



***Alternative Means of Child Care
 Considerations from the Perspective of Article 20
 of the Convention on the Rights of the Child of 1989***

SUMMARY

Millions of children around the world are deprived of their family environment. All those children are a particularly vulnerable group and therefore there are entitled to special protection and assistance from the State. The basis for that protection have been incorporated into the provision of Article 20 of the Convention on the Rights of the Child of 1989 which requires from the States to ensure alternative care for such children. The aim of the article is to present the scope and content of Article 20 of the CRC. The author focuses on the interpretation of the most essential terms used in Article 20, such as “family environment” and “deprivation of child’s family environment.” She also analyses the nature and content of State’s obligations towards a child living outside his or her family. The analysis of Article 20 is made from the legal perspective. Analyzed are the Travaux Préparatoires of the article in question, Article 20 itself, The UN Guidelines for the Alternative Care of Children adopted in 2010, others provisions of the CRC and other relevant international documents and chosen subject literature.

→ **KEYWORDS** – CHILD, FAMILY, FAMILY ENVIRONMENT, ALTERNATIVE CARE, STATE’S OBLIGATION, CHILDREN’S RIGHTS, PROTECTION

STRESZCZENIE

Alternatywne sposoby opieki nad dzieckiem. Rozważania z perspektywy przepisu artykułu 20 Konwencji o Prawach Dziecka z 1989 roku

Miliony dzieci na całym świecie są pozbawione środowiska rodzinnego. Dzieci te mają prawo do specjalnej ochrony i pomocy ze strony państwa. Prawną podstawę tej ochrony stanowi przepis artykułu 20 Konwencji o Prawach Dziecka z 1989 roku, który nakłada na państwa obowiązek zapewnienia opieki zastępczej dzieciom pozbawionym opieki rodzinnej. Artykuł przedstawia cel i treść przepisu artykułu 20 Konwencji

o Prawach Dziecka. Autorka skupia się na interpretacji najważniejszych terminów użytych w artykule, takich jak pojęcie „rodziny” oraz „pozbawienia dziecka środowiska rodzinnego”. Analizuje również charakter i zakres zobowiązań państwa wobec dziecka żyjącego poza swoją rodziną. Analiza artykułu 20 dokonana została w kontekście prawnym. Poddano jej Travaux Préparatoires artykułu 20, treść przepisu artykułu 20, wytyczne dotyczące alternatywnej opieki nad dziećmi uchwalone w 2010 roku, a także adekwatne postanowienia zawarte w Konwencji o Prawach Dziecka i innych relewantnych dokumentach prawa międzynarodowego oraz wybranej literaturze przedmiotu.

→ **SŁOWA KLUCZOWE** – DZIECKO, RODZINA, ŚRODOWISKO RODZINNE, ALTERNATYWNA OPIEKA, ZOBOWIĄZANIA PAŃSTWA, PRAWA DZIECKA, OCHRONA

Introduction

Millions of children around the world are deprived of their family environment.¹ There are various reasons leading to that situation. Among those children there are orphans who lost either one or both of their parents, children who for a specific length of time cannot stay in their family environment and those who – for their best interests – cannot be allowed to live with their families. All those children are a particularly vulnerable group and therefore there are entitled to special protection and assistance from the State. The basis for that protection have been incorporated into the provision of Article 20 of the Convention on the Rights of the Child of 1989² which requires from the States to ensure alternative care for such children.³ “As the Convention already accords special protection and assistance to all children this must imply that children without families are entitled to an additional level of protection and assistance above that of all other children.”⁴

¹ See for example: Children without parental care, <http://www.unicef.org/protection/57929_58004.html; Family separation in emergencies>, <http://www.unicef.org/protection/57929_57994.html>.

² Article 20 seems to have a universal character due to the number of ratifications of the Convention on the Rights of the Child. To date there are 194 State Parties to the Convention.

³ The United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456, 1577 U.N.T.S. 3 [hereinafter the CRC].

⁴ G. Van Bueren, *The International Law on the Rights of the Child*, The Hague/ Boston/ London 1998, p. 94.

The aim of the article is to present the scope and content of Article 20 of the CRC. The author analyses situation of a child who faces loss of, deprivation of or removal from his or her family environment. The article comprises of six parts⁵ titled: The superiority of family in child's upbringing; Alternative care for children living outside their family environment; The Travaux Préparatoires of Article 20 of the CRC; Children protected by Article 20 of the CRC; Deprivation of child's family environment; State's obligations towards a child living outside family environment. The author focuses on the interpretation of the most essential terms used in Article 20, such as "family environment" and "deprivation of child's family environment." She also analyses the nature and content of State's obligations towards a child living outside his or her family. The analysis of Article 20 is made from the legal perspective. Analyzed are the Travaux Préparatoires of the article in question, Article 20 itself, The UN Guidelines for the Alternative Care of Children adopted in 2010,⁶ others provisions of the CRC and other relevant international documents and chosen subject literature.

The superiority of family in child's upbringing

The family is often said to be the basic unit of society and the natural environment for a child's upbringing.⁷ These expressions are found in many international documents. Among international documents qualifying the status of the family as "the natural and fundamental group unit of society" are, most notably, the Universal Declaration of Human Rights of 1948,⁸ the International Covenant on Civil and Political Rights of 1966,⁹

⁵ Excluding introduction and conclusion.

⁶ The UN Guidelines for the Alternative Care of Children, Feb. 24 2010, UN Doc. A/RES/64/142*.

⁷ L.J. Le Blanc, *The Convention on the Rights of the Child – United Nations Lawmaking on Human Rights*, Lincoln and London 1995, p. 112 and The UN Guidelines for the Alternative Care of Children, op. cit., part. II A 3.

⁸ Article 16 (3) of the Universal Declaration of Human Rights, Dec. 10, 1948, A/RES/3/217 A.

⁹ Article 23 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, A/RES/21/2200 A Annex 2.

the International Covenant on Economic, Social and Cultural Rights of 1966¹⁰ and the Convention on the Rights of the Child of 1989.¹¹ Similar expression can be found in African Charter on the Rights and Welfare of the Child emphasizing the perception of the family as “the natural unit and basis of society.”¹² The family is believed to be the most advantageous environment of all contributing to the full and harmonious development of child’s personality.¹³ A family environment offers the most desirable conditions for protection, provision and support to the child. This is evidenced by numerous psychological and pedagogical research.

The Convention on the Rights of the Child contains a few provisions that refer to the rights of the child within the family structure. The Convention obliges State Parties: to respect the responsibilities, rights and duties of parents towards the child (Article 5), to ensure child’s right to know and be cared for by his/her parents (Article 7); to ensure that a child shall not be separated from his/ her parents against their will (except when it is determined to be necessary for the child’s best interests) (Article 9 (1)); to help families in their reunifications (Article 10); to assist parents/ legal guardians “in the performance of their child-rearing responsibilities” and to “ensure the development of institutions, facilities and services for the care of children” (Article 18); to assist parents/ others responsible for the child to fulfill their “primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development” and to “provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing” (Article 27).¹⁴

¹⁰ Article 10 of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, A/RES/21/2200 A Annex 1.

¹¹ The 5th preambular paragraph to the CRC.

¹² Article 18 (1) of the African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter the ACRWC].

¹³ The 6th preambular paragraph to the CRC and the 4th preambular paragraph to the ACRWC.

¹⁴ See: Articles 5, 7, 9, 10 (1), 18 and 27 of the CRC.

Alternative care for children living outside their family environment

Although the CRC emphasizes the primary role of the family in child's upbringing and its entitlement to protection by society and the State, there are numerous situations when the family, for whatever reason, cannot fulfill its fundamental role. In such situations it is the State's responsibility to provide a suitable alternative care to the child that prevents further disruption of the child's personal, emotional and physical development. This State obligation is reflected in the provision of Article 20 of the CRC, which reads as follows:

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, Kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.¹⁵

The Travaux Préparatoires of Article 20 of the CRC

The issue of protection of the child deprived of his/ her family environment has been discussed from the very beginning of the drafting process of the CRC. The basis for that discussion have been, mainly, laid down by Article VI of the initial Polish draft convention submitted to the Commission on Human Rights in 1978¹⁶ and Article 11 of the revised Polish proposal submitted

¹⁵ Article 20 of the CRC.

¹⁶ *The 1978 report of the Commission on Human Rights* (UN Doc. E/CN.4/1292, 1978, p. 124), in: *Legislative History of the Convention on the Rights*

to the Working Group in 1979¹⁷ and developed by the provisions of the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally adopted in 1986 (with main references to Articles 3-5 of the Declaration).¹⁸ The major problems discussed during drafting process on the provisions concerning children brought up outside their families have been issues concerning the category of children protected and kinds of alternative means of care offered to them.

Article VI of the first Polish draft based on the Principle 6 of the Declaration of the Rights of the Child adopted in 1959¹⁹ stated that the child “shall, wherever possible, grow up in the care and under the responsibility of his parents” and that “society and the public authorities shall have the duty to extend particular care to children without a family.”²⁰ Article 11 of the revised Polish draft of 1979 provided entitlement of each child deprived of parental care to the State’s protection and assistance. The State was obliged to provide appropriate “educational environment” to such a child and to undertake measures to facilitate adoption and establishment of foster-families.²¹

of the Child, Volume II, Office of the United Nations High Commissioner for Human Rights, United Nations, New York and Geneva 2007, p. 522.

¹⁷ See: UN Doc. E/CN.4/1349* (1980), p. 4 in: *Legislative History of the Convention on the Rights of the Child*, supra note 16, p. 526-527 and S. Detrick ET AL., *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff Publishers, Dordrecht/ Boston/ London 1992, p. 297.

¹⁸ The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Dec. 3, 1986 (UN Doc. A/RES/41/85) [hereinafter the 1986 Declaration].

¹⁹ The Declaration of the Rights of the Child, Nov. 20, 1959 (UN Doc. A/RES/1386 (XIV)).

²⁰ *The 1978 report of the Commission on Human Rights* (UN Doc. E/CN.4/1292, 1978, p. 124) in: *Legislative History of the Convention on the Rights of the Child*, op. cit.

²¹ Article 11: “1. A child deprived of parental care shall be entitled to the protection and assistance provided by the State. 2. The States Parties to the present Convention shall be obliged to provide appropriate educational environment to a child who is deprived of his natural family environment or, on account of his well-being, cannot be brought up in such environment. 3. The States Parties to the present Convention shall undertake measures so as to facilitate adoption of

The 1986 Declaration in its Article 3 emphasized the priority role of child's parents in taking care of him or her. In case of unavailability or inappropriateness of child's own parents' care the Articles 4 and 5 proposed consideration of – on the basis of the best interests of the child – alternative means of care from among child's parents' relatives' care, foster family, adoptive family or an appropriate institution.²²

Ten-year drafting process led to adoption of the current Article 20 of the CRC establishing State Parties' obligations towards children brought up outside family environment. Below I will present the basic review of the provisions of Article 20.

Children protected by Article 20 of the CRC

Article 20 of the CRC addresses all children who, for whatever reason, cannot stay and be brought up within the structures of their family environment. The key issue to indicate which children are and which are not covered by the protection granted through Article 20 is therefore determining the understanding of the term "family environment" used in the provision. There are two main approaches towards explaining this term: narrow and broad one. According to the narrow understanding "family environment" is limited to child's biological parents. Whereas the supporters of the broad understanding of the notion claim that "family environment" covers the concept of the extended family consisting of the child's biological parents and their relatives. The question arises now which approach Article 20 of the CRC refers to.

The prompt to the answer to this question could be found, *inter alia*, in the *Travaux Préparatoires* of the article. There were

children and create favourable conditions for establishing foster-families.' See: UN Doc. E/CN.4/1349* (1980), p. 4, *op. cit.*

²² The 1986 Declaration: "Article 3. The first priority for a child is to be cared for by his or her own parents. Article 4 When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered. Article 5. In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration."

several proposals referring to the formulation of the situation of children that are not able to live with their families. Article VI of the first Polish draft of the CRC of 1978 used the expression “children without a family.”²³ Article 11 of the revised Polish draft of 1979 referred to “a child deprived of parental care.”²⁴ During the drafting process different delegations working on the provision proposed their own concepts referring to the children covered by the article. These were: “a child who is deprived of his natural family environment;” “a child who is deprived of his biological family;” “a child (*who*)²⁵ cannot be cared for by his parents or other members of his biological family;” “a child (...) deprived of his normal family environment.”²⁶ Finally the Working Group decided to adopt the expression “a child (...) deprived of his or her family environment.”²⁷ The drafting process and the final decision of the representatives working on Article 20 reflects the authors’ will to cover situation of children not only without their parental but also without their relatives’ care. This broad interpretation of the term “family environment” finds it additional reinforcement in the General Comment No. 19 of the Human Rights Committee of 1990 on Article 23 of the International Covenant on Civil and Political Rights of 1966. In its comment

the Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. (...) States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, “nuclear” and “extended,” exist within a State, this should be indicated (...).²⁸

²³ *The 1978 report of the Commission on Human Rights* (UN Doc. E/CN.4/1292, 1978, p. 124), in: *Legislative History of the Convention on the Rights of the Child*, op. cit.

²⁴ See: UN Doc. E/CN.4/1349* (1980), op. cit., p. 4.

²⁵ The word added by the author.

²⁶ S. Detrick et al., *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”*, op. cit., pp. 297-300.

²⁷ *Ibidem*, p. 303.

²⁸ *CCPR General comment No. 19: Article 23 (The Family), Protection of the Family, the Right to Marriage and Equality of the Spouses*, adopted at the Thirty-ninth session of the Human Rights Committee, on 27 July 1990, Compilation

The broad understanding of “family environment” has been emphasized in the UN Guidelines for the Alternative Care of Children of 2010 that refers to “close family members.”²⁹

Concluding, we can say that Article 20 of the CRC refers to the broad interpretation of the term “family environment.” Therefore protection guaranteed under Article 20 of the CRC addresses all the children who, for whatever reason, are neither in the care of their parents, nor in the care of the members of their extended family (when the child is not “being looked after by a member of the extended family, whether spontaneously or at the behest of the parents”).³⁰ The members of the extended child’s family are understood as his or her parents’ relatives. However, we cannot automatically extend this expression to child’s non relatives.³¹

Deprivation of child’s family environment

Article 20 of the CRC covers the situation of a child³² who is either “temporarily or permanently deprived of his or her family environment” or “in whose own best interests cannot be allowed to remain in that environment.”³³ During the drafting process there were a few proposals considered to define the situation of children entitled to alternative care. Among them, there were: “a child deprived of parental care;”³⁴ “a child who is deprived of

of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994), in: N. Cantwell, A. Holzcheiter, *Article 20: Children Deprived of Their Family Environment*, in: A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde, *A Commentary on the United Nations Convention on the Rights*, Martinus Nijhoff Publishers, Leiden/ Boston 2008, p. 35.

²⁹ The UN Guidelines for the Alternative Care of Children, op. cit., part. II A 3.

³⁰ N. Cantwell, A. Holzcheiter, *Article 20: Children Deprived of Their Family Environment*, op. cit., p. 37.

³¹ Ibidem.

³² Understood as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” See: Article 1 of the CRC.

³³ Article 20 (1) of the CRC.

³⁴ Article 11 (1) of the revised Polish draft of the CRC of 1979: see: UN Doc. E/CN.4/1349* (1980), p. 4, in: *Legislative History of the Convention on the Rights of the Child*, op. cit.

his natural family environment;³⁵ a child on account of whose well-being – he “cannot be brought up in such (*natural family*)³⁶ environment;³⁷ “a child who is parentless;”³⁸ a child “who is temporarily or permanently deprived of his family environment;”³⁹ a child “who in his best interest cannot be brought up or allowed to remain in that (*family*)⁴⁰ environment.”⁴¹ Official final text of Article 20 of the CRC adopted in 1989 refers to a child who is either “temporarily or permanently deprived of his or her family environment” or “in whose own best interests cannot be allowed to remain in that environment.”⁴²

The term “deprived of” refers both to situation of child’s separation of or removal from his or her parents (or relatives) and to situation of child’s loss of his or her parental (or relatives”) care. This deprivation of child’s family environment can be both “temporal” or “permanent.” Therefore we can assume that the length of time during which a child lives outside his/ her family environment does not play a substantial role in covering a child by Article 20 provision. The difference is only when we decide on choosing an appropriate alternative mean of care to such a child. In such a situation we need to consider whether this deprivation is

³⁵ Article 11 (2) of the revised Polish draft of the CRC of 1979: see: UN Doc. E/CN.4/1349* (1980), p. 4, in: *Legislative History of the Convention on the Rights of the Child*, op. cit.

³⁶ The words added by the author.

³⁷ Article 11 (2) of the revised Polish draft of the CRC of 1979: see: UN Doc. E/CN.4/1349* (1980), p. 4, in: *Legislative History of the Convention on the Rights of the Child*, op. cit.

³⁸ Article 10 (1) of the draft text of the CRC adopted by the 1982 Working Group, see UN Doc. E/1982/12/Add.1, C, Annex p. 76, in: S. Detrick et al., *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”*, op. cit., p. 301.

³⁹ Article 10 (2) of the draft text of the CRC adopted by the 1982 Working Group, *supra note 38* and Article 10 (2) of the draft text of the CRC adopted by the 1988 Working Group at first reading, see UN Doc. E/CN/1988/WG.1/WP.1/Rev.2, p.14, in: S. Detrick et al., *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”*, op. cit., p. 302.

⁴⁰ The word added by the author.

⁴¹ Article 10 (2) of the draft text of the CRC adopted by the 1982 Working Group, op. cit. Article 10 (2) of the draft text of the CRC adopted by the 1988 Working Group at first reading, op. cit.

⁴² Article 20 (1) of the CRC.

“permanent” and thus resulting in child’s constant care outside family environment or “temporal” and thus with a possibility of child’s return to his/ her family.

The expression “a child (...) in whose own best interests cannot be allowed to remain in that environment”⁴³ addresses the situation of a child who would be in danger if left in his or her family and therefore puts upon the competent authority – acting in the best interests of the child – an obligation to remove a child from his or her parental (or relatives’) care. Article 20 concerns the child’s removal from the family based on the “decision of competent authorities and subject to judicial review.”⁴⁴ It covers “situations where the child’s separation takes place against the will of the parents (...)” but also “where the justification of a decision to remove a child is understood and accepted by the parents.”⁴⁵

According to the authors of the UN Commentary on Article 20 of the CRC “this provision is applicable to all children not able or allowed to live in their family environment, for whatever length of time and for whatever reason.”⁴⁶ They formulate non-exhaustive list of reasons justifying the implementation of Article 20. Among them, they distinguish:

- the death of parents,
- relinquishment or abandonment by parents,
- parents being involuntarily untraceable,
- temporary or permanent incapacity of parents (imprisonment, illness, disability),
- voluntary placement by parents (for the child’s medical or general care),
- the child’s decision to leave or not return to the family home,
- the child’s involuntarily internal displacement,
- arrival in a country as an unaccompanied minor seeking asylum or immigration, or as a victim of trafficking,
- an administrative or judicial decision to remove a child from parental care in his or her best interests (for protection and/ or to ensure appropriate upbringing and care).⁴⁷

⁴³ Ibidem.

⁴⁴ N. Cantwell, A. Holzcheiter, *Article 20: Children Deprived of Their Family Environment*, op. cit., p. 38.

⁴⁵ Ibidem.

⁴⁶ Ibidem, p. 39.

⁴⁷ Ibidem.

There are some specific groups of children who, although separated from their families, are not covered by Article 20 of the CRC. These are, inter alia, refugee children, mentally or physically disabled children, child victims of abduction, sale or trafficking, child-soldiers, children affected by armed conflicts, child victims of “any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment,”⁴⁸ children “alleged as, accused of, or recognized as having infringed the penal law” (juveniles).⁴⁹ Situation of these children is regulated in other provisions of the CRC (accordingly in articles: 22, 23, 35, 37, 38, 39, 40).⁵⁰ There are however also two groups of children without parental care – street children and children living in child-headed households, whose situation is not explicitly reflected in the provisions of the CRC and there are doubts of whether to address Article 20 to them or not.⁵¹

State’s obligations towards a child living outside family environment

Article 20 of the CRC guaranties special protection and assistance provided by State to any child who is unable to live and be brought up within his or her family environment. On the basis of paragraph 2 of Article 20 the State is obliged to ensure alternative care to such a child.⁵² However, deeper interpretation of that provision makes us conclude that in fact this State’s obligation is very much connected and preceded by the other State’s obligation reflected in the CRC which is the obligation to assist families (being the first and the most important units responsible for child’s upbringing) in fulfilling their duties towards children

⁴⁸ Article 39 of the CRC.

⁴⁹ Article 40 (1) of the CRC.

⁵⁰ Article 22 – refugee children; Article 23 – disabled children; Article 35 – child victims of abduction, sale or trafficking; Article 38 – child-soldiers, child victims of armed conflicts; Article 39 – child victims of: “any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment;” Article 40 – juveniles.

⁵¹ N. Cantwell, A. Holzcheiter, *Article 20: Children Deprived of Their Family Environment*, op. cit., pp. 41-43.

⁵² The UN Guidelines for the Alternative Care of Children, op. cit., part. VI.

and to help them with solving the problems they face.⁵³ Therefore, before it ensures proper alternative care to a parentless child, the State shall prevent all the situations that might result in child's loss of his or her family environment.⁵⁴

Paragraphs 1 and 2 of Article 20 underline that this is the State which is responsible for providing special protection and assistance for any child in need. It does not mean that this obligation must be directly realized by a public institution. The State can delegate its task of establishing alternative care to a non-state institution. In this situation it is, however, responsible for ensuring that such an alternative care has been provided for each child entitled and for monitoring its effectiveness.⁵⁵

Providing alternative care for a child should be consistent with national law of each State Party to the CRC. Article 20 (3) distinguishes exemplary forms of alternative care that could be chosen in order to satisfy in the best possible way needs of the individual child. Among them there are: foster placement, Kafalah of Islamic law, adoption placement in suitable institutions for the care of children.⁵⁶ This list is non-exhaustive one which means that the State should consider which of the alternative care options (available in its national laws) is the most suitable for a child and corresponds best to his or her situation.⁵⁷ The rule is that in the first place a child shall – if it is consistent with his or her best interests, be placed in a family-based foster setting and at the very last resort – in institutional setting.⁵⁸ The status of the “last resort” of institutional placement is reflected in using by the authors of the provision of Article 20 (3) the term “if necessary.” “Suitable institution” is understood as the one that, on the one hand – conforms with the basic requirements established

⁵³ These State's obligations are reflected in the following Articles of the CRC: 3, 5, 7-11, 18, 22-24, 27, and 28 and The UN Guidelines for the Alternative Care of Children, op. cit., part. IV.

⁵⁴ The UN Guidelines for the Alternative Care of Children, op. cit.

⁵⁵ The UN Guidelines for the Alternative Care of Children, op. cit., part. II A and part. V.

⁵⁶ Article 20 (3) of the CRC, op. cit.

⁵⁷ The UN Guidelines for the Alternative Care of Children, op. cit., part. II B.

⁵⁸ N. Cantwell, A. Holzcheiter, *Article 20: Children Deprived of Their Family Environment*, op. cit., pp. 49-59 and 64 and The UN Guidelines for the Alternative Care of Children, op. cit., part. II B, 11-23.

by the competent authority and addressed to such institutions so they could provide each child with proper safety and health measures and respect child's dignity and full enjoyment of his or her rights. On the other hand "suitable institution" is the one that at the exact moment of the individual child's life and his or her situation best corresponds to his or her needs and future.⁵⁹

The drafters of the CRC very strongly emphasized that each State considering alternative care options shall pay "due regard" "to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."⁶⁰ The "continuity in a child's upbringing" might be understood as protecting children from serial placements which could cause serious disruption to a child's life and providing a child with a stable care environment that best suits his or her needs. While choosing the appropriate care setting for a child, the State shall also respect "the child's ethnic, religious, cultural and linguistic background." Therefore it should – as far as possible – place the child in the same socio-cultural environment as the one it comes from. These rules have been reflected in the 12th preambular paragraph to the CRC which expresses "the importance of the traditions and cultural values of each people" that play the essential role in the harmonious development and protection of each child.⁶¹

Conclusion

"Article 20 applies to a situation where other articles in the Convention addressing the parents', family's or State's obligations *vis-à-vis* the child have already failed to produce a suitable environment for the child's well-being and growing-up."⁶² In such situations (no matter reasons which caused them) it is the State that is responsible for providing each child living outside his or her family environment with suitable alternative care. Such care should correspond best to the situation, interests and needs of

⁵⁹ N. Cantwell, A. Holzcheiter, *Article 20: Children Deprived of Their Family Environment*, op. cit., pp. 56-57.

⁶⁰ Article 20 of the CRC.

⁶¹ The 12th preambular paragraph to the CRC.

⁶² N. Cantwell, A. Holzcheiter, *Article 20: Children Deprived of Their Family Environment*, op. cit., p. 9.

the individual child.⁶³ It should help in providing “continuity in child’s upbringing” within the same socio-cultural environment as the one the child was born in. The preference is made to place a child within a family care setting. The institutional care shall always be considered as a last resort solution. The State is obliged to monitor and inspect situation of children placed in alternative care settings.⁶⁴

All these principles play the role in guaranteeing the least possible disruption to the child’s life and creation of the most possibly stable and harmonious environment to live in. The practice and the research in the topic reaffirm however that no matter how good alternative care is, it will never replace family environment which has always been and will always be the most desirable environment for a child’s upbringing and development. Therefore it should always be protected and supported by the State, the society and the individuals.

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⁶³ The UN Guidelines for the Alternative Care of Children, op. cit.

⁶⁴ Ibidem, part. VII D.

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