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Perspectives on the Legal Guardianship of Children in Côte d'Ivoire, South Africa and Uganda

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To the Memory of Eric Latt
1962–2016

Preface

In many African countries, there is inadequate understanding of the concept of legal guardianship and this translates to inadequate protection for children who are deprived of parental care or family. There is a lack of international norms and standards on the legal guardianship of children and this contributes to the inadequate understanding of the concept.

An important feature of the traditional African society in relation to childcare and protection is the communal nature of the society and the role of the extended family in childcare. This contributes immensely to the different approaches to children protection in different communities and countries in Africa. The traditional African system sees every child as a member of the community and in an ideal African community, no child should be left without care and protection, even when the parents are incapable of taking on their parental roles and responsibilities.

The traditional African idea of childcare and protection is different from the western idea, which sees the state as the upper guardian of the child. The African perspective on family and the community is reflected in the different legislation on the protection of the rights of the child and on how particular legal systems in Africa address matters concerning the child, including the legal guardianship of children. While this book is focused on only three African countries, it represents the kind of protection which is generally available to children who are deprived of parental care and family in Africa.

Pietermaritzburg, South Africa R. Sarumi
2017

Contents

1 Introduction 1

2 Audit of the Frameworks for the Regulation of Legal Guardianship of Children Under International Law 13

3 Models on the Guardianship of Children in Africa 25

4 Analysis of the Models for the Guardianship of Children in Africa 41

5 Concluding Analysis and Recommendations 59

Bibliography 65

Index 71

International Instruments

Accra Declaration on War-Affected Children in West Africa 2000
African Charter on Human and Peoples' Rights 1981
African Charter on the Rights and Welfare of the Child 1990
African Youth Charter 2006
Child Policy 2016
Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children 1966
Conventions on the Rights of the Child 1989
Declaration of the Rights of the Child of 1959
Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally of 1986
Geneva Declaration of the Rights of the Child 1924
Guidelines for the Alternative Care of Children 2010
Hague Convention Relating to the Settlement of Guardianship of Minors 1902
SADC Declaration on Gender and Development 1997
Southern African Development Community (SADC) Model Law on Eradicating Child Marriage 2016
Tunis Declaration on Aids and the Child in Africa 1992
Universal Declaration of Human Rights 1948

National Instruments

Act No. 64–375 of 7 October 1964, on marriage
Act No. 81–640 of 31 July 1981
Act No. 95–15 of 12 January 1995
Amending Act on Naming Act No. 64–373 of 7 October 1964
Children (Amendment) Act 2016
Children Act No. 46 (Cap. 59) of 1997 of Uganda
Children's Act No. 38 of 2005
Civil Status Act No. 83–799 of 2 August 1983
Code of Social Welfare Act No. 68–595 of 20 December 1968
Constitution of Côte d'Ivoire
Constitution of South Africa
Constitution of the Republic of Uganda
Education Act No. 95–685 of 7 September 1995
Labour Code Act No. 95–15 of 12 January 1995
Minority Act (Law No 70-483 of 1970)
Nationality Code Act No. 61–415 of 14 December 1961
Penal Code Act No. 81–640 of 31 July 1981

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	The African Charter on the Rights and Welfare of the Child
AU	African Union
AYC	African Youth Charter
CRC	Convention on the Rights of the Child
EAC	East African Community
OAU	Organisation of African Unity
OVC	Orphaned and vulnerable children
SADC	Southern African Development Community
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Emergency Fund

Chapter 1
Introduction

1.1 Background

Children are classified as a vulnerable population group that requires special laws for their rights to be protected, fulfilled and realised. The protection of the rights of children and the provision of full and complete care are important resilience factors which help ensure the survival and development of children in every society.

Children, especially those whose parents are absent or whose parents are incapable of raising them, are a more vulnerable group within a larger group of children who are already classified as a vulnerable group within a society. They require the care and protection of adults at different stages of their lives. The vulnerability of these children further exposes them to abuse and exploitation by the adults who are responsible for their protection and development.

Recent demographics show that Africa is home to many orphaned and vulnerable children (OVCs) (UNICEF 2006). A great number of children have been deprived of the luxury of growing up under the care of their biological parents due to factors which include the HIV/AIDS epidemic, wars and socio-economic inequalities. The traditional structure and composition of the family in Africa have also been affected by some of these factors and these have resulted in many children losing their right to parental or family care.

In order to protect children and their rights, treaties have been adopted both at the global and at regional levels to ensure that there is a legal basis for the protection of children. The Convention on the Rights of the Child (CRC) (CRC 1989) was adopted by the United Nations (UN) General Assembly resolution 44/25 of the 20th of November 1989 and it was enacted on 2 September 1990. It is the most significant global international law instrument dedicated solely to the rights of children. It recommends the enactment of national laws to protect children from violation of their rights, which they may be vulnerable to in their society. It does this through setting international norms on the key rights that ought to be accorded to children.

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The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted at the Twenty-Sixth Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) (as it was then called), in Addis Ababa, Ethiopia, in July 1990. This is the foremost African regional human rights instruments involved in the protection of the rights of children. Both instruments require member states to 'adopt such legislative or other measures as may be necessary to give effect to the provisions' of the Charter (article 2 (2) of the CRC and article 1 (1) of the ACRWC) (ACRWC 1999).

There is no denying the fact that both the CRC and the ACRWC place a high value on the role which the family plays in the growth and development of children within a society. For the purpose of this discussion, the family is defined as 'a group of individuals living under one roof and usually under one head' (Merriam-Webster online Dictionary 2017). The sixth preambular paragraph of the CRC acknowledges that the family is the 'fundamental group of society and the natural environment for the growth and well-being of all its members'. The ACRWC, on the other hand, stipulates that the 'family shall be the natural unit and basis of society, and it shall enjoy the protection and support of the State for its establishment and development'.

The seventh preambular paragraph of the CRC and the fifth preambular paragraph of the ACRWC both recognise that 'the child should grow up in a family environment in an atmosphere of happiness, love and understanding'. They also recognise the fact that the biological parents of a child are charged with the primary obligation to care for the child and to ensure that the factors necessary for the complete growth and development of the child are realised.

The usual composition of the family in the developing countries shows the presence of more than two or three adult members in a household. This is indicative of the prevalence of an extended type of family or of a nuclear family with adult children present (POPIN et al. 2017). Contrary to the natural composition of the family, a lot of children around the world are deprived of the opportunity of growing up within a family. These children are described in article 20 of the CRC as 'children temporarily or permanently deprived of his or her family environment'. Children deprived of a family environment are 'entitled to special protection and assistance provided by the state' through the enactment of laws which ensure that such children receive alternative care (article 20 (1) of the CRC). The CRC, in article 20 (2), provides for different alternative care options for children deprived of the natural family environment and these include the placement of the child in foster care, adoption, or Islamic kafala (the Islamic Kafala is a child guardianship model which was instituted by a Qur'anic revelation which establishes that the Muslim family is founded by blood or marriage and not by adoption). This revelation came about during the life of the Prophet Muhammad (S) who married his first wife, Khadijah, and he adopted Khadijah's slave boy named Zayd. Zayd was adopted by the Prophet, and his name was changed to Zayd the son of Muhammad (S). After the marriage of Zayd to Zainab was dissolved via a divorce, the Prophet was given a divine order to marry Zayd's divorced wife in Qur'an al-Ahzaab 33:37. (Islam Question and Answer 2017) This further established the Qur'anic law which stipulates that an adopted child is not a blood relative. By this same revelation, the guardianship, model of 'kafala', was established to enable children deprived of a family environment to be legally raised on a permanent basis in

families other than their own, but these children are to maintain their lineage if known (UNICEF 1998), and the placement of children in suitable institutions for the care of children.

1.1.1 Defining Legal Guardianship

Legal guardianship has been defined as the power granted to a person by the courts to administer the estate of a child on behalf of the child (Bernard et al. 1998), to grant consent to certain procedures which include medical treatment and to assist the child in the performance of certain acts which are recognised by law. The court may also grant the guardian custody of the child, and when a guardian is granted custody of the child, the guardian may also be granted other powers, rights and obligations over the child (Leashore 1984–1985).

The law recognises two main kinds of guardians, the natural guardian and the legal guardian. The natural guardians of a child are the biological parents of a child (Testa 2004) and the legal guardian is a non-parental party who is appointed by the court or any other legally recognised body to assume the role of protecting their ward. They are required to act for the benefit of their wards and to always consider their wards best interest when making decisions which affect their ward.

Naturally, all children are expected to be under the guidance and protection of an adult. Children by their nature, in most cases, lack the legal and intellectual capacity to enter binding contracts or to make decisions which may have a profound impact on their lives. It is a legal requirement for children to have a guardian who would guide them and who would make decisions on their behalf. A guardian is an adult who is legally responsible for protecting the well-being and interests of their ward, who is usually a minor (The Free Dictionary 2017). Guardians are also appointed by the courts to care for and protect persons who lack the intellectual capacity to take care of themselves for instance in the case of an incompetent person or a person with a mental disability.

The central reason for appointing a legal guardian for a child is to protect the child when decisions which might have legal ramifications for the child are made and to assume legal responsibility for the protection of the child (Akhbari 2017). Thus, in the absence of or incapacity of the biological parents of the child, the legal guardian of the child is the most suitable person to protect the child and take legal decisions on behalf of the child. A guardian of a child is allowed to make certain legal decisions on behalf of the child.

1.1.2 Understanding the Responsibility Towards Children

The Courts are the central guardian of a child, and thus they have the power to make rulings which relate to the protection of the rights and the well-being of the child (Morrison 2011). This is based on the doctrine of *parens patriae* which gives the

courts the power to grant relief which they deem fit to protect a vulnerable individual. It is against this backdrop that article 19 of the CRC stipulates that:

> States Parties shall take all appropriate legislative, administrative, social and educational measures 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 responsibilities and rights of the parent over the child are derived from two broad relationships which are established through guardianship or custody of the child (Bronstein 1998). In the absence of the biological parents, other adults may assume the role of caring for and ensuring that the child develops in the best of ways and this should be in line with the principles of the best interests of the child as stated in article 3 of the CRC and article 4 of the ACRWC. The adult, who cares for the child primarily, in the absence of the parents, is regarded as the primary caregiver of the child. This person is only responsible for caring for the health and well-being of the child in their custody. A caregiver does not necessarily have any legal relationship with a child and cannot consent to certain matters or take certain decisions which have legal implications for a child. A legal relationship with a child can only be established when the person is named in a will or appointed by the court or any other legally recognised body to act as the legal guardian of a minor child. Depending on the laws of each country, legal guardians have roles which only they can perform and these are sometimes distinguished from the roles which the caregiver of a child is allowed to perform.

The CRC and the ACRWC recognise the important role which the parents of a child play in raising the child. The CRC places the role of the legal guardian alongside that of the parents of the child in the care and upbringing of the child. For instance, article 18 of the CRC states that:

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.

Article 19 (1) of the ACRWC, on the other hand, maintains the right of the child to parental care and protection by stipulating that-

> Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child.

It should be noted that while article 18 of the CRC places the primary responsibility for the child's upbringing squarely on the parents and the legal guardians of the child, article 20 of the ACRWC extends the primary responsibility for the upbringing and development of the child from the child's 'parents to other persons responsible for the child'. The ACRWC was specific in the other sections (article 9, 10, 11, 23, 24, and 29) where it restricted the duty to protect the other rights of the child to only the 'parents or guardians' of the child alone. Nonetheless, in article 20, it extends the primary responsibility to the 'parents or other persons responsible for the child'. The extension of parental responsibility to other persons who are responsible for the child reflects the

African traditional values of childcare which is communally undertaken (Amos 2013a). In Africa, the extended family is seen as a 'cohesive unit which ideally provides economic, social and psychological security to all its members' and nobody's child is left out in the benefits of the extended family (Ojua et al. 2014).

Having looked at the recognition given to legal guardians under international law, and their role in the protection of children, it is important to understand what legal guardianship is and what their responsibilities are to their wards.

1.2 The Legal Frameworks of Côte d'Ivoire, South Africa and Uganda in Relation to the Rights of Children

The three countries reviewed in this book employ different approaches to the domestication of international human rights treaties in their legal systems.

Côte d'Ivoire is a country in the Western part of Africa which was a protectorate of France from 1843 to 1844 and it later became a French colony in 1893 (BBC 2017). Côte d'Ivoire employs a monist approach to international law domestication. According to the monist approach, international law can only be ratified after they have been approved by the legislature, and once ratified, the treaties become self-executing. Cote D'Ivoire does not have a Children's Rights legislation. The section in Chap. 4 which discusses Cote D'Ivoire's approach to the appointment of guardians in this book looks at the effect of the self-execution international law on the protection of children's rights. They form part of national laws and are legally applicable in the domestic courts without further domestication (Killander 2010). Thus, international law becomes part of the national law the moment they were ratified and properly gazetted by the state of Côte d'Ivoire (Vahard 2014).

South Africa is a country in the Southern part of Africa and was once colonised by the Dutch and the English from 1652 when the Dutch East India Company first arrived at the Cape and was later acquired by the British at the beginning of the nineteenth century. South Africa employs the hybrid-monist approach to treaty domestication (Sloss 2009), and in this approach, some international law treaties apply directly within the national legal system even without being domesticated while others need to be passed into law by the national parliament before they are applicable. This is stipulated in section 231 (4) of the South African Constitution-

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Uganda, on the other hand, is a country in the eastern part of Africa and was once a protectorate of the British Empire from 1894 to 1962. (Nations Online 2017) Uganda employs a dualist approach to treaty domestication. Under this approach, international law treaties exist separately from a municipal law and they cannot have any effect on, overrule or form part of the municipal law of Uganda

(Obitre-Gama 2000) unless the international law is domesticated through an act of the Parliament of Uganda.

Remarkably the constitutions of the three countries contain provisions which deal with the protection of children. Of the three countries under review, the section 6 of the Constitution of Cote d'Ivoire contains a minimal provision for children by requesting that 'the State assures the protection of children, the aged and the handicapped'. Section 28 of the Constitution of South Africa, on the other hand, defines a child and exclusively guarantees the crucial rights of children. It lays credence to the application of the best interest of the child principle in every matter concerning the child. The Constitution of Uganda makes it the duty of every citizen of Uganda to 'protect children and vulnerable persons against any form of abuse, harassment or ill-treatment' in section 17. Furthermore, section 31 discusses the rights of the child in a family and the right to be raised by one or both of their parents. More of the rights of children are further guaranteed in section 34 of the Constitution. Like the Constitution of South Africa, the Constitution of Uganda also lays credence to the applicability of the best interest of the child in laws enacted to protect children in section 34 (1). It also guarantees the state's duty to bestow special protection on orphans and vulnerable children in section 34 (7).

The three countries have enacted child-specific legislation aimed at providing protection to children, ensuring that there is a legal basis for guaranteeing the rights of children in their constitutions and at administering and regulating matters which concern children. These child-specific rights are contained in the South African Children's Act No. 38 of 2005 (Children's Act) and the Children Act No 46 (Cap. 59) of 1997 of Uganda (Children Act) respectively. Although Côte d'Ivoire does not have a child-specific Act and does not guarantee the protection of child-specific rights in any of its legislation, it has enacted various other laws which are applicable to the protection of children. The legislation include Act No. 68-595 of 20 December 1968, the Code of Social Welfare; Act No. 81-640 of 31 July 1981, the Penal Code; Act No. 83-799 of 2 August 1983, on civil status, Amending Act No. 64-373 of 7 October 1964, On Naming; Act No. 95-685 of 7 September 1995, on education; Act No. 95-15 of 12 January 1995, the Labour Code; Act No. 61-415 of 14 December 1961, on the Nationality Code; and Act No. 64-375 of 7 October 1964, on marriage. The Minority Act (Law No 70-483 of 1970) (Minority Act) contains comprehensive provisions on the administration and regulation of matters which concern the welfare of children including legal guardianship (the legislation of each country is analysed comprehensively in Chap. 3).

1.3 Traditional Approach to Child Protection and the Protection of the Rights of Children in Africa

The traditional view of children in Africa is similar to the view of children in many societies of the world where children are viewed as an important component of society (Armstrong et al. 1995). They represent the future and the continuity of a

society or community. This is evidenced by the sayings of the various groups within Africa. For instance, the Zulu people of South Africa say 'izingane zethu ziyikusasa umphakathi; and in Swahili they say 'watoto ni mustakabali wa jamii' which mean that the children represent the future of a society. The protection and preservation of children are crucial for the continuity of the society since they would grow up to fill positions which are left by their elders.

In Africa, children are seen as important individuals within their nuclear and extended families, especially since they perform different roles within the family. Children are classified as part of the economic strength of their families as they constitute the main labour force for families on farms (Idang 2015), in the families' petty trading and businesses. It is further believed that the greater the number of children that live in a family, the greater the agricultural and economic strength of a family (Armstrong et al. 1995).

In many societies and cultures in Africa, children are recognised as vulnerable and helpless persons that depend on adults for their protection and safety. In these societies, the adults who are usually the biological parents or close family members of the children assume the role of carers and protectors of the children. Thus, in African societal structure, the family represents 'the major source of the basic necessities of life, health, love, care and tenderness, food, water, clothing, shelter and sanitation which are made possible by the socio-economic, cultural and environmental conditions' Amos 2013b).

The African regional human rights system recognises the fact that children are individuals with inherent dignity, and this is in line with the Universal Declaration of Human Rights (UDHR) which recognises the universality of human rights and the inherent dignity of all members of the human family. Article 1 of the UDHR acknowledges that 'all human beings are born free and equal in dignity and rights'. In line with this, a number of child-based declarations and resolutions have been adopted at the African Union (AU) regional (the AU declarations include the ACHPR, ACRWC and the AYC) and subregional levels in Africa to protect the inherent dignity of children and their rights. Some of these instruments relate primarily to the protection of children generally, and others deal with the protection of some specific rights of children within society. The human rights instruments which have been adopted at the African regional level to protect children include the African Charter on Human and Peoples' Rights (ACHPR), ACRWC), the African Youth Charter (AYC), and the Tunis Declaration on Aids and the Child in Africa.

The ACHPR was adopted on 25 May 1963, and Côte d'Ivoire, South Africa and Uganda have ratified the Charter. Cote d'Ivoire ratified the ACHPR on 06 January 1992, South Africa ratified the ACHPR on 09 July 1996 while Uganda ratified the ACHPR on 10 May 1986. The ACHPR set out the obligations of state parties towards the protection of human rights in Africa. The ACRWC was adopted on 01 July 1990, and Côte d'Ivoire, South Africa and Uganda have all ratified the ACRWC. Cote d'Ivoire ratified the ACRWC on 01 March 2002, South Africa ratified the ACRWC on 07 January 2000 while Uganda ratified the ACRWC on 17 July 1994. The ACHPR recognises the right of children in article 18 where it stipulates that the State shall 'ensure the protection of the rights of women and the

child as stipulated in international declarations and conventions'. (AYC 2006) The AYC was adopted by the Summit of Heads of State and Government of the AU on 02 July 2006, and Côte d'Ivoire, South Africa and Uganda have ratified the Charter. Cote d'Ivoire ratified the AYC on 30 November 2009, South Africa ratified the AYC on 28 May 2009 while Uganda ratified the AYC on 06 August 2008. The AYC recognises the family as the most basic social institution and stipulates that it 'shall enjoy the full protection and support of State Parties'.

The legal instruments applicable to the protection of children include at the subregional level, the East African Community (EAC) Child Policy (2016), the Accra Declaration on War-Affected Children in West Africa (2000), the Southern African Development Community (SADC) Model Law on Eradicating Child Marriage (2016), and the SADC Declaration on Gender and Development (1997).

Traditionally, in Africa, orphaned children live in homes of extended family members and kinsmen (USAID et al. 2002). Childcare is undertaken by members of the extended family or family friends and this is a common form of 'out-of-home care' for children who are deprived of parental care (Save the Children 2007). Kinship carers include 'relatives, members of their tribes or clans, godparents, step-parents, or any adult who has a kinship bond with a child'. It may be a formal arrangement where a competent authority orders the placement of the child within the home of a relative or an informal or private arrangement where it is arranged privately that the child should be placed with a caregiver child (ISS and UNICEF 2004).

Childcare which is based on African traditional values has a number of advantages which include the fact that the children who are deprived of parental care are able to avoid the trauma of moving in with strangers in unfamiliar environments. When they are placed in kinship care, they remain with people who are known to the children either as their relatives or family friends. The children might be able to remain with their siblings, thereby avoiding separation. In some cases, the children remain within their communities and are able to avoid frequent changing of homes. Kinship care is not without a few disadvantages which include the fact that the child may be placed in a home of a relative who is not suitable to be a carer but because of the familial relationship, the child is placed in the home without any background investigation. The child may then be subjected to abuse or neglect. Unfortunately, this kind of abuse often goes undetected because it is assumed that the child is with the extended family members and the childcare arrangement is not supervised by the state. Children in kinship care may also be denied access to social services unlike those in non-kin foster care. The care of children by their kin can lead to intra-familial friction when many individuals are interested in controlling the affairs of the children and the children may suffer in the process.

1.4 Focus of the Book

This book presents a broad overview of the approaches which are taken by three African countries—Côte d'Ivoire, South Africa and Uganda on the guardianship of children who are deprived of parents or families. The main focus of this book is on

the roles of legal guardians in the protection of children. Thus, it examines the guardianship of children whose parents are absent or whose parents are incapable of taking on their children and fulfilling their parental responsibilities.

Côte d'Ivoire, South Africa and Uganda have been chosen because of their location in three different geographical zones of Africa. They have taken steps to domesticate and apply the provisions of international instruments to the rights of children through the enactment of national laws. This book analyses the different approaches which the countries have taken on the guardianship of children in relation to their existing international human rights obligations.

The book is divided into five chapters. The first chapter discusses the basic concepts which underpin the discussion on the guardianship of children in Africa. The second chapter discusses the regulation of legal guardianship of children under international law and examines the approaches employed under the global and African regional human rights frameworks such as the CRC and the African regional human rights framework such as the African Charter on Human and Peoples' Rights (ACHPR) and the ACRWC. The third chapter of the book sheds light on the legislation of the three countries and their approaches to the guardianship of children. The fourth chapter employs an analysis of the different models on the legal guardianship of children in Côte d'Ivoire, Uganda and South Africa by describing the similarities and differences as well as the advantages and the disadvantages of the different models. It also sets out to explicate the strengths and weaknesses of these models with a view to identifying the preferred model among the three models. Finally, the fifth chapter discusses the conclusions and proposes recommendations.

This book begins with the description of the concept of guardianship and the need for legal guardians for children. It gives a brief insight into the traditional African perspective on child protection and care as well as the role of the extended family in the guardianship of children. The book further describes how the guardianship of children has evolved within African communities to the kind of guardianship which exists today. It briefly touches on the different models of alternative care options for children deprived of a family and differentiates these from legal guardianship. The book also employs an analysis of the legal frameworks on the guardianship of children in Côte d'Ivoire, Uganda and South Africa and highlights how these frameworks relate to the international obligations of these three countries towards the protection of the rights of children.

1.5 Limitations of the Study

This study employed a desktop review of the literature and legal instruments on the protection of children in Africa, and in the course of this study, a number of substantive and procedural limitations were experienced which have some effect on the outcome of this study.

Firstly, the scope of the study is limited to only three African countries which are Côte d'Ivoire, South Africa and Uganda. The conclusions are therefore based on the outcomes of the analysis of the laws and literature from these countries. Furthermore,

the study is selective in its focus, as it does not examine all the rights of children but only the ones which are applicable to the protection of children in need of care or those temporarily or permanently deprived of his or her family environment.

On the procedural limitations, this study was limited to a desktop review of literature and legal instruments on the rights of children in Côte d'Ivoire, South Africa and Uganda. The study relied on the translation of the literature and legal instruments from Côte d'Ivoire as they were only available in French, and this study had to rely on the translation of these instruments into English. Effort was however made to ensure that only the correct translation of these instruments was analysed in this study. A qualified francophone translator was employed to translate the French version of the laws to English.

1.6 Conclusion

This chapter has laid out the background issues which underpin the basis for the protection of children, especially regarding the guardianship of children in Africa. This chapter presented the frameworks available at international and African regional levels on the protection of the rights of children within the family. It shows that the protection of the rights of children has been well established within the African human rights framework and the protection is in line with the global human rights standards.

The chapter places the role of the family vis-à-vis that of the state in caring for the child and links this to the need for alternative care for some children in special cases. It looks at the definitions of legal and natural guardians in the care of children and establishes the need for legal guardians for children whose parents are not capable or available to care for the child. It further indicates the obligations of state parties to the CRC and the ACRWC in ensuring that the rights of all children are protected.

The argument that children in Africa are regarded as individuals with dignity, whose rights are respected, is buttressed by the fact that the ACRWC recognises children as individuals whose rights are worthy of protection both at regional and at state levels. This is evidenced also by the fact that the constitutions of the three countries discussed in this chapter accord some guarantees for the rights of children. The constitutional guarantees afforded by South Africa and Uganda, especially to the rights of children of the family and parental care, are extensive and remarkable.

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Chapter 2
Audit of the Frameworks for the Regulation of Legal Guardianship of Children Under International Law

2.1 Introduction

The first international instrument to give credence to the need for the special protection of children was the Geneva Declaration on the Rights of the Child of 1924 (The Geneva Declaration). After the Geneva Declaration, the UN Declaration on the Rights of the Child of 1959 (the Declaration) was established, which underlined some of the acknowledgements made in the Geneva Declaration of 1924. The Declaration, in its third preambular paragraph, acknowledges that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'. While the Declaration is a non-binding document, its most significant impact is the fact that, it is the first instrument to recognise children as rights bearers. It also sets the groundwork upon which further developments were made on the international jurisprudence on the protection of children's rights (Kaime 2009).

Since the adoption of the Declaration on the Rights of the Child, much advancement has been made on the international protection of the rights of children internationally, with the adoption of the CRC and the ACRWC. These instruments require states to give specific and special legal protection to children without parental care. The stipulation is found in various provisions of the Declaration on the Rights of the Child, the CRC and the ACRWC. The UN Guidelines for the Alternative Care of Children (the Guidelines), which was adopted by the UN General Assembly in 2010, also categorically provides that 'no child should be without the support and protection of a legal guardian or other recognised responsible adult or competent public body at any time (paragraph 19)'. The appointment of a legal guardian is, therefore, a legal requirement and a special protection for a child who is deprived of parental care or of a family.

This chapter looks at what the international law instruments recommend regarding the appointment of legal guardians. It provides an audit of the instruments

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which are applicable to the regulation of the appointment of legal guardians for children both at the global and at the regional levels. The chapter further highlights the similarities and differences between the standards at the various levels.

2.2 Development of Standards on the International Protection of the Rights of Children

Prior to the adoption of the UN Declaration on the Rights of the Child in 1959, there had been dialogues on the protection and status of children at a global level. For instance, the Hague Convention Relating to the Settlement of Guardianship of Minors of 1902 was adopted. This was the first attempt at addressing international family law through The Hague Conference. The Hague Convention of 1902 was later replaced by The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1966.

There were also several non-child-specific instruments which made provisions for the protection of specific rights of children and required states to comply with the provisions. These instruments contained provisions which are adaptable for the protection of children's rights. Some of these provisions were contained in binding treaties and they were and still are adaptable to the protection of certain children's rights.

The UN has for years deliberated on the need for a comprehensive statement on children's rights which would be binding under international law. In 1989, the CRC was adopted unanimously by the UN General Assembly, and to date, a total of 195 countries have ratified the CRC. It is the most widely ratified UN human rights treaty in history. The CRC is regarded to have become 'customary international law to which all states, whether they have ratified the CRC or not, will be required to adhere to by the international community' (Lloyd 2002).

The CRC is based on four core principles which are the principle of non-discrimination, respect for the best interest of a child, the right to life, survival and development of the child and the respect for the views of the child. The rights protected under the CRC are child-specific rights and they are guarantees in line with these four core principles listed above. These principles are to guide state parties in the interpretation and implementation of the CRC. They are founded on the concept of the equality and universality of rights and that children are human beings with equal rights.

The Guidelines, though not a binding instrument, gives the most comprehensive insight into the role of the state in the appointment of legal guardians when it stipulates in article 19 that 'no child should be without the support and protection of a legal guardian or other recognised responsible adult or competent public body at any time'.

At the African regional level, the ACHPR was adopted by the OAU (as it then was) in 1981. It is the main African regional human rights instrument. It provides for the rights of different categories of people in Africa, and in article 18, it sets out the standard for the protection of the family and vulnerable groups which include women and children. The ACHPR recognises the family as the 'natural unit and basis of society' and stipulates that 'it shall be protected by the state'. It also guarantees the protection of children in line with the standards set out in international declarations and conventions (article 18 (3)).

The ACRWC, which was adopted shortly after the CRC in July 1990, is one of the three charters of the AU. It is the only regional child-specific human rights instrument in existence, and the standards set out therein are in furtherance of the principles of the CRC. The ACRWC stipulates standards which are important for the protection of the rights of children in the African context and the instrument has been ratified by all except seven of the member states of the African Union (AU).

2.2.1 International Law Perception of the Child

As mentioned in the previous section, the beginning of the twentieth century ushered in an era when the rights of children started to receive special attention in international human rights instruments. The Geneva Declaration of the Rights of the Child of 1924 was one of the first instruments to express the vulnerable status of the child and acknowledged the need for such special safeguards for a child. The Universal Declaration of Human Rights of 1948 also recognised the need for 'special care and assistance' for children. The Declaration of the Rights of the Child of 1959 stipulates that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care …' (third preambular paragraph). Likewise, 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 of 1986 recognises the need for a child to grow up with parents and the need of the child to a family. In 2010, the Guidelines were adopted and this instrument stipulates the need for a legal guardian or any other recognised responsible adult.

These Declarations do not define who a child is, but they all recognise the duty of care and protection which the family and indeed the state owes to the child (the preamble to the Geneva Declaration of the Rights of the Child, article 25 of the UNHDR and Principle 2 of the Declaration on the rights of the child). They acknowledge the 'inherent dignity and the equal and inalienable rights of all members of the human family' (first preambular paragraph) which includes children, and they reaffirm the 'fundamental human rights' and 'the dignity and worth of the human person' (third preambular paragraph of the Declaration on the Rights of the Child).

The child is defined in article 1 of the CRC as 'every human being below the age of 18 years'. The definition of a child in the section leaves room for the special cases where the national laws allow majority is attained earlier. The CRC reiterates the fact that the 'inherent dignity and the equal and inalienable rights of all members of

the human family is the foundation of freedom, justice and peace in the world' (first preambular paragraph). It views the child as an individual with dignity and its purpose is to uphold the dignity of the child (second preambular paragraph).

The ACRWC reiterates the definition of a child given in the CRC in article 2 of the ACRWC. It acknowledges that 'the child occupies a unique and privileged position in African society' and that the 'child should grow up in a family environment in an atmosphere of happiness, love and understanding…' (fifth preambular paragraph). In Africa, the child is regarded as a valuable yet defenceless and vulnerable human being whose rights must be protected by the family as well as the state.

Africa's dedication to the rights of children is indicated by the adoption of a child-specific charter by the AU, despite the existence of several global treaties which are adaptable to the protection of the rights of children. These include the CRC, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). It is important to note that the ACRWC was adopted by the AU despite the existence of the CRC due to the 'desire to address certain peculiarly African problems' (Muthoga 1998). Another reason suggested by Viljoen for the adoption of African standards on the rights of children was that some African heads of states were frustrated with some of the issues which arose during the drafting process of the CRC and these issues include the fact that (Viljoen 1998):

- Africans were underrepresented during the drafting process of the CRC.
- Potentially divisive and emotive issues were omitted in the search for consensus among states from diverse backgrounds.
- Specific provisions on aspects peculiar to Africa fell victim to the overriding aim of reaching a compromise and were not sufficiently addressed in the UN instrument.

The African regional instrument according to Olowu complements the CRC and they both provide the framework through which the rights and welfare of children are discussed and realised in Africa (Olowu 2002).

The CRC, the ACHPR and the ACRWC, respectively, recognise the role of the family, which is the fundamental group of society (The fifth preambular paragraph) and the natural unit and the basis of society in the protection of children (articles 18 (1)) of the ACHPR and the ACRWC). While the two instruments recognise the role of the family in child protection, the CRC specifically places the responsibility of ensuring the protection and care necessary for the child's well-being, on the parents, legal guardians, or other individuals legally responsible for the child (article 3 of the CRC). The ACRWC also saddles the parents of the child and 'where applicable, the legal guardians' and 'other persons' with the responsibility of caring for the child and for making decisions which are important for the well-being of the child. It goes without saying that the child is regarded as an individual who requires care and protection and the role of caring for the child rests solely with the parents, legal guardians, other persons responsible for the child and, indeed, the family of the child. The state will support only when it is necessary.

As previously noted, there are instances when the parents of the child are unavailable to perform their duties in respect of their child. In those instances, there are legal requirements to be followed in order to appoint a legal guardian for the

child. The following sections explore the framework on the regulation of legal guardianship under international law. They look at the adequacy of the standards on legal guardianship under the global framework as well as the regional framework. It points out the similarities between the two frameworks on legal guardianship and determines the strengths and weaknesses of the systems as a whole.

2.3 Guardianship of Children Under the Global Human Rights Framework

The CRC does not stipulate the procedure for the appointment of a legal guardian for a child. Nonetheless, various sections of the CRC recognise the need for legal guardians and the roles which they perform in the care and protection of the child. For instance, article 3(2) of the CRC requires states to:

> undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

This section categorically acknowledges the role of parents, legal guardians, and other individuals who are legally responsible for the child. Another relevant provision is article 5 of the CRC which requires states to:

> 'respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child…'

In addition, article 14(2) requires states to:

> 'respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'.

Article 18 places the primary responsibility for the child's upbringing and development on the parent or legal guardians of the child. Furthermore, paragraph 6 of the UN document entitled *A World Fit for Children*, which is a resolution adopted by the General Assembly in 2002, recognises and pledges support for parents and families or legal guardians as well as the primary caretakers of children (UN 2002).

Paragraph 37 of the Guidelines, though not a binding instrument, also stipulates that:

> … States should ensure, including through the appointment of a legal guardian, a recognised responsible adult or, where appropriate, a public body legally mandated to act as guardian, as stipulated in paragraph 19 above, that such households benefit from mandatory protection from all forms of exploitation and abuse, and supervision and support on the part of the local community and its competent services, such as social workers, with particular concern for the children's health, housing, education and inheritance rights….

The Guidelines also reiterate the application of the best interest principle in all decisions, initiatives and approaches taken by states within the scope of the Guidelines. It recommends that it should be made on a case-by-case basis, with a view, notably, to ensuring the child's safety and security and must be grounded in the protection of the rights of the child concerned (paragraph 6).

It is important to note that apart from the parents and the legal guardians of the child, the CRC recognises the fact that certain individuals may also be legally responsible for the upbringing and development of the child. These persons are listed in articles 3(2) and (5) as 'other individuals legally responsible for the child'. This is indicative of the fact that the CRC recognises that certain other persons may be allowed under the national laws of other countries to be legally responsible for the child.

2.4 Guardianship of Children Under the African Regional Human Rights Framework

The ACRWC, which is the main regional instrument on the protection of the rights of children in Africa, recognises the role of legal guardians in ensuring the care and welfare of children. This is evidenced by several provisions such as articles 10, 11, 19, 23, 24 and 29 of the ACRWC. Article 9 (3) specifically provides that:

> State Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

While the ACRWC recognises the role of a legal guardian in various articles, it does not make any provisions for the legal process or procedure for the appointment of a person as the legal guardian. This suggests that the ACRWC also leaves the process for the appointment of a legal guardian within the jurisdiction of each state to decide on the legislative or other measures to adopt. It can also be inferred from article 1 of the ACRWC which stipulates the obligations of state parties to:

> undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

The provisions of the ACRWC are centred on the best interests of the child principle. It is important that states ensure that the best interests of children are their main consideration at all times. On this, article 4 of the ACRWC provides that 'in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration'. Article 24 of the ACRWC also requires that national instruments should ensure that the best interest of the child is the paramount consideration in adoption cases.

An interesting feature of the ACRWC is the fact that article 20 (1) vests the primary responsibility for the upbringing and development of the child in the parents or other persons responsible for the child. In article 20 (2), states pledge assistance to the

parents or other persons responsible for the child and not necessarily a legal guardian. This article extends the provision of 'material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing to not just the parents, legal guardians or any 'person legally recognised' as required in article 3 of the CRC. The fact that the ACRWC extends this support and assistance to 'any other person who is responsible for the child' is indicative of the fact that other persons may have some legally recognised relationship which is similar to those borne by the parents and guardians of the child. This, therefore, suggests that the other persons may act as legal guardians and are empowered to make decisions in relation to the assistance and support provided for the child in article 20 (2) of the ACRWC.

2.5 Procedure for the Appointment of Legal Guardian under the International Human Rights Frameworks

While the CRC, some other UN instruments and the ACRWC recognise the role of a legal guardian in various articles, they do not stipulate on provisions on the procedure for the appointment of a person as the legal guardian. It appears that the legal procedure for the appointment of a legal guardian is left within the jurisdiction of each state to decide. This is especially so since article 3 of the CRC requires states parties to:

> undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 20 of the CRC further prescribes the duty of the state to provide special protection for a 'child who is temporarily or permanently deprived of his or her family environment or in whose own best interests cannot be allowed to remain in that environment'. 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, further expresses the obligation of states to determine the legal procedure for the appointment of a legal guardian, by directing in article 7 that 'governments should determine the adequacy of their national child welfare services and consider appropriate actions'. In addition, paragraph 32 (1) of A World Fit for Children affirms that parents, families, legal guardians and other caregivers have the primary role and responsibility for the well-being of children, and pledges support for them in the performance of their child-rearing responsibilities. It further requires states to ensure that 'all … policies and programmes should promote the shared responsibility of parents, families, legal guardians and other caregivers, and society as a whole …' This is reiterated in article 1 of the ACRWC which requires states to recognise the rights, freedoms and duties enshrined in the Charter and to undertake the necessary steps:

> in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

Furthermore, article 20 (2) (b) (c) of the ACRWC indicates the responsibility of the state to assist parents and other persons responsible for the child in the performance of child-rearing and to ensure the development of institutions responsible for providing care for children.

It appears that the CRC, the UN instruments and the ACRWC leave the regulation and appointment of a legal guardian within the scope and domain of national laws like in the cases of adoption and child custody. In adoption cases, article 24 (a) of the ACRWC stipulates that the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and places this within the scope of applicable laws and procedures in each state. The guidelines laid down by each state should, nevertheless, be in line with the standards set out in article 3 of the CRC, article 4 of the ACRWC, paragraph 37 of the Guidelines and in article 5 of 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.

The best interest of the child principle should be a primary consideration in all actions taken by states in respect of children. It should guide the state in the appointment of a legal guardian since the legal guardian is expected to serve a protective role in the survival and development of vulnerable children. These children need special protection due to the absence and incapacity of their parents to fulfil their parental responsibilities and the state is required to ensure that their best interests are served always.

2.6 Similarities and Differences Between the Global and Regional Frameworks of Guardianship

There are a number of similarities and differences in the manner in which the global and regional frameworks deal with matters of guardianship of children. Some of the similarities and differences are listed below.

2.6.1 Similarities

(a) **Recognition of the Role of the Family in the Survival and Development of the Child**

The global and regional instruments recognise the fundamental position of the family and the pivotal role which it plays in the welfare, survival and development of the child. The instruments enjoin states to ensure support for the family and to ensure that children grow within the family. It is significant that the instruments regard children who are deprived of family environment as a vulnerable group of children and the instruments contain special protection for such children.

(b) **Recognition of the Role of Legal Guardians**

The instruments at both the global and regional levels recognise the important role which legal guardians play in the protection and development of children. These instruments place this role alongside that of the biological parents of a child. They acknowledge the fact that the natural guardians of a child may not be available or capable of taking care of the child, and as such some legally recognised persons are empowered by the law to make important decisions for the child, to protect the rights of the child and to see to the child's well-being. The instruments respect the duty of parents and legal guardians and pledge to support them in relation to the child.

(c) **Application of the Best Interest Principle**

The two systems consider the best interests of the child as paramount and a primary consideration in any matter concerning a child. This is an important factor in the protection of children since children who are deprived of parental care or family require special safeguards by the state. In order to protect the development and welfare of children, it is crucial that such a high standard is applied by states when appointing legal guardians and when regulating legal guardianship for such children.

(d) **Legal Procedure for the Appointment of Legal Guardians**

It is interesting to note that the two instruments do not stipulate any legal process or procedure for the appointment of legal guardians for children. They nonetheless provide for the obligations of individual state parties to take 'all appropriate legislative and administrative measures' and other measures to ensure the implementation of the provisions' of the instruments. These words suggest that the member states are left to develop the appropriate legal or administrative standards which would meet the needs of each individual country when matters relating to the appointment of guardians arise. These standards developed by the states are nonetheless expected to conform to the provisions of the international instruments.

2.6.2 Differences

(a) **Defining Those Who Have Parental Responsibility Over a Child**

In defining those who have parental responsibilities for a child, the CRC recognises the duty of the 'parents, legal guardians and other persons legally responsible for the child' (articles 3 and 5). Article 20 of the ACRWC, on the other hand, recognises the parents or 'other persons responsible for the child'. The omission of the word 'legally' in the ACRWC, as spelt out in the CRC, appears to be deliberate. This suggests the fact that the ACRWC considers the role of persons such as extended family members, kin and the community in the upbringing and development of the child. This is a feature of the African traditional childcare system where it is believed that it takes a community to raise a child (Weisner et al. 1997), and as such there are times when the person who has the primary responsibility of the upbringing and development does not have any legal relationship with the child (LeVine et al. 1998).

(b) **Employing an 'African Approach' to the Rights of Child**

According to Olowu (2002), the ACRWC employs an African approach to the protection of the rights of children by upholding the cultural values and experiences which affect the rights of the child in Africa. The use of an 'African approach' also stems from the need to address certain peculiar problems affecting the African child which were not addressed in the CRC (Mothoga 2009). Some of these peculiar problems affecting the African child include 'children living under apartheid, disadvantages facing the African girl child, the African conception of the community's responsibilities and duties, the role of the extended family in the upbringing of children, the use of children as soldiers and problems of internal displacement arising from civil wars and internal insurrections'. This is perhaps one of the reasons why the description of those who have parental responsibilities over a child in the ACRWC includes all adults who are responsible for the child.

2.7 Conclusion

This chapter has established that legal guardianship is recognised under both international and regional human rights systems and both systems states have pledged their support for the parents and guardians of children. The chapter has also shown that the state has a duty to protect children who are temporarily or permanently deprived of their family and that the appointment of a legal guardian to take legally binding decisions for these children is important for their welfare, survival and development.

In this chapter, it has been established that international instruments do not stipulate any process or procedure for the regulation or appointment of guardians and that state parties have the exclusive jurisdiction to legislate on the procedure which may be followed for the appointment of a legal guardian for the child. It is nevertheless suggested that the regulation of the guardianship of children may adopt a similar approach to the provisions on the adoption of children in international instruments which leave the member states to 'establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws of each country' (article 24 of the ACRWC and article 21 of the CRC).

From the discussion above, it can be deduced that the matters relating to the adoption of children are part of the appropriate legislative and administrative measures which member states are required to take to give effect to the adoption of children as stipulated in the instruments. This also considers the fact that guardianship falls within the category of matters which states parties are allowed to take appropriate legislative and administrative measures.

National guidelines on the guardianship of children should, however, be in line with the principle of the best interests of the child. The application of the best interests of the child principle was drawn in, to emphasise the duty of the state to ensure that the guardian is appointed to provide adequate and appropriate protection

of the interests of the child and to ensure their welfare, development and survival. They will ensure that no child is left unprotected and that they are able to access the protection and guarantees which have been stipulated in both national and international instruments in respect of children in need of care and those who are described in article 20 of the CRC.

The various provisions which relate to the provision of special safeguards and protection in the instruments have established that international law contains an adequate basis for the protection of the rights of children.

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Chapter 3
Models on the Guardianship of Children in Africa

3.1 Introduction

The CRC requires states parties to take all 'appropriate legislative, administrative, and other measures for the implementation of the rights recognised' therein (article 3). The states parties to the ACRWC are also required to 'undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter' (article 1).

As noted earlier, Côte d'Ivoire, South Africa and Uganda have all ratified the CRC and the ACRWC. They are therefore under an obligation to bring their national laws in line with their international obligations. These countries have taken steps to implement these provisions by the enactment of legislation and policies in this regard. The legislation and policies are therefore to realise the protections which have been guaranteed to children in international instruments.

The Constitutions of Côte d'Ivoire, South Africa and Uganda have child-specific provisions which indicate the commitment of the country to the rights of children. In addition, the countries have adopted child-specific pieces of legislation which ensure the protection of children. This chapter provides an audit of the instruments which are applicable to the regulation of legal guardianship for children. It looks at the approach of these countries to the appointment of a legal guardian, the responsibilities of a legal guardian in relation to their ward (the child) and the procedure for the termination of legal guardianship. It discusses what the national laws of the three counties recommend regarding the legal guardians.

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3.2 Framework for the Guardianship of Children in Côte d'Ivoire

The framework for the guardianship of children in Côte d'Ivoire stems from the international and national standards on the protection of children in Côte d'Ivoire. This is borne out of the fact that Côte d'Ivoire employs a monist approach in relation to international law which recognises a singular source of law in a country and it does not consider whether the source of the laws is national or international. Thus, in theory, the international instruments which are ratified by Côte d'Ivoire are self-executing. On this, the Constitution of Côte d'Ivoire 2000 (the Constitution) in section 87 provides that the authority of international instruments that have been ratified is superior to that of the national laws once they are published. In practice, however, the courts are not very open to the application of international law because of the inadequate awareness of these laws.

(a) International Instruments and the Rights of Children in Côte d'Ivoire

Côte d'Ivoire adopts the monist approach to the domestication of international instruments which directs that duly ratified international instruments have a higher position than the national laws of Côte d'Ivoire (section 87 of the Constitution). Section 84 of the Constitution requires the President of Côte d'Ivoire to negotiate and ratify treaties and other international agreements. However, the President needs the approval by the Constitutional Council of Côte d'Ivoire before ratifying any international treaty (Ayeni 2016). The procedure requires the Constitutional Council to determine whether or not the treaty violates any of the provisions of the Constitution. Section 86 of the Constitution charges the Constitutional Council with the power to decide suitability or not of a treaty before it is ratified. For instance, it decided on the suitability of the Rome Statute in its decision 002/CC/SG of 17 December 2003 (Ayeni 2016). Once the treaty is approved and ratified, the treaty will have to be published in an official gazette before they are recognised (CRIN 2014). Thus international instruments that are ratified in Côte d'Ivoire do not necessarily become applicable in the legal system of Côte d'Ivoire unless they are published and incorporated in a national document.

Côte d'Ivoire ratified the CRC on 4 February 1991 and ratified the ACRWC on 1 March 2002. So far, neither the CRC nor the ACRWC has been published nor incorporated into the legal system of Côte d'Ivoire, so it cannot be assumed that the CRC or ACRWC automatically has any force of law. In fact, to date, the provisions of the CRC (CRIN 2017) or the ACRWC have not been published in any official gazette and have never been invoked in the national courts of Côte d'Ivoire (Ayeni 2016).

(b) The National Instruments on the Rights of Children in Côte d'Ivoire

The title 1 of the Constitution contains general provisions which protect the freedom and of the rights of every human being irrespective of age. It also contains child-specific provisions such as section 6 of the Constitution which guarantees the protection of children, the aged and the handicapped. Based on this, the state is

obliged to work in furtherance of the rights of children. Section 8 guarantees further rights of youths which are applicable to children as well. It stipulates the duty of the state to see to the development of youth and to create the conditions which are favourable to their civic and moral education and which assure their protection against moral exploitation and abandonment (section 8 of the Constitution). In line with these, several sections of the law have been enacted to reflect the commitment of the state to the protection of children and some of these indicate the standards which regulate the guardianship of children in Côte d'Ivoire (CRIN 2017).

3.2.1 Holders of Parental Authority and Responsibilities

In Côte d'Ivoire, children are regarded as an important component of the family and a society. The parents of a child are the natural guardians of a child, and as such they are charged with the responsibility of caring for a child and for making important decisions on behalf of the child.

Section 3 of the Minority Act (Law No 70–483 of 1970) (Minority Act) acknowledges that parental power 'is the totality of the rights granted to the father and mother over the person and property of their minor children to enable them to fulfil their obligations'. Section 4 of the Minority Act stipulates that the parental powers include the rights and obligations with respect to the minor child. These powers and rights are also applicable to guardians by virtue of section 88 of the Minority Act and they include:

- Ensure his custody and, in particular, secure his residence, subject to the laws on recruitment;
- To provide for its maintenance, education, and supervision;
- To impose on a measure of educational assistance on the child, under the conditions laid down in Article 10, paragraph 1;
- Administer its assets;
- To dispose of the income of such property;
- To consent to his marriage, to his adoption, to his emancipation, in the conditions prescribed by law; and
- For the survivor of the father and mother, choose him a guardian for this case of his death.

Section 5 of the Minority Act charges the father and mother of the child with parental authority and with the civil responsibility of a child under the age of 21 years. Article 6 of the Minority Act, nonetheless, makes a distinction between the person who exercises parental power over a child born in or out of wedlock. Parental power over a child born in wedlock is vested in the father as head of the family (section 58 of the law of 7 October 1964 on marriage) and this power shifts to the mother of the child if the court decides otherwise. Section 6 (1–3) of the Minority Act also sets out the reasons why a father can have his parental power withdrawn. Section 22 of the Law of 7 October 1964 on divorce and separation also stipulates

that in the event of divorce or legal separation, the parental power is exercised by the parent who acquires custody of the child and upon the death of the father, the power shifts to the mother (section 8 of the Minority Act). In the absence or incapacity of the two parents, the Minority Act, in section 7 stipulates that the guardianship of a minor may be 'entrusted by the guardianship judge to a third party if the interest of the minor so requires'. Thus, section 7 recognises and lays down the role of the guardianship judge in the appointment of a legal guardian for a minor.

3.2.2 Appointment of a Legal Guardian

Upon the death or incapacity of one or both natural guardians of the child and subject to section 48 of the Minority Act, a legal guardian may be appointed to oversee the welfare of the child and to make important decisions which are in the interest of the child. Section 56 of the Minority Act also stipulates that the appointment of a legal guardian may be made by the dying parent of a child in a will or 'by a special declaration either before a notary public or before the guardianship judge' (section 57). Furthermore, section 48 stipulates that legal guardianship is required in the case of a child when:

(i) Both parents of the minor child have died or are unable to manifest their will because of their incapacity, absence, removal or other cause;
(ii) They are both deprived of the rights of parental power;
(iii) The survivor is deprived of the rights of paternal power;
(iv) Both parents have been convicted of abandonment of a family in the case where the victim of this abandonment is one of their children, and even if the degradation of the paternal power has not been pronounced;
(v) The child is born out of wedlock and his birth certificate does not bear the mother's name, and he has not been legally and voluntarily recognised by his father or mother.

It is important to know that the parents of a child may also lose their parental authority when the court decides that there is 'harm to the health, safety, morals or physical integrity of a child'. In such cases, proceedings may be instituted for the transfer of guardianship of the child in accordance with provisions of the Minority Act.

In terms of section 58 of the Minority Act, a legal guardian may also be appointed by the Family Council which is set up by the guardianship judge. This kind of appointment is made when no appointment is made by the dying parent in terms of section 57 or where the appointed guardian terminates his role as a legal guardian of the child.

The court acts as the upper guardian of all children and as such has the power to make orders in respect of the child in Côte d'Ivoire. This power is exercised by the Guardianship judge makes such orders in respect of children in difficult situations. It should be noted that the guardianship judge is a judicial officer who exercises general supervision over the legal administration and the guardianship of minor children. Section 52 of the Minority Act grants the Guardianship judge the authority to 'summon

the legal, judicial or ad hoc administrator, guardian, and the members of the family of a child to request clarification, make observations and issue injunctions'. The Family Council is set up by the guardianship judge and it is comprised of four to six members, chosen from the members of the families and friends of the parents of the child. Section 67 of the Minority Act stipulates that the appointment of the Family Council is for the duration of the guardianship and it is overseen by the Guardianship judge.

3.2.3 Who Qualifies as a Legal Guardian?

In terms of section 80 of the Minority Act, any person may be appointed as a guardian of a minor child, irrespective of the person's sex, gender or nationality. The following persons are precluded from appointment into guardianship roles. These include persons listed in sections 81–84 of the Minority Act:

(i) Persons who are themselves minors (except they are the fathers and mothers of the child),
(ii) Persons who have been declared the insane or prodigals by the court,
(iii) Persons who are ex-convicts.
(iv) Persons prohibited under article 42 of the Penal Code.
(v) Persons who have been deprived of their paternal power.
(vi) Persons with notorious or questionable conduct, or who are unable to do business.
(vii) Persons who personally or whose ascendants or descendants have a dispute with the child or a significant part of the child's property.

Section 62 of the Minority Act provides that any person may also be exempted from taking up the role of a guardian if they experienced hindrances such as their age, state of health, inaccessibility, inabilities, occupational or family duties which are time-consuming, or a previous guardianship duty, will prevent them from carrying on the role in the best interests of the minor. In terms of section 87 of the Minority Act, anyone person who has been disqualified from acting as a minor may appeal the decision of the guardianship judge.

Section 53 of the Minority Act stipulates that a person who acts as a guardian does so in a personal capacity and the role of a guardian cannot be 'transmitted to the spouse or heirs of the guardian' (Section 83 of the Minority Act). A guardianship role is also regarded as a community role which no one can refuse appointment into.

3.2.4 Responsibilities of a Legal Guardian in Relation to the Child

The guardian is responsible for the maintenance, education and administration of the property of a minor and he has a duty to act with care and in the interest of the minor child (sections 4, 48 and 88 of the Minority Act). The guardian may perform functions which include but are not limited to (sections 97–100 of the Minority Act):

(i) Alienation of the property on behalf of the minor child. This should be in accordance with the provisions for the judicial sale of such property.
(ii) Use or re-use of the minor's capital subject to the approval of the family council.
(iii) Sale of the immovable and the business premises by amicable agreement this is subject to the approval of the family council.
(iv) The contribution of a building or a business is made in a friendly way subject to the approval of the family council.
(v) Acceptance of a succession due to the minor only for the benefit of inventory.
(vi) Acceptance of unauthorised donations and legacies granted to the minor, unless they are burdened with charges.
(vii) Bringing an action relating to the economic rights of the minor.

It should be noted that, in all cases, an act of the guardian is only valid when it is approved by the Family Council, and the approval of the Family Council may be supplemented by approval of the guardianship judge (section 105 of the Minority Act). The guardian also may be asked to appear at any time before the guardianship once a year to answer questions relating to his management, and the Family Council may be convened if necessary. The Guardianship Judge may request that the management account is presented to the child who is above 18 years old. A minor may approve the management account after 1 month after the guardian has given him a receipt and if there is any dispute regarding the account the matter may be adjudicated (section 109 of the Minority Act).

3.2.5 Termination of Guardianship

A guardian is appointed for the duration of the period which a child is still a minor and it terminates upon the attaining of majority by the child or when the child becomes emancipated in terms of chapter 6 of the Minority Act. Guardianship may also be terminated upon the death of the minor child or that of the guardian, when the guardian renounces the role or when the guardian is incapacitated or dismissed.

Any of the reasons given in section 20 of the Minority Act for the withdrawal of parental rights and powers from parents by the court can lead to the termination of guardianship. These reasons stipulated in section 21 of the Minority Act include a conviction for prostituting the child or for being perpetrators or accomplices to a crime committed against one or several children. Thus, the Minority Act authorises the Guardianship Judge to withdraw the 'custody of a child whose health, development or physical, moral or mental integrity is being endangered' by the person who has custody of the child or a person who exercises parental authority over that child and entrust the child to a suitable person or institution (Human Rights Committee 1993). Other reasons which would lead to the termination of a guardianship order include when a guardian commits an offence in accordance with the provisions of article 42 of the Penal Code and meeting the criteria stated in section 82 of the Minority Act.

3.3 Framework for the Guardianship of Children in South Africa

The framework for the guardianship of children in South Africa stems from the 1996 Constitution of South Africa Act no 108 of 1996 (the Constitution) and the South African Children's Act No. 38 of 2005 (Children's Act). The rules of international law are also applicable in South Africa by virtue of section 231 of the Constitution. South Africa employs a hybrid-monist approach in relation to the domestication of international law; thus, the international instruments which are ratified by South Africa are either self-executing or they need to be enacted into law by an Act of the Parliament of South Africa before they are recognised as a source of law.

On this, section 231 of the Constitution provides that:

2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

(a) International Law and the Rights of Children in South Africa

South Africa ratified the CRC on 16 June 1995 and ratified the ACRWC on 07 January 2000. In line with the hybrid approach to treaty domestication, the provisions of these international law instruments have been domesticated with the enactment of the Children's Act. In this way, the international law provisions concerning children have been domesticated and are therefore applicable in the courts of South Africa. In addition, section 39(b) of the Constitution requires that in the interpretation of the Bill of Rights, a court, tribunal or forum must consider international law (see also section 233 of the Constitution of South Africa). Hence, it can be implied that the provisions of the CRC and the ACRWC are binding on South African courts when matters concerning children are presented before the courts. The courts have applied the provisions of the CRC in the interpretation of matters concerning the rights of children in the cases of *AD and Another v DW and Others* (CCT48/07);[2008] where article 3 of the CRC on the best interests of the child, and article 21 on adoption were considered by the Constitutional Court. The Western Cape High Court also applied the provisions of the CRC in the case of *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa & Government of the Province of Western Cape* (2011 (5) SA 87 (WCC) [2010] ZAWCHC 544; 18678/2007 (11 November 2010) where article 23 of the CRC on the rights of children with disabilities, article 28 on the right to education were interpreted.

(b) National instruments on the rights of children in South Africa

In South Africa, children are regarded as an important part of the family and the community and that they have roles and responsibilities to perform within the community. The parents of a child are the natural guardians of a child and they are charged with the responsibility of caring for a child and for making important decisions on behalf of a child. Chapter Two of the Constitution of South Africa contains the Bill of Rights which sets out the fundamental rights and freedoms of everyone in South Africa. Section 28 contains the rights which are exclusively guaranteed to children. Section 28 (3) defines a child as any person below the age of 18 years and it reiterates the paramount and important nature of the child's best interests in every matter concerning the child as prescribed in the CRC and the ACRWC. Section 28 (1) guarantees that every child has a right to:

(a) A name and a nationality from birth;
(b) Family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) Basic nutrition, shelter, basic health care services and social services;
(d) Be protected from maltreatment, neglect, abuse or degradation;
(e) Be protected from exploitative labour practices;
(f) Not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age; or
(g) Place at risk the child's well-being, education, physical and mental health or spiritual, moral or social development;
(h) Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
    (i) Kept separately from detained persons over the age of 18 years; and
    (ii) Treated in a manner, and kept in conditions, that take account of the child's age;
(i) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
    (i) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

The Children's Act describes a child as any person below the age of 18 years by pegging the age of majority at 18 years (section 17). It contains provisions which safeguard the rights of children and stipulates standards for dealing with children generally. Apart from the general protection of children, strengthening the family, providing a mechanism for enforcing and monitoring the rights of children and giving effect to the constitutional rights of children, the Children's Act is South Africa's attempt at domesticating the rights of children as required by the international instruments which South Africa has ratified. Sections 7 and 9 of the Children's Act also reiterate the importance of the application of the best interests of child standards in every matter concerning a child. Another important feature of the Children's Act is that it brings together all the instruments on the protection of children in South Africa, thus upon its enactment, the Children's Act presented an integrated document of all the standards on the protection of children in South Africa.

3.3.1 Holders of Parental Authority and Responsibilities

The Children's Act places the onus of caring for the child on the parents and it prescribes all the rights and responsibilities of the parents of a child. It recognises the duty of the parents of the child to act as guardian of the child in section 18 (2) (c) and in section 18 (3) it recognises the role of the parent (as the natural guardian) or another person (as the legal guardian).

It is also noteworthy that the interpretation section of the Children's Act defines an abandoned child as one who is deserted not by the parents alone but also by the guardian or caregiver; or a child who, for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least 3 months. As provided in Part 1, section 1 of the Children's Act, the qualification of the desertion of a child by the guardian in the definition of an abandoned child shows the importance of the guardian in the development and protection of a child.

3.3.2 Appointment of a Legal Guardian

The Children's Act prescribes that a legal guardian may be appointed in terms of section 24 and section 27. The Children's Act gives a parent who is the sole guardian (a parent may be the sole guardian of a child if the other parent of the child is dead or if he or she is not involved in the life of the child) or a parent who has the sole care of a child the power to appoint a fit and proper person as guardian of the child in the event of the death of the parent. This kind of appointment must be contained in a will made by the parent described in section 27 (1) (b) and the person so appointed will be vested with the guardianship or care role over the child upon the death of the parent and subject to the express or implied acceptance of the appointment by the person (Section 27 (3) (a) and (b)). Two or more persons may be appointed as the guardian of a child and any, or all of the persons listed in the will may accept the appointment.

A legal guardian may also be appointed by an order of the court in terms of section 24 of the Children's Act. It allows any person who has 'an interest in the care, well-being and development of a child' to apply to the High Court for an order granting the guardianship of the child to such a person. It lays down the factors to consider and the procedure which the court will take in granting such an application. These factors include:

(a) The best interests of the child;
(b) The relationship between the applicant and the child, and any other relevant person and the child; and
(c) Any other fact that should, in the opinion of the court, be considered.

3.3.3 Who Qualifies as a Legal Guardian?

According to section 27 of the Children's Act, any fit and proper person may be appointed as a guardian of a child. The Children's Act does not list the criteria for a person to qualify as a guardian. Nonetheless, section 24 (1) suggests that any person who has an interest in the care, well-being and development of a child may apply to the High Court for an order to be appointed as the guardian of the child and such a person may be appointed once the court has considered the factors listed in section 24 (2).

3.3.4 Responsibilities of a Legal Guardian in Relation to the Child

The responsibilities of a legal guardian are listed in section 18 (3) of the Children's Act which provides that:

(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian
  (a) Administer and safeguard the child's property and property interests;
  (b) Assist or represent the child in administrative, contractual and other legal matters; or
  (c) Give or refuse any consent required by law in respect of the child, including-
    (i) Consent to the child's marriage;
    (ii) Consent to the child's adoption;
    (iii) Consent to the child's departure or removal from the Republic;
    (iv) Consent to the child's application for a passport; and
    (v) Consent to the alienation or encumbrance of any immovable property of the child.
  (d) Whenever more than one person has guardianship of a child, each one of them is competent subject to subsection (5), any other law or any order of a competent court to the contrary to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.
  (e) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).

3.3.5 Termination of Guardianship

The termination, extension, suspension or restriction of parental responsibilities and rights are discussed in section 28 (1) of the Children's Act. An application may be presented to the Court for the termination or suspension of a person appointed as a guardian in terms of section 27 from performing any or all the parental responsibilities and rights which they acquired when appointed as a guardian for the child in terms of section 18 (3). The application may be brought:

(a) By a co-holder of parental responsibilities and rights in respect of the child;
(b) By any other person having a sufficient interest in the care, protection, well-being or development of the child;
(c) By the child, acting with leave of the court;
(d) In the child's interest by any other person, acting with leave of the court; or
(e) By a family advocate or the representative of any interested organ of state.

An application may also be made for the removal of an existing guardian and to another person to replace the existing guardian. This application is made in terms of section 24 (3) which sets out the procedure for applying for guardianship of a child that already has a guardian. It requires that an application should be made to the High Court stating the reasons why the existing guardian is not suitable to have guardianship of the child. The court considering the application for the removal or suspension of a guardian needs to consider factors such as the (section 28 (4) of the Children's Act):

> best interests of the child; the relationship between the child and the person whose parental responsibilities and rights are being challenged; the degree of commitment that the person has shown towards the child; and any other fact that should, in the opinion of the court, be taken into account.

3.4 Framework for the Guardianship of Children in Uganda

The guardianship of children in Uganda is regulated by the international standards which guide the national laws on the protection of children. Uganda employs a dualist approach to the domestication of international law (Obitre-Gama 2000). This approach sees international law as a separate source of law and the international treaties which have to be domesticated through an act of Parliament of Uganda before they can be applied by the courts. International treaties cannot directly overrule or form part of the municipal law of Uganda. On the relationship between the national laws of Uganda and international law, section 123 of the Constitution of the Republic of Uganda (the Constitution) authorises the President or a person authorised by the President to 'make treaties, conventions, agreements or other arrangements between Uganda and any other country, or between Uganda and any international organisation or body, in respect of any matter'. It further requires Parliament to make laws to govern the ratification of treaties, international agreements made in terms of section 123 (1). The section places the obligation on the Parliament of Uganda to domesticate the international law duly ratified, and in line with this, a number of international instruments have been domesticated in Uganda.

(a) International Instruments and the Rights of Children in Uganda

Uganda ratified the CRC on 17 August 1990 and ratified the ACRWC on 17 August 1994. The provisions of the CRC and the ACRWC are binding on the courts in Uganda and the provisions can be applied when matters concerning children are presented before the courts.

Thus far, the Courts in Uganda have applied the provisions of the CRC in cases which required the interpretation of certain rights of children. Such cases include *Nantume v. Kampala City Council & two others* (Minors) (Family Cause No 28 of 2009) [2009] UGHC 89 (30 March 2009) where the High Court considered article 12 of the CRC in the interpretation of a child's contractual obligations. The High Court also applied the provisions of article 12 of the CRC to arrive at a ruling on the guardianship of a child in the case of *Namugerwa Joyce, Nantongo Harriet, Nakafero Jackline (Minors) (Family Cause No 28 of 2009) [2010] UGHC 13 (10 February 2010).*

(b) **National Instruments on the Rights of Children in Uganda**

The interpretation section of the Constitution of Uganda (section 257 (c) defines a child as 'a person under the age of 18 years'. The Constitution contains general provisions which guarantee the rights and freedoms of every citizen of Uganda irrespective of age. It also contains child-specific provisions such as section 34 of the Constitution which guarantees the protection of the rights of children. It requires that laws which apply to children should be in their best interests and lays down the right of children to know and be cared for by their parents or those entitled by law to bring them up. It further requires the state to enact laws for special protection to orphans and other vulnerable children (section 34 (7). Other provisions which recognise the protection of children include section 17 which requires every citizen 'to protect children and vulnerable persons against any form of abuse, harassment or ill-treatment'. In addition, section 31 (2) of the Constitution obligates Parliament to make appropriate laws to ensure that widows and widowers are able to enjoy parental rights over their children among other things.

The Children Act No 46 (Cap. 59) of 1997 of Uganda (Children Act) defines a child as 'a person below the age of 18 years' and this is consistent with the constitutional definition of a child. Part II, section 3, Part III, section 11 of the Children Act stipulates the requirement for the application of the best interest principle in several sections where decisions are to be made in respect of the child. The first schedule, paragraph 1 of the Children Act ranks the child's welfare as the paramount consideration whenever questions regarding the upbringing of a child, the administration of a child's property or the application of any income that arises from it. In 2016, the Parliament of Uganda amended the Children Act with the inclusion of more detailed provisions on guardianship of children among other things. This amendment was effected by the passing of the Children (Amendment) Act in 2016.

The Children (Amendment) Act 2016 (the Amendment Act) clarifies the standards for the regulation of guardianship of children and increases the protection guaranteed to children in the Children Act, by prescribing more stringent conditions to be complied with, by persons who intend to be guardians of children. It lists the procedure for the regulation of guardians and the requirements for the application and termination of guardianship in Uganda. Other provisions of the Amendment Act include the regulation of inter-country adoption and prohibit corporal punishment and provides for other associated matters.

3.4.1 Holders of Parental Authority and Responsibilities

Section 31 (4) of the Constitution of Uganda stipulates that the parents of a child are charged with the 'right and duty to care for and bring up their children'. The Constitution stipulates the importance of the family and prohibits the unlawful separation of children from their families or the persons entitled to bring them up (section 31 (5)).

The interpretation section of the Children Act (part I section 1 (k) of the Children Act and Section 43 (F) of the Amendment Act) defines a guardian as a person having parental responsibility for a child. Section 4 of the Children Act prescribes that a child should live with his or her parents or guardians. Section 5 also makes it the duty of a parent, guardian or any person who has custody of a child to maintain the child and to protect the socio-economic rights of the child. It also makes it a duty of the person who has the custody of a child to protect the child from discrimination, violence, abuse and neglect. Section 6 entrusts the natural parents and guardians of the child with parental responsibility. It adds that when the natural parents of a child are deceased, the parental responsibility may be transferred to 'relatives of either parent, or by way of a care order, to the warden of an approved home, or to a foster parent'.

It should also be noted that the Act does not restrict the parental responsibility to the child's parents or legal guardian alone, but it extends it to a wide array of people listed in section 6 (3). However, despite charging an array of people with parental responsibility, various sections of the Children Act still place the duties of the parents of a child alongside that of the legal guardian alone especially, in relation to the welfare of the child and for granting consent to matters concerning the child.

3.4.2 Appointment of a Legal Guardian

The appointment of a legal guardian is regulated by Section 43 of the Children Amendment Act. Section 43A (2) of the Amendment Act restricts the application for guardianship for citizens of Uganda. It provides that a legal guardian may be appointed by the parents of a child, by agreement or a deed which must be signed by the parent in the presence of two witnesses who should include a social welfare officer, a probation officer and a local councillor.

An order for legal guardianship may also be made by the High Court, and the Court will consider a number of factors before granting the application. These factors are listed in section 43F (1) (a–f) of the Amendment Act. Other factors which need to be considered by the Court include but are not limited to whether the applicant:

(a) Has continuously lived in Uganda for a minimum of 1 year;
(b) Does not have a criminal record and obtains a recommendation regarding his/her fitness to be a guardian from the relevant authority in the applicant's country of origin; and
(c) Country of origin will recognise the guardianship order.

Section 43F (2–5) of the Amendment Act places some stringent procedural requirements on persons who intend to be appointed as guardians.

Form 1 of the third schedule of the Amendment Act lists the procedural requirements for the guardian to meet while making an application to the High Court of Uganda. The Act also stipulates that a guardianship order shall only be made if the Court is satisfied that the prospective guardian has not made any payment or given any other reward in consideration for the guardianship. Finally, the appointment of the guardian is subject to the submission of a favourable report by the probation and social welfare officer.

Section 43C (1) of the Amendment Act provides for the appointment of a customary guardian who is appointed by family members in accordance with the customs, culture and traditions of the family and this appointment is made when both parents of the child are deceased or cannot be found, when the parents are incapacitated or when no one bears parental responsibility in respect of the child.

3.4.3 Who Qualifies as a Legal Guardian?

The appointment of legal guardians is regulated by the Children Act 2016 and the Amendment Act. Section 6 (3) of the Children Act 2016 stipulates that:

> Where the natural parents of a child are deceased, parental responsibility may be passed on to relatives of either parent, or by way of a care order, to the warden of an approved home, or to a foster parent.

Section 43A (2) of the Amendment Act stipulates that only citizens of Uganda shall be eligible for appointment as legal guardians and that any person above the age of 18 years may be appointed as a guardian. In addition, a prospective guardian must not have any criminal record.

Since section 6 (3) of the Children Act confirms that parental responsibility may be exercised by the parents, the guardians of the child and other people such as the relatives of either parents of a child, the warden of an approved home or a foster parent, then it can be inferred that any of the listed individuals may be appointed as a guardian as stipulated in Form 1 of the third schedule of the Amendment Act which lists some further procedural criteria which a person who intends to be appointed as a guardian must meet.

3.4.4 Responsibilities of a Legal Guardian in Relation to the Child

The definition of a guardian in Paragraph k of the interpretation section of the Children Act indicates that a guardian is any person who has parental responsibility for a child. Thus, the guardian owes the child the responsibility to perform all the

duties of a parent. The Children Act makes it a duty of the 'parent, guardian or any person having custody of a child to maintain that child'. In defining parental responsibility, section 6 of the Children Act 2016 prescribes that 'every parent and guardian shall have parental responsibility for his or her child'. This indicates that a guardian is legally recognised as a person who has parental responsibility for a child. This is corroborated by section 43H (1) of the Amendment Act which explains that the guardianship order 'shall vest parental responsibility of the child to the guardian'.

The parental duty to maintain the child requires that the parent or the guardian of the child should ensure the realisation of the child's right to education and guidance, immunisation, adequate diet, clothing, shelter, and medical attention (section 5 of the Children Act).

The responsibilities of customary guardians are listed in section 43C and these include acting as trustee in respect of the property of the child. Furthermore, form 1 of the third schedule of the Amendment Act on the Petition for Guardianship lists the procedural and substantive responsibilities which an applicant for guardianship must undertake in respect of the child. These include catering for the child's religious needs, looking after the child's health, allowing the officer in charge of the child's welfare to visit their home to see the child at any time, informing the district probation officer if the child is ill, missing, in trouble or involved in an accident and informing the appropriate officer if the guardian plans to change residence or address.

3.4.5 Termination of Guardianship

Section 43H (2) of the Amendment Act stipulates that 'guardianship of a child terminates when the child turns 18 years old or when it is revoked by a competent court'. Section 43 K of the Amendment Act prescribes the conditions under which a guardianship order may be revoked. Section 43 K (2) states that if a guardian fails to meet the applicable conditions, a social welfare officer or a relative of a child under guardianship may apply to the court for the guardianship order to be revoked when:

(a) It is satisfied that the guardianship order was obtained by fraud or misrepresentation;
(b) The guardian has not complied with the conditions issued by the court in respect of the child in the guardianship;
(c) The guardian has neglected the parental responsibility for a child.

The guardianship may also be terminated if a guardian makes gives or agrees to make any payment or any other reward in consideration of the guardianship.

3.5 Conclusion

This chapter has presented an audit of the standards which form the national frameworks for the guardianship of children in Côte d'Ivoire, South Africa and Uganda. It is noteworthy that all three countries have adopted the provisions of the international instruments by the enactment of child-specific national legislation, especially in the guardianship of children.

This chapter has shown the different models which the three countries have employed with regard to the role, appointment, termination and even the recognition given to legal guardians. It shows that there are some variations in the approaches which each country takes in the guardianship of children. For instance, while the roles of a guardian are clearly spelt out in the Minority Act of Côte d'Ivoire and the Children's Act of South Africa, the Amendment Act of Uganda does not clearly distinguish the roles of a guardian from the roles of other adults charged with the care of the child. These similarities and differences are nonetheless further examined in the next chapter.

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Chapter 4
Analysis of the Models for the Guardianship of Children in Africa

4.1 Introduction

It has been established that all the three countries studied recognise and protect the institution of guardianship. However, the different countries have adopted different models for the regulation of the guardianship of children. The models are fashioned to suit the needs of the countries and communities. The existence of the different models on the guardianship of children in these countries prompted a look into the distinctive characteristics of each model and an exposition of the similarities and differences between the different models.

Through the enactment of child-specific legislation to regulate the guardianship of children, Côte d'Ivoire, South Africa and Uganda have taken steps which are in line with their international law obligations to take legislative and other measures which are appropriate for the implementation of the rights of children. However, the fact that the countries have addressed this obligation from different perspectives provokes a need for an investigation into the different models to see if anyone or all of these models are capable of realising the rights of children.

To this end, this chapter highlights the similarities and differences among the different models employed in the countries with a view to establishing the potential of the model employed by each country to achieve the protective role which is necessary for the children in need of care and guardianship.

4.2 An African Perspective on Parenthood and the Family and Its Reflection on the Countries' Guardianship Models

This section explores the concept of guardianship from an African point of view and elucidates the concepts which underpin the choice of the models employed on the guardianship of children in the three countries discussed.

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As earlier pointed out, the requirement for legal guardianship is rooted in the English common law (UNICEF 2007) doctrine of *parens patriae* (Encyclopaedia.com 2003) which recognises the state as the upper guardian and protector of all citizens who are unable to protect themselves (Webster Dictionary 2017). Legal guardianship in the strict sense is foreign to the African traditional system as no child is left without guardianship even after the death of the natural guardian. The traditional childcare system of kinship care runs on the premise that all the members of the extended family share the child-rearing responsibilities including the economic and socialisation aspects (Van Bueren 1998). This is reflective of the communal nature of the traditional African society and it is against the individualistic nature of western society.

The acknowledgement of the family as the natural unit and basis of society in article 18 of the ACRWC is reflective of the traditional African view of the role of the family in childcare. The view of the family in Africa is of crucial importance in this discourse as there are different kinds of families and different ways of qualifying the members of the family. There are nuclear families, extended families, polygamous families and single parent families. The extended family which is formed as a single unit which extends both horizontally and vertically is charged with the responsibility of caring for the child in the absence of the biological parent. As such, the guardianship of the child in this situation is hinged on the ties of kinship rather than on the legal needs of the child. Thus, in Africa, taking responsibility for a child by persons other than the biological parents of the child is a role based on kinship unity and trust (Hale 1998).

Even the more modern ACRWC recognises the responsibility which parents and other persons may have in the care of a child. For instance, article 20, while discussing parental responsibilities, stipulates that:

> 1. Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child and shall have the duty:
>
> (a) to ensure that the best interests of the child are their basic concern at all times;
> (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
> (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

The phrase 'other persons' reflects the communal nature of childcare and it qualifies a number of extended family members (both vertical and horizontal extension) as parents of a child. Vertical extension implies the existence of parents, grandparents and siblings and horizontal extension implies the existence of cousins and married children. It also gives them some legitimate basis for asserting authority and responsibilities towards the day-to-day care of the child. The shared childcare responsibility in many traditional African societies motivated the equation of family members with the parents of the child and this has led to the absence of terminologies to describe certain members of the extended families. Hence, an aunt may only be called a mother, an uncle may only be called a father and the extended family member so called is expected to take on the role of the parent of the child (Van Bueren 1998).

Parenthood and the guardianship of children in Africa are also influenced by the patriarchal nature of the society and the shared decision-making powers within the family. The patriarchal system (which is practised in many parts of Africa including Côte d'Ivoire, South Africa and Uganda) in some societies also has a big influence on decision-making within the family as the patriarch who is regarded as the head of the family usually has the final say in matters which concern the family, and in some cases, this may include the interest of the child (Musa and Domatab 2012). The implication of this is that the parents of the child cannot appoint legal guardians outside the family, even when it is in the best interest of the child to do so. The situation is even worse in the case of a mother who is a single parent and who wants to appoint a legal guardian for her child before her demise.

The shift to meet the legal requirement for guardianship is based on a number of factors, including the changing nature of the role of the family. The legislation in all three countries shows that the state is involved in the appointment of the guardian and this is in recognition of the role of the state as *parens patriae*. This limits the control and authority which the traditional family has as the best interests of the child has to be the paramount consideration in all matters concerning the child.

4.2.1 Specific Influences of the African Perspective on Parenthood and the Family on the Guardianship of Children in Côte d'Ivoire, South Africa and Uganda

The central role of the African concept of kinship care is reflected in the approaches to the guardianship of children in Côte d'Ivoire and Uganda.

(a) **The recognition of customary guardianship**

The Children Amendment Act (Amendment Act) of Uganda provides for the appointment of a customary guardian who is appointed in accordance with the customs, culture and traditions of the family in section 43C (1) of the Amendment Act.

(b) **The inclusion of the family in the appointment of the guardian**

The Minority Act of Côte d'Ivoire and the Amendment Act respectively recognise the role of the family in the appointment of guardians for children. In the systems practised in Côte d'Ivoire and Uganda, the extended family is involved, either in the appointment of guardians, or in the guardianship of the child. The Minority Act provides that the guardian is appointed by the Family Council which is composed of six members, chosen by the members of the families and friends of both parents of a child (sections 58 and 67). Under the Amendment Act, the customary guardian who is appointed in terms of section 43C (1) is appointed by the relatives of the child. On the other hand, the South Africa model, which is based on the need to fulfil a more legal requirement, does not require that the legal guardian of the child has any familial bond with the child.

(c) **The requirement that the guardian of the child is responsible of the caregiving and maintenance of the child**

The legal guardianship of children in Côte d'Ivoire and Uganda is viewed broadly in the sense that the person who is the guardian of a child is responsible for the general well-being of the child. This suggests that the guardian shall have custody of the child. This approach is different under the South African model where legal guardianship is viewed narrowly. The South African model recognises the roles of a caregiver which may be separated from that of the guardian. In South Africa, a good number of children live with their caregivers who are not necessarily the legal guardians of the child. A report showed that 26% of South African children live with caregivers and of this group, 80% of the caregivers were grandparents or relatives (South African Human Rights Commission and UNICEF 2011). Under the South Africa model, legal guardianship is viewed narrowly as the guardian is required to only perform the roles specified in section 18 (3) of the Children's Act. The role in section 18 (3) includes the administration and safeguarding of their ward's property and property interests, to represent or assist the child in administrative, contractual and other legal matters as well as to give or withhold consent when required by the law in matters relating to the child (Sect. 3.3.3 of Chap. 3 of the Children's Act). These roles which are exclusively reserved for a legal guardian may only be performed by a legal guardian and not a caregiver. In fact, the Children's Act separates the role of a guardian from that of a caregiver and it indicates which roles go to each party.

4.2.2 Advantages of the African Perspective on Family to the Guardianship of Children

The following are the disadvantages of the African perspective on family to the guardianship of children:

(i) The African model of care ensures that no child is left without care, even in the absence of the biological parents of the child. The extended family members do not require any court to grant them the legal authority to take on the parental responsibilities in relation to the child.
(ii) The model leaves the affairs of the child in the hands of relatives who are most likely to be mindful of the child's best interest and to protect the child. It also leaves room for very little state intervention as the extended family often guards their affairs confidentially and matters are dealt with internally. This is in line with the African values and traditions.
(iii) The involvement of the family in childcare also results in minimal disruption in the child's life as the child is kept within the same family unit with siblings, or with known people, with whom they have lived all their lives.

(iv) Children are more likely to adapt to their new lives without their biological parents faster and to find the loss of their parents less traumatic if they live together with their siblings and family members whom they are familiar with.
(v) The guardianship model where the guardian is charged with the custody and maintenance of the child will ensure consistency and simplicity in the administration of child welfare as the caregiver and the legal guardian is the same person.

4.2.3 Disadvantages of the African Perspective on Family to the Guardianship of Children

The following are the disadvantages of the African perspective on family to the guardianship of children:

(i) A major disadvantage of the communal nature of the traditional African families is the fact that parents are not always able to individually make decisions regarding their children. Parents share the decision-making power over their children with the family head and other members of the family. It is unlikely that approval would be given by the family for the appointment of a non-relative as a legal guardian even when it is in the child's best interest.
(ii) The patriarchal nature of the African society implies that women would be prejudiced if the decision on the appointment of a guardian outside the child's family is to be made. A mother cannot appoint her own family member as the guardian of her child. Even if she does, it is unlikely that members of her family would be willing to take on the role of legal guardian of her child. In a patriarchal family, the child belongs to the father's family. Thus, accepting the role of the legal guardian by the mother's family member might be seen as meddling in the affairs of the family to which the child belongs.
(iii) There could be conflicts even among the men within the extended family on certain decisions taken in relation to the child as there are different interests to be served. While traditional systems have their conflict-mediation methods within the family, the non-retributive method of enforcing the decisions are often ineffective. This is because the family members are often left to their conscience to make the right decisions.
(iv) The extensive powers of the extended family in the guardianship of children under the African traditional system leaves the family member who is appointed as the legal guardian of the child with a broad range of powers which can be abused if left unchecked (Mwenda et al. 2005). Such powers have led to acts of property grabbing where children lose ownership of their inheritance to relatives who claim the inheritance as their own.

It should be noted that property grabbing, which is very common in many African societies, would not be an issue if the property is communally owned or when the customary ownership of land applies. Nevertheless, when the

property is individually owned, children run a risk of losing their inheritance, especially when the parents do not make a will, when the property is not properly documented or when the property documents are lost.

(v) The fact that a child in need of care has been absorbed into an extended family unit may contribute to the abuse and neglect of the child. The child might be disqualified from receiving special protection and assistance meant for a child temporarily or permanently deprived of his or her family environment (article 20 of the CRC). They might be disentitled while living in an underprivileged situation psychologically, emotionally and financially, especially if the family is not coping with the financial responsibilities and other childcare responsibilities. Evidence also shows that the absorption of orphaned children by foster parents has a negative impact on finances in many households. Legal guardians may become overwhelmed with caregiving and may invariably resolve to feed their own children first, before feeding or caring for the orphans (Gilborn 2002).

(vi) The nature of the traditional African family is changing. There is an increase in the movement from rural areas to the urban areas and the high cost of living also makes it less possible for extended families to absorb orphans into their families.

4.3 Analysis of the Models for the Legal Guardianship of Children in Côte d'Ivoire, South Africa and Uganda

This section looks at the legislation on the regulation of legal guardianship in the three countries and identifies the factors which set each model apart from the rest. It looks at the similarities and differences among the three models and enumerates the strengths and weaknesses of each model against the others.

4.3.1 Similarities Among the Models

The similarities among the models employed on the guardianship of children in the legal systems of Côte d'Ivoire, South Africa and Uganda are considered in the following areas:

4.3.1.1 Constitutional Protection of Children's Rights

Section 28 of the Constitution of South Africa and section 257 of the Constitution of Uganda define a child as a person under the age of 18 years while section 1 of the Minority Act defines a child as any person under the age of 21. The Constitutions of both South Africa and Uganda contain sections which are dedicated specifically to the

protection of the rights of children and child-specific rights are listed in these sections (section 28 of the South African Constitution and section 34 of the Constitution of Uganda). In contrast, the Constitution of Côte d'Ivoire does not define who a child is. It also does not contain provisions for the protection of child-specific rights. It merely recommends the protection of children in section 6 of the Constitution. This provision is dedicated to other vulnerable members of the society such as the aged and the handicapped. The Constitution of Côte d'Ivoire also does not discuss any child-specific rights.

4.3.1.2 Legislation on the Rights of Children

The three countries have enacted other child-specific legislation which regulates the guardianship of children. While South Africa and Uganda enacted the Children's Act No. 38 of 2005 and the Children Act No 46 (Cap. 59) of 1997 of Uganda (Children Act), respectively, Côte d'Ivoire enacted the Minority Act (Law No 70-483 of 1970) (Minority Act).

4.3.1.3 Recognition of the Role of Legal Guardians

The laws of the three countries recognise the role of guardians in the protection of children and they acknowledge that in the absence of the natural parents of the child, the authority to make important decisions on behalf of the child is assigned to the legal guardian of the child.

Section 88 of the Minority Act of Côte d'Ivoire recognises the fact that all the parental powers in respect of the minor child which are listed in section 4 may be transferred to the guardian of the child in the absence of the child's natural parents. The Children's Act of South Africa as well as the Children (Amendment) Act 2016 (the Amendment Act) of Uganda also recognises that the legal guardian is the person who is legally permitted to exercise their parental responsibilities in the absence of the natural parents of the child (section 43H (1)).

4.3.1.4 Appointment of a Guardian

(a) **Appointment of legal guardian in a will or deed**

The legislation of Côte d'Ivoire, South Africa and Uganda acknowledge the appointment of a legal guardian by the parents of a child. This kind of appointment is valid if it is made in a will (section 27 (2 and 3) of the Children's Act), by agreement, in a deed (section 43 (D) (1) of the Amendment Act), or by a special declaration either before a notary or before the guardianship judge (section 57 of the Minority Act). This appointment made by the parents before their demise gives authority to the appointment of a guardian and it relieves the courts or Family Council of the duty to appoint a legal guardian for the child.

(b) **Appointment of legal guardian by legally constituted authorities**

In terms of the laws of the three countries, a legal guardian may be appointed for children whose natural guardians are deceased or who are incapable of taking on the parental role in respect of their children. The appointment of legal guardians in the three countries is recognised only if they are ordered by a legally constituted authority. In section 26 of the Minority Act, the appointment of a guardian is made by the Family Council, in section 24 of the Children's Act, a guardian is appointed by the High Court and in section 43 (B) (b) of the Amendment Act, the High Court is responsible for the appointment of a guardian.

(c) **Appointment of two or more persons as legal guardian**

The Children's Act provides that one, two or more persons may be appointed as guardians of a child at the same time. This is in terms of section 27 (4) of the Children's Act and each of them is competent to act independently except when the consents of all the legal guardians are required as stated in section 27 (5). It is also possible for one or all of the guardians to accept the nomination as a guardian of the child when the appointment is made in a will. The Children's Act also provides that in some cases, the consent of all the legal guardians is necessary for the matters listed in section 18 (3) (c) of the Children's Act to be valid. This is similar to section 43E (1) of the Amendment Act which provides for the appointment of one guardian or joint guardians for a child. Section 43E (2) of the Amendment Act stipulates that the court should be approached for the resolution of disagreements between the joint guardians when decisions concerning the child are being made. The Amendment Act nevertheless, does not state if or when the consents of the joint guardians are necessary. It is also important to note that the joint guardianship, granted in terms of section 43G (2) of the Amendment Act, would only be granted to spouses. Joint guardianship would not be granted to more than one person unless the applicants are spouses. The Minority Act, on the other hand, is silent on the number of persons who may simultaneously act as a guardian of a child. The text of the Minority Act does not suggest that more than one person may act as a guardian at a time. The provisions in the Minority Act which suggest that only one person may act as a guardian at a time include the fact that it recognises that guardianship is a personal responsibility (section 53), that the guardian is solely responsible for the management of the minor (section 54), and that the guardian is subject to the general supervision of the guardianship judge (section 52).

(d) **Consideration of the views of the child in the appointment of guardian**

The Amendment Act requires that the views of a child who in the opinion of the court is able to understand the guardianship proceedings must be obtained before a guardian may be appointed to the child and that this may only be dispensed with if it is impossible for the child to give his/her views (section 43(1) (e)). This is similar to the provision of section 31(1) (b) (iii) of the Children's Act which requires that the opinion of a child be given due consideration when decisions regarding the appointment of a legal guardian are made. Both the Amendment Act and the

Children's Act do not set any age limit for the views of the child to be considered. It only requires that consideration should be given to the views of the child in accordance with the age, maturity and stage of development of the child. In contrast, the Minority Act does not give any weight to the opinions of a child in the appointment of a legal guardian.

4.3.1.5 Who Qualifies as a Legal Guardian?

Sections 65 and 81 to 85 of the Minority Act provides that any person, irrespective of the person's sex, gender or nationality, may be appointed as a guardian of a minor child, if such a person is not disqualified on one or more of the grounds listed in the Act. In the Children's Act of South Africa, any person who is fit and proper (section 27) and who has an interest in the care, well-being and development of the child (section 24 (1)) qualifies to be a legal guardian of a child. The standard for qualifying as a legal guardian in South Africa is higher than the standard set in the other two countries as the person who intends to be appointed as a legal guardian needs to prove that they qualify for the position. Section 43F (2) (b) of the Amendment Act, on the other hand, stipulates that before making an order for legal guardianship, the Court shall satisfy itself that the person who is to be appointed as a legal guardian does not have a legal/criminal record. In addition to the lack of a criminal record, a potential legal guardian needs to be above the age of 18 years (section 43B (a)). Of the three countries, Uganda is the only country which stipulates that citizens of Uganda may be appointed as guardians (section 43 (A) (2) of the Amendment Act).

4.3.1.6 Responsibilities of a Legal Guardian in Relation to the Child

Under the three laws, legal guardians are assigned with parental responsibilities. Under the Children's Act, the responsibilities of the legal guardian is limited to the administration of the child's property and property interests, assistance or representation of the child in administrative, contractual and legal matters and granting consent to matters where the law requires consent in terms of the child (section 18 (3) (a-c) of the Children's Act). Section 24 (1) of the Children's Act adds ensuring the care, well-being and development of the child. Under the Minority Act, the legal guardian is expected to take on parental responsibilities, which include the maintenance and education of the minor and the administration of his property. Likewise, under the Amendment Act, the guardian is expected to exercise all parental powers and duties.

4.3.1.7 Termination of Guardianship

The main similarity among the three legal systems is the fact that they all recognise that guardianship ends when the child reaches majority. It should nevertheless be noted that minority ends at different ages in the three countries. While the laws of South Africa

and Uganda recognise that minority ends at 18 years of age, the law of Côte d'Ivoire set 21 years of age as the end of minority. It should be noted that under the African traditional system, even after the termination of the legal guardianship, the ward might still be under the guidance of an adult since the guardian is part of the family.

The three laws also recognise that the guardian may be disqualified from performing the duties of a guardian if the order is revoked. The conditions which are common for the revocation of a guardianship order in the three laws include the fact that the guardian has a criminal record (section 43F (2) (b) of the Amendment Act see also section 43K (1 and 2)), when the guardian is not fit and proper (section 27 (b) of the Children's Act) and when the guardian is found incapable of performing the guardianship role in terms of the provisions of article 42 of the Penal Code (section 82 (2) of the Minority Act).

4.3.2 Differences Among the Models

A number of differences have been identified in the approaches employed in the legal guardianship of children in the legal systems of Côte d'Ivoire, South Africa and Uganda. These differences are found in the areas of:

4.3.2.1 Legislation on the Rights of Children

(a) **Definition of a child and end of minority**

Section 1 of the Minority Act of Côte d'Ivoire interprets a child as any person below the age of 21 years and section 5 of the Minority Act saddles the father and mother with parental powers and authority over a child under the age of 21. This contrasts with section 3 of the Children's Act of South Africa and part II section 1 of the Children Act of Uganda where majority is reached at 18 years old.

(b) **Parental authority and responsibilities over a child born in or out of wedlock**

The Minority Act of Côte d'Ivoire makes a distinction between children born in and out of wedlock. It assigns the authority over a child which is born during a marriage to the father of the child (section 6). When the child is born out of wedlock, the authority is assigned to the mother if the father is dead or where there is no recognition of the child by the father in the year of the child's birth or when the father is not named on the birth certificate (section 9).

Sections 20 and 21 of the Children's Act of South Africa make a distinction between the parental responsibilities of children born inside or outside of wedlock. In the case where the parents are married, the biological father of a child has full parental responsibilities and rights in respect of the child. In the case of a child born outside wedlock, the biological father of a child does not automatically have parental

responsibilities and rights in respect of the child unless at the time of the child's birth the father (Section 21)-

> 'is living with the mother in a permanent life-partnership or if he, regardless of whether he has lived or is living with the mother:
>
> (a) Consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law
> (b) Contributes or has attempted in good faith to contribute to the child's upkeep
> (c) Contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

On the contrary, Section 6 of the Children Act of Uganda, saddles every biological parent with parental responsibilities over their child irrespective of their marital status.

4.3.2.2 Kinds of Guardianships Recognised

Another distinguishing feature among the three approaches to the legal guardianship of children is the kinds of guardianships which are recognised in the legislation apart from a child's natural guardians. The Amendment Act recognises two kinds of guardianships which are customary guardianship (section 43 (c)) and legal guardianship (section 43 (a)). The Children's Act and the Minority Act, on the other hand, recognise only legal guardians who are appointed by a will or by a legally constituted authority.

4.3.2.3 Appointment of a Guardian

(a) **Residence and citizenship as a condition for appointment as guardian**

For a Ugandan citizen to be appointed as a guardian to a child, the person needs to have lived in Uganda for a period of three months. This suggests that non-residents cannot be appointed as a guardian of a child. This nonetheless raises a dilemma in the case of a child whose next of kin or only known relative lives outside Uganda.

(b) **Guardianship order would only be made if other forms of alternative care options have been exhausted**

The conditions for guardianship as listed under section 43 (F) of the Amendment Act seem to confuse guardianship with other forms of alternative care options for the child. For instance, it states that guardianship would only be granted when there is no known relative or next of kin for the child; or when all other forms of alternative care options have been exhausted; or where the relatives are unwilling to take parental responsibility for the child among other conditions. These statements suggest that legal guardianship would not be granted if there is a family member who is acting as a caregiver or when the child is in foster care.

It is important to note that the requirement for a legal guardian does not cancel the need for a caregiver who could be a family member and the caregiver of a child does not necessarily have to be the legal guardian. For instance, even if the child is

in foster care, a legal guardian still needs to be appointed as parental responsibilities are not automatically transferred to the person who has custody of a child.

(c) **Consideration of family ties in the appointment of the Family Council**

In the Minority Act of Côte d'Ivoire, the Family Council is responsible for the appointment of the legal guardian. The appointment is not performed by a judicial body as is the case in South Africa and Uganda where the Courts appoint the legal guardian. The Family Council is composed of four to six members, and the membership does not include the guardianship judge (section 68). The members of the Family Council are chosen from among the families and allies of both parents of the minor and efforts are made to ensure that both sides of the child's family are represented (section 69). The judges of high courts in South Africa and Uganda are not required to consider the views of the family of the child before appointing a legal guardian.

(d) **Consent of the child in the granting of guardianship**

Section 43F (1) (e) of the Amendment Act is the only law which requires that the consent of the child who is 12 years or above be obtained before a guardianship order is made. Neither the Minority Act nor the Children's Act makes any such requirement for the making of a guardianship order.

4.3.2.4 Who Qualifies as a Legal Guardian?

(a) **Nationality and residence as a condition for granting legal guardianship.**

Section 43A (1 and 2) stipulates that only citizens of Uganda may be eligible for appointment as legal guardians for a child. This is contrary to the positions in the Minority Act and the Children's Act as these acts do not take the nationality of an applicant for legal guardianship into consideration before granting the application for guardianship.

(b) **Family relationship as a condition for granting legal guardianship**

Under the Amendment Act, only relatives of the child may be appointed as customary guardians in terms of the customs, culture and traditions of the child. Section 43F of the Amendment Act, while stating the conditions for the granting of guardianship, stipulates that guardianship will only be granted where there is an absence, inability or unwillingness of family members of the child to take up the role.

This is different from the positions under the Minority Act and the Children's Act. Although the Children's Act in section 23 (2) (b) requires that the relationship between an applicant for guardianship and the child must be considered before granting an order for guardianship, it does not, however, stipulate that the guardian has to be a relative of the child. The Family Council which selects the guardian is constituted in terms of the Minority Act and the Family Council consists of

members of the child's family. The members of the Family Council are selected from both parents' families of the child and the Minority Act does not indicate that non-relatives of the child would be excluded from guardianship.

4.3.2.5 Responsibilities of a Legal Guardian in Relation to the Child

The interpretation section of the Children Act defines a caregiver as any person other than a parent or guardian of the child. The Children's Act distinguishes between a parent, a caregiver and a guardian and makes separate provisions for parental responsibilities and the responsibilities of the guardian. Section 5 of the Minority Act also does not merely state that legal guardians should exercise parental responsibilities in respect of a child. It sets out the dos and don'ts of a guardian in charge of the child in section 88 of the Minority Act. Section 43(H) of the Amendment Act, on the other hand, merely stipulates that the parental powers with respect to the minor child may be transferred to the legal guardian. This suggests that a legal guardian may in addition to other responsibilities have custody of the child assigned to them.

4.3.2.6 Termination of Guardianship

The Children's Act recognises the fact that a guardianship order may be terminated if an application is brought by a competent person who may include the child his/herself. Section 48 of the Minority Act also allows an emancipated minor to bring an action for the dissolution of the Family Council and against any acts accomplished by the deliberations of the Family Council. This invariably leads to the termination of guardianship. In contrast, section 43K (1) of the Amendment Act does not recognise that the child could bring an application for the order to be revoked. The order may only be revoked when an application is presented to the court by probation and social welfare officer or a relative of the child under guardianship.

4.4 Strengths and Weaknesses of the Models

4.4.1 The Strengths and the Weaknesses of the Models Employed by Each Country Are Shown in the Table Below

Themes	Strengths of the models in Côte d'Ivoire, South Africa and Uganda
Recognition of guardians	• The three countries recognise the need for legal guardians and the legislation of each country states the roles of legal guardians, although these roles vary in the different countries. • It is significant that Uganda recognises customary guardianship which is guardianship in terms of the culture and customs of the child.

Themes	Strengths of the models in Côte d'Ivoire, South Africa and Uganda
Reflection of traditional African values on child protection	• Guardianship in Uganda and Côte d'Ivoire reflect African values of child protection and the role of the family in caring for the child. • The models in Côte d'Ivoire and Uganda suggest the involvement of the extended family in caring for the child. The involvement of the extended family in the care of the child will serve the purpose of retaining the child within the family structure which is perceived to be the natural unit and the safest net for the child. It also indicates that since the child is within his or her family, the family is likely to cater for the needs of the child within their available means. This would lead to minimal state intervention in the life of the child. • The oversight of the guardianship process by the Family Council as stipulated in the Minority Act would ensure that the affairs of the child are not left unsupervised. This can ensure that the child is not subjected to abuse and neglect.
Legislation on the rights of children	• The three countries have enacted laws which are aimed at protecting the rights of children exclusively. These are the Minority Act of Côte d'Ivoire, the Children's Act of South Africa and the Children Act of Uganda. • Both South Africa and Uganda have child-specific provisions in their constitutions and these further reinforce the protection available to children in both countries. • The three countries have legislation which regulates the guardianship of children.
Appointment of a guardian	• The Minority Act stipulates that both sides of the child's family are included in the composition of the Family Council. This would further strengthen family ties between a child and a guardian and the people caring for the child in the absence of the parents. • The Minority Act provides for the involvement of the Family Council in the appointment of a guardian. This ensures that the guardianship process is less formal as the Family Council would appoint a guardian and oversee the guardianship process. • The Children's Act requires that due consideration is given to the opinions of the child when decisions regarding the appointment of a legal guardian are considered. The Amendment Act, on the other hand, requires that the consent of the child should be given before a legal guardian is appointed for the child. • The three laws require the person to be appointed as a legal guardian should meet some minimum requirements before they can be appointed. It is significant to point out that South Africa sets a high legal standard for the person to be appointed.
Appointment of joint guardian	• The provision for the appointment of joint guardians in the South African and Ugandan legislation is laudable considering the role which a guardian performs. The availability of another guardian in the absence of the one guardian would ensure that the child is not left without a guardian at any time. This would further ensure that the child is protected at all times. • The fact that the Amendment Act states that joint guardianship would only be granted to spouses might be beneficial to the child, especially when the child is being fostered by the legal guardian. This would ensure that both guardians can grant consent to matters that affect the child in their care, even in the absence of the other. • The fact that the laws also stipulate the method of resolving the conflict among joint guardians when they arise is indicative of the progressive role which is anticipated in the regulation of legal guardianship.

Themes	Strengths of the models in Côte d'Ivoire, South Africa and Uganda
Responsibilities of a legal guardian in relation to the child	• The guardianship models of Côte d'Ivoire and Uganda show that the legal guardian might be expected to take on the role of a caregiver to the child. The laws of both countries suggest that the guardian oversees the custody of the child and is expected to be responsible for making the day-to-day decisions and to grant consent to a variety of matters which concern the child. This will result in consistency in the life of the child and in ease since the welfare of the child and other matters are administered by one person who is both the caregiver and the legal guardian. The wide range of responsibilities which the legal guardian is able to take on would also ensure that there is ease of accountability as all the matters concerning the child would be dealt with by the same person who is the legal guardian.
Termination of guardianship	• The guardianship models of Côte d'Ivoire and Uganda which is based on the traditional African Society would ensure that the child is protected even after the termination of the guardianship as the family is still involved in the care and welfare of the child as a member of the family. This would ensure that the child can still receive guidance from members of their family even after the end of the guardianship.

4.4.2 The Weaknesses of the Models Employed by Each Country Are Shown in the Table Below

Themes	Weaknesses of the models in Côte d'Ivoire, South Africa and Uganda
Reflection of traditional African values on child protection	• The guardianship model in South Africa undermines the fact that the African values of childcare are widely practised in South Africa where the grandparents are responsible for caring for their grandchildren. The model does not stipulate that a legal guardian would have any familial ties with the child or that the selection of the legal guardian should reflect the customs of the child. It, therefore, appears that the appointment of the legal guardian under the South African model is targeted at fulfilling the legal requirements for representing the child in legal matters, granting consent to certain matters and administering and safeguarding the property interests of the child. These roles do not necessarily include caring for the child or for regulating the day-to-day affairs of the child.
Legislation on the rights of children	• The fact that the Constitution of Côte d'Ivoire does not provide for the protection of children's rights is detrimental to the rights of children. This is because there is no constitutional basis for the protection of specific rights of children.

Themes	Weaknesses of the models in Côte d'Ivoire, South Africa and Uganda
Appointment of a guardian	• Apart from the appointment of legal guardians by the parents of the child, the appointment by a legally constituted authority in South Africa and Uganda appears to be complicated as potential guardians have to approach the High Court for the guardianship order to be made. This can be problematic for people living in rural areas and those with scarce resources as they are forced to spend their scarce resources on the appointment of a legal guardian. • The fact that the Minority Act does not give any weight to the opinions of the child in the appointment of a legal guardian is a weakness as the child would not be able to express his or her displeasure or otherwise regarding the appointed guardian. • On the appointment of a legal guardian, the Amendment Act states that a guardianship order would only be made if other forms of alternative care options have been exhausted. This suggests that there is confusion with the role of a legal guardian. It is also not clear why other alternative care options should be exhausted before a guardian is appointed. All children require a guardian at all times whether they are in alternative care or not. For instance, a child in an orphanage still requires a guardian. Thus, there is no need to wait for all alternative options to be exhausted before the order for the appointment of a guardian is made.
Appointment of joint guardian	• The fact that the Minority Act does not provide for the appointment of joint guardians is a weakness which might be detrimental to the child, especially when the child is being fostered by the legal guardian. The absence of the legal guardian means that the person who has custody of the child would have to wait for the legal guardian to grant consent to matters that affect the child in their care, in the absence of the guardian. This is particularly cumbersome when the spouse of a legal guardian does not have the power to consent to matters concerning the child in their care.
Responsibilities of a legal guardian in relation to the child	• The guardianship model in South Africa where the roles of the guardian and caregiver are separated can make the administration of the welfare of the child cumbersome. The fact that the caregiver does not necessarily have to be the legal guardian can result in difficulty for the child, especially when the child and the guardian live in different places or even towns. There have been cases where the child and the caregiver live in a different city while the guardian lives in another. • Another weakness of the guardianship model in South Africa is the fact that it can subject the child to neglect since caregivers who have not been appointed as guardians cannot carry out any of the duties listed in section 18(3) of the Children's Act. 'They have limited legal capacity to act on behalf of the child. This limited capacity allows them to carry out many day-to-day rights and responsibilities to care for the child, in line with section 12 (2) of the Children's Act (Sarumi 2014)'. They are allowed to consent to medical treatment for the child and they can enrol a child in school but they cannot enrol the children in research. 'They also lack the legal capacity to carry out any of the actions listed in section 18 (3) of the Children's Act, on behalf of the child. The only recourse which caregivers who want to assume the role of guardians of a child have in respect of the child, as listed in section 18(3), is to approach the courts for an order declaring them as guardians of the children. This might be a problem if they are not able to access the courts due to the financial constraints (Sarumi 2014)'.

4.5 Conclusion

This chapter has established the fact that traditional African values play a pivotal role in understanding the concept of children and childhood in Africa and in shaping the protection available to children in the countries discussed. While the laws on the rights of the child in these countries are aimed at ensuring the legal protection of the child, it is commendable that the laws did not leave out the positive influences of the traditional African systems. The influences of the patriarchal nature of African society are also notable, even in modern legislation as reflected in the distinction between children born in and out of wedlock.

Perhaps the most commendable impact of traditional African values on the guardianship of children is the kinship care method where the child is raised by the extended family. This would ensure that no child is left without care and it would lead to little or no reliance on the state as the child would be raised within the family. This system comes with several advantages and disadvantages which have been discussed above.

The fact that the three countries have enacted child-specific legislation which regulates the protection of the rights of a child generally, and the guardianship of children specifically, is a laudable step towards achieving the fulfilment and the realisation of the rights of children.

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Chapter 5
Concluding Analysis and Recommendations

5.1 Introduction

While children represent a broad group of vulnerable people, those who are deprived of parental or family care are in a very precarious position. They are vulnerable because, like all other children, they are young and lack legal capacity and maturity. They are also vulnerable because the loss of their parents means that they do not have any adult person who is legally recognised to make decisions on their behalf when they lack capacity. Adult guidance with decision-making is necessary for their well-being, as can be seen from article 3 (2) of the CRC.

This study has established that the legal guardianship of children is an important way to ensure the protection of children and their rights after the loss of their parents or families. This study has shown that there is an important role for legal guardians play in ensuring the well-being and development of children. As the adult decision-maker in the child's life, they are entrusted with responsibility to represent the child when decisions are made on their behalf and to promote their well-being. They are also required to ensure that the child is cared for on a day-to-day level.

This study has shown that in Africa, legal guardianship of children is subject to different interpretations when compared to the traditional European model. There are different features of the models for the legal guardianship in Côte d'Ivoire, South Africa and Uganda. In these countries, legal guardianship has been interpreted in both the broad and narrow senses. South Africa employs the narrow interpretation of legal guardianship by restricting the responsibilities of legal guardians to the functions listed in section 18 (3) of the Children's Act (Sect. 3.3.4 of Chap. 3). The Children's Act in South Africa does not transfer all the parental responsibilities to the legal guardian. This means that the legal guardian does not have to be the primary caregiver of their ward. In Côte d'Ivoire and Uganda, on the other hand, the interpretation of the concept of legal guardianship is very broad. Section 88 of

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the Minority Act confers the parental powers granted to the parents in section 4 on the Legal guardian by stating that

> in the cases of initiation referred to in section 48, the guardianship shall include, for the person exercising it, the rights and obligations enumerated in Section 4, unless the law provides otherwise.

The interpretation section of the Children Act defines a guardian as a person having parental responsibility for a child. See the Part I section 1 (k) of the Children Act and Section 43 (F) of the Amendment Act and section 43H (1) of the Amendment Act. The broad interpretation allows the legal guardian to fulfil more than the narrow decision-making functions listed in section 18 (3) of the South African Children's Act. Thus, legal guardians in Côte d'Ivoire and Uganda are granted parental powers and responsibilities when they are appointed. In some cases, they are also entrusted with the custody and the duty to maintain the child. This is in addition to the role which they are required to play in the administration of the child's estate and the power to grant consent to various decisions on behalf of the child.

While the approaches employed by the three different countries have their own respective advantages and disadvantages, some general observations have been be made.

5.1.1 General Observations from the Research

This study makes four broad observations which are:

1. Legal guardians are required and recognised for the protection and welfare of children whose parents are absent or incapable of taking on their parental responsibilities:

Legal guardians play a very important role in child protection, welfare and development. In the three countries studied, the roles of legal guardians are quite similar. They represent the parents of the child when they are no longer present and they are entrusted with all or some of the parental responsibilities for that child.

2. Apart from the appointment of legal guardians by the courts or a legally constituted authority, the appointment of a legal guardian by the parents of the child in a will or deed (which is a simplified process for appointing a legal guardian) is recognised under the laws of Côte d'Ivoire (section 57 of the Minority Act), South Africa (section 27 (2 and 3) of the Children's Act) and Uganda (section 43D (2) of the Amendment Act).

Appointments made by the parents of the child must be done in the prescribed manner, either by agreement, or by a special declaration either before a notary or a Guardianship Judge, or in a will or deed. Where the appointment of the legal guardian is made by the parents of the child, in the prescribed manner, the appointment is valid. The appointment is given effect to upon the demise or incapacity of the parents and the guardian so appointed is relieved of the burden of having to apply to the court of any other legally constituted authority for an appointment order.

In many countries, the process of approaching the courts for a guardianship order can be burdensome on a prospective guardian who is not appointed in a deed or will. It is therefore advised that parents should make use of the opportunity in their lifetime as the appointment made by the parents of the child in their lifetime simplifies the process. The legal guardian appointed in this manner becomes legally recognised upon the demise or incapacity of the parents.

3. The uniquely African perspective on parenthood and the family plays an important role in the interpretation given to the concept of guardianship in Côte d'Ivoire and Uganda:

The Children Act of Uganda does not restrict the parental responsibility to the child's parents or legal guardian alone but it extends it to a wide array of people listed in section 6(3). This provision acknowledges that parental responsibility may be transferred to the extended family such as the 'relatives of either parent, or by way of a care order, to the warden of an approved home, or to a foster parent'. The Minority Act of Côte d'Ivoire, on the other hand, restricts the guardianship to persons who are appointed by the Family Council but such persons are granted the parental responsibilities as well. Section 58 of the Minority Act stipulates the role of the Family Council to appoint a guardian for a child if no guardian was appointed by the last dying parent of the child, or if the person who has been appointed ceases to hold office. The Family Council itself is constituted by the Guardianship Judged who takes the child's customary and familial relationship with the members of the Family Council into account. On this, section 69 of the Minority Act stipulates that

> The guardianship judge shall choose the members of the family council from the parents of the minor and from the allies of his father and mother… It was above all concerned with the customary relations which the father and mother had with their various relatives and allies, as well as with the interest which those parents or allies had or might appear to possess in the person of the person concerned.

4. There is a dearth of international law standards on the regulation of legal guardianship and this may be one of the reasons for the differences in the approaches adopted by different countries:

While the roles of legal guardians are recognised under international law, there is a shortage of legally recognised norms on the standards which states can adopt to ensure the appropriate regulation of the roles of legal guardians. Legal guardianship is one of the protective steps which states are required to take in order to ensure that children who are in need of parental and family care are protected through the appointment of responsible adults who are able to make decisions on their behalf. The vast differences in the guardianship processes among the three countries show that there is a need for some international law regulation and standards on how the guardianship process should be administered in each country.

For instance, while a guardianship order in Côte d'Ivoire and Uganda allows the transfer of all parental powers and responsibilities, in South Africa, only the powers listed in section 18(3) are transferred to the legal guardian. In Uganda, on the other

hand, the guardianship order would only be issued as a final care option for the child. Thus, a legal guardian would be appointed for a child only when there is no known relative or next of kin, or when all other forms of alternative care options have been exhausted (Sect. 4.3.2.3 of Chap. 4). This is inconsistent with international law which requires that a guardian is compulsory for all children at every stage of their lives, even if they are in alternative care (like foster care, kinship care or orphanage). Paragraph 19 of the UN Guidelines for the Alternative Care of Children provides that 'no child should be without the support and protection of a legal guardian or other recognised responsible adult or competent public body at any time'. Thus, it is inappropriate to wait for all forms of alternative care options to be exhausted before appointing a legal guardian for a child. This is not in the child's best interests as it might expose the child to abuse and even lead to a violation of the child's rights. The lack of uniformity in the definition, roles, supervision and assistance given to legal guardians in the different countries (has been highlighted in the preceding chapters) also affects the kind of protection which children are able to access under the different guardianship models.

5.2 Conclusion

After considering the strengths and weaknesses of the different models which have been highlighted in Chap. 4, this study concludes that the model employed for the guardianship of children in Côte d'Ivoire is the preferred model. The features of the Côte d'Ivoire model, which places it in the best position to meet the needs of children in need of parental and family care include the fact that:

(a) **The Process for the Appointment of Legal Guardians in Côte d'Ivoire is Less Stringent and There is Less Formality in the Appointment**

It is important that a legal guardian is formally appointed, it is also important to ensure that the process for the appointment of legal guardians is not too formalised and stringent as those who really want to serve as guardians to vulnerable children might be discouraged. An overly formalistic process may also act as a barrier to the appointment of guardians in impoverished communities.

In South Africa, prospective guardian and well-meaning adults may be discouraged from approaching the Courts for an order to be appointed as a legal guardian for financial or other reasons. This is considering the fact that some of the prospective guardians are poor and uneducated adults who live in the rural areas and they may find it difficult to navigate such procedures. In these instances, they would rather act as caregivers or unofficial legal guardians who do not receive any supervision in the performance of their guardianship roles from the state and this might affect the quality of care and protection the children in their care receive.

In Uganda, the appointment is also made by the courts and the Amendment Act of Uganda also lists some requirements that a prospective legal guardian must meet. One of them is that the legal guardian must have lived continuously in Uganda for a

minimum of three months. This might be an onerous condition for some well-meaning relatives to meet. For example, a foreign aunt who lives outside the country, but who wants to be appointed as the legal guardian of her niece or nephew might not be able to leave her work for three months and live in Uganda in order to meet this minimum requirement.

In Côte d'Ivoire on the other hand, the process of appointing a legal guardian is simplified as it is made by the Family Council which is a legally constituted authority. The Guardianship Judge oversees the process and exercises general supervision over the legal guardian. He may summon the legal guardian, and the members of the Family Council for clarification on their roles, make observations and issue injunctions in respect of the guardianship.

(b) **The Family Council is Involved in the Administration of the Guardianship**

The Family Council, which is constituted by the Guardianship Judge, comprises of the relatives of the child or people who are familiar with the child and whom the child is familiar with. This makes the process less traumatic for the child. The laws of South Africa and Uganda require that a potential legal guardian must meet certain requirements as to their conduct and must have an interest in the well-being of the child or must be related to the child before they are appointed. The Minority Act, in addition to setting the requirements which legal guardians should meet, requires the Family Council (which is a group of relatives) to continue to be involved in the guardianship process. This will ensure that the various relatives and allies of the child's parents continue to be involved in the affairs of the child. A group of relatives as the case in the Family Council would most likely ensure that the legal guardian performs the role to the benefit and with the best interests of the child.

(c) **The Monitoring of the Guardianship Process Is Carried Out by the Family Council and Not a Court. This Family Council Is a Quasi-Judicial Body and thus the Proceedings Are Not Subject to the Rules of Court**

The fact that the monitoring of the guardianship process is carried out by the Family Council and not the court will ensure that there is more protection for the child. Each child has its own Family Council which is set up solely for overseeing the affairs of the child, so it is less likely to be overburdened. The Court, on the other hand, has other children's rights matters to deal with and as such might not perform the oversight of guardianship matters as effectively as it should.

In addition to the positive features of the Côte d'Ivoire model which have been listed above, some of the positive features of the South African and Ugandan models include the fact that-

1. South Africa sets a high standard for the person to meet before they can be appointed as a legal guardian. It requires that the person must be fit and proper.
2. Both South Africa and Uganda allow the appointment of joint guardians which is not allowed under the Côte d'Ivoire model. The advantages of this have been highlighted in Sect. 4.4.1 of Chap. 4.

5.3 Recommendations

It is recommended that the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child should issue General Comments on the legal guardianship of children. This would set the international and regional standards which member states would be required to follow in the guardianship of children. In addition, the following recommendations are made for each of the countries:

(a) **Côte d'Ivoire**

International laws on the protection of children should be published in Côte d'Ivoire. This would enable the laws to have a binding effect on the country. It is also recommended that Côte d'Ivoire enacts a child-specific legislation which would guarantee further and better protection of children and their rights.

(b) **South Africa**

Caregivers should be allowed to perform more of the functions which are exclusively reserved for legal guardians. This would ensure that more children have access to the welfare services provided by the state as many orphaned children live with their caregivers and they have very limited contact with their legal guardians (this is the situation for children whose grandparents have been appointed as their legal guardian but the child lives in the city with a family friend or aunty).

In addition, while it is necessary that the appointment of legal guardians is regulated by the state, it is important to ensure that a legally constituted body, other than the High Court, is competent to make the appointment order.

(c) **Uganda**

The requirement for three months of residence in Uganda for potential guardians should be reconsidered as this might be burdensome on well-meaning relatives who are domiciled abroad, who want to apply for guardianship. It is also suggested that Uganda should reconsider making citizenship one of the conditions for a person to qualify as a legal guardian. This would enable well-meaning foreign citizens, who live in Uganda, but who are interested in serving as guardians and not adoptive parents to Ugandan orphans to qualify.

The fact that a guardianship order would only be made after all other alternative care options have been exhausted is inconsistent with the international law requirement that no child should be without a legal guardian. As any child whose parent is unable or unavailable to care for them should be under the protection of a legal guardian.

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Index

A
African Charter on Human and Peoples' Rights (ACHPR), 9
  natural unit and basis of society, 15
  OAU, 15
African Charter on the Rights and Welfare of the Child (ACRWC), 2, 13
  child principle, 18
  definition, 16
  legal guardian, 16, 18, 19
  parental care, 13
  parental responsibility, 4
  right of child, 4
  stipulation, 2
African regional human rights, guardianship of children, 18
African Union (AU)
  ACRWC, 15
  CRC, 16
  ICCPR, 16
  ICESCR, 16
Appointment of legal guardian, international human rights, 19
A World Fit for Children, 17

B
Best interest, 63

C
Children Act of Uganda, 61
Children Amendment Act, 43
Child-specific legislation, 41
Convention on the Rights of the Child (CRC)
  CRC and ACRWC, 2
  customary international law, 14
  description, 2
  international community, 14
  interpretation and implementation, 14
  legal guardian, 17, 18
  parental care, 13
  primary responsibility, 4
  principles, 14, 15
  rights, 14
  states, 4
  stipulation, 4
Côte d'Ivoire, *see* Legal guardianship
CRC and ACRWC
  caregiver of child, 4
  definition, 2

D
Decision-making, 59, 60

E
East African Community (EAC), 8

G
Global and regional frameworks
  differences
    employing 'African approach', 22
    parental responsibility, 21

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Global and regional frameworks (*cont.*)
guardianship of children
guidelines, 17, 18
requirement, 17
similarities
application, interest principle, 21
appointment of legal guardians, 21
natural guardians, 21
role of legal guardians, 21
role of the family, survival and development of the child, 20
Guardianship
of children, 41
legal, 3
natural, 3
Guardianship models
ACRWC, 25
African perspective
advantages, 44–45
disadvantages, 45–46
Côte d'Ivoire
international instruments and rights of children, 26
national instruments and rights of children, 26, 27
Côte d'Ivoire and Uganda
appointment, 43
caregiving and maintenance, 44
customary guardianship, 43
families, 42
kinship unity and trust, 42
legal guardian
appointment, 28–29, 33–34
qualification, 29, 34
responsibilities, 29–30, 34
termination, 34–35
legislation, 43
legislation and policies, 25
parental authority and responsibilities, 27–28, 33
parental responsibilities, 42
patriarchal system, 43
South Africa
international law, 31
international law and rights of children, 31
national instruments and rights of children, 32
section 231 of the Constitution, 31
termination, 30
traditional childcare system, 42
Uganda, 35–39
vertical and horizontal extension, 42
Guidance, 59

I
International Covenant on Civil and Political Rights (ICCPR), 16
International Covenant on Economic, Social and Cultural Rights (ICESCR), 16
International protection of the rights of children
CRC, Art. 1, 14, 15
family, 14
parental care, 14
perception, international Law, 15–17
provisions, 14
special care and assistance, 15
UN declaration, 14
Islamic kafala, 2

K
Kinship care, 8

L
Legal guardianship
advantages, 53–55
appointment
child's view, 48
legally constituted authorities, 48
persons, 48
will/deed, 47
child protection, 6–8
children, 9
child-specific legislation, 47
constitutional protection, children's rights, 46–47
definition, 3
deprived of parental care, 8
disadvantages, 55–57
frameworks, 10
legal framework
Côte d'Ivoire, 5–6
South Africa, 5–6
Uganda, 5–6
limitations of study, 9–10
literature, legal instruments, 10
overview approach, 8–9
protection of rights, 6–8
qualification, 49
recognition, 47
responsibilities, 49
responsibility on children, 3–5
termination, 49–50
vulnerable children, 1
Legal guardianship of protection of children
ACRWC, 13, 15, 16, 18–20
CRC, 13

framework
African regional human rights, 18
global human rights (*see* Global human rights framework, guardianship of children)
procedure, appointment of legal guardian, 19
Geneva Declaration, rights of children, 13
global and regional frameworks, 20
International protection (*see* International protection of the rights of children)
legal guardian, 13
UN Declaration, rights of children, 13
Viljoen, 16
Legislation
appointment
alternative care options, 51
consent, 52
Family Council, 52
residence and citizenship, 51
child and end of minority, 50
family relationships, 52, 53
nationality and residence, 52
parental authority and responsibilities, 50, 51
responsibilities, 53
termination, 53

M
Minority Act, 27, 29
Minority Act of Côte d'Ivoire, 61

O
Organisation of African Unity (OAU), 2, 15
Orphaned and vulnerable children (OVCs), 1

P
Parens patriae, 42, 43
Parenthood, 43

Q
Quasi-judicial, 63

S
South Africa, *see* Legal guardianship
Southern African Development Community (SADC), 8

U
Uganda
international instruments and rights of children, 35
legal guardian
appointment, 37–38
qualification, 38
responsibilities, 38–39
termination, 39 (*see also* Legal guardianship)
national instruments and rights of children, 36
parental authority and responsibilities, 37
United Nations (UN), 1
Universal Declaration of Human Rights (UDHR), 7

V
Vulnerable group, 15, 20