been an orphan and have experienced violence in those years. It's also been hard because of the circumstances during these two years of writing.

I pulled through thanks to the parties concerned at the Erasmus University School of Law. Not even in my wildest dreams, working on a farmland in Suriname as a little girl, I could have imagined eventually walking through the doors of this amazing institution. My gratitude specifically and especially goes to prof. dr. Ellen Hey for her wonderful guidance during the writing of this thesis and the researching of this subject.

Special thanks also go to Nidhi Arya, LLM who has supported me throughout the writing process. Without your help I would still be in bed, recovering from Long COVID, not having the strength to proceed.

Finally, I want to thank my family and in particular my husband, Kishan P.B. Shri, MSc, for all the intense support both emotionally and physically to get me to this point.

There were times when I sat with tears in my eyes reading the various reports and articles, reliving past traumas. I therefore hope that this thesis is the first of many future contributions to prevent violence against children.

S.T. Jakoeb, LLM

Barendrecht, 2 July 2021

*“We owe our children  
– the most vulnerable citizens in any society –  
a life free from violence and fear.”*

Nelson Mandela

# Abstract

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One would assume that alternative care institutions have been established to provide care and protection to children. However, reports from many countries demonstrate children living in these institutions often deal with violence by staff, that should be responsible for their well-being. Article 19 CRC is one of the most important articles with regard to protecting children in alternative care institutions against violence. The implementation of this provision nevertheless suffers from some defects, which cause a barrier in achieving protection from all forms of violence against children including children living in alternative care institutions. The effective implementation of article 19 CRC after all plays an essential role in creating a violence free environment for children.

The aim of this thesis is to understand the challenges states are facing to respect, protect and fulfill their obligations under article 19 CRC, specifically in alternative care institutions. In this regard the thesis analyses which responsibilities states should shoulder in order to protect children living in alternative care institutions against violence.

Article 19 (1) CRC states that “legislative, administrative, social and educational measures need to be taken to protect the child from all forms of violence while in the care of legal guardian(s) or any other person(s)”. Most states are hardly successful in taking these measures. The practice of judicial and quasi-judicial bodies against the background of the state obligation to respect, protect and fulfill the rights of children has also been looked into in order to find out if states adequately protect the rights of children to be free from violence in alternative care institutions. Concerning the obligation to respect, most states fail to hire or supervise suitable and qualified professionals, who are responsible for the care of children, or fail to recognize violence against children. Concerning the obligation to protect, the progress whereby corporal punishment in alternative care institutions is prohibited, has been slow in the majority of states. This means those states have not sufficiently displayed due diligence and therefore have failed to protect children against violence committed by non-state actors. Finally, concerning the obligation to fulfill, the majority of states is not successful in providing an adequate legal framework to ensure the protection of children against violence nor in conducting an effective investigation mechanism into instances of violence against children in alternative care institutions.

**Key words: violence against children, alternative care institutions, CRC, state obligation**

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## List of abbreviations

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CFCSA	Child, Family and Community Service Act
Committee	United Nations Committee on the Rights of the Child
CRC	(United Nations) Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
GC	General Comments
Guidelines	Guidelines for the Alternative Care of Children
NGO	Non-Governmental Organization
NSA	Non-state actors
SDG	Sustainable Development Goals
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund

# Chapter 1. Introduction

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## 1.1 Problem statement

The way children are raised and are taken care of has a huge effect on their physical and mental development and through that on the quality of the rest of their lives. Growing up within a family is generally considered to be in the best interest of a child.<sup>1</sup> In some situations this isn't possible and therefore options are made possible to offer these children an alternative home. This has resulted in the development of alternative care institutions. Alternative care is “the arrangements where children are looked after by caretakers other than their parents”.<sup>2</sup> Millions of children worldwide have spent a considerable amount of their life without their families under the superintendence and supervision of alternative care institutions. In the UN Guidelines for the Alternative Care of Children (hereinafter: Guidelines) a range of alternative formal and informal care options can be found. Informal care arrangements represent the form of care by means of friends, neighbors or other relatives. Formal care arrangements can be organized by the care in a residential setting, providing this type of care has been ordered by a competent administrative body or judicial authority such as orphanages and residential care facilities.<sup>3</sup>

One would assume that alternative care institutions have been established to provide care and protection to children, yet reports from many countries in all regions with different political, socioeconomic systems and cultures show that children living in these care institutions often deal with violence from staff, that at the same time is responsible for their well-being.<sup>4</sup> General Comment no. 13 (hereinafter GC no. 13) of the Committee on the Rights of the Child (hereinafter: the Committee) has described violence as “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”.<sup>5</sup> Violence against children takes place in the form of omission and commission by state or non-state actors (hereinafter: NSAs).<sup>6</sup>

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<sup>1</sup> Lorraine Sherr, Kathryn J. Roberts and Natasha Gandhi, ‘Child Violence Experiences in Institutionalized/Orphanage Care’ (2017) *Psychology, Health and Medicine* <<https://www.tandfonline.com/loi/cphm20>> accessed on 20 December 2020.

<sup>2</sup> Rebecca Dobson and others, ‘From a Whisper to a Shout: A Call to End Violence Against Children in Alternative Care’ (*SOS Children’s Villages International*, 18 February 2015) <<https://reliefweb.int/report/world/whisper-shout-call-end-violence-against-children-alternative-care>> accessed 29 June 2021.

<sup>3</sup> UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142, art 29.

<sup>4</sup> Jessica Smart, ‘Risk and Protective Factors for Child Abuse and Neglect’ (2017) *Australian Institute of Family Studies* <<https://aifs.gov.au/cfca/publications/risk-and-protective-factors-child-abuse-and-neglect>> accessed 5 November 2019.

<sup>5</sup> UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13.

<sup>6</sup> UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13.



Several initiatives have been presented to protect children in alternative care against violence. The Convention on the Rights of the Child (hereinafter: CRC) is one of these legal initiatives that have codified the right to be free from violence.<sup>7</sup> The CRC has been adopted by the United Nations General Assembly resolution of 44/25 of 20 November 1989.<sup>8</sup> The CRC has been ratified by 195 states, therefore these states must incorporate the provisions of this convention into their domestic legal sphere in the form of legislation, guidelines or practice.<sup>9</sup> Only the United States of America has not ratified the CRC.

The doctrine of *'parens patriae'* which refers to the power of the state to act as the parent of any child, who needs care and/or protection, has been reflected in article 20 CRC.<sup>10</sup> The CRC not only requires states to take steps to implement the provisions of the CRC, it has also established the Committee, whose task is to monitor the progress made by states in fulfilling their obligations as defined in the CRC. The complaint mechanism regarding violations of the provisions of the CRC in the Optional Protocol on a communication procedure enables the Committee to receive complaints by an individual or a group of individuals who alleges violation of any provision of the CRC or of any of its optional protocols.<sup>11</sup>

Article 19 CRC is one of the most important articles in protecting children in alternative care institutions against violence. This article has been drafted elaborately in order to include all appropriate measures to ensure protection from violence. This includes both 'preventive' and 'responsive' measures to avoid violence from happening and to respond to situations if children experience violence. Article 19 CRC does not simply provide a general right to protection against violence. It rather imposes a specific obligation on states to protect children from violence when in the care of "their parents, legal guardians, or any person who has the care of the child".<sup>12</sup> Despite the merits of article 19 CRC, the implementation of this provision still suffers from some defects which cause a barrier in achieving freedom from all forms of violence against children including children living in alternative care institutions. The implementation

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<sup>7</sup> John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22.

<sup>8</sup> John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22.

<sup>9</sup> United Nations Human Rights Treaty Bodies, 'UN Treaty Body Database' (OHCHR)

<[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en)> accessed 22 May 2021.

<sup>10</sup> Jini L. Roby, 'Children in informal Alternative care' (2011) UNICEF, 9

<[http://m.bettercarenetwork.nl/content/17382/download/clnt/32435\\_UNICEF\\_DP\\_2011\\_children\\_informal\\_care.pdf](http://m.bettercarenetwork.nl/content/17382/download/clnt/32435_UNICEF_DP_2011_children_informal_care.pdf)> accessed 22 May 2021.

<sup>11</sup> UNCRC 'Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure' (19 December 2011) UN Doc CTC/4/11 .

<sup>12</sup> John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22.

of article 19 CRC depends on the developing mechanisms which means states should provide the necessary law, policies and procedures according to their resources in order to give effect to the obligation under article 19 CRC. Effective implementation of article 19 CRC after all plays an essential role in creating a violence free environment for children.

## 1.2 Aims and objective of the study

This thesis is limited to a detailed analysis of article 19 CRC and the responsibilities of states to respect, protect and fulfil their obligation under this article. The researcher has not aimed for an in-depth analysis of the international legal instruments protecting children against violence. As stated before, article 19 CRC does not simply provide a general right to protection against violence, yet it imposes a specific obligation on states to protect children from violence. This means the protection against violence in all settings doesn't depend on the states' generosity or on a limited extent of the availability of resources. Instead, it is the state's legal duty.

Reports on violence against children illustrate the existence of this violence in all settings irrespective of the fact whether they are under the control of the state or are maintained by private organizations or Non-Governmental Organizations (hereinafter: NGO's).<sup>13</sup> By providing an overview of the state obligations to protect children against violence in alternative care institutions and considering in more detail the extent of these obligations, this thesis allows to understand the challenges states are facing to respect, protect and fulfill their obligations under article 19 CRC specifically in alternative care institutions.

## 1.3 Research questions

In this thesis the next main question is researched:

*Based on article 19 CRC, what responsibilities does a state incur to protect children living in alternative care institutions against violence and are states fulfilling their duties to respect, protect and fulfil their obligations under the CRC?*

In order to answer this question, the following sub-questions need to be answered:

- 1) *What is the meaning of alternative care institutions and what reasons can be found for violence against children in alternative care institutions?*

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<sup>13</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

- 2) *What are the responsibilities of states under the CRC to protect children living in alternative care institutions against violence?*
- 3) *What is the practice of judicial and quasi-judicial bodies in the light of state responsibilities according to the CRC to protect children from violence in alternative care institutions?*

## 1.4 Methodology

The research method employed in this study consists of a literature review and the analysis of relevant case law from the Committee and the European Court of Human Rights (hereinafter: ECtHR). The researcher has adopted doctrinal research while focusing on the CRC, the Guidelines, General Comments (hereinafter: GC) and the concluding observations of the Committee. Reference to other human rights treaties have also been made on the condition that these are necessary. The researcher has also relied on various secondary sources like manuals, articles, journals and websites. Reports with opinions of various experts and stakeholders who have dealt with the present topic have also been considered valuable.

## 1.5 Outline

Chapter 2 discusses the definition of alternative care institutions and searches for the reasons for the emergence of alternative care institutions. In that chapter the factors, which contribute to violence in alternative care institutions, are also covered. The existing international legal framework is examined in chapter 3 concerning the protection of children in alternative care institutions against violence. Chapter 4 continues with the analysis of the practice of judicial and quasi-judicial bodies in the light of state responsibilities to protect children from violence in alternative care institutions. Finally, chapter 5 provides a conclusion and an answer to the main research question.

## Chapter 2. Violence against children in alternative care institutions

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### 2.1 Introduction

In this chapter the meaning of alternative care institutions and the reasons for violence in these institutions are discussed. Firstly, the meaning of alternative care institutions is addressed in paragraph two. The need for alternative care institutions is examined in paragraph three. Finally, the factors contributing to violence in alternative care institutions will be explained in paragraph four. The sub-conclusion is included in paragraph five.

### 2.2 The meaning of alternative care institutions

According to the Guidelines, alternative care can be defined as “any substitute care for a child when the family of the child is unable to take care of the child”. This includes situations in which the family does not have the means to look after a child or when a child has been abandoned or relinquished. In this situation the responsibility for looking after this child shifts to the state in order to protect the child and ensure its alternative care. This can be fulfilled by a local authority or by recognized civil society institutions. One of the prime duties of the state is to regulate and control the safety, development and protection of the child in such alternative care. Also, the state should conduct a regular assessment of the alternative care provided to the child.<sup>14</sup>

A generally accepted definition of alternative care institutions is not available. According to SOS Children’s Villages International alternative care can be defined as: “any arrangement formal or informal, temporary or permanent for a child who is living away from his or her parents”.<sup>15</sup>

The Guidelines define primarily two kinds of alternative care options. Firstly, the informal care arrangement can be mentioned, which covers any private setting where the child has been placed in a family-like environment and is looked after by relatives, friends or any other person in his or her individual capacity in a continuous and indeterminate manner. Such a private setting can be initiated either by the child itself or by the parents without the intervention of any

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<sup>14</sup> UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142.

<sup>15</sup> Rebecca Dobson and others, ‘From a Whisper to a Shout: A Call to End Violence Against Children in Alternative Care’ (*SOS Children’s Villages International*, 18 February 2015) < <https://reliefweb.int/report/world/whisper-shout-call-end-violence-against-children-alternative-care>> accessed 29 June 2021.

administrative or judicial authority.<sup>16</sup> Informal care therefore basically consists of any arrangement for the care of a child through family, friends or relatives which has not been ordered by any administrative or legal authority. This type of care has been generally accepted as a suitable alternative care choice and is the major recourse of alternative care throughout the world which takes place voluntarily between private individuals by means of unofficial culturally accepted practices.<sup>17</sup>

The second kind of alternative care that is recognized by the Guidelines is formal care. This kind of care includes the arrangements facilitated by an authorized administrative or judicial body in a family like environment. It also covers the care in residential institutions including public and private facilities which could be a consequence of any legal or administrative measure.<sup>18</sup> Formal care includes all arrangements with a recognized caregiver irrespective of the fact at whose initiative these arrangements have been instigated and how these have been arranged.<sup>19</sup>

The Guidelines primarily categorize formal care into two types, namely ‘agencies’ and ‘facilities’. Agencies and facilities can be controlled publicly, meaning that they are controlled and managed by the state directly. Private control is also possible, which means ‘non-state’ involvement, thereby including NGOs and faith-based organizations.<sup>20</sup>

Formal alternative care can further be classified into family-based care and residential care. Family-based care refers to any arrangement in which the child has been settled with a responsible relative, which can be a guardian or distant relative of the child. Residential care refers to any arrangement in a non-family environment where children reside in groups with paid or unpaid employees and receive care, based on a decision by a competent authority.<sup>21</sup> Residential care facilities are either run by the government or by a private organization. Residential care includes for example children’s homes, orphanages, special institutions for children with disabilities and special institutions for children from vulnerable families.<sup>22</sup>

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<sup>16</sup> UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142, art 29(b).

<sup>17</sup> Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012) 31.

<sup>18</sup> UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142, art 29(b).

<sup>19</sup> UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142, art 29(b)(ii).

<sup>20</sup> Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012) 32.

<sup>21</sup> UNICEF, ‘Definitions overview’ (*UNICEF*) <<https://www.unicef.org/eca/definitions>> accessed 22 May 2021.

<sup>22</sup> UNICEF, ‘Definitions overview’ (*UNICEF*) <<https://www.unicef.org/eca/definitions>> accessed 22 May 2021.

The government has the responsibility to create legislation and policies for alternative care and needs to regulate the person or organization responsible for taking the decision whether a child needs to be placed in alternative care or not.<sup>23</sup> The government must ensure decisions about alternative care are only taken in the best interest of the child using the aid and assistance of people like social workers, family members, officers of the court and lawyers.<sup>24</sup> According to the Guidelines, children should only be placed in alternative care unless this is absolutely necessary.<sup>25</sup> There is no doubt that the care of the child in cases of formal care arrangements is granted to the CRC, yet in cases of informal care arrangements usually no intervention of the state is organized. The Guidelines however provide that states should have the means to ensure appropriate welfare and protection for children while they are in informal care.<sup>26</sup>

## 2.3 The need for alternative care institutions

According to research conducted by UNICEF, globally about 150 million children were without a father and mother in 2014.<sup>27</sup> The need for alternative care institutions consists of several reasons. The most common reasons for putting children in alternative care institutions concern poverty, violent family environment and discrimination.<sup>28</sup> These reasons are outlined in the next sub-paragraphs.

### 2.3.1 Poverty

When parents are unable to take care of their children due to poverty, they usually place their children in alternative care in order for their child to receive better education, healthcare and nutrition which they cannot provide them at home. Poverty forces parents to opt for alternative care for their children believing that they will be in a better position compared to the one at home.<sup>29</sup>

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<sup>23</sup> UNGA 'Guidelines for the Alternative Care of Children' (18 December 2009) UN Doc A/RES/64/142, art 29(b).

<sup>24</sup> Save the Children, 'Guidelines for the Alternative Care of Children, a Tool for Reviewing the United Nations Framework with Children' (*Save the Children*, 2010) <<https://resourcecentre.savethechildren.net/node/5361/pdf/5361.pdf>> accessed 22 May 2021.

<sup>25</sup> Save the Children, 'Guidelines for the Alternative Care of Children, a Tool for Reviewing the United Nations Framework with Children' (*Save the Children*, 2010) <<https://resourcecentre.savethechildren.net/node/5361/pdf/5361.pdf>> accessed 22 May 2021.

<sup>26</sup> Jini L. Roby, 'Children in informal Alternative care' (2011) UNICEF, 9 <[http://m.bettercarenetwork.nl/content/17382/download/clnt/32435\\_UNICEF\\_DP\\_2011\\_children\\_informal\\_care.pdf](http://m.bettercarenetwork.nl/content/17382/download/clnt/32435_UNICEF_DP_2011_children_informal_care.pdf)> accessed 22 May 2021.

<sup>27</sup> UNICEF, *The State of the World's Children 2014 in Numbers: Every Child Counts: Revealing disparities, advancing children's rights* (UNICEF 2014).

<sup>28</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

<sup>29</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

### 2.3.2 Violent family environment

Violence inflicted in any form upon the child by one of its family members leaves a long-lasting impact upon this child. Children are removed from such violent family environment and placed in alternative care to ensure a safe environment.<sup>30</sup>

### 2.3.3 Discrimination

When children suffer from any form of disability the parents tend to neglect them as they are unable to fulfil the demand of special care and attention towards their children either due to the lack of resources or specific requirements in the form of medical assistance. Moreover, the stigma attached to children with disabilities forces the parents to choose alternative care.<sup>31</sup> In the sub-Saharan region the illness or dysfunction of the parent commonly due to HIV/AIDS is probably the reason these parents opt for alternative care arrangements.<sup>32</sup> Certain children face discrimination due to their belongingness to some ethnic or minority group, to being children of a single mother or being from broken families. They are also placed in alternative care institutions to prevent the continuance of such discrimination.<sup>33</sup>

## 2.4 The causes of violence against children in alternative care institutions

In this section the causes of violence against children in alternative care institutions, as recognized in the World Report on Violence Against Children, are discussed.<sup>34</sup> Violence against children in alternative care is mainly caused by poorly trained staff, in order to discipline children and the lack of monitoring. The subparagraphs below will elaborate on these causes.

### 2.4.1 Poorly trained staff

Violence against children in alternative care institutions is caused by inexperienced, poorly trained and unqualified staff. Staff in alternative care institutions rarely receive training on issues concerning the development of the child in relation to violence. The frequent violence against children in alternative care institutions results from both omission and commission by

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<sup>30</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

<sup>31</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

<sup>32</sup> Levison Chiwaula, Rebecca Dobson and Susan Elsley, *Drumming Together for Change: A Child's Right to Quality Care in Sub-Saharan Africa* (Centre for Excellence for Looked After Children in Scotland and University of Malawi 2014).

<sup>33</sup> Corinna Csáky, 'Keeping Children out of Harmful Institutions: Why we Should Be Investing in Family Based Care' (*Save the Children*, 2009) <<https://resourcecentre.savethechildren.net/node/1398/pdf/1398.pdf>> accessed 22 May 2021.

<sup>34</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

the staff. Violence results from its neglect by the staff and from the staff itself being the perpetrator of violence.<sup>35</sup>

Usually, people who seek out jobs in alternative care institutions have not had a background check.<sup>36</sup> This allows individuals with a history of violence to be recruited and subsequently to gain access to children. The lack of supervision of the staff is also a crucial factor which results in incidents of violence in alternative care institutions.<sup>37</sup> Without supervision, staff has shown to be less likely to stop acting violently towards children.<sup>38</sup>

#### 2.4.2 The use of violence to discipline children

In the majority of countries around the world some form of violence against children is present, which is condoned by a majority of society.<sup>39</sup> Countries on the one hand discard the most severe forms of violence and on the other hand accept lesser forms of violence in order to discipline the children. The regulations in most countries are designed in a particular manner in order to accept reasonable punishment. With that however violence receives the approval of society, since it has been included as discipline.<sup>40</sup> In a few states the use of canes and/or whips as a form of corporal punishment is still authorized relating the sentencing of the child.<sup>41</sup>

The most common example of state-authorized violence is corporal punishment.<sup>42</sup> The Committee defines ‘corporal punishment’ as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light”. Corporal punishment is still considered legal in many countries. This means that violence is generally accepted in those countries.<sup>43</sup> The general idea behind corporal punishment is that infliction of little harm

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<sup>35</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General’s Study on Violence Against Children 2006).

<sup>36</sup> Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012) 31.

<sup>37</sup> John E. Sheridan, John White and Thomas J. Fairchild, ‘Ineffective staff, ineffective supervision, or ineffective administration? Why some nursing homes fail to provide adequate care’ (1992) *The Gerontologist* 32(3), 334-41 <<https://doi.org/10.1093/geront/32.3.334>> accessed 19 May 2021.

<sup>38</sup> John E. Sheridan, John White and Thomas J. Fairchild, ‘Ineffective staff, ineffective supervision, or ineffective administration? Why some nursing homes fail to provide adequate care’ (1992) *The Gerontologist* 32(3), 334-41 <<https://doi.org/10.1093/geront/32.3.334>> accessed 19 May 2021.

<sup>39</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General’s Study on Violence Against Children 2006).

<sup>40</sup> UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8.

<sup>41</sup> UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8.

<sup>42</sup> UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8.

<sup>43</sup> End Corporal Punishment, ‘Global Report 2021: Prohibiting all corporal punishment of children: laying the foundations for non-violent childhoods’ (*Global Partnership to End Violence Against Children*, 2021) accessed <<https://endcorporalpunishment.org/resources/global-report-2021/>> 22 May 2021.



is part of the process of growing up, whereby punishment is a measure which ensures a responsible and disciplined child. Another example is the practice of medical intervention in order to limit reproductive functions. In the name of treatment, electric shocks are also used to control the behavior of children.<sup>44</sup> Corporal punishment is often justified by cultural, traditional and religious practice and is also supported by traditional justice systems.<sup>45</sup> The approval of violence for disciplining children is evident from the fact that according to a progress report until 2021 only 62 states have fully prohibited corporal punishment in all settings, which include alternative care settings.<sup>46</sup> After prohibiting corporal punishment in alternative care settings, it is required to properly implement and enforce this prohibition to make sure that the protection of all children against corporal punishment can be guaranteed.<sup>47</sup>

### 2.4.3 The lack of monitoring violence in alternative care settings

The third reason for violence being inflicted on children includes the lack of monitoring in alternative care settings. Many of the institutions are located in secluded or remote areas, which means that these are mostly unregulated. According to the Guidelines an effective and impartial mechanism should be available for children, so they can complain about their treatment or conditions of placement.<sup>48</sup> Nevertheless a lack of effective monitoring, complaint and inspection mechanism in alternative care institutions have been observed.<sup>49</sup>

In alternative care institutions children are either unaware of the complaints procedure or they are too afraid of using this reporting mechanism. States moreover inconsistently record the placement of children in alternative care, which means that there is no record of cases of violence against children.<sup>50</sup> In Armenia for example all residential facilities have formal complaint mechanisms in the form of special boxes and child helplines. Most of these boxes

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<sup>44</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

<sup>45</sup> Yvon Dandurand, 'Article 19 of the CRC and the Criminal Justice System's Duty to Protect Children Against Violence', (2014) *The Canadian Journal of Children's Rights* 1(1), 46-84 <<https://ojs.library.carleton.ca/index.php/cjcr/article/view/31>> accessed 15 March 2021.

<sup>46</sup> End Corporal Punishment, 'Global Report 2021: Prohibiting all corporal punishment of children: laying the foundations for non-violent childhoods' (*Global Partnership to End Violence Against Children*, 2021) accessed <<https://endcorporalpunishment.org/resources/global-report-2021/>> 22 May 2021.

<sup>47</sup> Global Initiative to End All Corporal Punishment of Children and Save the Children Sweden, 'Ending legalised violence against children: Prohibiting and eliminating corporal punishment in all alternative care and day care settings' (*BetterCareNetwork* 2012)

<<https://bettercarenetwork.org/sites/default/files/attachments/Ending%20Legalised%20Violence%20Against%20Children.pdf>> accessed 19 May 2021.

<sup>48</sup> UNGA 'Guidelines for the Alternative Care of Children' (18 December 2009) UN Doc A/RES/64/142, art 99.

<sup>49</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

<sup>50</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence Against Children 2006).

however remain empty and no cases of violence in alternative care institutions have been recorded.<sup>51</sup>

The lack of monitoring the incidents of violence in alternative care institutions may be due to the reluctance of the investigating agencies or the non-accessibility to alternative care settings. This absence of control could lead to the failure of holding the perpetrator of violence accountable for his or her actions and will only result in the continuation of violence in alternative care settings.<sup>52</sup>

## 2.5 Sub-conclusion

In this chapter the meaning of alternative care institutions and reasons for violence in these institutions have been discussed. In simple words, alternative care can be defined as: “any arrangement formal or informal, temporary or permanent for a child who is living away from his or her parents”. The Guidelines define primarily two kinds of alternative care options namely formal and informal care. Residential care institutions are the most commonly recognized option for children amongst various alternative care institutions. It is the responsibility of the government to make laws and policies for alternative care and regulate whom should take the decision whether a child should be placed in alternative care or not. Three main causes of violence in alternative care centers can be identified: poorly trained staff, the use of violence to discipline children and the lack of monitoring.

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<sup>51</sup> Rebecca Dobson and others, ‘From a Whisper to a Shout: A Call to End Violence Against Children in Alternative Care’ (*SOS Children’s Villages International*, 18 February 2015) < <https://reliefweb.int/report/world/whisper-shout-call-end-violence-against-children-alternative-care>> accessed 29 June 2021.

<sup>52</sup> Laura Lundy and others, ‘The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries’ (*UNICEF*, November 2012) <[https://downloads.unicef.org.uk/wp-content/uploads/2012/11/UNICEFUK\\_2012CRCimplementationreport-FINAL-PDF-version.pdf?\\_ga=2.143449526.2074372114.1564059496-355458155.1563455639](https://downloads.unicef.org.uk/wp-content/uploads/2012/11/UNICEFUK_2012CRCimplementationreport-FINAL-PDF-version.pdf?_ga=2.143449526.2074372114.1564059496-355458155.1563455639)> accessed 19 May 2021.

# Chapter 3. The responsibility of states under the CRC to protect children against violence in alternative care institutions

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## 3.1 Introduction

Usually, the primary protection and care of children is achieved within their families. With the absence of family this duty shifts upon the state, which means the state becomes responsible for the proper care and protection of children. Under international law states are obliged to protect children from violence. Before analyzing the practice of the judicial and quasi-judicial bodies in the light of the state obligation to protect children from violence in alternative care institutions, it is important to focus on the obligation of states to protect children against violence under international law.

In this chapter therefore the responsibilities of states under the CRC to protect children against violence in alternative care institutions are discussed in four paragraphs. The first paragraph will discuss the core obligation of a state. The international obligations of the state regarding children in alternative care will be debated in the second paragraph. The third paragraph will zoom in on the Guidelines and the fourth paragraph will present a legal analyses of article 19 CRC.

## 3.2 The core obligation of the state to implement the CRC

A member state of the CRC is obliged to implement the rights provided in this convention as set out in article 4 CRC. According to this provision a state should undertake all appropriate measures, including legislative and administrative, for the implementation of the rights recognized in the CRC.<sup>53</sup> This implementation implies that states find ways to put the provisions of the CRC in practice. The CRC however does not directly affect the national system of countries.<sup>54</sup> In cases of national law conflicting with the CRC the latter provisions therefore do not take precedence. On the other hand, an immediate effect can lead to the creation of rights that are not available in national law. States can give effect to the CRC either by placing it alongside their respective national constitutions or by using the CRC as a guiding force for implementing legislations. Irrespective of the different attitudes of states towards the

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<sup>53</sup> John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22.

<sup>54</sup> Patrick Geary, *CRC in Court: The Case Law of the Convention on the Rights of the Child* (CRIN 2012).

enforceability of the CRC, its provisions have been a source of valuable interpretative guidance for national courts.<sup>55</sup>

In order to determine the obligation of states to protect children from violence in alternative care institutions, it is necessary to refer to the GCs developed by the Committee. Though GCs are not legally binding, they contain authoritative interpretations developed by the Committee. They furthermore guide state parties through fulfilling their obligations under the CRC. The relevant GCs for the purpose of this study are GC No. 8 (The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment),<sup>56</sup> GC No. 9 (The rights of children with disabilities),<sup>57</sup> and GC No. 13 (The right of the child to freedom from all forms of violence).<sup>58</sup>

### 3.3 International obligations regarding children in alternative care

According to article 25 CRC the treatment and care of children living in alternative care should always be governed by what is in the best interest of the child (article 3 CRC). States also must ensure that other rights such as the right to be protected from violence (article 19 CRC), the right to education (articles 28 and 29 CRC), the right to food<sup>59</sup> and the right to play and leisure<sup>60</sup> comply with this treatment. Article 25 CRC further requires that states have proper mechanisms to ensure periodic reviews and assessments of the suitability of care provided to the child.<sup>61</sup>

### 3.4 UN Guidelines for the alternative care

The Committee<sup>62</sup> has articulated the need for alternative care for children, which has resulted in the United Nations General Assembly<sup>63</sup> adopting the Guidelines. These aim to enhance the implementation of the CRC in the area of the alternative care for children. These Guidelines are non-binding, yet they do include specific indications of the level of care and the basic requirements for alternative care. For example, according to the Guidelines (a) states are

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<sup>55</sup> Patrick Geary, *CRC in Court: The Case Law of the Convention on the Rights of the Child* (CRIN 2012).

<sup>56</sup> UNCRC 'General Comment 8' in 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)' (2 March 2007) UN Doc CRC/C/GC/8.

<sup>57</sup> UNCRC 'General Comment 9' in 'The rights of children with disabilities' (27 February 2007) UN Doc CRC/C/GC/9.

<sup>58</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13.

<sup>59</sup> Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012).

<sup>60</sup> Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012).

<sup>61</sup> Kristen Sandberg, *Children's Right to Protection under the CRC* (Palgrave Macmillan 2018) 15-38

<sup>62</sup> Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012).

<sup>63</sup> UNGA 'Guidelines for the Alternative Care of Children' (18 December 2009) UN Doc A/RES/64/142.

obliged to have a variety of alternative care options, (b) the period spent in alternative care must be suitable, (c) the accommodation and monitoring should provide adequate safeguards against violence and (d) corrective actions and behavior modification that constitute some types of violence are forbidden.<sup>64</sup> Independently of the control and regulation of alternative care institutions by states, those still have a duty to shield children from abuse.<sup>65</sup>

### 3.5 International obligation under article 19 CRC to protect children from violence

Article 19 CRC has been divided into two components: the first paragraph of article 19 CRC provides that states have a mandatory obligation to take the necessary appropriate educational, social, legislative and administrative measures to protect children from violence and the second paragraph of this article explains that these appropriate measures should include preventive and responsive steps. States consequently enjoy a certain margin of discretion in determining which measures are considered to be ‘appropriate’ for protecting children from violence.

#### 3.5.1 Legal analysis of article 19 paragraph 1 CRC

According to the Committee the concept of ‘appropriate’ in article 19 paragraph 1 CRC refers to a wide range of measures which also should be ‘effective’ and ‘consistent’ in order to protect children from all forms of violence.<sup>66</sup> Effective prohibitions of corporal punishment will be used as an example to illustrate the interpretation of these terms in relation to the measures taken. Firstly, the appropriateness of a measure that prohibits corporal punishment can be determined by the efforts made by those states concerning recently enacted laws prohibiting the use of corporal punishment as a form of child discipline in all settings, as well the consideration of such legislation as in terms of law. This means any measure will be appropriate as long as it has been assigned for the particular purpose to be achieved by that law.<sup>67</sup>

Secondly, the effectiveness of the measure that prohibits corporal punishment can be determined by their actual implementation in practice. For example, the Canadian legislator has created laws to protect children from violence, yet these regulations fail to effectively protect

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<sup>64</sup> Kristen Sandberg, *Children’s Right to Protection under the CRC* (Palgrave Macmillan 2018) 1-29.

<sup>65</sup> Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012).

<sup>66</sup> UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13.

<sup>67</sup> End Corporal Punishment, ‘ACERWC calls for prohibition of all corporal punishment of children in General Comment No. 5’ (*End Corporal Punishment*, 9 November 2018) <<https://endcorporalpunishment.org/acerwc-calls-for-prohibition-of-all-corporal-punishment-of-children-in-general-comment-no-5/>> accessed 15 March 2021.

children from violence in practice.<sup>68</sup> Despite the fact that the CRC denounces the use of corporal punishment, social and cultural attitudes in Canada condone violence against children in terms of corporal punishment and prevent adequate enforcement of applicable laws.<sup>69</sup> If these measures are not supplemented by the improvement in human behavior and social values, these measures may prove to be ineffective.

Thirdly, the measure that prohibits corporal punishment should be consistent with the provisions of the CRC. Countries like the Maldives, Malaysia, Bangladesh and Bhutan have ratified the CRC in order to protect children from all forms of violence, while failing to legislate the prohibition of corporal punishment in alternative care settings. This indicates the inconsistencies between the content and purpose of the CRC and domestic regulations.<sup>70</sup> In this regard, the Committee specifically has stated that “any measures which affect the right to be free from violence is contrary to international law and must be eliminated and that the persistence of harmful practices like corporal punishment cannot be safeguarded due to approval of custom, tradition or culture”.<sup>71</sup> The CRC basically prohibits provisions in national law which allow the usage of violence against children either as a corrective measure or as a chastisement in all settings including alternative care. According to the Committee it is necessary that due to the traditional acceptance of corporal punishment, “all branches of law relating to all forms of alternative care and justice systems should clearly prohibit the use of corporal punishment in all settings”.<sup>72</sup>

Article 19 paragraph 1 CRC further determines that “states should take legislative, administrative, social and educational measures”. These measures can be explained under various headings:

### *Legislative measures*

The legislative measures apply to all aspects of policy including the implementation, budgeting, and enforcement. A full and detailed picture of the impact of the provisions established by CRC

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<sup>68</sup> Article 43 of the Canadian Criminal Code provides the protection of children from corporal punishment.

<sup>69</sup> UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8.

<sup>70</sup> End Corporal Punishment, ‘Global Report 2021: Prohibiting all corporal punishment of children: laying the foundations for non-violent childhoods’ (*Global Partnership to End Violence Against Children*, 2021) accessed <<https://endcorporalpunishment.org/resources/global-report-2021/>> 22 May 2021.

<sup>71</sup> End Corporal Punishment, ‘ACERWC calls for prohibition of all corporal punishment of children in General Comment No. 5’ (*End Corporal Punishment*, 9 November 2018) <<https://endcorporalpunishment.org/acerwc-calls-for-prohibition-of-all-corporal-punishment-of-children-in-general-comment-no-5/>> accessed 15 March 2021.

<sup>72</sup> UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8.

at national level of all 195 member states within the framework of this thesis is nevertheless impossible. The reports submitted to the Committee however show a wide variety of legislative, social and further measures consisting of different degrees of challenges to implement all of these measures. According to the Committee in GC No. 5<sup>73</sup> on General Measures of Implementation of the CRC the ‘incorporation’ of the provisions of the CRC into the domestic legislations falls within the legislative measures required under article 19 CRC.<sup>74</sup> When states ‘incorporate’ the provisions of the CRC in their national legal system, these provisions can also be directly invoked before the courts. ‘Incorporation’ also means that the provisions of the CRC must be given priority over domestic legislation in case of an inconsistency between the CRC and national legislation. In this regard the Committee emphasizes that provisions of the CRC necessarily should be applied and enforced in an appropriate way and should encourage states to give priority to ‘incorporation’ amongst other measures. Most of the states which have ratified the CRC have directly or indirectly incorporated all provisions of the CRC into their domestic legislation. Some states have even incorporated different aspects of the CRC according to their requirements. Two-thirds of the member states have explicitly integrated the provisions of the CRC into its national law (mostly civil law countries).<sup>75</sup> This ensures that these provisions are both enforceable in court and are binding for state bodies. Since 1989, one-third of the examined countries has adopted new constitutions, which include provisions on the rights of the child. Africa is arguably leading with the provisions of new constitutional instruments in Burkina Faso, Ethiopia, Rwanda and South Africa, the last of which has the most extensive provisions. These provisions all contain express protection for children's rights.<sup>76</sup>

As noted above, direct incorporation means that provisions of the CRC can be applied and enforced directly in state law. The alternative to this system is indirect incorporation.<sup>77</sup> Through this system some effect can result in treaties in domestic law by using a different legal mechanism. This can be achieved by referencing to human rights treaties which have been

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<sup>73</sup> UNCRC ‘General Comment 5’ in ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5.

<sup>74</sup> UNCRC ‘General Comment 5’ in ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5.

<sup>75</sup> Simon Hoffman and Rebecca Thorburn Stern, ‘Incorporation of the UN Convention on the Rights of the Child in National Law’ (2020) *The International Journal of Children’s Rights* 28(1), 133-156 <<https://doi.org/10.1163/15718182-02801001>> accessed 12 May 2021.

<sup>76</sup> Examples of cases where the CRC has been directly applied within the national legal system are the case of *Bencosme v Devers*, *Kerezov v Minister of Justice*, *Maja Dreo et al. v Slovenia*, *Touwota Molu v John Molou and S.R.*, *V.R. v Lithuania*. Examples of cases in which the CRC has been used as interpretive are *Government v Grootboom*, *In re Lorna Gleeson*, *Ndlovu v Macheme*, *Police v Vailopa* and *Smith v Smith and Another*. For the full details of these cases see Appendix B.

<sup>77</sup> Simon Hoffman and Rebecca Thorburn Stern, ‘Incorporation of the UN Convention on the Rights of the Child in National Law’ (2020) *The International Journal of Children’s Rights* 28(1), 133-156.

ratified by states in their constitutions. The effect of indirect incorporation will have to be determined by the fact whether or not the provisions have ‘direct effect’ in domestic law.<sup>78</sup> Wales can be used for the explanation of indirect incorporation of the CRC, since this country adopted the ‘Rights of Children and Young Persons (Wales) Measure’ in 2011.<sup>79</sup> It therefore requires the Ministers of the Wales Assembly to give due regard to the provisions of the CRC, while formulating or reviewing any legislation or policy. This results in the indirect incorporation of the CRC by taking into account the provisions of the CRC, while making a decision on the rights of children.<sup>80</sup> In short, indirect incorporation will not have any potential enforcement until it has been comprehensively implemented into national law, considering the treaty as a part of national law is not enough.<sup>81</sup> Over the past thirty years, human rights have been a prime focus in almost every constitutional restructuring. States like Chile and Morocco have indirectly incorporated the CRC by means of a constitutional reference.<sup>82</sup> Even though the CRC is the only treaty that supports the rights of children to be free from violence,<sup>83</sup> reality shows that just a small number of states have incorporated the provisions of the CRC in its domestic law. The demonstrated aspirational goal of the incorporation of the CRC alone is yet insufficient to protecting the rights of children. It is rather the duty of each state to facilitate necessary legal, social and institutional changes in order to give effect to provisions of the CRC.<sup>84</sup>

#### *Administrative measures*

Secondly, according to article 19 paragraph 1 CRC states should take administrative measures which include the government's obligations to implement legislation and services in order to monitor the accountability of mechanisms to protect children from all forms of violence. In Central and Eastern Europe, Asia and sub-Saharan Africa the law can be poorly enforced due to an inadequate governance, the lack of transparency and a monitoring processes, insufficient

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<sup>78</sup> Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021.

<sup>79</sup> Gov.uk, ‘Rights of Children and Young Persons (Wales) Measure 2011’ (*legislation.gov.uk*, 2011) <<https://www.legislation.gov.uk/mwa/2011/2/contents>> accessed 14 June 2021.

<sup>80</sup> Laura Lundy, Ursula Kilkelly and Bronagh Byrne, ‘Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review’ (2013) *The International Journal of Children’s Rights* 21(3), 442-463.

<sup>81</sup> Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021.

<sup>82</sup> Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021.

<sup>83</sup> Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021.

<sup>84</sup> Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021.



financial capital and corruption, despite the existence of child protection laws and policies.<sup>85</sup> The regulation and supervision of child protection programs are lacking due to factors such as (1) limited resources for government actors, (2) the decentralization of the requirements for child care services among various states and NSAs in many countries and (3) the duplication of responsibilities or functions with other protection departments. These characteristics lead to an ineffective vertical and horizontal coordination between institutions, resulting in duplication, the waste of scarce capital and a lack of adequate oversight and transparency within the system.<sup>86</sup>

### *Social measures*

Thirdly, article 19 paragraph 1 CRC determines that states should take social measures to ensure that children's rights are protected and that basic and targeted services are available which may be introduced and enforced by both the state and NGOs. Social policy interventions to minimize harm and avoid abuse against children are examples of such measures.<sup>87</sup> Child poverty has been identified as a major problem for child rights in the 'Council of Europe's Strategy for the Rights of the Child (2016-21)', since it stresses the urgency of ensuring children's social rights as outlined in the CRC.<sup>88</sup> The framework of the CRC however does not recognize the characteristics and experiences of children who live in alternative care institutions from the perspective of poverty. The CRC approaches the issue of child poverty by family and household-oriented measures (articles 26 and 27 CRC). Children around the world, of the ones who cannot afford to look after them, end up in alternative care. As a consequence, paragraph 15 of the Guidelines states that: "Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family".<sup>89</sup> This statement is reflected in paragraph 62 of GC No. 14 of the Committee's

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<sup>85</sup> Ghazal Keshavarzian, 'Protect my future: The links between child protection and good governance' (*Save the Children*, February 2013) <<https://resourcecentre.savethechildren.net/sites/default/files/documents/7257.pdf>> accessed 15 March 2021.

<sup>86</sup> Ghazal Keshavarzian, 'Protect my future: The links between child protection and good governance' (*Save the Children*, February 2013) <<https://resourcecentre.savethechildren.net/sites/default/files/documents/7257.pdf>> accessed 15 March 2021.

<sup>87</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13.

<sup>88</sup> DECS-ENF, 'Council of Europe Strategy for the Rights of the Child (2016-2021)' (*Council of Europe*, 2016) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8>> accessed 29 June 2021.

<sup>89</sup> UNGA 'Guidelines for the Alternative Care of Children' (18 December 2009) UN Doc A/RES/64/142.

Concluding Observations to States, under which concerning Sierra Leone<sup>90</sup> and Suriname,<sup>91</sup> are often reiterated that financial issues or other circumstances should not be a reason for placing children into alternative care institutions. This is intertwined with the states' responsibility to provide social security under article 27 CRC. According to the Guidelines, government initiatives should take remedial action concerning children being placed in alternative care institutions and should therefore focus on poverty-reduction steps.<sup>92</sup> Such assistance can be used to supplement or replace salaries in situations where work is scarce or wages are insufficient to sustain a family.<sup>93</sup>

### *Educational measures*

Lastly, article 19 paragraph 1 CRC determines that states should take educational measures to make sure professionals dealing with children have the tools for preventing violence in alternative care. For example, by promoting a constructive dialogue around violence and facilitate children's expertise, both by state and other actors, as long as the state is in charge.<sup>94</sup> The Committee has elaborated the educational measures in GC No. 13, in which the committee recognizes that the way knowledge is created, taught and applied by professionals is extremely important for ensuring that children's rights are protected and implemented. Norway for example provides training programs for care takers, such as a bachelor's degree in social work for children. This however does not suggest Norway has a professional education curriculum oriented toward or applicable to child protection services. Norway conversely does not apply education systems that train personnel explicitly for the area of child protection practice. Furthermore, this country does not have a system regarding the authorization of child protection caseworkers, as is usual practice in other careers.<sup>95</sup>

### 3.5.2 Legal analysis of article 19 paragraph 2

Article 19 paragraph 2 CRC determines that the appropriate protective measures provided under article 19 paragraph 1 CRC also include measures preventing violence from happening and responding effectively in the event of an incident of violence. The term 'effective procedures'

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<sup>90</sup> UNCRC 'Concluding observations on the combined third to fifth periodic reports of Sierra Leone' (1 November 2016) UN Doc CRC/C/SLE/CO/3-5, para 25.

<sup>91</sup> UNCRC 'Concluding observations on the combined third and fourth periodic reports of Suriname' (9 November 2016) UN Doc CRC/C/SUR/CO/3-4, para 24.

<sup>92</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13, para 32.

<sup>93</sup> Kirsten Sandberg, 'Alternative Care and Children's Rights' in Ursula Kilkelly and Ton Liefgaard (eds), *International Human Rights of Children. International Human Rights* (Springer Singapore 2018) 1-29.

<sup>94</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13.

<sup>95</sup> Harald Grimen and Anders Molander. 'Profesjon og skjønn. I A. Molander & A. Terum' (2008) *Profesjonsstudier*, 179–197.

can include the coordination among different sectors directed by protocols, the development and implementation of systematic mechanisms for data collection and its analysis and the development of measurable objectives, policies and outcomes indicators in reference to the policies for children living in alternative care settings.<sup>96</sup> For example, outcome indicators can be formulated which focus on a child's positive development, his/her wellbeing and his/her rights, instead of narrowly focusing on various forms of violence. Also worth considering are the reviews of child deaths and critical injuries, as these can identify the reason violence occurs while making recommendations for corrective measures.<sup>97</sup> The term 'include' in article 19 paragraph 2 CRC indicates that the measures are illustrative and not exhaustive. This term also includes 'preventive' and 'responsive' measures.<sup>98</sup> The committee has suggested that a state's preventive strategy must have some if not all of the following characteristics: clear policy, protocols and programs; data collection, monitoring and evaluation; comprehensive services and equity; working with children; working with families, parents, caretakers, community involvement; interdisciplinary and multi-sectoral approaches, involving policy makers, international collaboration and partnership.<sup>99</sup> The responsive measures include the identification and reporting of cases of violence against children in alternative care institutions, the referral and investigation by competent authorities, the treatment and follow up of children who have faced violence and finally the judicial intervention.

Article 19 paragraph 2 CRC can be explained under two headings: (i) preventive measures and (ii) responsive measures. These measures will be further addressed below.

### 3.5.2.1 Preventive measures under article 19 paragraph 2 CRC

Preventing violence from occurring is the basic step towards protecting children against violence. The Committee has "emphasized that child protection must begin with proactive prevention of all forms of violence".<sup>100</sup> Effective preventive measures therefore should tackle the 'root causes of violence'.<sup>101</sup> Prevention will be possible only with "effective coordination at

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<sup>96</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13.

<sup>97</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13.

<sup>98</sup> John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22.

<sup>99</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13, para 27-29.

<sup>100</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13, para 46.

<sup>101</sup> UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13, para 46.

central, regional and local levels between different sectors and with civil society including empirical research community”.<sup>102</sup> The list of preventive measures available to states is extensive. States also enjoy a margin of discretion<sup>103</sup> in identifying the appropriate measures within their jurisdiction following consultation with all relevant actors.<sup>104</sup> An important component of national law for alternative care institutions to prevent violence against children can be found in challenges implementing preventive measures by a state monitoring and complaint system. An open debate can improve the transparency and accountability concerning the outcomes of the monitoring and complaint systems, allowing for better management of alternative care institutions.<sup>105</sup> The next subparagraph will further elaborate on two preventive measures namely, monitoring and complaint system.

### 3.5.2.2 Lack of monitoring system

For the purpose of assessing and monitoring the alternative care institutions it is firstly necessary to ensure that all alternative care institutions are registered. Apart from registration it is also necessary that these alternative care institutions are regularly monitored by states irrespective of the fact whether these institutions are private- or state-run. Insufficient monitoring of the government concerning the alternative care institutions affects the ability of states to protect children from violence. In this context, the state of Chile may be seen as an example, where this state only has authority over institutions that accept government subsidies, implying that the government does not oversee privately financed alternative care institutions.<sup>106</sup> A lack of monitoring system in alternative care institutions is a big hindrance in giving effect to state obligation in order to protect children against violence and will give scope for unattended cases of violence against children.

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<sup>102</sup> UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13, para 72(j).

<sup>103</sup> Despite this discretion, it is suggested that a state’s preventive strategy must have some if not all of the following characteristics: clear policy, protocols, and programs; data collection, monitoring, and evaluation; comprehensive services and equity; working with children; working with caretakers, community involvement, interdisciplinary and multi-sectoral approaches, involving policy makers, international collaboration and partnership (UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13, para 27-29).

<sup>104</sup> UNICEF, UNHCR, Save the Children and World Vision, ‘A Better way to Protect all Children: The Theory and Practice of Child Protection Systems’ (*A Better Way to Protect all Children Conference*, 2013) <[https://resourcecentre.savethechildren.net/sites/default/files/documents/c956\\_cps\\_interior\\_5\\_130620web\\_0.pdf](https://resourcecentre.savethechildren.net/sites/default/files/documents/c956_cps_interior_5_130620web_0.pdf)> accessed on 15 March 2021.

<sup>105</sup> Kathy Vandergrift, ‘Challenges in Implementing and Enforcing Children’s Rights’ (2004) *Cornell International Law Journal* 32(3) <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1629&context=cilj>> accessed 14 June 2021.

<sup>106</sup> Nicolás Espejo Yaksic, ‘Report of the Investigation in Chile under Article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communication Procedure, CRC/HL/INQ/1’ (2018) 2018/2 (note).

### 3.5.2.3 Lack of complaint system

The complaint system in alternative care institutions is also not guaranteed. The first step ensuring quality care is to effectively manage complaints. Nevertheless reporting procedures or complaint mechanisms are standard under national law,<sup>107</sup> while the processes and structures in place to facilitate reporting and complaints are often inadequate.<sup>108</sup> In practice, collaboration between the police and child welfare authorities is frequently intermittent, if not problematic.<sup>109</sup> In Armenia for example all residential care facilities have formal complaint mechanisms in the form of complaint boxes and child helplines, yet most of these boxes remain empty, thereby no cases of violence are recorded in alternative care institutions.<sup>110</sup> In Kosovo it has been observed that children are unable to raise complaints or express their concerns due to a lack of knowledge about the right to file complaints, despite the existence of complaint raising procedures for children living in alternative care. Moreover, children living in alternative care are fearful in complaining against the people who are responsible for their care. This emphasizes the demand for improved communication enabling children to raise their complaints against violence without any fear. The Committee has recommended that states should provide child accessible complaint mechanisms in every alternative care institution.<sup>111</sup> Until 2014 children were not allowed to bring complaints directly to the Committee. It was only in 2014 when the third optional protocol to the CRC was adopted. This allows children to bring complaints directly to the Committee for investigation.<sup>112</sup> The Committee has made a very welcoming step by strengthening the position of children under CRC, since they can now bring complaints of violence in alternative care institutions to the notice of the Committee. This strengthening yet seems illusionary as the protocol is optional. This means states can still choose to be bound by the protocol or not.

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<sup>107</sup> For example in countries like Denmark and Sweden, reporting is part of the national law. In other countries like Finland and Latvia the obligations to report only apply to specific professionals like social workers and teachers. (Daja Wenke, *Family Support and Alternative Care* (Council of the Baltic Sea States Secretariat Stockholm, Sweden 2015).

<sup>108</sup> Lizette Berry and others, *Children's right to be protected from violence: A review of South Africa's laws and policies* (Save the Children South Africa 2014).

<sup>109</sup> Yvon Dandurand, 'Article 19 of the CRC and the Criminal Justice System's Duty to Protect Children Against Violence', (2014) *The Canadian Journal of Children's Right* 1(1), 46-84 <<https://ojs.library.carleton.ca/index.php/cjcr/article/view/31>> accessed 15 March 2021.

<sup>110</sup> Rebecca Dobson and others, 'From a Whisper to a Shout: A Call to End Violence Against Children in Alternative Care' (*SOS Children's Villages International*, 18 February 2015) < <https://reliefweb.int/report/world/whisper-shout-call-end-violence-against-children-alternative-care>> accessed 29 June 2021.

<sup>111</sup> Eurochild, 'Children in Alternative Care – National Surveys' (*Eurochild*, January 2010) <[https://eurochild.org/uploads/2021/01/Eurochild\\_Publication\\_-\\_Children\\_in\\_Alternative\\_Care\\_-\\_2nd\\_Edition\\_January2010.pdf](https://eurochild.org/uploads/2021/01/Eurochild_Publication_-_Children_in_Alternative_Care_-_2nd_Edition_January2010.pdf)> accessed 14 June 2021.

<sup>112</sup> UNCRC 'Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure' (19 December 2011) UN Doc CTC/4/11.

#### 3.5.2.4 Responsive measures under article 19 paragraph 2 CRC

With regard to responsive measures this thesis will zoom in on the investigation of violence in alternative care settings. The process of investigation includes the collection of evidence, identification of the accused, arresting the accused and forming charges against the accused. Investigation plays a very vital role in any criminal justice system, as the conviction of any guilty person will depend on the results of the investigation. The aim of investigation is to ensure justice by fair trials in courts as the efficiency and fairness of the investigation will determine justice to the victim and punishment to the accused. Without an efficient investigation, the defendant will be less probably accused or punished. Preventing the aggressor from committing acts of violence against children in alternative care institutions to a large extent depends on the investigation process.

The Committee has reported that inquiries must be carried out by adequately trained staff with adequate resources to ensure a comprehensive and impartial inquiry, when violence against children occurs. This can be hard in practice because usually insufficient specialized staff is available. In result people with no special training research these cases, thereby creating a varied quality of the investigations and a different treatment of the children's experiences of violence.<sup>113</sup> In Canada for example, in spite of its strong social understanding of the issue and a very high degree of trust in the police, in several cases the plaintiffs have taken a long time recording the incident. In certain cases finding the suspect is a comparatively easy process, while collecting adequate information in order to continue the charges is a difficult and time-consuming task.<sup>114</sup>

### 3.6 Sub-conclusion

In this chapter the state responsibilities under the CRC have been discussed. A state has the obligation to implement the rights as codified in article 4 CRC in order to apply the appropriate legislative, administrative, social and educational measures as described in article 19 CRC. At times the obligations may be legally binding in the form of provisions of the treaty, after been given mandatorily effect by states, while sometimes these obligations are included in recommendations to states as explained in the reports and GCs by the Committee. These sources

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<sup>113</sup> Diana Roberts, 'Child Protection in the 21<sup>st</sup> Century' (1991) *Child Abuse and Neglect* 15(1) 25-30.

<sup>114</sup> Adam Cotter and Pascale Beaupré, 'Police-reported sexual offences against children and youth in Canada, 2012' (2014) Component of Statistics Canada catalogue no. 85-002-X <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2014001/article/14008-eng.pdf?st=E1xzbOiX>> accessed on 15 March 2021.

guide the course of action of states in effecting the provision of the treaty. Although the GCs of the Committee are not legally binding, these can still be seen as authoritative legal interpretations of state obligations based on the CRC.

Based on the CRC, there can be no denying that states have the primary obligation to protect children from all forms of violence, which includes the protection in alternative care institutions. Relevant articles of the CRC and the GCs provide an approach which is proactive, holistic and inclusive and focuses on an environment free of violence against children.<sup>115</sup> However, laws and policies will be of no use, when the mechanisms for effective implementation in place are missing.

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<sup>115</sup> John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22.

# Chapter 4. Analysis of the practice of judicial and quasi-judicial bodies in the light of the state obligation to protect children from violence in alternative care institutions

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## 4.1 Introduction

The scope of the obligation to protect children from violence in alternative care institutions has been exhaustively discussed in the preceding chapters. This chapter will focus on the success of states meeting their obligations to respect, protect and fulfill the rights under article 19 CRC based on the practice of judicial and quasi-judicial bodies. In addition to the case law under the CRC, this thesis will refer to the provisions of the European Convention on Human Rights (hereafter: ECHR) and the case law of the ECtHR to shed light on the obligations of states by analogy. Analogical reasoning means a certain argument used in a particular case should be used in the same certain manner in a similar case. The researcher has referred to the relevant findings of the ECHR, as all European Union states are parties to the CRC and the integration of the CRC principles into the case law of the ECtHR gives greater force to the CRC.<sup>116</sup> Moreover, reference to ECtHR has also been made as the children right's principle provided under the CRC has influenced the ECtHR's reasoning and in some cases the ECtHR has referred directly to provisions of the CRC.<sup>117</sup>

In paragraph 4.2 the meaning of the tripartite obligation of states (the obligation to respect, protect and fulfil) under article 19 CRC will be discussed. Paragraph 4.3 will zoom in on the obligation to fulfill. In paragraph 4.4. the obligation to protect will be discussed and paragraph 4.5 will finally focus on the obligation to fulfill.

## 4.2 State obligation under article 19 CRC

The basic obligation for states to ratify a human rights treaty is threefold: firstly the obligation to 'respect' the rights in the treaty, secondly the obligation to 'protect' the rights enshrined in

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<sup>116</sup> European Union Agency for Fundamental Rights and Council of Europe, 'Handbook on European Law relating to the rights of the child' (*EUFRA*, 20 November 2015) 114-119 <<https://fra.europa.eu/en/publication/2015/handbook-european-law-relating-rights-child>> accessed 29 June 2021.

<sup>117</sup> European Union Agency for Fundamental Rights and Council of Europe, 'Handbook on European Law relating to the rights of the child' (*EUFRA*, 20 November 2015) 114-119 <<https://fra.europa.eu/en/publication/2015/handbook-european-law-relating-rights-child>> accessed 29 June 2021.



the treaty and finally to ‘fulfil’ the rights to the benefit of the right holder.<sup>118</sup> From this perspective the obligations under CRC can be understood as follows.

- Obligations ‘to respect’ means that states should not interfere with the enjoyment of any kind of rights. This obligation is sometimes referred to as a ‘negative obligation’, meaning that the state actors (staff, police, teachers, residential care workers, public authorities et cetera) should not engage in acts which constitute violence.<sup>119</sup> It also means that states should not in any manner facilitate violation of children’s rights.
- Obligation ‘to protect’ means that states have to protect children from violence which requires states to take positive action and prevent occurrence of violence. Thereby states are obliged to restrain third parties from violating rights.<sup>120</sup>
- Obligation ‘to fulfil’ means states should take positive actions to make sure that rights of children can be effectively exercised.<sup>121</sup>

Article 19 CRC incorporates both substantive and procedural obligation to protect children from violence and providing states with redressal and remedies for instance of violence.<sup>122</sup> The obligations of states can be substantive by the use of terms such as “... to protect, prevent, preserve, provide, cease, refrain from, or abstain...” or procedural, involving the obligation with redressal and remedies. Apart from procedural and substantive obligation human rights treaties include due diligence obligation either in express terms or implied in the provisions of the treaty. Due diligence is the standard of conduct according to the substantive obligation of states.

### 4.3 Obligation to respect

Human rights treaties place obligations on states which means these states are responsible for the breach of their obligations. The issue of state responsibility is discussed under the draft prepared by International Law Commission known as ‘Draft articles on Responsibility of States

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<sup>118</sup> Julia Sloth Nielsen, ‘Monitoring and Implementation of Children’s Right’ in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer Singapore 2019) 49.

<sup>119</sup> Julia Sloth Nielsen, ‘Monitoring and Implementation of Children’s Right’ in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer Singapore 2019) 49.

<sup>120</sup> Monica Hakimi, ‘State Bystander Responsibility’ (2010) *The European Journal of International Law* 21(2) <<http://ejil.org/pdfs/21/2/2010.pdf>> accessed 22 May 2021.

<sup>121</sup> Julia Sloth Nielsen, ‘Monitoring and Implementation of Children’s Right’ in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer Singapore 2019) 49.

<sup>122</sup> Stefan Talmon, ‘Jus Cogens After Germany v. Italy: Substantive and Procedural Rules Distinguished’ (2012) *Leiden Journal of International Law* 25(4), 979-1002.

for Internationally Wrongful Acts'.<sup>123</sup> The primary goal of the draft articles is the codification of rules applicable on state responsibility. According to these provisions, states will only be held responsible firstly, when the act or omission constitutes the breach of an international legal obligation, which means the obligation must be binding on states and secondly, when the act or omission is attributable to the state.<sup>124</sup>

A state as an abstract legal entity cannot act by itself, yet it can act through its authorized officials and representatives. However, the state cannot be made responsible for every act or omission of its officials or representatives. This means a state is responsible only for the acts or omissions of its officials and representatives which are attributable to it. The doctrine of attributability is the legal fiction which attributes the acts or omissions of state officials to the state. It also depends on the link between the state and the person committing the act or omission.<sup>125</sup> This means states can be held responsible for the acts or omissions committed by any of its organs and also for the acts or omissions of persons or groups on which the state exercises a degree of control in such a manner that they can be considered to be dependent on the state.

Under article 5 of the draft articles the acts or omissions of an entity or a person which/who is not part of a state organ, but is authorized to exercise governmental authority, must be empowered by law to exercise functions of public importance which are normally exercised by state organs. Article 8 of the draft articles attributes the acts or omissions of private individuals to the state, when the private person acts on the instructions of the state and when that person acts under the direction and control of this state.

According to article 19 CRC “states have the obligation to ensure that all necessary steps are taken to protect children from violence” in conformity with their constitutional processes to give effect to the rights provided under the CRC. Since the obligation to respect means that states have to refrain from violating the rights, it can be implied that state actors under article 19 CRC should abstain themselves from being the perpetrator of violence to children in alternative care. State actors normally include the state officials for whose acts the state can be held responsible.

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<sup>123</sup> UNILC ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001’ (November 2001) UN Doc A/56/10.

<sup>124</sup> Mayank Madhaw, *Public International Law and Human Rights (Law of Peace)* (Singhal Law Publications 2019).

<sup>125</sup> UNILC ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001’ (November 2001) UN Doc A/56/10.

The failure of states to take action to prevent violence from occurring results into the breach of the due diligence obligation. This obligation regarding human rights refers to taking measures to protect, prevent, minimize or rectify the violation of the human rights of individuals, which can be imposed either through a human rights treaty or international customary law.<sup>126</sup>

The obligation of due diligence can be expressly mentioned in any treaty either with the use of the term ‘due diligence’ or impliedly as a standard and duty of due diligence, which are used to assess the measures taken by states to implement substantive obligation.<sup>127</sup> In terms of protection against violence, the obligation of due diligence means that states ought to take necessary measures according to the capacity of the state to protect children, when states “knew or ought to have known of a risk”.

The question which arises after an instance of violence in alternative care is: Should the state be responsible for violence against children in alternative care? Should the state be made vicariously liable<sup>128</sup> for the negligence<sup>129</sup> in the form of action or inaction of the authority responsible for protection and care of the child in alternative care? In respect of alternative care institutions, negligence may involve the failure to hire or supervise suitable and qualified staff and it may also involve the failure to recognize the violence.<sup>130</sup> The ECtHR has already developed jurisprudence on states’ obligation in the context of violence against children in alternative care settings. These cases will be used to examine the extent of the obligation of states to protect children against violence by those who have the responsibility to ensure their care and protection in alternative care institutions.

In the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* the main question was not related to the infliction of physical violence, but to the inaction on the part of

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<sup>126</sup> Ellen Campbell and others, ‘Due Diligence Obligation of International Organizations Under International Law’ (2018) *International Law and Politics* 50, 541-604.

<sup>127</sup> Ellen Campbell and others, ‘Due Diligence Obligation of International Organizations Under International Law’ (2018) *International Law and Politics* 50, 541-604.

<sup>128</sup> Vicarious Liability is a principle of tort law where someone is held responsible for the acts or omissions of another person. It is a principle of strict liability under which an employer will be liable for the actions of employee committed in the course of employment. (Margaret Hall, ‘The liability of public authorities for the abuse of children in institutional care: common law developments in Canada and The United Kingdom’ (2000) *International Journal of Law, Policy and the Family* 14(3), 281-301 <<https://doi.org/10.1093/lawfam/14.3.281>> accessed 15 May 2021).

<sup>129</sup> Torts of negligence means breach of duty of care by a person which he owed to another as a result of which the other person suffers some legal injury. (Margaret Hall, ‘The liability of public authorities for the abuse of children in institutional care: common law developments in Canada and The United Kingdom’ (2000) *International Journal of Law, Policy and the Family* 14(3), 281-301 <<https://doi.org/10.1093/lawfam/14.3.281>> accessed 15 May 2021).

<sup>130</sup> Margaret Hall, ‘The liability of public authorities for the abuse of children in institutional care: common law developments in Canada and The United Kingdom’ (2000) *International Journal of Law, Policy and the Family* 14(3), 281-301 <<https://doi.org/10.1093/lawfam/14.3.281>> accessed 15 May 2021.

the authorities, where they neglected Valentin Câmpeanu because of his illness HIV.<sup>131</sup> Valentin was denied the implementation of his HIV treatment and he was placed in a medical institution which was incapable of providing him the adequate care required for his mental condition. The ECtHR considered this neglect to provide adequate care and treatment a violation of article 2 ECHR which guarantees the right to life and obliges states to ensure the prohibition of the intentional deprivation of life.

According to article 19 CRC, violence is not limited only to physical violence. Rather in its widest scope violence includes “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse”.<sup>132</sup> In *Câmpeanu v Romania* it was held that the neglect of the authorities to provide proper treatment while being responsible for the care of Valentin Câmpeanu was, by analogy, equivalent to the violence under article 19 CRC.

In *Nencheva v Bulgaria* the ECtHR took notice of the neglect by the government officials who were aware of the problems faced by the Dzhurkovo Care home in providing adequate food and medical assistance to the children therein.<sup>133</sup> Despite their knowledge about the situation the officials failed to take any measures and neglected the children as a result of which fifteen children in this care home died.<sup>134</sup> It would not be wrong to say that state indirectly has abetted the violation of the rights of these children by neglecting their basic needs such as food and medical treatment, which is also a form of violence.

In the ‘Report of the Investigation in Chile under article 13 of the Optional Protocol to the CRC on a Communication Procedure’, the situation of children in alternative care in Chile required an investigation as several deaths due to negligence of the staff responsible for care and protection of children had been reported.<sup>135</sup> According to the Committee, Chile had infringed the obligation to respect various rights of children including those under article 19 CRC, which had been violated by the state towards these children during the period of their stay in residential

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<sup>131</sup> *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania Application* (2014) ECtHR, 47848/08, para 69-100.

<sup>132</sup> Paulo Sergio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General’s Study on Violence Against Children 2006).

<sup>133</sup> *Nencheva v Bulgaria Application* (2013) ECtHR, 48609/06, para 105-116.

<sup>134</sup> International Justice Resource Center, ‘In *Nencheva v Bulgaria*, European Court Finds State Responsible for Deaths in Institutions for Children with Disabilities’ (*International Justice Resource Center*, 25 June 2013) <<https://ijrcenter.org/2013/06/25/in-nencheva-v-bulgaria-european-court-finds-state-responsible-for-deaths-in-institution-for-children-with-disabilities/>> accessed 7 May 2021.

<sup>135</sup> UNCRC ‘Report of the related investigation in Chile under the Article 13 of the Optional Protocol to the Convention on the Rights of the Child regarding a procedure of communications (1 June 2018) UN Doc CRC/C/CHL/INQ/1, para 111-113.

care, in which they were under the direct control of the state. This had resulted in the revictimization of these children by the staff of these residential care institutions.<sup>136</sup> The state was declared directly responsible for the violations which were committed by the staff of these residential care institutions. This decision has its importance as the Committee has drawn attention to the concrete ‘obligation to respect’ along with other obligations, as the state had failed to comply with these.

Based on the analysis of the above mentioned cases, the following conclusions can be drawn. Not every act of officials or personnel who have the responsibility to ensure the child’s care and protection is deemed to consist of acts and omissions of the state. States can be held responsible only if the act or omission is attributable to the state. If states cannot be held vicariously responsible for these acts or omissions, only the individual in his personal capacity can be held criminally responsible.<sup>137</sup> Applying the principle of article 5 of the draft articles the acts and omissions of the alternative care institutions will be attributed to the state as these exercise the function of public importance and their conduct relates to the exercise of governmental authority.<sup>138</sup> The state will also be held responsible for the conduct of the agencies, officials or private individuals which may be in the form of “positive acts, omissions, failure to meet a standard of due care, or lack of vigilance which would be lawful according to the national law of the state”.<sup>139</sup> The acts of staff or personnel in the form of ‘volunteers’ who may be private individuals not employed by the state may be attributed to the state, if the state gives directions to these individuals or exercises control over them in relation to their function of the care and protection of children.

When states have the obligation to respect a right under any international human rights treaty, due diligence can be used as a standard to assess the compliance by states with respect to substantive obligation. Personnel and government officials neglecting the children in care or directly committing any violence upon children in alternative care, therefore result into the breach of ‘obligation to respect’ by states, as states become the facilitator directly or indirectly. In this case states fail to restrain their state actors from violating the rights of children. When

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<sup>136</sup> Nicolás Espejo Yaksic, ‘Report of the Investigation in Chile under Article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communication Procedure, CRC/C/HL/INQ/1’ (2018) 2018/2 (note).

<sup>137</sup> UNILC ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001’ (November 2001) UN Doc A/56/10.

<sup>138</sup> Robert McCorquodale, ‘Non State Actors and International Human Rights Law’ in Sarah Joseph and Andrew McBeth (eds), *International Human Rights Law* (Edward Elgar 2009).

<sup>139</sup> Goran Lysén, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles* (Lustus Forlag 1979) 59.

the violence in any manner originates from the state officials or the persons whose acts are deemed to be an act of states, a breach of due diligence and ‘obligation to respect’ the rights of a child to be free from violence can be noted.

#### 4.4 Obligation to protect

International human rights place direct obligation on states alone, which means states cannot be held responsible for the act or omission of non-state or private actors. It also means their acts or omissions will not constitute a violation of human rights law and the state will not be held responsible irrespective of the impact left by acts or omissions of non-state actors.<sup>140</sup>

Therefore, the state responsibility depends on the link between the state and the act or omission. In order to make this state responsible for the act of NSAs it must qualify as an ‘act of a state’, which means the acts or omissions of NSAs are generally not attributable to states. The International Law Commission however has identified four situations where the act of NSAs or private actors can be attributed to a state. This means that a state can be held responsible for breaching an international obligation to ensure the protection of human rights at the hands of NSAs. Firstly, a state can be made responsible for the acts or omissions of a person or entity in such circumstances where it has been proved that the latter was exercising components of state activity. Secondly, when the person or entity has been shown to act under the direction or control of the state, the state can be made responsible. Thirdly, when the state ratifies or acknowledges the act or omission of the person or entity it becomes the act of the state. Lastly, the state can also be responsible when it fails to exercise due diligence in preventing the outcomes of the actions of NSAs.<sup>141</sup>

Though NSAs have not been conferred any direct obligation under the CRC, states have the obligation to exercise due diligence to regulate, supervise and monitor their conduct. The concept of due diligence concerning the responsibility of the state for acts of NSAs has been explained by the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez v Honduras*.<sup>142</sup> According to this Court the acts which are not attributable to states, can also lead to the international obligation of states due to a lack of due diligence to prevent violation of any

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<sup>140</sup> Robert McCorquodale, ‘Non State Actors and International Human Rights Law’ in Sarah Joseph and Andrew McBeth (eds), *International Human Rights Law* (Edward Elgar 2009).

<sup>141</sup> Robert McCorquodale, ‘Non State Actors and International Human Rights Law’ in Sarah Joseph and Andrew McBeth (eds), *International Human Rights Law* (Edward Elgar 2009).

<sup>142</sup> *Velasquez Rodriguez v Honduras* (1989) Inter-American Court of Human Rights, 4 172.

right or to respond to it in the manner required by a treaty.<sup>143</sup> In relation to violence against children by NSAs ‘due diligence’ means states are condoning the act of violence when not making appropriate efforts to stop this violence .<sup>144</sup>

In the light of article 19 CRC ‘the obligation to protect’ involves the assurance that the rights of children are not violated by NSAs. States therefore have to protect children against violence. The failure to protect children from violence can lead to state responsibility in certain circumstances.<sup>145</sup> Not only the CRC addresses the role of NSAs, also the Committee which is responsible for supervising the treaty’s implementation has emphasized that states “have a legal obligation to respect and ensure the rights of children as stipulated in the Convention, which includes the obligation to ensure that non-state service providers operate in accordance with its provisions”.<sup>146</sup>

In addition, the Committee is very clear that states should be unable to diminish their obligation in ensuring full recognition to the right of children provided in the CRC in the light of privatization.<sup>147</sup> The state will consequently be held responsible for tolerating the violence as it does not take any efforts to prevent any violence being committed against children by NSAs either in alternative care or in other establishments.<sup>148</sup>

The ECtHR has dealt with several cases related to violence against children where violence had been inflicted in several establishments administered by NSAs. The primary question here revolves around the state responsibility, which means whether state responsibility could arise or not. The most important component developed by ECtHR is its ruling that a state cannot vindicate itself from its duty to protect children from violence merely because of the fact that there is delegation of the administration of public services to private actors.<sup>149</sup>

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<sup>143</sup> Lee Hasselbacher, ‘State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence and International Legal Minimums of Protection’ (2010) *Journal of Human Rights* 8(2), para 78.

<sup>144</sup> Robert McCorquodale, ‘Non State Actors and International Human Rights Law’ in Sarah Joseph and Andrew McBeth (eds), *International Human Rights Law* (Edward Elgar 2009).

<sup>145</sup> Julie Fraser, ‘Domestic Implementation of International Human Rights Treaties: The Role of Public and Private Actors’ in Julie Fraser (ed), *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (Cambridge University Press 2020).

<sup>146</sup> UNCRC ‘General Comment 5’ in ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5, para 43.

<sup>147</sup> Karen A. Polonko and Lucien X. Lombardo, ‘Non-Governmental Organizations and the UN Convention on the Rights of the Child’ (2015) *International Journal of Children’s Rights* 23, 133-153

<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/intjchrb23&div=10&id=&page=>> accessed 22 May 2021.

<sup>148</sup> UNCRC ‘General Comment 5’ in ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5, para 43.

<sup>149</sup> European Union Agency for Fundamental Rights and Council of Europe, ‘Handbook on European Law relating to the rights of the child’ (*EUFRA*, 20 November 2015) 114-119 <<https://fra.europa.eu/en/publication/2015/handbook-european-law-relating-rights-child>> accessed 29 June 2021.

As discussed under chapter 3, the use of corporal punishment in the guise of discipline is a common form of violence faced by children in alternative care. The protection against corporal punishment can be used as an example to analyze to what extent states have been able to fulfill their obligation to protect children in alternative care. Little research has been carried out focusing specifically on corporal punishment in alternative care, as reports tend to focus more generally on the violence or abuse. Corporal punishment against children when inflicted by parents is often considered lawful since it is generally believed that a certain amount of violence is acceptable in the process of childrearing and this violence is often carried into other settings including foster care and residential care institutions.<sup>150</sup>

Corporal punishment against children can occur at the hands of the state, in school, in care institutions or in other institutional settings or by private individuals such as parents, other family members and individuals involved in raising the child. Legal systems must directly regulate physical punishment. If these systems do not specifically regulate this violence by specific legislations, general laws, criminal laws and tort laws for child protection applies. Specific regulation can after all increase the legal justification.<sup>151</sup>

The ECtHR has held corporal punishment to be a form of disciplinary measure which comes within the terms of article 3 ECHR. When disciplinary measures reach a certain level of severity, ECtHR could decide this measure is a violation of article 3 ECHR. If this measure is not to be found severe enough for a violation of article 3 ECHR, it could possibly contain a violation of article 8 ECHR, violating the right to physical and moral integrity.<sup>152</sup> The ECtHR however has so far not decided on corporal punishment using article 8 ECHR.<sup>153</sup> Almost no jurisprudence is available specifically on the violence by NSAs in alternative care institutions. Therefore, the researcher will refer to the cases of violence by NSAs in other arrangements, as the focus of this part of the chapter is on the state responsibility to protect children from violence committed by NSAs and the same responsibility will extend to violence in alternative care

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<sup>150</sup> Global Initiative to End All Corporal Punishment of Children and Save the Children Sweden, 'Ending legalised violence against children: Prohibiting and eliminating corporal punishment in all alternative care and day care settings' (BetterCareNetwork 2012) <<https://bettercarenetwork.org/sites/default/files/attachments/Ending%20Legalised%20Violence%20Against%20Children.pdf>> accessed 19 May 2021.

<sup>151</sup> Natsu Nogami, Judith Ennew and Dominique Pierre Plateau, *Discipline and punishment of children: a rights-based review of laws, attitudes and practices in East Asia and the Pacific* (Save the Children Sweden 2005).

<sup>152</sup> ECtHR, 'Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence' (ECtHR, 31 December 2020) <[https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf)> accessed 7 May 2021.

<sup>153</sup> ECtHR, 'Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence' (ECtHR, 31 December 2020) <[https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf)> accessed 7 May 2021.



institutions by NSAs. The law cannot prevent the state from incurring the responsibility in relation to the violence by NSAs in alternative care. The topic of corporal punishment by NSAs specifically has been addressed in the case of *A v. the United Kingdom*.<sup>154</sup>

ECtHR has emphasized that state parties have the obligation to secure rights and freedoms mentioned in the CRC and that article 3 ECHR requires states to make sure that children are not subjected to torture or inhuman or degrading treatment, nor punishment by private individuals.<sup>155</sup> In the case *Z & others v the United Kingdom* the court has determined a violation of article 3 CRC.<sup>156</sup> The United Kingdom has failed to remove a group of siblings from its parents who treated them with cruelty and neglected them. Therefore the ECtHR has found the United Kingdom responsible, even though the injury had not been inflicted directly by anyone in a public capacity.<sup>157</sup> The Court held that “it was the duty of the state to ensure that individuals in their jurisdiction are not subjected to inhuman or degrading treatment including ill treatment by private individuals and that the state failed in its positive obligation under article 3 to provide them with adequate protection against inhuman and degrading treatment”.<sup>158</sup>

In the case of *Parents Forum for Meaningful Education v Union of India and Another* a petition had been brought challenging the legality of corporal punishment in schools.<sup>159</sup> The Indian Delhi High Court held that “the state is to ensure that children are not subjected to corporal punishment in schools”, relying on various international human rights instruments including the CRC. The court then concluded article 19 CRC focuses on providing protection to children from all forms of violence and on preservation of the dignity of the child.<sup>160</sup>

In Bangladesh a writ petition has been filed after several reports of corporal punishment against children in government and non-government schools challenging the corporal punishment in schools including: torture, cruel, inhuman or degrading treatment or punishment.<sup>161</sup> The Supreme Court of Bangladesh has held that corporal punishment is against the prohibition of torture, cruel, inhuman or degrading treatment or punishment and therefore should be prohibited

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<sup>154</sup> *A v United Kingdom* (1998) ECtHR, 100/1997/884/1096, para 22-24.

<sup>155</sup> *A v United Kingdom* (1998) ECtHR, 100/1997/884/1096.

<sup>156</sup> *Z and others v UK Application* (2001) ECtHR, 29392/95, para 87-90.

<sup>157</sup> *Z and others v UK Application* (2001) ECtHR, 29392/95, para 87-90.

<sup>158</sup> *Z and others v UK Application* (2001) ECtHR, 29392/95, para 87-90.

<sup>159</sup> *Parents Forum for Meaningful Education v Union of India and Another* (2001) Delhi High Court, 212, para 9.

<sup>160</sup> Global Initiative to End All Corporal Punishment of Children, ‘Global Report 2019: Progress Towards Ending Corporal Punishment of children’ (*Global Initiative to End All Corporal Punishment of Children*, February 2020) <<http://endcorporalpunishment.org/wp-content/uploads/global/Global-report-2019.pdf>> accessed 7 May 2021.

<sup>161</sup> *Writ Petition No. 5684 of 2010* (2010) The Supreme Court of Bangladesh.

in both public and private spheres. However, so far in Bangladesh no legislation to eliminate corporal punishment in (public or private) alternative care settings have been realized.<sup>162</sup>

Based on the analysis of the above-mentioned cases the following two conclusions can be drawn. Firstly, states should not admit any dichotomy between the public and private sphere, since this will result in unjustified restrictions on human rights. For example, in the case of *A v. United Kingdom* the ECtHR has highlighted the state's obligation to protect children. This obligation is not only in respect of acts occurred under government oversight but also includes actions by NSAs. Secondly, in judgements condemning corporal punishment, the reform is sought to prohibit corporal punishment in all settings including alternative care settings. Corporal punishment is unacceptable in every domain both private as public and states have the responsibility to protect children from violence committed by NSAs under the obligation of due diligence. For example, in the case of *Z & others v. United Kingdom*, the authorities, once they had been notified, had to take adequate measures to protect the physical integrity of the victims. The state's failure with regard to taking these measures means it has not sufficiently displayed due diligence and therefore has failed to protect the children under article 3 ECHR.

Based on the analyses above, it can be concluded that states will be held responsible for the acts of NSAs if they do not meet their duty of care or their due diligence obligations. This means they will not be responsible for 'any' violation. Nevertheless, no direct case law is available in which violence in alternative care settings has been committed by NSAs. By the principle of analogy, states can still be held responsible for violence by NSAs in alternative care institutions. States do not only have the obligation to protect children from violence, they also have the obligation to exercise due diligence to assure that children are not subjected to violence by NSAs in every setting including alternative care.

#### 4.5 Obligation to fulfil

The obligation 'to fulfil' means states are required to take positive actions to ensure that the rights of children can be properly exercised. Merely adopting legislation to protect children from violence is however not the end of the line, since it rather extends to a comprehensive set of measures to facilitate its implementation, enforcement and follow-up.<sup>163</sup> Apart from legislative measures, it includes taking necessary administrative, budgetary and judicial

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<sup>162</sup> Sonia Vohito, 'Using the Courts to End Corporal Punishment – The International Score Card' (2019) *De Jure Law Journal* 52, 597-609.

<sup>163</sup> Katja L.H. Samuel, 'The Legal Character of Due Diligence: Standards, Obligation or Both?' (2018) 1 *Central Asian Yearbook of International Law* <<https://dx.doi.org/10.2139/ssrn.3264764>> accessed 14 June 2021.

measures.<sup>164</sup> This obligation does not focus on a person who commits violence unlike the obligation to ‘respect’ and ‘protect’, which directly deals with persons who participate in the violence.<sup>165</sup> The mandatory obligation of states as discussed in chapter 3 includes taking all appropriate measures to protect children from violence, which includes preventing violence from happening. States also have the obligation to respond with adequate measures in accordance with article 19 paragraph 2 CRC, when this violence of children nevertheless occurs.

This sub-paragraph has focused on the subject of investigation as a responsive measure that should be taken after violence has occurred. After the incident of violence has been reported by the child or someone else, it is necessary to effectively investigate this report. The result of an investigation will decide whether the perpetrator of violence can be punished or not.<sup>166</sup> The process of investigation includes the collection of the evidence identification of the accused, arresting the accused and forming charges against the accused. This process plays a very vital role in any criminal justice system as the conviction of any guilty person depends on this.<sup>167</sup>

The duty of the state is to conduct a proper investigation using its law enforcement agencies and to determine whether any violence has been or is being committed against children or not, and if the violence has been committed to identify and apprehend the offender in order to adequately punish him or her. Several factors can hinder an effective investigation into instances of violence. Firstly, the incidents of violence are not always isolated and usually take place over a large span of time with increasing gravity.<sup>168</sup> Secondly, violence occurs at such private places resulting in the absence of witnesses to the event.<sup>169</sup> Thirdly, many domestic legal systems view children as less credible witnesses and convictions on the sole testimony of children are still rare.<sup>170</sup>

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<sup>164</sup> Julia Sloth Nielsen, ‘Monitoring and Implementation of Children’s Right’ in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer Singapore 2019) 49.

<sup>165</sup> Monica Hakimi, ‘State Bystander Responsibility’ (2010) *The European Journal of International Law* 21(2) <<http://ejil.org/pdfs/21/2/2010.pdf>> accessed 22 May 2021.

<sup>166</sup> Kristen Sandberg, *Children’s Right to Protection under the CRC* (Palgrave Macmillan 2018) 15-38

<sup>167</sup> Rod Gehl and Darryl Plecas, *Introduction to Criminal Investigation: Processes, Practices and Thinking* (BCcampus 2017) ch 4.

<sup>168</sup> Michael A. Nunno and Janet K. Motz, ‘Development of an Effective Response to the Abuse of Children in Out of Care Home’ (1988) *Child Abuse and Neglect* 12(4):521 <<https://pubmed.ncbi.nlm.nih.gov/3069187/>> accessed 7 May 2021.

<sup>169</sup> Michael A. Nunno and Janet K. Motz, ‘Development of an Effective Response to the Abuse of Children in Out of Care Home’ (1988) *Child Abuse and Neglect* 12(4):521 <<https://pubmed.ncbi.nlm.nih.gov/3069187/>> accessed 7 May 2021.

<sup>170</sup> Michael A. Nunno and Janet K. Motz, ‘Development of an Effective Response to the Abuse of Children in Out of Care Home’ (1988) *Child Abuse and Neglect* 12(4):521 <<https://pubmed.ncbi.nlm.nih.gov/3069187/>> accessed 7 May 2021.

The investigation into institutional violence is more challenging compared to investigating the violence occurring in families. The level of violence that is permissible in a family setting may also be unacceptable in residential care settings. The state's failure to respond effectively to violence against children from the very beginning will not result into the conviction of the culprit or in some cases it will even result into false charges against innocent people.<sup>171</sup> Another challenge faced while investigating the violence incident is the non-cooperation in investigations when access to the primary institutional setting of the child is rejected.<sup>172</sup>

According to ECtHR states should conduct an effective investigation into the allegations of violence irrespective of the fact whether it has been perpetrated by state agents or private persons. Any investigation will be deemed to be effective if states, upon receiving complaints from victims, are able to set into motion a procedure capable of resulting into identification and punishment of the individuals responsible for acts of violence.<sup>173</sup> In the relevant case law of the ECtHR the positive duty of states has been held to encompass the duty to provide an adequate legal framework in order to ensure child protection and to conduct an effective investigation into incidents of violence in public and private settings, as the procedure for effective investigation has to be similar, irrespective of the fact where the violence has occurred.<sup>174</sup>

In the case of *KT v Norway* the ECtHR has laid emphasis on the human rights of children and the standards to which all states must conform in realization of the rights of children provided under the CRC.<sup>175</sup> In this case, in answer to several investigations into allegations of violence by the father of the children, the court has ruled that “the investigation into complaints of violence is within the range of measures provided by article 19 CRC to protect children from violence”. The court has also ruled that “the authorities have the general duty of under article 19 CRC to investigate into complaints of violence as soon as the complaint has been received without any preliminary inquiry as to whether the complaint is genuine or not, as this could result into the delay in the investigation of the genuine complaints”.<sup>176</sup>

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<sup>171</sup> US Department of Justice, ‘Law Enforcement Response to Child Abuse’ (*Office of Juvenile Justice and Delinquency Prevention*, March 2001) <<https://www.ojp.gov/pdffiles/162425.pdf>> accessed 22 May 2021.

<sup>172</sup> Christine Barter, ‘Practitioners’ Experiences and Perceptions of Investigating Allegations of Institutional Abuse’ (1999) *Child Abuse Review* 8(6), 392-404 <[https://onlinelibrary.wiley.com/doi/abs/10.1002/\(SICI\)1099-0852\(199911/12\)8:6%3C392::AID-CAR571%3E3.0.CO;2-T](https://onlinelibrary.wiley.com/doi/abs/10.1002/(SICI)1099-0852(199911/12)8:6%3C392::AID-CAR571%3E3.0.CO;2-T)> accessed 22 May 2021.

<sup>173</sup> ECtHR, ‘Guide on Article 13 of the European Convention on Human Rights - Right to an effective remedy’ (*ECtHR*, 30 April 2021) <[https://www.echr.coe.int/Documents/Guide\\_Art\\_13\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf)> accessed 14 June 2021.

<sup>174</sup> Jean-François Akandji-Kombe, ‘Positive obligations under the European Convention on Human Rights’ (*Council of Europe*, January 2007) <<https://rm.coe.int/168007ff4d>> accessed 14 June 2021.

<sup>175</sup> *KT v Norway* (2008) ECtHR, 26664/03.

<sup>176</sup> CRIN, ‘KT v Norway case Summary’ (*Child Rights International Network*, 25 September 2008) para 61-75 <<https://legallibrary.crin.org/kt-v-norway/>> accessed 22 May 2021.

In the case of *P.M. v Bulgaria*, the attention of the ECtHR has been drawn to the fact that the authorities have taken more than fifteen years to complete the pending investigation. Also, the helplessness of the applicant against the reluctance of the authorities while prosecuting the offenders has been taken into account.<sup>177</sup> The court has held that “the investigation was ineffective, even though the facts of the case and the identity of the offenders were established by the applicant’s rape complaint”.<sup>178</sup>

In the case of *C.A.S. and C.S. v Romania* the court has declared that states have an obligation under the articles 3 and 8 ECHR to ensure that cases concerning the violence against children are criminally investigated effectively.<sup>179 / 180</sup> Hereby the ECtHR has focused on the international obligation which Romania had undertaken to protect of children against any form of abuse.<sup>181</sup>

In the case of *I.C. v Romania* the court has determined the violation of article 3 ECHR as the findings had indicated that the investigation of the case had been deficient.<sup>182</sup> The Romanian State had failed to effectively apply the criminal law system with regard to punishing the perpetrators.<sup>183</sup> The court has further stated that the Romanian authorities had given undue emphasis in relation to the lack of proof concerning the fact that the applicant had resisted the intercourse. Also, the authorities had wrongly based their conclusions only on the testimony of the alleged accused and they had claimed that the victim had consented to sexual intercourse. Lastly, no signs of violence on the victim’s body had been found.<sup>184</sup>

In the case of *X and Others v Bulgaria* the court has ruled that the investigating authorities had failed to make use of the available investigation and international cooperation mechanisms. Moreover, the authorities had neglected to pursue some inquiry which might have been

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<sup>177</sup> *P.M. v Bulgaria* (2012) ECtHR, 49669/07.

<sup>178</sup> Harvard University, ‘P.M. v Bulgaria ECtHR (*Harvard University Violence Against Women Research Database*, 2012) <<https://projects.iq.harvard.edu/violenceagainstwomen/publications/case-ofpm-vbulgaria>> accessed 22 May 2021.

<sup>179</sup> *CAS and CS v Romania* (2012) ECtHR, 26692/05.

<sup>180</sup> Madeleine Eklund, *Due Diligence and State Responsibility for violence against Women by Private Actors* (Orebro Universitet 2016) para 74-78.

<sup>181</sup> Madeleine Eklund, *Due Diligence and State Responsibility for violence against Women by Private Actors* (Orebro Universitet 2016) para 74-78.

<sup>182</sup> *I.C. v Romania* (2016) ECtHR, 36934/08.

<sup>183</sup> Kai Lindenberg, ‘Case comment regarding *I.C. v. Romania*, ECtHR May 24 2016, no. 36934/08, «EHRC» 2016/175, *M.G.C. v. Romania*, ECtHR March 15 2016, no. 61495/11, «EHRC» 2016/159 and *A, B en C v. Latvia*, EHRM March 31 2016, no. 30808/11, «EHRC» 2016/163’ (2016) 2016/163 (note).

<sup>184</sup> Kai Lindenberg, ‘Case comment regarding *I.C. v. Romania*, ECtHR May 24 2016, no. 36934/08, «EHRC» 2016/175, *M.G.C. v. Romania*, ECtHR March 15 2016, no. 61495/11, «EHRC» 2016/159 and *A, B en C v. Latvia*, EHRM March 31 2016, no. 30808/11, «EHRC» 2016/163’ (2016) 2016/163 (note).

relevant, due to which the failure had appeared sufficiently serious, ruling out that the investigation had not been carried out effectively for the purposes of article 3 CRC.<sup>185</sup>

Based on the analysis of the cases above, it can be concluded that the failure of states to adequately respond to the allegations of violence could lead to the violation of article 19 CRC, since the effective investigation into incidents of violence against children is an important facet of article 19 CRC. Consequently, it is the obligation of states to give effect to measures mentioned under article 19 CRC.

As stated before, article 19 paragraph 2 CRC rightly indicates the responsive measures which should be taken by states including the implementation of effective procedures in order to identify, report and refer instances of violence against children. When the violence against children is not identified or the abuse is not reported in an effective way, the possibility of preventing or remedying violence against children and preventing further abuse from occurring are mere illusions.

#### 4.6 Sub-conclusion

This chapter has discussed the tripartite obligation to respect, protect and fulfil. Based on case law and the practice of judicial and quasi-judicial bodies, the state obligation to protect children from violence in alternative care institutions has been explored.

Firstly, under the obligation ‘to respect’ the state only has to refrain from interfering with the rights of children. This means the state is not required to take action, it rather merely has to abstain from violence occurring. The state should therefore not be a facilitator, nor an aid and abet in any manner concerning the violence against children. The scope of obligation ‘to respect’ is narrow in comparison to the obligation ‘to protect’ and ‘to fulfil’, as these kinds of obligation demand action from states to ensure the right of children to be free from violence.

Secondly, based on the analyses made in this chapter, it can be concluded that the CRC has implied due diligence on states in the form of reasonable conduct. States systematically failing to implement the necessary and adequate steps to protect children from violence will infringe their due diligence obligation and will be held responsible for this.

Thirdly, the obligations ‘to protect’ and ‘to fulfil’ require an active interference of states in the form of preventive and responsive measures to prevent children from experiencing violence.

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<sup>185</sup> *X and Others v Bulgaria Application* (2021) ECtHR, 22457/16, para 179-145.

Hence, states must create mechanisms and take steps to put institutions and procedures in place in order to prevent and respond to the violence against children.

## Chapter 5. Conclusion

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States are obliged to protect and assist children who are deprived of their family environment either temporarily or permanently and are required to arrange alternative care for children according to their best interest (article 20 CRC). States furthermore have the obligation to protect children in alternative care institutions against violence according to article 19 CRC.

This research has explored the responsibilities states have under article 19 CRC to protect children living in alternative care institutions against violence to the extent that states fulfill their duties to respect, protect and fulfil under the CRC.

Firstly, the meaning of alternative care and the reasons for violence in alternative care institutions have been discussed. Then the state obligation under the CRC to protect children living in alternative care from violence has been addressed. Finally, the practice of judicial and quasi-judicial bodies in the light of the state responsibility to protect children from violence in alternative care institutions has been discussed.

Alternative care is the substitute care for a child in the event that the family of the child is unable to accommodate this. If a state is member to the CRC, the responsibility to protect the child and ensure alternative care (article 20 CRC) is shifted to the state. Furthermore, the state needs to protect these children from violence (article 19 CRC). The main causes of violence in these settings consist of poorly trained staff, the use of violence to discipline children and the lack of monitoring.

Certain obligations related to protecting children living in alternative care against violence rest on states, some of which are general obligations. First, states need to undertake all appropriate measures to implement the rights recognized in the CRC (article 4 CRC). Then, the treatment and care of children living in alternative care should always be governed by what is in the best interest of the child (article 3 CRC). The obligation under article 19 CRC has been the focus of this research. This obligation prescribes that a state must guarantee the protection of children from all forms of violence, whether this is perpetrated by the state or by another caretaker.

Article 19 paragraph 1 CRC states that “legislative, administrative, social and educational measures need to be taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”. The legislative measures apply to all aspects of policy including the implementation,



budgeting and enforcement. The key challenge implementing these measures relates to the social attitudes of individuals. In this regard research has shown that motivation on the part of some states to enact specific legislation to protect children in alternative care institutions is still a weak link. Based on these analyses one can conclude that states, even though most of them have ratified the CRC and implemented its provisions in their legal system, in general are not successful in fulfilling their duty to take legislative measures to protect children against violence in alternative care institutions, since violence still occurs not only in developing countries but also in well developed countries in all settings including alternative care.

Administrative measures include the monitoring and accountability mechanisms to protect children from all forms of violence. A realistic approach to enforce child protection standards included passing laws requiring well-trained workers to report the violence against children in alternative care settings to authorities. In 2014 the third optional protocol to the CRC has been adopted, allowing children and others on behalf of children such as NGOs to bring complaints directly to the Committee, which then can investigate this complaint.<sup>186</sup> It has been a very welcoming step by the Committee strengthening the position of children under the CRC, yet this seems illusory as the protocol is optional. This means states enjoy a margin of discretion to choose whether they want to be bound by this protocol. The intention of states taking measures can be made clear from the fact that until 2021 only 52 states have signed the protocol, of which 47 states have ratified these provisions.<sup>187</sup> This demonstrates how many states wish to strengthen their communication procedure on complaints regarding violence including the violence against children in alternative care institutions.

Social measures should demonstrate the government's commitment to ensuring that children's rights are protected. In doing so it is important that states deal with factors that lead children to live in alternative care institutions such as child poverty and discrimination. Regarding child poverty, many countries have developed and implemented 'Poverty Reduction Strategy Papers'.<sup>188</sup> However, in these strategies very little if any attention is given to child poverty. Studies show that some countries completely lack a specific child rights approach and that a 'children's budget' is missing. Even though developed countries (over the past 30 years have

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<sup>186</sup> UNGA 'Unilateral economic measures as a means of political and economic coercion against developing countries' (6 February 2012) UN Doc A/RES/66/186.

<sup>187</sup> United Nations Treaty Collection, 'Status as at 22 May 2021 – Chapter IV Human Rights' (*UNTC*) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4)> accessed 22 May 2021.

<sup>188</sup> Jaap E. Doek, 'The CRC 20 years: An overview of some of the major achievements and remaining challenges' (2009) *Child Abuse & Neglect* 33(11), 771-782.

committed and recommitted themselves many times to spend 0.7% of their Gross Domestic Product (GDP) to help developing countries to combat poverty, so far only 5 countries have met this commitment and most of the rich countries are committing less than half of this percentage.

Regarding discrimination, states have taken various measures to address discrimination, although most were of a rather general nature, for example provisions in the national law. In other countries specific actions were taken by legislative measures against gender discrimination and improved protection against discrimination of children belonging to minorities or children with disabilities. There is much more that could be said about the impact of this measures at the national level but it is fair to say that most states are still not successful to implement social measures to protect children living in alternative care against violence as alternative care setting are still overcrowded worldwide as a result of poverty and discrimination against children.

Educational measures should also be implemented to make sure that professionals dealing with children have the right tools for preventing violence in alternative care settings. Even though figures show progress for implementing educational measures at national level, one can conclude that such an infrastructure is in itself not enough, unless it contributes to the creation of a culture of respect for the rights of the child. In that regard it is fundamental that professionals understand what the provisions (articles 3 and 19 CRC) mean and require in order to take proper care of children and create a safe environment for them. Based on the analysis most states are generally not successful at protecting children against violence in alternative care settings, as research has shown that many cases of violence in alternative care setting occur by the hands of the caregiver who is poorly trained, unqualified, overworked and underpaid.

Article 19 paragraph 2 CRC determines that states take preventive and responsive measures. Preventive measures also require, apart from the social measures as mentioned above, the identification of children at the risk of violence and the appropriate intervention by the authorities. In this regard it is very important for states to have accurate and reliable data of children living in alternative care institutions, since this will help states to strengthen their monitoring systems and prevent incidents of violence in alternative care institutions. In some countries the alternative care institutions run by states present accurate data to their respective governments, yet the institutes ran by NSAs often fail to present the government accurate data of the number of children.

With regard to responsive measures, investigation plays a very vital role in any criminal justice system, as the conviction of any guilty person depends on the outcome of the investigation. States have the obligation to take effective responsive measures, but their attitude concerning violence towards the victims, especially in alternative care institutions, is very cold. Once violence has been committed states tend to ignore the victim and seem reluctant in taking any action against the perpetrator whether it be the state itself or the NSAs. Since most of the children living in alternative care institutions are in the care of state or NSAs, they only have the option to report the violence to these authorities. Naturally the perpetrator of violence will not take action against him- or herself, will even try to suppress the victim and will try to prevent the act of violence from coming out.

Finally, the practice of judicial and quasi-judicial bodies in the light of the state obligation to respect, protect and fulfill the rights of children has been studied in order to find out if states protect these rights sufficiently. The obligation to respect in the light of article 19 CRC means states should ensure that state actors (staff, professionals, teachers, residential care workers et cetera) do not become the perpetrator of violence in alternative care institutions. In terms of the protection against violence, the obligation of due diligence means that states ought to take the necessary measures according to the capacity of the state to protect children, when states “knew or ought to have known of a risk”. Most states yet fail to hire or supervise suitable and qualified professional staff, who is responsible for the care of children, or they fail to recognize the signals of violence against children. This means most states are not successful in respecting the right of the child to be free from violence.

In the light of article 19 CRC the ‘obligation to protect’ involves the assurance that the rights of children are not violated by NSAs. The ECtHR has highlighted that corporal punishment is unacceptable in every private or public domain. States also have the responsibility to protect children from violence committed by NSAs under the obligation of due diligence. Once the authorities have been notified, these need to take adequate measures to protect the physical integrity of the victims. The progress of prohibiting corporal punishment in alternative care institutions has been slow in the majority of states, which means those states have not sufficiently displayed due diligence and therefore have failed to protect children against violence committed by NSAs.

Under ‘the obligation to fulfill’ the duty of the state through its law enforcement agencies consists of conducting a proper investigation and determining whether any violence is being

committed against children or not. In case violence has been committed, states need to identify and apprehend the offender in order to adequately punish him or her. Once violence has been committed states after all tend to ignore the victim and are reluctant in taking any action against the perpetrator whether it be state or NSAs. This means the majority of states is not successful at fulfilling its obligation under article 19 CRC to provide an adequate legal framework in order to ensure the protection of children against violence and to conduct the effective investigation into instances of violence against children in alternative care institutions.

In conclusion the obligations under article 19 CRC provide the sufficient protection towards children against violence living in alternative care. It can be stated that the majority of states takes care of its responsibilities under article 19 CRC and provides sufficient protection towards children in alternative care from violence. The biggest challenge creating an environment in alternative care institutions that is violence free remains due to the inefficient implementation of article 19 CRC. This results in most states being unable to fulfil their obligation to respect, protect and fulfil the right to be free from violence, since they fail to take the necessary, appropriate and effective measures.

It is beyond the scope of this research to address possible recommendations in regard of the best practical implementation of article 19 CRC. The researcher however believes that taking the necessary measures by states to implement the right to protect children against violence directly depends on the resources these states have. This means states with inadequate resources are not always in a position to take the same measures compared to financially funded states. Even though, states should at least take targeted measures which are effective in protecting children from violence in alternative care institutions. Irrespective of the resources possessed by states these states should try to fulfil their obligations provided under the CRC.

## Appendix A – Cases

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- *A v United Kingdom* (1998) ECtHR, 100/1997/884/1096
- *CAS and CS v Romania* (2012) ECtHR, 26692/05
- *Centre for Legal Resources on Behalf of Valentine Campeanu v Romania Application* (2014) ECtHR, 47848/08
- *Government v Grootboom* (2000) Constitutional Court of South Africa, CCT 11/00
- *I.C. v Romania* (2016) ECtHR, 36934/08
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