

CHAPTER ONE

What, why, how and for whom?

- 1. What, why, how and for whom?**
 - 1.1 Introduction**
 - 1.2 Aim of the study and research questions**
 - 1.3 Significance of the study**
 - 1.4 Overview of the chapters**
 - 1.5 Conceptual clarification**
 - 1.6 Methodology**
 - 1.7 Literature review**
 - 1.8 Limitations of the study**
 - 1.9 Conclusion**

1.1 Introduction

“Africa is the continent of all ills.”¹ This blunt statement may not attract universal agreement. However, one may find it easier to agree with the following statement: “Africa is in big trouble.”² Africa is, indeed, in big trouble. 34 out of 50 least developed states are in Africa³ and 24 countries with the lowest human development records are also in Africa.⁴ Over the past 40 years, 20 African states have experienced a civil war.⁵ In 23 African states, the life expectancy at birth is less than 51 years; adult literacy rate is lower than 50 per cent in 12 African states; in 35 African states, over 10 per cent of the population is undernourished and in 27 of these countries, the rate of undernourishment is over 30 per cent.⁶ In addition to that, Africa is the epicentre of the HIV epidemic.

Sub-Saharan Africa is the region most affected by the HIV epidemic. In 2009, an estimated 68 per cent of all adults and over 90 per cent of all children living with HIV are in the region.⁷ In 2008 alone, an estimated 1.4 million people died of AIDS and 1.9 million adults and children have been newly infected with HIV, increasing the total number of people living with HIV to 22.4 million in sub-Saharan Africa.⁸

* The footnotes in the study are numbered consecutively per chapter. Therefore, in each chapter, the numbering of the footnotes starts afresh.

¹ Remark by Mr Gabriel Siakeu, President of the World Association for the School as an Instrument of Peace, in his speech ‘Peace and human security in Africa’ delivered at the First international meeting of directors of peace research and training institutions, *What agenda for human security in the twenty-first Century*, UNESCO, Paris (27-28 November, 2000). The speech by Mr Siakeu and other papers presented during the meeting are available at: <http://unesdoc.unesco.org/images/0014/001405/140553e.pdf> [accessed: 15 January 2007].

² E O Hutchinson, *Future report: Bush’s African challenge* available at: <http://www.thehutchinsonreport.com/070703feature.htm> [accessed: 15 January 2007].

³ See LDCs list available at: <http://www.un.org/special-rep/ohrlls/ldc/list.htm> [accessed: 15 January 2007].

⁴ See Table 1 Human Development Report 2007/2008, *Fighting climate change: Human solidarity in a divided world*, UNDP Human Development Report (007/2008) available at: http://hdr.undp.org/en/media/hdr_20072008_en_complete.pdf [accessed: 12 June 2008].

⁵ I Elbadawi & N Sambanis, ‘Why are there so many civil wars in Africa? Understanding and preventing violent conflict’ World Bank research paper, 2 (December, 2000) available at: www.worldbank.org/research/conflict/papers/eca2000c/pdf [accessed: 15 January 2007].

⁶ See Table 7 Water, sanitation and nutritional status in the UNDP HDR 2007/2008 (n 4 above).

⁷ UNAIDS, Report on the global AIDS epidemic 2009, statistics available at: http://data.unaids.org/pub/FactSheet/2009/20091124_FS_global_en.pdf [accessed: 2 July 2010].

⁸ UNAIDS, 2009 (as above).

Among the countries in sub-Saharan Africa, Southern African states are most severely affected by the epidemic. The national HIV prevalence is over 15 per cent in eight Southern African countries.⁹ Among those countries, Lesotho, South Africa, Botswana and Swaziland have an HIV prevalence of over 25 per cent among women who attend antenatal services.¹⁰ Although in many countries the prevalence has been stabilised or declined, HIV and AIDS remains to be the most serious health and human rights hazard in the region.¹¹

The HIV epidemic also has a huge impact on a group of the population that was previously considered as only marginally affected: children. As noted in the General Comment No 3 by the United Nations Committee on the Rights of the Child (CRC Committee) on HIV and AIDS and the Rights of the Child, the HIV epidemic has adverse impact on children directly and indirectly.¹²

Naturally, the consequence of the HIV epidemic on children is felt the strongest in economically challenged countries with weak infrastructures. Many African states, due to the lack of health care services, including limited access to anti-retroviral treatment (ART) and inadequate social welfare services, fail to mitigate the impact of the epidemic on children.¹³ The lack of adequate health care or access to ART means

⁹ UNAIDS Global Epidemic Update 2007, Fact sheet, available at: http://data.unaids.org/pub/EPISlides/2007/071118_epi_regional%20factsheet_en.pdf [accessed: 15 January 2008] Eight countries are Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. The most recent country by country data by UNAIDS is for 2007.

¹⁰ UNAIDS, 2007 (as above) 15.

¹¹ UNAIDS, 2007 (as above) 15-18; According to the UNAIDS 2007 Global Report, in 26 sub-Saharan African states, with exceptions of Senegal and Uganda, the HIV prevalence rate has declined or stabilised. UNAIDS (2007) 11.

¹² Committee on the Rights of the Child, General Comment No 3 (2003) on HIV/AIDS and the Rights of the Child, CRC/GC/2003/3 (17 March 2003) para 31.

¹³ Examination of the UNGASS Progress Report 2008 submitted by various African states indicates that despite the progress, ART including ART for HIV-positive pregnant women are not reaching a large proportion of people in need of such treatment. In Zambia, it is reported that only 50 % of people living with HIV are receiving ART and less than 40 % of HIV-positive women received ART to prevent mother-to-child-transmission in 2007. In Swaziland, less than 50 % of people in need of ART received the treatment and in Mozambique, less than 40 % of people in need of ART received the treatment and only 12 % of HIV-positive pregnant women received ART to prevent mother-to-child-transmission. The reports examined are: Botswana United Nations General Assembly Special Session on HIV/AIDS Progress Report (UNGASS) 2008, Kenya UNGASS Progress Report 2008, Lesotho UNGASS Country Report 2008, Malawi HIV and AIDS Monitoring and Evaluation Report 2008, South Africa UNGASS Country Report 2008, Swaziland UNGASS Progress Report 2008, Kenya National Human Development

that more people living with HIV die from AIDS-related or other diseases than otherwise would have if they were provided with adequate health care. Access to ART and adequate health care is an important means to prevent children from losing parents to AIDS. Furthermore, the limited access to medical provisions to prevent mother-to-child-transmission combined with limited paediatric ART means many children are vulnerable to mother-to-child-transmission of HIV, and children who are living with HIV are not receiving appropriate ART.¹⁴

Despite the increasing focus on children in the context of the HIV epidemic, considering the gravity of the situation, issues relating to children have received far too little attention since the beginning of the epidemic.¹⁵ The lack of, or slow pace of government intervention in the areas of children's rights in the context of HIV epidemic may be attributed to the earlier understanding that children are only marginally affected by the epidemic, and the conventional understanding of 'vulnerable children'. Traditionally, vulnerable children were seen as a particular group of children comprised, mostly, of street children, children exposed to harmful labour conditions, trafficked children and children affected by armed conflicts.¹⁶ However, the epidemic has in fact affected many communities and households, dramatically increasing the number of children at risk.¹⁷

One of the most serious and tragic consequences of the HIV epidemic in Africa is the growing number of children living in child-headed households without any adult supervision.¹⁸ As a result of the high adult mortality rate and the inability of extended

Report 2006: *Human Security and Human Development: a deliberate choice*, Malawi National Human Development Report 2005: *Reversing HIV and AIDS in Malawi*, Zambia National Human Development Report 2007: *Enhancing Household Capacity to Respond to HIV/AIDS*, Lesotho National Human Development Report 2006, Mozambique National Human Development Report 2007: *Challenges and Opportunities: the Response to HIV and AIDS*.

¹⁴ *Children: The missing face of AIDS: United for children and united against AIDS*, UNICEF & UNAIDS (2005) 7.

¹⁵ CRC Committee, 2003 (n 12 above) para 1.

¹⁶ K Deininger *et al.*, 'AIDS-induced orphanhood as a systemic shock: magnitude, impact and programme interventions in Africa' (2003) 31/7 *World Development* 1201.

¹⁷ K Deininger *et al.*, 2003 (as above) 1201.

¹⁸ *Report on the mid-term review of the STRIVE project*, Catholic Relief Service (2003) 2; Also see A Bequele, *Emerging challenges of children heading households: some reflections*, Speech delivered at the opening session of 5th African Conference on *Child abuse and neglect on HIV/AIDS and children: challenges of care for and protection of children in Africa*, Uganda

families to absorb the increasing number of children who are orphaned, the number of children living in child-headed households is increasing at an alarming rate especially in Southern and Eastern African states.¹⁹

The CRC Committee has also noted the vulnerability of children in child-headed households and recommended that special attention be given to children in child-headed households in its General Comment No 3.²⁰ The Committee emphasised the necessity of providing legal, economic and social protection to those children to protect their inheritance rights and ensure their access to essential services, such as education, shelter and health and other social services.²¹

The conventional legal response to children who are deprived of their family environment would be to place them in alternative care, such as foster care, institutionalised care or, if appropriate, adoption. However, there are several socio-economic factors that hinder such an approach to provide conventional forms of alternative care. Those factors are closely linked to the nature and scope of the HIV epidemic in Africa. First of all, as mentioned before, due to the epidemic, the number of children in need of alternative care has increased on an unprecedented scale. Secondly, together with the dramatically increasing number of children in need of alternative care, the high mortality rate in the principal labour force further exacerbates the economic vulnerability of the community, severely eroding the ability of extended families and communities to absorb children in need of alternative care.²² Unfortunately, the majority of African states do not have resources to provide

(27-29 March, 2007); B B Sibale & E Kachale, *Educational perspectives related to the impact of the HIV/AIDS pandemic on child labour in Malawi*, Policy paper No 7, International Labour Organisation (2004) 14; The report on the Global AIDS epidemic 2008 suggests that although the number of children who lost both parents has increased in Tanzania, South Africa and Malawi, the number of child-headed households has not increased. Such assertion is not only inaccurate but also dangerous as it downplays the gravity of issues relating to child-headed households. UNAIDS, 2008, 47.

¹⁹ H H Semkiwa *et al.*, 'HIV/AIDS and child labour in the United Republic of Tanzania: a rapid assessment', No 3, ILO (2003) 15; S Tsegaye, *HIV/AIDS, orphans and child-headed households in sub-Saharan Africa*, African Child Policy Forum (2008) 17. The detailed discussion on the trends and nature of child-headed households is provided in the following section. See sec 1.3 below.

²⁰ CRC Committee, 2003 (n 12 above) para 31.

²¹ CRC Committee, 2003 (as above) para 31.

²² S Tsegaye, 2008 (n 19 above) 17.

conventional forms of alternative care, as recognised by the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC), to all children who are deprived of their family environment.²³ Moreover, in some cases, children's interests and wishes prevent the placement of children in those alternative care placements.

The question is how best to protect those children who are deprived of their family environment, but who cannot be placed in conventional forms of alternative care. The increasing number of children in unsupported and unprotected child-headed households and of street children illustrates the need to devise effective and innovative solutions to meet the needs of those children.

In South Africa, the move towards legally recognising child-headed households has resulted in the inclusion of child-headed households in the Children's Act No 38 of 2005 as amended by the Children's Amendment Act No 41 of 2007.²⁴ The South African way of legally recognising child-headed households as a protective measure is the first in Africa. Providing legal recognition acknowledges the existence of child-headed households and endeavours actively to provide legal protection to children in such households. However, the challenge is how to legally recognise child-headed households while protecting and fulfilling the rights of children in child-headed households, especially the right to alternative care, and special protection and assistance.²⁵ Legally recognizing child-headed households, and therefore, in effect socially justifying their existence, when adequate protection and assistance is lacking to these children, would not only be a serious violation of children's rights, but also be morally reprehensible.

²³ The CRC and ACRWC recognise primarily foster care, adoption, *kafalah* and institutionalised care. However, the lists provided in the instruments are not exhaustive.

²⁴ As explained in chapter 4, the split between the Children's Act No 38 of 2005 as amended by Children's Amendment Act No 41 of 2007 was due to the procedural issues regarding legislative competencies of national government and provincial government. The purpose of the Children's Amendment Act is 'to amend the Children's Act, 2005, so as to insert certain definitions; to provide for partial care for children; to provide for early childhood development; to make further provision regarding the protection of children; to provide for prevention and early intervention; to provide for children in foster care; to provide for child and youth care centres and drop-in centres; and to create certain new offences relating to children; and to provide for matters connected therewith.'

²⁵ N Cantwell & A Holzscheiter, *A commentary on the United National Convention on the Rights of the Child, article 20: children deprived of their family environment*, Martinus Nijhoff (2008) para 88.

Despite such concerns, there are strong arguments in favour of legally recognising child-headed households. It can be argued that by legally recognising them, states can, through legislative review or other legal reform, provide legislative protection and assistance to such households. The fact is that child-headed households do exist in many African societies. Moreover, the number is increasing and it will continue to increase, especially in countries where the HIV epidemic has taken its toll and the resources and abilities of extended families to absorb children who are orphaned are diminishing rapidly.²⁶ In countries where effective measures to monitor and regulate the standard of care in informal care are not in place, placing children with unscreened relatives could have harmful consequences.²⁷ Finally, granting legal recognition may be an important step towards the application of a rights-based approach to protecting and supporting children in child-headed households. Nevertheless, the way child-headed households are recognised, supported and protected should be scrutinised carefully to avoid states legally recognising child-headed households as a cheap panacea for the increasing number of children in need of state-provided alternative care.

1.2 Aim of the study and research questions

The factors such as modernisation and urbanisation changed and eroded the effective traditional family network, which provided protection and care to children who are deprived of their family environment. In particular, the grave socio-economic impact of the HIV epidemic in many parts of Africa, which dramatically increasing the number of children who are deprived of their parental care, continues to deplete human and economic resources of the extended families and communities to provide effective care to children in need of alternative care. Such social changes introduced new forms of families and households, such child-headed and skip-generation households, which are generally economically and socially more vulnerable. The general aim of the study is to examine, from a rights-based perspective, the phenomenon of child-headed households in the context of the HIV epidemic in sub-Saharan Africa. It explores state responsibilities to provide special protection and

²⁶ *Review of the Child Care Act*, Project 110, South African Law Reform Commission (2002) 172.

²⁷ See for instance, *Reversed roles and stressed souls: child-headed households in Ethiopia*, African Child Policy Forum (2008) 44.

assistance to children in such households. The study critically analyses the South African legislation on child-headed households and makes recommendations to countries that are facing similar challenges.

In 2002, in its discussion paper on the Child Care Act No 74 of 1983, the South African Law Reform Commission recommended that ‘legal recognition be given to child-headed households as *a placement option for orphaned children in need of care.*’²⁸ Eventually, in the Children’s Act, child-headed households have been recognised as a ‘protective measure’.²⁹ Recognising child-headed households as a measure of protection rather than a placement of alternative care indicates the government’s deliberate effort to avoid ‘normalising’ child-headed households. It illustrates that children should not be *placed* deliberately in child-headed households as would be the case with an alternative care placement.³⁰ Nevertheless, when children are *found* to be in child-headed households, they should be protected and assisted.

The move towards ‘legally recognising’ child-headed households directly leads to several questions, which this study endeavours to address in the later chapters.

First of all, there are three sets of closely related questions: what are the existing alternative forms of care?; what are their limitations that necessitate legally recognising child-headed households? Children who are deprived of their family environment have traditionally been absorbed into their extended family network. However, with time, the societal changes in many African societies, the traditional family network system has also gone through a change. In particular, in the context of the HIV and AIDS, the dwindling resources of families and communities make it difficult for them to fulfil their role as a care provider to all children who are deprived of their parental care. Besides the informal kinship care, the CRC and the ACRWC provides a non-exhaustive list of alternative forms of care, including foster care, *kafalah*, and institutionalised care. When all the conventional forms of alternative care

²⁸ SALRC, 2002 (n 26 above) 170 (The emphasis is mine.)

²⁹ Sec 137 of the Children’s Act as amended by the Children’s Amendment Act.

³⁰ In discussion with Dr Ann Skelton, Director of the Centre for Child Law, University of Pretoria on 3 Feb 2008.

are available and properly implemented, the necessity of legally recognising child-headed households may be minimal. However, as mentioned above, the need to recognise child-headed households arises due to several factors, such as the unavailability of the conventional forms of alternative care to all children in need of alternative care in the context of HIV and AIDS, and undesirability of enforcing conventional forms of alternative care in a uniformed manner, which, in general, require removing the child from their home environment.

Secondly, if recognising child-headed households is unavoidable in certain circumstances, what are the existing norms and standards on the recognition of child-headed households?; and what would be the state obligations towards children in child-headed households under those norms and standards? There are increasing interests in the issues of child-headed households internationally and domestically in many African states. The CRC Committee first mentioned the child-headed households in its General Comment in 2003 and the 2009 UN Guidelines for the Alternative Care of Children specifically require states to provide appropriate support and protection measures to such households. Child-headed households are also included in domestic legislation in Namibia, South Africa, Southern Sudan and Uganda, and are included in many national policies on orphans and vulnerable children in many other African states. It should be emphasised that any measures to provide care and protection to children deprived of their family environment, including child-headed households, should be designed to fulfil the *purpose* of article 20 of the CRC and article 25 of the ACRWC, which is to realise the full range of children's rights of children in particularly vulnerable situations due to their lack of family environment. Giving legal recognition means that child-headed households are legally entitled to adequate support and protection to function as a placement of care and protection.³¹ Therefore, child-headed households should be recognised in a way that is least disruptive to the realisation of their rights as children.

Finally, as mentioned above, South Africa developed a detailed legislative and policy framework recognising, protecting and supporting child-headed households. The South African model has informed the drafting of the similar legal frameworks in

³¹ Art 25 of the CRC.

other countries in the region, such as Namibia, Southern Sudan and Uganda, which are discussed in details in chapter three. Legally recognising child-headed household may be a vital step towards providing support and protection based on a rights-based approach, but the standard of the protection and support provided to those children is equally important. The study examines the South African legal and policy frameworks to protect and support child-headed households to assess its adherence to international standards and norms of the relevant international laws and guidelines, including the CRC, ACRWC and the UN Guidelines for the Alternative Care of Children.

To summarise the main research questions and sub-research questions are as follows:

1. Is the extended African family capable of providing care to children who are deprived of their parental care?
 - How does the HIV epidemic impact on society, including the social structure, demography and socio-economic development?
 - How does the HIV epidemic affect children?
 - What are the factors leading to the increasing number of children in child-headed households?

2. What are the state obligations under articles 20 of the CRC and 25 of the ACRWC towards children who are deprived of their family environment?
 - What are the existing forms of alternative care?
 - How can international ‘soft law’ on children who are deprived of their family environment, such as 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally and the UN Guidelines for the Alternative Care of Children, be used to understand state obligations towards children who are deprived of their family environment?

3. What is the position of international treaty law, guidelines and declarations on child-headed households?
 - How are child-headed households supported and protected in the legal and policy frameworks in African countries?
 - How can a rights-based approach be used in recognising and supporting a child-headed household?
 - What criteria should be applied when determining if a child-headed household is functional and legal recognition should be given to it?
4. How does South African law recognise child-headed households?
 - What are the measures of support and protection granted to such households in the Children's Act?
 - Does the South African legislative measure of legally recognising child-headed households conform to the international standards established under the international children's instruments?

1.3 Significance of the study

Any serious interdisciplinary research, which endeavours to understand the phenomenon of children who have been orphaned or deprived of their family environment on such massive scale, is important in this critical situation where more than 14 million children have been orphaned by 2010 in sub-Saharan Africa due to the HIV epidemic.³² The significance of the study is in the novelty of the subject matter and approach it has taken. The issue of legally recognising child-headed household is new in Africa. South Africa is the first country in Africa to legally recognise child-headed households and implement protection measures in legislation. There has not been a major academic study analysing the implications of legally recognising child-headed households and assessing the way South Africa has recognised child-headed

³² UNAIDS, 2009 (n 7 above).

households from a rights-based perspective.³³ As Cantwell and Holzscheiter pointed out, the implications of legally recognising child-headed households on the right to alternative care, and special protection and assistance have not been explored fully.³⁴ Furthermore, the interdisciplinary nature of the study is another important aspect of the study as it is not only limited to the analysis of the legal framework but it also explores the socio-economic background in which the legal framework operates and the challenges of the implementation of legal provisions.

Context is everything: Importance of understanding the impact of HIV epidemic on children's rights

First of all, without the epidemic, the number of children in need of special protection and assistance, or in need of alternative care, may not have increased with such an unmanageable speed. In countries that are severely affected by the epidemic, the incidence of orphanhood has increased from an average 2 per cent to 17 per cent since the first AIDS cases were reported.³⁵ Also, importantly, in Africa the primary mode of HIV transmission is through sexual intercourse. Due to the nature of the transmission, it most severely affects adults at their most productive and reproductive age. Particularly in Africa, as the HIV transmission is mainly through heterosexual activities, children are mostly likely to lose both of their parents to AIDS.³⁶ Countries with a low AIDS-related mortality rate have two or fewer double orphans per 1000

³³ However, there are several important academic writings on the rights of child-headed households. Most notably Sloth-Nielsen has published numerous articles on the rights of children in child-headed households, including *Realising the rights of children growing up in child-headed households: a guide to laws, policies and social advocacy*, Community Law Centre, University of Western Cape (2004) and the plight of child-headed households has been explored in various publications by the Children's Institute, University of Cape Town, including *Child-headed households in South Africa: A statistical brief 2009* and S Rosa, *Counting on children: Realising the rights of social assistance of child-headed households*, University of Cape Town, (August, 2004). Also for more recent article on the child-headed households, see H Meintjes *et al.*, 'Orphans of the AIDS epidemic? The extent, nature and circumstances of child-headed households in South Africa' (2009) 22/1 *AIDS Care* 40-49. For further discussion on related writings, see sec 1.7.

³⁴ N Cantwell & A Holzscheiter, 2008 (n 25 above) paras 88-89.

³⁵ K Subbarao *et al.*, *Social protection of Africa's orphaned and other vulnerable children: issues, good practice programme options*, Africa regional human development working paper series, Africa region, The World Bank (August 2001) v.

³⁶ J C Caldwell, 'The impact of the African HIV epidemic' (1997) 7/2 *Health Transition Review* 173, The author shows that while in the US, Europe and Latin America, HIV infection rate is highest among homosexuals, bisexuals and intravenous drug users, in Africa, they account for less than 2 per cent of the epidemic.

population, whereas countries with a high AIDS-related mortality rate, such as Uganda, Malawi, Zambia and Zimbabwe, have around seven to ten per cent.³⁷

Secondly, together with the dramatically increasing number of children who are deprived of their family environment and parental care, the high mortality rate in the principal labour force further exacerbates the economic vulnerability of the community. The nature and scope of the epidemic affects the very foundation of the communities and erodes their ability to absorb the rapidly increasing number of children in need of care. The combination of the increasing number of children and decreasing number of adults who can provide adequate care often translates into an increasing number of children growing up in grandparent-headed households or child-headed households without adequate adult supervision.

Finally, the discrimination and stigma attached to the HIV compounds the challenges faced by children orphaned by AIDS. As emphasised in the introduction, the study does not differentiate between children who are orphaned by AIDS or children who are orphaned by other causes. However, children in HIV-affected child-headed households may require different types of intervention and support, including trauma counselling.³⁸ Therefore, the support measures to child-headed households should be broad enough to provide a necessary support to children in HIV-affected child-headed households.

Why a rights-based approach?

In the study, the rights-based approach to special protection and assistance to children growing up in child-headed households is understood at three levels. At the first level, employing a rights-based approach means acknowledging children's status as rights-

³⁷ Z Zimmer & J Dayton, 'Older adults in sub-Saharan Africa living with children and grandchildren' (2005) 59/3 *Population Studies* 306.

³⁸ *Reversed roles and stressed souls: a study on child-headed households in Ethiopia* shows that the majority of children in child-headed households experience psychological challenges. Children who lost their parents to AIDS-related illness show a higher level of anxiety on health-related issues and are exposed to a high level of stress and anxiety having to care for terminally ill parents. See African Child Policy Forum, 2008 (n 27 above) 62, 76 & 81.

holders and identifying corresponding duty-bearers.³⁹ It means holding governments responsible for their ineptness in protecting, promoting and fulfilling children's rights; advocating a child-friendly legal framework in which children are empowered to assert their rights; and emphasizing that providing adequate protection and assistance is not a charitable action but an obligation, which state parties owe to the children. At the second level, applying a rights-based approach requires a critical examination of the implications for children's rights of legally recognising child-headed households. The purpose of the analysis is to identify the rights that are potentially in danger of being violated by legally recognizing child-headed households. Finally, the rights-based approach aims to fulfil the rights of children who are growing up in child-headed households and to ensure that the mere fact that children are in child-headed households does not necessarily mean their rights as children are violated or marginalised. To do so, legal protection and support measures should be designed and implemented from a rights-based approach.

Another important aspect of a rights-based approach is acknowledging that the rights of an individual child can, and do come into conflict with those of others, and consequently finding a balance that justifies the prioritisation of certain rights or the most vulnerable groups of children minimising a harm caused by a 'trade-off effect'.⁴⁰ For instance, when evaluating the best interests of the children in child-headed households, the rights of children heading households may come into conflict with those of younger siblings. Another possibility is that the rights of children who are orphaned by AIDS and those of other vulnerable children may compete with each other.⁴¹ When a fair weight is given to older children's rights to education and childhood, and the right of younger siblings to grow up with their own family members, a blind endorsement of child-headed households or unqualified support for informal care is neither acceptable nor desirable. When a balance is struck between

³⁹ *Ripple in still water: Reflection by activists on local- and national-level work on Economic, Social and Cultural Rights*, International Human Rights Internship Programme available at: <http://www1.umn.edu/humanrts/edumat/IHRIP/ripple/toc.html> [accessed: 28 Sept 2009] 4

⁴⁰ E Filmer-Wilson, 'The human rights-based approach to development: the right to water' (2005) 23/2 *Netherlands Quarterly of Human Rights* 220.

⁴¹ Sloth-Nielsen pointed out the difficulties of implementing the principles of children's rights in the context of the HIV epidemic. See J Sloth-Nielsen, 'Of newborns and nubile: some critical challenges to children's rights in Africa in the era of HIV/Aids' (2005) 13 *International Journal of Children's Rights* 73-85.

the rights to education and health care of children orphaned by AIDS and those of other children made vulnerable by non-AIDS related causes, the selective measures that leave out equally but differently vulnerable groups should not be allowed. A rights-based approach, which is based on, *inter alia*, the principles of non-discrimination and equality, provides a guidance to the delicate balancing act between different sets of rights and groups without compromising the principle of non-retrogression.

Why the right to alternative care, and special protection and assistance?

Children who are deprived of their family environment have the right to alternative care, and special protection and assistance under the CRC and ACRWC. The study focuses on the analysis of the right and explores obligations of states under the right. In particular, the study divides the right to alternative care, and special protection and assistance into two separate parts: 1) alternative care and 2) special protection and assistance. The importance of focusing on the right is closely linked to the traditional African way of taking care of children who are deprived of their family environment and the nature and scale of the HIV epidemic that threatens the very fabric of society.⁴²

Traditionally, in many parts of Africa, children who are deprived of parental care were often looked after by their extended families. It is reported that in almost all sub-Saharan African countries, extended families have provided care to over 90 per cent of children who are orphaned.⁴³ It is often said that members of extended families assist each other in difficult times and ‘the extended family safety net’ is still the most effective and reliable response to various crises in sub-Saharan Africa.⁴⁴ As relatives often assume parental duties and responsibilities,⁴⁵ some argue that an ‘orphan’ is not

⁴² T Barnett & A Whiteside, ‘HIV/AIDS in Africa: Implications for ‘development’ and policy’ (March 1999); also cited in *HIV/AIDS and human development in Africa*, World Vision Special Report (February 2001).

⁴³ *Africa’s orphaned generations*, UNICEF (November 2003) 15.

⁴⁴ G Foster, ‘Safety nets for children affected by HIV/AIDS in Southern Africa’, R Pharoah (ed) *A generation at risk? HIV/AIDS, vulnerable children and security in Southern Africa*, Institute for Security Studies, Monograph Series No 109 (December 2004) 67.

⁴⁵ G Foster, 2004 (as above) 67.

a recognised term in an African context⁴⁶ and the concept of ‘social orphan’ is new in most of African societies.⁴⁷

This tradition of taking in children who are deprived of their parental care may explain to some extent the lack of, or slow pace of governmental recognition of child-headed households and intervention to support children in such households.⁴⁸ Nonetheless, as the HIV epidemic is depriving children of parental care and family environment on an unprecedented scale,⁴⁹ the unique form of informal social security mechanism is under tremendous strain.⁵⁰ It is projected that by the end of 2010, in Lesotho, the number of children without parental care will reach 206,000 and the majority of them would have been orphaned by AIDS.⁵¹ The traditional way of extended families taking care of such children is not sustainable without active intervention by government. The growing number of children in unsupported child-headed households or poverty-ridden grandparent-headed households is a clear example.

Separating alternative care, and special protection and assistance is based on the assumption that articles 20 of the CRC and 25 of the ACRWC intend that states take a separate set of measures under the obligation to provide alternative care and the obligation to provide special protection and assistance.⁵² Unfortunately, there is a lack

⁴⁶ D Skinner *et al.*, *Defining orphaned and vulnerable children*, Human Science Research Council of South Africa (2004) 9.

⁴⁷ G Foster, 2004 (n 44 above) 67.

⁴⁸ Similar sentiment is expressed in an essay by Foster where he argued the slow government reaction could be attributed to the fact that families and communities have assumed most of the burden of caring, both financially and emotionally. He further points out that by 2003, only 13 % of sub-Saharan countries (6 out of 46) had a national policy on orphans and vulnerable children. G Foster, ‘Children who live in communities affected by AIDS’ (2006) 367 *Lancet* 700. However, it should be noted that in 1999, a consultative paper on ‘Children living with HIV/AIDS’ was prepared for the South African Law Reform Commission by C Barret, N McKerrow and A Strode, which addressed the need to consider diverse form of alternative care, including child-headed households. In 1999, the SALRC recognised the importance of reforming the existing alternative care system in the context of the HIV epidemic in South Africa. Correspondence with Mr R van Zyl, Researcher, South African Law Reform Commission on 20 July, 2010. The content of the consultative paper is discussed in chapter 4.

⁴⁹ R Smart, *Policies for orphans and vulnerable children: A framework for moving ahead*, Policy (July 2003).

⁵⁰ *HIV/AIDS as a security issue*, International Crisis Group Report (June 2001) 6.

⁵¹ UNICEF, 2003 (n 43 above) 51.

⁵² The point is further developed in chapter 3.

of research focusing on the special protection and assistance. As mentioned before, the analysis of article 20 of the CRC often focused on alternative care. The relationship between article 20(1), which provides for state obligation to give special protection and assistance to children who are deprived of their family environment, and article 20(2), which gives the right to alternative care to such children, has not been fully explored. For instance, do articles 20(1) and 20(2) give separate rights? Do children who are deprived of their family environment have separate claims under article 20(1) and 20(2)? Article 20(2) seemed to have been interpreted only in relation to article 20(3). The CRC Committee guidelines on state reporting, which separate measures implementing ‘special protection and assistance’ and ‘alternative care’. It seems to suggest that the two are separate rights and entitlements, which complements each other. Furthermore, the CRC General Comment on HIV/AIDS and the rights of the child emphasizes the importance of the ‘holistic child rights-based approach’ and mentions article 20 of the CRC on ‘the right to special protection and assistance by the state’ as one of the most relevant rights in protecting children and adolescents.⁵³

The starting point of the study is, thus, to recognise the paramount importance of a right to alternative care, and special protection and assistance of children who are deprived of family environment. So far, the Committee on the Rights of the Child has been rather silent on the interpretation of the nature and scope of state obligation under article 20. The African Committee of Experts on the Rights and Welfare of the Child has also been silent on article 25 of the ACRWC. The major significance of the study is its attempt to understand the right to alternative care, and special protection and assistance in the African context. In order to do so, 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally and 2009 UN Guidelines for the Alternative Care of Children informed much of the discussion on the state obligations under the articles.

⁵³ CRC Committee, 2002 (n 12 above) para 4.

Why child-headed households?

The focus on child-headed households can be justified by the fact that the number of child-headed households is increasing in the countries that are severely affected by the epidemic and the particular vulnerable situation in which children in such households find themselves. It should be noted that there are contending views on the increasing number of child-headed households. While it is often argued that the number of child-headed households is increasing in the context of the HIV epidemic,⁵⁴ several authors, including Hosegood and Meintjes, argue that child-headed households are still rare incidents.⁵⁵ The main arguments are: 1) the number of child-headed households is small, and 2) in the majority of cases, there is a surviving parent in the households.⁵⁶

It is true that the various household surveys indicate that the number of children in child-headed households is still small. However, there are several concerns over this assertion. First of all, the data collection methods of household surveys may leave out many child-headed households, especially in the areas where the rate of official birth or death registration is low. Secondly, as discussed in the following section, the definition of child-headed households as a ‘child-only’ household is problematic. In cases where there is a surviving parent in a household, it is feasible that a child has assumed a role of *de facto* care giver to his or her parents and siblings due to the incapacity of the surviving parent. If all households in which children provide primary care to other members of the family are included in the statistics, the number of ‘child-headed households’ inevitably increase. Furthermore, despite the relatively small number of children in child-headed households, their particular vulnerability warrants special attention and support. However, it does not mean that other vulnerable children should be sidelined. Rather, it means, a legal or policy framework to protection and support vulnerable children should be comprehensive enough to cater for the special needs of children in child-headed households.

⁵⁴ Catholic Relief Service, 2003 (n 18 above) 2; A Bequele, 2007 (n 18 above); B B Sibale & E Kachale, 2004 (n 18 above) 14; G Foster *et al.*, ‘Factors leading to the establishment of child-headed households: the case of Zimbabwe’ (1997) 7/2 *Health Transition Review*; African Child Policy Forum, 2008 (n 27 above).

⁵⁵ V Hosegood, ‘The demographic impact of HIV and AIDS across the family and household life-cycle: implications for efforts to strengthen families in sub-Saharan Africa’ (2009) 21/1 *AIDS Care* 13-21; H Meintjes *et al.*, 2009 (n 35 above).

⁵⁶ V Hosegood, 2009 (as above) 17; H Meintjes *et al.*, 2009 (n 35 above) 46-47.

At the theoretical level, foster care or adoption, whether informal or formal, may fit in better with the aspirations of the CRC and the ACRWC. However, there are several difficulties in enforcing foster care that conforms to the principles of children's rights in many African societies. First of all, through an informal foster care arrangement, children who have been orphaned are often taken in by relatives. During the process, siblings are often separated and incorporated into different households.⁵⁷ The separation of siblings could increase the psychological and emotional stress children are already going through after the death of their parents.⁵⁸ There is also an increasing trend of children being incorporated into grandparent-headed households. High mortality rate among sexually active adults results in grandparents having to care for grandchildren as their own children pass away.⁵⁹ Often, grandparent-headed households experience acute poverty, and children may experience another loss of caregiver as their grandparents pass away.⁶⁰

Apart from those problems, children in informal care settings can be vulnerable when there is no effective regulatory or monitoring mechanism put in place to assess the suitability of the care arrangements. Children are not only invisible, but also unheard, as they may choose to stay silent despite abuses at home because they are afraid of the unknown consequences of speaking out.⁶¹ The danger of children being abused, and the abuses going unreported, increases with the children's inability to pursue their rights and unwillingness to report due to the fear of the consequences.

Children should be able to form and remain in child-headed households without having their rights violated. Critical appraisal is given to a growing acceptance of the

⁵⁷ See *Improving protection for children without parental care- care for children affected by HIV/AIDS: The urgent need for international standards*, International Social Services (ISS) & UNICEF (2004)

⁵⁸ A Skinner *et al.*, 'Understanding the psychological and emotional needs of AIDS orphans in Africa', A Singhal & W S Howard (eds) *The Children of Africa confront AIDS: from vulnerability to possibility*, Ohio University research in international studies: Africa series no 80, Ohio University Press, Athens (2003) 98.

⁵⁹ G Foster, 'Children rearing children: a study of child-headed households', paper delivered in the conference, *The socio-economic impact of AIDS in Africa*, International Union for the Scientific Study of Population and University of Natal, Durban, South Africa (3-6 February 1997).

⁶⁰ A Bequele, *Tackling the impact of HIV/AIDS on children in Africa: progress and challenges*, keynote address given at the *Getting it right Conference*, Tanzania (27 September- 2 October) 4.

⁶¹ G Mann, *Family matters: the care and protection of children affected by HIV/AIDS in Malawi*, Commissioned by Save the Children USA (2002) 51.

view that child-headed households are a viable measure of care. Child-headed households should be fully supported and, in return, the establishment of child-headed households should only be allowed when the conditions of support are met, and legal and policy frameworks are put in place to protect and assist such households.

Depending on the age of the children and the level of support, child-headed households can be an alternative option of care when other existing options are not appropriate. However, one should never assume that a child-head of a household always voluntarily takes up the role of a care giver. Where there is no reliable alternative care provision, the eldest child might be pressurised into taking up the position. Nevertheless, where, for the best interests of children, the establishment of child-headed households is inevitable, the difficult question is how to determine what level of support is adequate for children in such households, especially for a child-head of the household. What level and standard of adult supervision, and what kind of regulatory and complaint mechanisms should be put in place to ensure that the rights of those children are respected equally as children as well as heads of households? An analysis of the state obligation to provide ‘special protection and assistance’ helps to clarify above questions.

1.4 Overview of the chapters

Chapter 1 What, why, how and for whom

The aim of the chapter is to give a brief summary of the study. The chapter is comprised of nine sections dealing with the introduction, aim and significance of the study, conceptual clarification, research questions, methodology, literary review and limitations of the study.

Chapter 2 Who cares?: The changing role of African extended families

This chapter is divided into four sections. Followed by a brief introduction, section 2.2 shows how, over time, the traditional coping mechanisms, such as various forms of assistance from extended family network for economic and social crises, including providing care to children who lost their parents, have been weakened due to various factors, such as urbanisation, the growth of the cash economy, the economic downturn

and the HIV epidemic. It argues that the traditional coping mechanism cannot be sustained in the midst of the HIV epidemic and advocates stronger government interventions. The section examines the traditional ways of coping with social and economic crises in Africa, which include providing informal social security and assistance to needy family members, by illustrating the importance and effectiveness of the extended family safety net mechanism. Section 2.3 examines the socio-economic impact of the HIV epidemic on sub-Saharan African societies, such as a change of demography and an increasing number of households in a deepening level of poverty. By doing so, it argues that the conventional reliance on extended families as an informal social safety net has a limit and advocates stronger government intervention. Notwithstanding the focus of the study on South Africa, a general analysis is undertaken to give a broad overview of situations in sub-Saharan Africa, where the epidemic causes the biggest havoc. Section 2.4 is a concluding section of the chapter.

Chapter 3 International legal protection of children who are deprived of their family environment

The purpose of the chapter is to explore state obligations towards children who are deprived of their family environment. Although the main focus of the chapter is on the analysis of article 20 of the CRC and article 25 of the ACRWC, other relevant international instruments are also examined. Section 3.2 examines the contents of international treaties, guidelines and recommendations on children who are deprived of their family environment. Section 3.3 examines the wording of articles 20 of the CRC and 25 of the ACRWC. The 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally and the 2009 UN Guidelines for the Alternative Care of Children have informed much of the discussion. In the section, the principles of the rights-based approach in relation to children who are deprived of their family environment are also discussed to clarify the extent of state obligations with regard to the right to alternative care, and special protection and assistance. In section 3.4, various existing forms of alternative care have been discussed to evaluate the care options that are alternatives to child-headed households. Section 3.5 discusses child-headed households as an emerging form of care. The

section also examines the way in which child-headed households are supported and recognised in other African countries, namely, Ethiopia, Lesotho, Namibia, Southern Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Section 3.6 is the concluding section of the chapter.

Chapter 4 The case of South Africa

Chapter 4 examines the way South Africa has legally recognised child-headed households. The chapter contains five sections. After the introductory section, section 4.2 briefly describes the status of South African children in the context of the HIV epidemic. Section 4.3 examines the children's rights protected under section 28 of the South African Constitution. Relevant cases are used to inform the discussion. Section 4.4 examines section 137 of the Children's Act and other relevant provisions and regulations pertaining to the Children's Act from a rights-based approach. Section 4.5 is a concluding section of the chapter.

Chapter 5 Conclusion and recommendation

Chapter 5 argues that in the view of the increasing number of children who are deprived of their parental care and family environment, an effective legal and policy framework should be implemented to protect the right to alternative care, and special protection and assistance. The thesis argues that as part of the effort to protection children who are deprived of their family environment, child-headed households should be legally recognised and supported in accordance with the principles of a rights-based approach.

1.5 Conceptual clarification

In this section, terms that bear significance for the study have been explored. In addition to the terms that are directly related to the study, other terms that are used frequently are also explored.

Care

The term, 'care', is fundamentally important for the purpose of the study. Children who are deprived of their family environment are entitled to 'alternative care'. Understanding the term, 'care', is useful to determine the standards of 'alternative care'.

Care is an important component in children's growth and development. To properly understand the terms such as 'family care', 'parental care' or 'alternative care', it is important to understand the concept of 'care'. The concept of care is defined as 'the provision of what is necessary for the welfare and protection of someone or something'.⁶² Similarly, in the 1992 International Conference on Nutrition, the concept of care is defined as 'provision in the household and the community of time, attention and support to meet the physical, mental and social needs of the growing child and other household members'.⁶³ Engle and Lhotska adopted a slightly broader definition of care. They defined it as 'behaviours and practices of caregivers (mothers, siblings, fathers, and child-care providers) to provide the food, health care, stimulation, and emotional support necessary for children's healthy growth and development'.⁶⁴ Engle and Lhotska emphasised that not only the type of 'behaviours and practices' but also 'the way they are performed-with affection and responsiveness to children' are critical to children's growth and development.⁶⁵ The care practice should meet not only the physical needs of children but also the emotional and psycho-social needs of children.

Alternative care

The term, 'alternative care', indicates provisions of care other than parental care. The widely recognised forms of alternative care include foster care, either by relatives or

⁶² Oxford on-line dictionary, available at: http://www.askoxford.com/concise_oed/care?view=uk [accessed: 04 November, 2007].

⁶³ I Jallow, 'Ensuring effective caring practice within the family and community', Association for the Development of Education in Africa, Biennale on Education in Africa (Libreville, Gabon, March 27-31, 2006) available at: http://www.adeanet.org/biennial-2006/doc/document/C2_1_jallow_en.pdf [accessed: 07 November, 2007].

⁶⁴ P L Engle & L Lhotska, 'The role of care in programmatic actions for nutrition: designing programmes involving care' (1999) 20/1 *Food and Nutrition Bulletin* 122.

⁶⁵ P L Engle & L Lhotska, 1999 (as above) 122.

unrelated persons, adoption, *Kafalah* of Islamic law, or, if necessary, a placement in a suitable institutions. Under article 20 of the CRC and 25 of the ACRWC, children who are deprived of family environment, either temporarily or permanently, or children for whose best interests cannot remain in that environment are entitled to alternative care. As discussed above, ‘care’ should meet not only the physical needs but also emotional needs as well. Therefore, alternative care is understood to meet both physical and emotional needs of children.

Child

Most literature as well as the CRC and the ACRWC define children as boys and girls under the age of 18.⁶⁶ However, a study conducted by the Human Science Research Council (HSRC) suggests that the participants indicated that the protection provided to a child should be extended to the age of 21, if a youth is still in education.⁶⁷ It is an important point in relation to child-headed households. The support measures to assist child-headed household should not end abruptly when a youth heading the household turns 18 years old. The point is further discussed in chapter 5. The participants of the study also felt that the definition should depend ‘on the period of dependence of the child on the parents or caretakers of the household.’⁶⁸ Although it is a valid point, the period of dependence varies in different societies and families. Furthermore, the concept of ‘dependency’ is subjective as it could mean material as well as emotional dependency. It is hard to determine a universally appropriate period of dependency. Moreover, the term, ‘children’, which includes all individuals under the age of 18, seems to suggest that ‘children’ is a homogeneous group. It fails to recognise that a 10 year old child and 17 year old child have different needs. A 17 year old child might have more common with 22 year old youth than with a 10 year old child. The term, ‘youth’ which includes adolescents is used where appropriate. Nevertheless, for the purpose of the study, the definition provided under the CRC and the ACRWC will be used.

⁶⁶ Art 1 of the CRC ‘...a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.’; Art 1 of the ACRWC ‘... a child means every human being below the age of 18 years.’

⁶⁷ D Skinner *et al.*, 2004 (n 46 above) 8.

⁶⁸ D Skinner *et al.*, 2004 (n 46 above) 8.

Child-headed household

Understanding the term, ‘child-headed household’ is central to the thesis. In some cases, the term is used to indicate a ‘child-only household’⁶⁹ or ‘sibling-headed household’.⁷⁰ ‘Household’ is defined as ‘a house and its occupants regarded as a unit’⁷¹ or ‘one or more people who share cooking and eating arrangement’.⁷² A head of household is ‘the person primarily responsible for the day-to-day running of the households, including child care, breadwinning and household supervision’.⁷³ A child-headed household is a household headed by a person under 18 years old and it may not be necessarily a sibling-headed household. Furthermore, emphasising the actual functions of a head of household, the term, ‘child-headed household’ should include the situation where a child is heading a household despite the presence of an adult because the adult is too old or too ill to provide effective care. It includes a household with terminally ill adults or grandparent-headed households where a child has assumed a *de facto* primary caregiver role to younger siblings and his or her adult caregiver.⁷⁴ Therefore, for the purpose of the thesis, the term, ‘child-headed household’ is used to indicate a household that is headed by a child, including but not limited to ‘child-only households’.

Unaccompanied child-headed households/ accompanied child-headed households

A study of child-headed households in Ethiopia by the African Child Policy Forum, *Reversed roles and stressed souls: child-headed households in Ethiopia*, differentiates between unaccompanied child-headed households and accompanied child-headed households. An unaccompanied child-headed household is defined as a household where ‘a child is supporting and taking care of siblings without an adult, in the household’ due to death of parents or abandonment.⁷⁵ An accompanied child-headed

⁶⁹ H Meintjes *et al.*, 2009 (n 35 above).

⁷⁰ Para 37 of the 2009 United Nations Guidelines for the Alternative Care of Children, A/HRC/11/L.13, adopted at the UN General Assembly on 20 November, 2010.

⁷¹ J Pearsall, *Oxford Concise Dictionary*, Oxford University Press (2001).

⁷² G Foster *et al.*, 1997 (n 54 above) 158.

⁷³ G Foster *et al.*, 1997 (as above).

⁷⁴ See A Bequele, *Emerging challenges of children heading households* (n 18 above) 2.

⁷⁵ African Child Policy Forum, 2008 (n 27 above) 29.

household is a household where a child has taken over the role of headship despite the presence of an adult due to illness or incapacitation of the adult.

Youth-headed household

The term, ‘youth-headed household’, is used to describe a household headed by a youth over 18 but under 25 years old. The term, ‘youth’ is particularly difficult to define as the concept of ‘youth’ is subjective. The African Youth Charter defines ‘youth’ as a person aged between 15 and 35 years old.⁷⁶ However, it was felt that the 18 to 35 age bracket was too wide to accurately define ‘youth’. For the purpose of the study, the youth is defined as persons between the age 18 and 25. The age bracket of 18 to 25 is also used by Mann whose study concerned the children affected by HIV and AIDS in Malawi.⁷⁷

Skip-generation household

A skip-generation household is a household in which only adults are older adults and/or grandparents.⁷⁸ The concept of a ‘skip-generation household’ is larger than a ‘grand-parent-headed household’ as the term includes any household headed by the elderly person(s) regardless of the blood relations between the head of the household and other members of the household.

Children who have been orphaned

The term ‘orphan’ is defined as ‘a child whose parents are dead’ or ‘who has been deprived of parental care and has not been adopted’.⁷⁹ As an adjective, it can also mean ‘lacking support, supervision, care’. It is an interesting point that the second definition does not require the ‘death of parents’. This broader concept of orphan or orphanhood fits closely with the traditional understanding of orphan in various African societies. For instance, Chirwa illustrates how in Malawian local languages the term ‘orphan’ reflects ‘a social and economic process that goes beyond the

⁷⁶ Adopted in Banjul, The Gambia in July 2006 and came into force on 9 August 2009.

⁷⁷ G Mann, 2002 (n 61 above) 6.

⁷⁸ V Hosegood, 2009 (n 55 above).

⁷⁹ *The American Heritage Dictionary of the English Language*, Houghton Mifflin (2000).

biological situation' caused by the death of parents.⁸⁰ In most local languages in Malawi, the definition of orphan includes 'loss of parents; the rupture of social bonds; lack of family support; the process and situation of deprivation and want; and the lack of money or means of livelihood'.⁸¹

It might be a stretch to define children 'lacking support, supervision and care' as orphans in a classic sense, but 'children who are deprived of parental care' could mean much broader group than children 'whose parents are dead' depending on the interpretation of the 'deprivation of parental care'. In a broad sense, the term children who are deprived of parental care could include children whose parents are terminally ill, hence, unable to provide actual parental care. It is noted in *Caring for children affected by HIV and AIDS* that in Malawi, a child who is living with a disabled or chronically ill parent is considered an orphan. Also in Rwanda, the concept of orphan is not necessarily tied to a death of parents. A child, who lost his or her parents but is living comfortably within the extended family, is not considered as an orphan.⁸² An all-inclusive definition was suggested during the discussion session for the UNICEF publication, *Children in need of special protection measures: a Tanzania study*: 'an orphan is a person [child] who does not have people to take care of him or her, or one who has lost his/her father or mother, or whose father and mother are unknown'.⁸³

Most of the literature uses the term orphans to mean 'children whose parents are dead'. One of the contentious issues is whether an abandoned child whose parents are untraceable should be considered to be an orphan. According to the second definition, abandoned children fall in a category of children 'who have been deprived of parental care'. Abandoned children or children who are 'deprived of parental care' for other reasons than death of parents can be referred as 'social orphans'. The term is explained in detail in the following section. For the purpose of the study, the distinction between a social orphan and biological orphan is unnecessary. In the study,

⁸⁰ W C Chirwa, 'Social exclusion and inclusion: challenges to orphan care in Malawi' (2002) 11/1 *Nordic Journal of African Studies* 95.

⁸¹ W C Chirwa, 2002 (as above) 96.

⁸² *Caring for children affected by HIV and AIDS*, UNICEF- IRC (November 2006) 21.

⁸³ S Ahmed *et al.*, *Children in need of special protection measures: a Tanzanian study*, UNICEF-Tanzania (1999) cited in R M C Evans, 'Social networks, migration, and care in Tanzania' (2005) 11/2 *Journal of Children and Poverty* 122.

the definition of children who have been orphaned also includes abandoned ‘children who lost their parents through desertion or whose parents are unwilling to provide care.’⁸⁴ However, it does not include children with terminally ill parents.

The UNICEF publication, *Children on the brink 2004*, provides definitions of different categories of children who have been orphaned. Categorising children in different groups may not reflect the reality that in some cases, single orphans (maternal or paternal) are ‘virtual double orphans’ as abandonment by a surviving parent does happen.⁸⁵ It is important to bear in mind that these terms are only to be used for statistical purpose, not to single out any section of the population.

Maternal orphans are children aged under 18 whose mothers and, maybe, fathers, have died. Therefore, it also includes doubles orphans.

Paternal orphans are children aged under 18 whose fathers have died.

Double orphans are children whose both parents have died.

The above definitions are not without problems. In reality, it is difficult to conceive that child can be classified as an ‘orphan’ till they reach 18 and stop being an orphan when they are over 18. The problems they face as ‘orphans’ do not suddenly disappear when their eighteenth birthday arrives. The programmes or projects to aid orphaned children should be designed to enable a smooth transition from childhood to adulthood.

Social orphans

The concept of ‘social orphan’ is new in Africa. The term can be interpreted in two ways. In relation to the traditional foster care arrangements within a traditional African extended family system, the term indicates children who are not only biologically orphaned but also have no relatives to care for them. Children in child-headed households without support from relatives or street children who are not in contact with family members can be understood as ‘social orphans’. Secondly, the term also refers to children who are abandoned by surviving parents.

⁸⁴ D Skinner *et al.*, 2004 (n 46 above) 8.

⁸⁵ A Case *et al.*, *Orphans in Africa: Parental death, poverty and school enrolment (revised version)*, Princeton: Centre for Health and Wellbeing, Princeton University (2004) 12.

In the study, the term, ‘social orphan’ is used to indicate children who do not have an adult caregiver despite the existence of members of extended families.

Vulnerable children

Defining ‘vulnerable children’ is complicated. A report by UNAIDS and UNICEF, *Children on the Brink 2004*, defines vulnerable children as ‘those children whose survival, well-being, or development is threatened by HIV and AIDS.’⁸⁶ The definition includes ‘children with sick family members, those who live in a household caring for orphans, and those who are living with HIV themselves’ among others.⁸⁷ However, this definition is narrow and limited. It is true that the epidemic has an enormous impact on the deepening level of poverty, but it should not be assumed that all households caring for children who are orphaned or family members who are living with HIV are vulnerable. Therefore, HIV-affectedness should not be a determinant factor in defining ‘vulnerable children’.

The term ‘vulnerability’ means ‘potential to be harmed physically and psychologically’⁸⁸ or ‘defencelessness, insecurity and exposure to risk, shocks and stress.’⁸⁹ The definition suggests that vulnerability is not solely based on an income level but also a lack of access to services, inability to claim their rights and mitigate impact of hardships on their own, regardless of the cause of such hardships.

Understanding ‘vulnerability’ broadly, Skinner *et al.*’s study on the definition of ‘orphaned and vulnerable children’ provides a useful understanding of ‘vulnerability’ with regards to children. Broadly, a child who has no, or very limited, access to basic needs was seen as a vulnerable child regardless of the cause of the deprivation.⁹⁰

⁸⁶ *Children on the Brink 2004: A joint report new orphan estimates and a framework for action*, UNICEF & UNAIDS (July 2004) 6.

⁸⁷ P A Wilson, *Combating AIDS in the developing world, achieving the Millennium Development Goals*, Task Force on HIV/AIDS, malaria, TB and access to essential medicines, working group on HIV/AIDS Report (2005) 111.

⁸⁸ Definition from: http://www.reference.com/browse/wiki/Social_Vulnerability [accessed: 10 July 2007].

⁸⁹ A Tostensen, ‘Towards feasible social security systems in sub-Saharan Africa’, (2004) 5 *Chr. Michelsen Institute Development Studies and Human Rights Working Paper*, available at: www.cmi.no/publications [accessed: 10 July 2007] 1.

⁹⁰ D Skinner *et al.*, 2004 (n 46 above) 10.

Other measures used to determine vulnerability of children were the uncertainty of fulfilling the basic rights and problems in the environment of the child.⁹¹ The study also provides definitions of ‘vulnerability’ in several African countries. For instance, in Botswana ‘vulnerable children’ include, ‘street children, child labourers, children who are sexually exploited, children who are neglected, children with handicaps, children in remote areas who are part of indigenous minorities.’⁹² In South Africa, vulnerable children include, ‘children who are neglected, destitute or abandoned, children with terminally ill parents, children born to single mothers, children with unemployed caretakers, children abused or ill-treated by caretakers and disabled children.’⁹³

A more comprehensive list of vulnerable children can be found in the Mozambique National Action Plan for Orphaned and Other Vulnerable Children, which lists:⁹⁴

- Children in households below the poverty line:
 - children in households headed by children, youth, the elderly or women;
 - children in households where an adult is chronically ill;
 - children affected or infected by HIV/AIDS;
- Street children;
- Children living in institutions;
- Children in conflict with the law
- Children with disabilities;
- Children victims of violence;
- Children victims of sexual abuse and exploitation;
- Children victims of trafficking;
- Children victims of the worst forms of child labour
- Children who are married before the legally defined age;
- Refugee and displaced children.

⁹¹ As above, 10; The study identifies the basic rights as ‘name and nationality; safe home and community environment; education; family care and support; sufficient food and basic nutrition; protection from maltreatment, neglect, abuse, security from community and the government; health care and good hygiene; shelter; recreational facilities; love; good clothing; the right to make choices concerning their ways of living.’

⁹² As above, 3.

⁹³ As above, 4.

⁹⁴ National Action Plan for Orphaned and Other Vulnerable Children, Ministry for Women and Social Action, Republic of Mozambique (2005) 11.

The study also rightly points out that vulnerability is not an absolute condition.⁹⁵ The level of vulnerability is determined by various factors, but it argues that the most vulnerable children are those without caregivers.⁹⁶ Also, there seems to be a well-established link between a level of poverty and vulnerability.⁹⁷ Differentiating between vulnerable children and children who are orphaned has practical limitations. A study conducted in Zambia found that most Zambians prefer the term ‘vulnerable child’ to ‘children who are orphaned’ because, more often than not, a child with parents is as materially deprived as a child who is orphaned, and equally in need of aid.⁹⁸ For the purpose of the study, it is accepted that children who are orphaned are part of a wider concept of vulnerable children, but vulnerable children are not synonymous with children without parents, or vice versa.

The present study is careful to avoid using the term ‘AIDS orphans’, CABA (children affected by HIV and AIDS) and OVC (orphans and other vulnerable children). The term ‘AIDS orphan’ is often used in various sources.⁹⁹ However, there is a danger of such terminology being employed as a label and creating a social identity. Labelling should be avoided not only in case of ‘AIDS orphans’ but also other cases, such as ‘famine orphans’, ‘war orphans’, ‘malaria orphans’ or ‘social orphans’.¹⁰⁰ It may affect external as well as internal stigmatisation of children.¹⁰¹ As one of the participants in the HSRC research project succinctly expressed, “a child remains a child right through.”¹⁰²

⁹⁵ D Skinner *et al.*, 2004 (n 46 above) 13.

⁹⁶ As above, 13.

⁹⁷ R Smart, 2003 (n 49 above) 5.

⁹⁸ ‘AIDS orphans: facing Africa’s “silent crisis”’, reprint from *Africa Recovery* (October 2001).

⁹⁹ P A Wilson, *Combating AIDS in the developing world, achieving the Millennium Development Goals*, Task Force on HIV/AIDS, malaria, TB and access to essential medicines, working group on HIV/AIDS Report (2005) 112; *Africa Recovery*, 2001 (as above); T Abebe & A Aase, ‘Children, AIDS and the politics of orphan care in Ethiopia: the extended family revisited’ (2007) 64 *Social Science & Medicine* 2059.

¹⁰⁰ T Abebe & Aase, 2007 (as above).

¹⁰¹ For a comprehensive research on stigmatisation and discrimination, see H Deacon *et al.*, *Understanding HIV/AIDS stigma: a theoretical and methodological analysis*, HSRC research monograph (2005).

¹⁰² D Skinner *et al.*, 2004 (n 46 above).

Street children

The study endeavours to avoid using the term, ‘street children’, unless it was absolutely necessary. The term is included in the section as it was felt that the term, ‘street children’ has often been used without a clear conceptualisation. The negativity and stigma attached to the term has been discussed in the following paragraph to highlight the danger of an over-use of the term.

UNICEF has categorised three types of street children: street living children, street working children and children of street living families. ‘Street living children’ and ‘street working children’ can be described as children *of* streets or children working *on* streets. The majority of street children are children working on the streets to supplement their family income. Those children may stay on streets but return home most nights. Children of streets, on the other hand, live, work and sleep on streets. Studies show that many such children are parentless but some also keep in contact with their families.¹⁰³ Although it is unclear how many of those children are orphaned by AIDS, but considering the increase in the number of children who are orphaned by AIDS, the number of street children is most likely to increase in Africa.¹⁰⁴ The term ‘street children’ should be used with caution as it may have a stigmatising effect. For instance, in Egypt, the term has been linked to ‘vagrants’, ‘delinquents’ or ‘juvenile delinquents’.¹⁰⁵

¹⁰³ *Orphans and other vulnerable children and adolescents in Zimbabwe: A study on street children in Zimbabwe*, available at: http://www.unicef.org/evaldatabase/files/ZIM_01-805.pdf [17 July 2007]; C Suda, ‘Street children in Nairobi and the African cultural ideology of kin-based support system: change and challenge’ (1997) 6 *Child Abuse Review* 209.

¹⁰⁴ G Foster, 2004 (n 44 above); The CRC Committee also noted the increasing number of street children in various countries in Africa. See Concluding observation by the CRC Committee: Angola (CRC/C/15/Add.246, 2004) para 68; Concluding observation by the CRC Committee: Senegal (CRC/C/SEN/CO/2, 2006) para 58; Concluding observation by the CRC Committee: Ghana (CRC/C/GHA/CO/2, 2006) para 63; Concluding observation by the CRC Committee: Cote d’Ivoire (CRC/C/15/Add.155, 2001) para 57; Concluding observation by the CRC Committee: Nigeria (CRC/C/15/Add. 257, 2005) para 69; Concluding observation by the CRC Committee: Lesotho (CRC/C/15/Add. 177, 2002) para 52; Concluding observation by the CRC Committee: DRC (CRC/C/COD/CO/2, 2009) 76; Concluding observation by the CRC Committee: Cameroon (CRC/CMR/CO/2, 2010) para 71.

¹⁰⁵ *Rapid situation assessment report on the situation of street children in Cairo and Alexandria including children’s drug abuse and health/nutritional status*, World Food Programme, UNICEF, UN Office for Drug Control and Crime Prevention (Cairo, 2001) available at: http://www.unicef.org/evaldatabase/files/EGY_2001_005.pdf [accessed: 17 July 2007] 13.

Rights-based approach

Understanding the concept of a ‘children’s rights-based approach’ (or ‘rights-based approach’ as used inter-changeably) is important to the study. Similar to many other concepts that contain complex dimensions, it is impossible to define a ‘rights-based approach’ meaningfully. In the simplest terms, a rights-based approach uses ‘international human rights norms and treaties to hold governments accountable for their obligation.’¹⁰⁶ One of the main advantages of a rights-based approach is that it can create a far reaching consequence that could bring a fundamental change in laws or policies. For instance, using a rights-based approach, individuals or groups of individuals can challenge executive actions undertaken under laws, or against the laws, thereby bringing about the change in the law.¹⁰⁷ Legal actions based on a rights-based approach can also bring structural changes.¹⁰⁸ *Minister of Health v Treatment Action Campaign and others*,¹⁰⁹ which challenged the implementation of a treatment programme and *Hoffman v SAA*¹¹⁰ that confronted discrimination based on the HIV status in the work place are two among numerous examples.

As the concept is explored in detail in chapter four, in this section, the term, ‘rights-based approach’ is not discussed at length. However, in simplistic terms, a rights-based approach is an approach to problem-solving which is firmly based on the principles of legally recognised children’s rights. Core principles of children’s rights explored in the thesis in relation to children who are deprived of their family environment are: (1) the right to parental care; (2) best interests of the child; (3) equality and non-discrimination; (4) survival and development; (5) child participation; (6) monitoring and evaluation.

¹⁰⁶ *Ripple in still water: Reflection by activists on local- and national-level work on Economic, Social and Cultural Rights* (n 39 above) 4.

¹⁰⁷ F Viljoen, ‘Introduction’ in F Viljoen (ed), *Righting stigma: exploring a rights-based approach to addressing stigma*, AIDS and Human Rights Research Unit, University of Pretoria (2005) 8.

¹⁰⁸ F Viljoen, 2005 (as above) 8.

¹⁰⁹ *Minister of Health v Treatment Action Campaign and others*, 2005 (5) SA 171 (CC); cited in F Viljoen 2005 (n 107 above) 8.

¹¹⁰ *Hoffman v SAA* (2000) 11 BCLR 1211 (CC), cited in F Viljoen, 2005 (n 107 above) 8.

Social security; right to social security

The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No 19 on the Right to Social Security, explains that the right to social security

encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, *inter alia*, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.¹¹¹

The CESCR identifies nine main branches of social security; health care; sickness benefit; old age pension; unemployment benefit; employment injury; family and child support; maternity grant; disability grant; and survivor and orphans grant.¹¹²

In the study, the term, ‘social security’ is understood as government provisions with regards to health care, educational services and social grants.

1.6 Methodology

The study contains elements of four broadly defined research methods or approaches: 1) an analytical element, in that it is based on an analysis of primary and secondary sources; 2) an empirical element, in that it is in part informed by informal interviews and on-site visits; 3) a comparative element, by the examination of different legal and policy frameworks in different African states; and 4) in part, a multi-disciplinary approach, incorporating anthropological studies on African families and societies.

Analysis of primary sources

The methodology in the first instance consists of an analysis of relevant international (global and regional) instruments and domestic legislation. The study includes the

¹¹¹ CESCR, General Comment No 19: the right to social security (article 9), Committee on Economic, Social and Cultural Rights, E/C.12/GC/19 (30 January 2008) para 2.

¹¹² As above, para 13-22.

examination of the case of South Africa for which the relevant sections of the Children's Act and Social Assistance Act No 13 of 2004 are analysed. The focus on South Africa is mainly due to the fact that South Africa is the only country in Africa that has legally recognised child-headed households. By examining the South African legal framework recognising and protection child-headed households, the study makes recommendations to other countries that are considering following the South African example.

Analysis of secondary sources

The study employed relevant academic articles and books on children's rights and the impact of the HIV epidemic in affected communities in Africa. The articles and books on anthropological perspective on 'family' have also been used. The study further makes use of commentaries on the CRC, ACRWC and the South African legislation, the Children's Act.

Interviews

In addition to the legal analysis, informal interviews with various interested parties in Temba, Hammanskraal were also conducted to examine how the legal provisions are implemented and enforced on the ground. The purpose of the interviews and on-site visits was not to develop quantifiable data on children in child-headed households, but to shed the light on the difficulties, which children in child-headed or youth-headed households face. The information obtained from the interviews has been used in chapter 5 to point out the discrepancy between the social security provisions and their application on the ground. The details of the interviews are as follows:

Interview with social workers

Two social workers, Ms Olivia Ratema and Ms Susan Molokomme from the Moretele Sunrise Hospice were interviewed. The interview took place in their office in Temba, Hammanskraal on 25 June 2009. The address is: Moretele Sunrise Hospice; P.O. Box 616; Temba, 0407.

Interview with Ms Catherine Sepato, a director of Tswaraganang orphanage

The interview took place at Tshepo Ya Bana (Hope for Children), a registered non-governmental organisation providing temporary and permanent care to children orphaned or abandoned. Tshepo Ya Bana is run by Mark and Christine Harding. The interview took place on 23 June 2009. The address is: Tswaraganang orphanage; P.O. Box 124; Temba, 0407.

On-site visits to youth-headed households

After the interview on 23 June 2009, Ms Catherine Sepato proposed the visit to her orphanage and youth-headed households around the area. She identified 10 youth-headed households, but only four of them were visited due to the time constraints. The visits took place on 25 June 2009. The interview with children and youths were conducted in Sesotho through Ms Catherine Sepato's interpretation.

Household	Number of children/youth	Age of children/youth in the household	Age of youth heading households	Year when their parents or other caregiver passed away
A	3	14 & 18	20	2006
B	3	16 & 17	20	2002
C	3	5 & 12	22	2004
D	11	From 3 month infant to 16 years	24	2006

All the households were located in Temba, Hammanskraal. They had close relationship with Ms Catherine Sepato who regularly visited them and assisted them with household items and food. All the households were located within walking distance of each other.

Three of the households (A, B & C) visited did not receive any social grants or assistance from the government. Children in two of the households (B & C) mentioned that they did not have any food in the house. One of the households (A) did not have an electricity connection. Two of the households (B & C), despite having a prepaid electricity connection, did not have money to buy credit for electricity. All of the households visited did not have proper housing. In the household A, B and C, all the members of the households were living in a one-bedroom shack with no

demarcation between kitchen and the bedroom. Household D, all the children were living in a small shack and the eldest caregiver had a separate small bedroom which she shared with her infant.

Although the on-site visits were informal and short, the interaction with children in child-headed households and youth-headed households provided valuable insights into the study highlighting the shortcomings of the implementation of the social security provisions.

Comparative studies of Namibia, Southern Sudan and Uganda

In addition to South African, child-headed households are recognised in the legislative frameworks of three other African states, Namibia, Southern Sudan and Uganda. The degree of protection and support provided to child-headed households differ in each country. For instance, Namibia developed extensive provisions defining, protecting and supporting child-headed households. The Child Care and Protection Bill of Namibia¹¹³ shares many similarities with the South African Children's Act. It contains similar criteria for determining child-headed households and also provides a designated adult supervisor to a child-headed household.¹¹⁴ The provisions contained in the proposed draft amendment Bill for the Children Act in Uganda¹¹⁵ are less detailed. It does not define child-headed household and the measures to protect and support child-headed households are not clearly listed in the law. The Child Act in Southern Sudan¹¹⁶ is also limited in that it does not define child-headed households. It does not clearly set criteria based on which child-headed households could be recognised.¹¹⁷ Although the Act provides material and other assistance, it is not clear what kind of support will be provided and how such measures will be implemented and monitored. Chapter 3 contains a detailed discussion on Namibia, Southern Sudan and Uganda.

¹¹³ Child Care and Protection Bill, Namibia (Revised Final Draft: May 2010).

¹¹⁴ Sec 206 of the Child Care and Protection Bill (as above).

¹¹⁵ Sec 36 of the proposed draft amendment Bill for the Children Act, Uganda (March 2010).

¹¹⁶ The Child Act No 10 of 2008, Southern Sudan.

¹¹⁷ Sec 117 of the Child Act (as above).

Multidisciplinary approach

To some extent, the study adopts a multidisciplinary approach. The examination of the impact of the HIV epidemic in various African families and communities and the consequent changes in the role and functions of African traditional family network is an important part of the thesis. Therefore, the thesis goes beyond the strictly ‘legal’ in that it contains anthropological studies on the traditional African families and communities and socio-economic studies on the impact of the HIV epidemic in various parts of Africa.

1.7 Literature review

There is a wide range of literature by non-governmental organisations, intergovernmental organisations and research institutes on issues concerning children in the context of the HIV epidemic. For instance, UNICEF publications, such as *Children on the brink 2004*, *Africa’s orphaned generations* and *Children orphaned by AIDS: frontline responses from eastern and southern Africa*, provide valuable statistics and various African states’ national policies on vulnerable children. Some publications focus on children made vulnerable by the HIV epidemic and others deal with vulnerable children in general.¹¹⁸ Policy publication, such as *Policies for orphans and vulnerable children: a framework for moving ahead*, provides useful definitions of orphaned and vulnerable children and policy analysis on orphans and vulnerable children.¹¹⁹ The World Vision publication, *Special Report 2001: HIV/AIDS and human development in Africa*, provides a useful statistical and situational analysis on general population and identifies the most vulnerable sections of the population.¹²⁰

Apart from the publications on statistical data, there are many valuable publications examining the issues such as HIV-related stigma on children and children’s access to education and health care services. The Human Science Research Council (HSRC)

¹¹⁸ UNICEF & UNAIDS, 2004 (n 86 above); UNICEF, 2003 (n 43 above); *Children orphaned by AIDS: frontline responses from eastern and southern Africa*, UNICEF & UNAIDS (December 1999).

¹¹⁹ R Smart, 2003 (n 49 above).

¹²⁰ M Dombo *et al.*, *Special report 2001: HIV/AIDS and Human Development in Africa* (February 2001).

has published numerous valuable studies on various themes on HIV and AIDS in Africa. Most notably, the HSRC published interesting studies on stigmatisation,¹²¹ situational analysis on children's education and access to health care,¹²² definition of orphaned and vulnerable children,¹²³ and research on the care of orphans and vulnerable children in Botswana, South Africa and Zimbabwe.¹²⁴

There are also studies linking the HIV epidemic with security issues.¹²⁵ For example, the Institute for Security Studies (ISS) published, *A generation at risk? HIV/AIDS, vulnerable children and security in southern Africa*, a collection of research papers on various issues surrounding children made vulnerable by HIV and AIDS.¹²⁶ Although those studies are interesting, a concern can be raised as some of those publications insinuate that children made vulnerable by the HIV epidemic as a security threat. Such insinuation could lead to stereotyping those children as potential delinquents. For instance, the International Crisis Group also published a report identifying AIDS as a security issue.¹²⁷ It focuses on trans-national and trans-regional dimensions of the HIV epidemic and provides an interesting analysis of consequences of the epidemic on both global and personal level. However, both studies do not link their recommendations with a children's rights perspective.

The subject of children orphaned and made vulnerable by the HIV epidemic has also received much attention. Among those publications addressing the issues of children in the context of the HIV epidemic, the publications concerning child-headed households are of a particular interest for the purpose of the thesis. Foster, as early as

¹²¹ H Deacon *et al.*, 2005 (n 101 above).

¹²² L Richter, J Manegold & R Pather, *Family and community interventions for children affected by AIDS*, HSRC monograph (2004), available at: www.hsrcpublishers.ac.za [accessed: 03 Oct 2007].

¹²³ D Skinner *et al.*, 2004 (n 46 above).

¹²⁴ P K Dlamini, *A description selected interventions for the care of orphans and vulnerable children in Botswana, South Africa and Zimbabwe*, HSRC monograph (2004).

¹²⁵ See P Fourie & M Schonteich, *Die, the beloved countries: Human security and HIV/AIDS in Africa* available at: www.sarpn.org.za/documents/d0000177/P170_Security_HIVAIDS.pdf [accessed: 19 May 2005]; J Spectar, 'The olde order crumbleth: HIV-Pestilence as a security issue and new thinking about core concepts in international affairs' (2003) 13 *Indiana International and Comparative Law Review* 481.

¹²⁶ R Pharoah (ed), *A generation at risk? HIV/AIDS, vulnerable children and security in Southern Africa*, ISS monograph series 109 (December 2004).

¹²⁷ International Crisis Group report, 2001 (n 50 above).

1997, pointed out that due to the rapid increase in parental death and the limited means of extended families to absorb children, child-headed households would become a coping method.¹²⁸

Some suggest that the number of child-headed households is small and not increasing.¹²⁹ Richter argued that child-headed households and skip-generations are only a small proportion and to narrowly focus on these extreme vulnerabilities would be to ‘blink our eyes to the much larger numbers of children and families that urgently require protection and support.’¹³⁰

It is true that in terms of proportion, child-headed households as conventionally defined as ‘adult-less’ households, is small. However, there are numerous reports indicating that the number of child-headed households is increasing fast in the countries where the epidemic has taken its toll. Furthermore, if the conventional understanding is broadened to incorporate *de facto* as well as *de jure* child-headed households, the number of child-headed households could increase.¹³¹ Desmond *et al.* raised important concerns regarding the conventional understanding of child-headed households as ‘adult-less households’.¹³² They pointed out that in many cases, children assume the role of ‘head of household’ despite the presence of adult family members when the living-in adults are too old or too sick to provide an effective care.¹³³ In some cases, an adult member of the family might be absent because of labour migration and a child may be providing a primary care to younger siblings.¹³⁴

The African Child Policy Forum also contributed greatly to enhancing understanding the status of children in Africa. One of the most ambitious and comprehensive publications on children in Africa is *The African Report on Child*

¹²⁸ G Foster, 1997 (n 54 above)

¹²⁹ See UNAIDS, 2008 (n 18 above) 47.

¹³⁰ L Richter, *No small issue: children and families Universal Action Now*, Plenary Presentation at the XVII International AIDS Conference, Mexico City, Mexico (6 August 2008) 6.

¹³¹ See C Desmond *et al.*, ‘Child-headed households: dissecting our understanding of who is at risk’ (2003) special edition *ChildrenFirst* 3.

¹³² C Desmond *et al.*, 2003 (as above).

¹³³ As above.

¹³⁴ As above.

Well-being, which examines legal and policy frameworks protecting children's rights and budgetary commitments to improve situations of African children in all African states.¹³⁵

The African Child Policy Forum also published a number of valuable reports on child-headed households, such as *HIV/AIDS, orphans and child-headed households in sub-Saharan Africa* and the *Reversed roles and stressed souls: child-headed households in Ethiopia 2008*. The *Reversed roles and stressed souls* provides a unique and valuable distinction between unaccompanied child-headed households and accompanied child-headed households.¹³⁶ The distinction is useful when devising supporting and protection measures to the children because children in unaccompanied child-headed households and children in accompanied child-headed households face different challenges.

The issue of targeting child-headed households is also contentious. Richter and Desmond questioned the wisdom of focusing on child-headed households and skip-generation households when other households, such as single adult-headed households or young adult-headed households experience equally or more desperate poverty.¹³⁷ It is a valid point as the economic situation of children in unemployed adult-headed households might be as dire as children in child-headed households. Targeting resources or assistance narrowly to children in child-headed households may leave out many other equally but differently vulnerable children. However, as UNICEF pointed out, child-headed households are particularly vulnerable to exploitation and abuses.¹³⁸ Special efforts should be made to address the particular vulnerability of the children in child-headed households. The special efforts on child-headed households do not need to be at the expense of other vulnerable children. The issue is not de-prioritising child-headed households but broadening the understanding of vulnerable children and addressing the needs of all groups of vulnerable children.

¹³⁵ *The African Report on Child Well-being 2008*, African Child Policy Forum (2008).

¹³⁶ Definitions are explored in chapter 1.5.

¹³⁷ L Richter & C Desmond, 'Targeting AIDS orphans and child-headed households? A perspective from national surveys in South Africa 1995-2005' (2008) 20/9 *AIDS Care* 1019.

¹³⁸ *Enhanced protection for children affected by AIDS: A companion paper to the Framework for protection, care and support of orphans and vulnerable children living in a world with HIV and AIDS*, UNICEF (2007) 29.

In relation to children's rights in Africa, Sloth-Nielsen's *Children's rights in Africa: a legal perspective* is one of the definitive books on children's rights in Africa.¹³⁹ Many of the chapters are highly relevant to the issue of children's rights in the context of the HIV epidemic, including Sloth-Nielsen and Mezmur's 'HIV/Aids and children's rights in law and policy in Africa: confronting hydra head on'¹⁴⁰ and Davel's 'Inter-country adoption from an African perspective'.¹⁴¹

Skelton and Davel's *Commentary on the Children's Act* provides excellent and detailed explanations of all the provisions of South Africa's Children's Act.¹⁴² Each provision of the Act is thoroughly analysed providing an impressive depth of information on children's rights in South Africa.

There are also a number of publications focusing on the rights of children in child-headed households. Most notably, Sloth-Nielsen, in her numerous articles, pointed out the state obligations towards children in child-headed households and called for a comprehensive protection measures for such households.¹⁴³ The Children's Institute has also been prolific and published valuable studies advocating for the access to social assistance to children in child-headed households.¹⁴⁴ Although these publications provide helpful insights into the issue, there is a lack of publications focusing on the subject of child-headed households from a right to alternative care, and special protection and assistance. Cantwell also points out the lack of studies focusing on the implications of legally recognising child-headed households.¹⁴⁵

¹³⁹ J Sloth-Nielsen (ed), *Children's rights in Africa: a legal perspective*, Ashgate (2008).

¹⁴⁰ J Sloth-Nielsen & B Mezmur, 'HIV/Aids and children's rights in law and policy in Africa: confronting hydra head on' in J Sloth-Nielsen (ed) *Children's rights in Africa* (as above) 279.

¹⁴¹ T Davel, 'Inter-country adoption from an African perspective' in J Sloth-Nielsen (ed) *Children's rights in Africa* (n 134 above) 257.

¹⁴² C J Davel & A M Skelton (eds), *Commentary on the Children's Act*, Juta (2007).

¹⁴³ Especially see, J Sloth-Nielsen, *Realising the rights of children growing up in child-headed households: a guide to laws, policies and social advocacy*, Community Law Centre, University of Western Cape (2004); J Sloth-Nielsen, 'Of newborns and nubile: some critical challenges to children's rights in Africa in the era of HIV/Aids' (2005) 13 *International Journal of Children's Rights* 73-85.

¹⁴⁴ Children without adult caregivers and access to social assistance, workshop report (20-21 August 2003), Children's Institute; S Rosa, *Counting on children: realising the right to social assistance for child-headed households in South Africa*, Children's Institute, University of Cape Town (2004).

¹⁴⁵ N Cantwell & A Holzscheiter, 2008 (n 42 above) para 32.

That said, there are two important articles analysing South African legislative reform to legally recognise child-headed households and its implications: ‘Supporting familiar and community care to children: legislative reform and implication challenges in South Africa’¹⁴⁶ by Zaal and Matthias; and ‘Legal recognition for child-headed households: An evaluation of emerging South African framework’¹⁴⁷ by Couzens and Zaal. Zaal and Matthias examined the contents of various ‘care’ arrangements, such as cluster care, shared care and the child-headed households. Couzens and Zaal focused on the legal framework recognising child-headed households. Although the above articles have informed the discussions in the study, the articles were written before the Children’s Act had been finalised. The study endeavours to fill the void by providing up-to-date and detailed analysis of the implications of legally recognising child-headed households on the right to alternative care, and special protection and assistance.

1.8 Limitations of the study

There are substantive and methodological limitations to the study that need to be acknowledged from the outset.

The substantive limitation of the study is the scope of the study. The majority of children in the developing world are vulnerable in many ways despite having surviving parents. There might not be much difference between children with poor parents and children who have been orphaned in terms of their economic vulnerability. A study conducted in Zambia for example found that 75 per cent of children who are orphaned and 73 per cent of children with poor parents lived below the poverty line.¹⁴⁸ Another study conducted in KwaZulu-Natal in South Africa also suggested that there was no significant difference in their vulnerability between

¹⁴⁶ F N Zaal & C R Matthias, ‘Supporting familial and community care to children: Legislative reform and implication challenges in South Africa’ (2009) 18 *International Journal of Social Welfare* 291.

¹⁴⁷ M Couzens & F N Zaal, ‘Legal recognition for child-headed households: An evaluation of the emerging South African framework’ (2009) 17 *International Journal on Children’s Rights* 299.

¹⁴⁸ ‘AIDS orphans: facing Africa’s silent crisis’, reprint from *African recovery* (October 2001).

children based on their orphan status.¹⁴⁹ Instead, the study found that the key factor affecting children's vulnerability was poverty.¹⁵⁰ This is an important finding as it shows that any assistance programmes or projects which focus narrowly and rigidly on children who are orphans may leave out other equally but differently vulnerable children.

However, these findings contradict the findings of other various studies, which suggested that children without parental care or children in foster care are often more disadvantaged in terms of receiving education or health care. For instance, the dropout rate was the highest among children who have lost both of their parents compared to children who lost neither or one parent.¹⁵¹ Furthermore, concerning the nutritional status, level of stunting was significantly higher among children who have been orphaned.¹⁵² Also, the study, *Children orphaned by AIDS*, shows that children who are orphaned fared worse compared to non-orphaned children on the enrolment in primary school in Zambia.¹⁵³ According to the study, in urban areas, 32 per cent of the children who are orphaned were out of school compared to 25 per cent of non-orphaned children, and in rural areas, 68 per cent of children who are orphaned were not enrolled in school compared to 48 per cent of non-orphans. These inconsistent findings make it difficult to accept any one study as a final authority on the issue. However, such inconsistent findings show that children's vulnerability should be understood in a broader context. Therefore, intervention programmes should be designed to avoid strict 'orphan exclusivity'.

The study fully acknowledges that children become vulnerable in the context of the HIV epidemic, not only due to the loss of parents, but also due to various other factors, such as the deepening level of poverty. However, the right to alternative care, and special protection and assistance is only applicable to children who are deprived of

¹⁴⁹ 'South Africa: research is discounting myth about orphans' *IRIN Pulse News*, (10 November 2006), available at: <http://www.plusnews.org/aidsreport.asp?reportid=6535> [accessed: 15 March 2007].

¹⁵⁰ As above.

¹⁵¹ See A Case *et al.*, 2004 (n 85 above).

¹⁵² As above.

¹⁵³ UNICEF & UNAIDS, 1999 (n 118 above) 17.

their family environment; hence a limitation to the scope of subject was deemed necessary.

Another substantive limitation is the selected scope of the research subject. Article 20 of the CRC is applicable to children who are ‘temporarily’ deprived of their family environment, or ‘in whose own best interest cannot be allowed to remain in that environment.’¹⁵⁴ Article 25(2)(a) of the ACRWC also includes children who are temporarily deprived of their family environment or who, in their interest, cannot be brought up or allowed to remain in that environment.¹⁵⁵ The application of the article is broader than children who are parentless or permanently deprived of family environment, and it inevitably includes children who are in an abusive, dangerous or unhealthy family environment. Nevertheless, the focus of the study is strictly on the children who are in child-headed households as the focus of the study is to examine the implications of legally recognising child-headed households.

The loss of parents due to AIDS-related illnesses is not the only reason why child-headed households are formed. For instance, in Rwanda, it is reported that approximately 13 per cent of the households are child-headed.¹⁵⁶ The focus on South Africa and other countries that have been heavily affected by the HIV epidemic does not mean that the recommendations from the study are only applicable in the context of the HIV epidemic.

Although the study is contextualized against the background of the HIV and AIDS crisis in sub-Saharan Africa, and in Southern Africa in particular, its focus on South Africa by necessity implies that the study is limited in its geographic scope, and that it may not be representative of the region. However, South Africa has been selected principally because it is the first country to legally recognise child-headed households. Although it is true that there is no one single ‘African setting’ or African society, the recommendations of the study are applicable to other countries facing similar challenges. Limited resources and weak infrastructure are common difficulties in most of the African states. While the study recognises that the different levels of available

¹⁵⁴ Art 20 of the CRC.

¹⁵⁵ Art 25(2) (a) of the ACRWC.

¹⁵⁶ A Bequele, 2007 (n 18 above) 3.

resources of states may hinder the effective implementation of the recommendations, considering the common difficulties in various African societies, it hopes to contribute in designing a support system based on a rights-based approach to protect children in child-headed households.

Finally, methodologically, the study is limited because it mainly consists of desk research. However, supplementary information was obtained from as wide a range of sources as possible, and efforts were made to overcome the inherent limitation of desk studies by including informal interviews with interested parties in chapter 4.

1.9 Conclusion

Children who are temporarily or permanently deprived of their family environment have the right to alternative care, and special protection and assistance. The importance of the right to alternative care, and special protection and assistance cannot be exaggerated in the midst of the HIV epidemic because an unprecedented number of the children are, and continue to be, temporarily or permanently deprived of their family environment. The combination of a dramatically increasing number of children deprived of their family environment and a decreasing number of adults who can provide care to such children resulted in the increasing number of children living on streets and in child-headed households without adult supervision.¹⁵⁷

Considering its importance, the right to alternative care, and special protection and assistance for children deprived of their family environment has received far too little attention. There are several reasons for the lack of attention. One could be the misperception that children are being adequately taken care of by extended families, and that the extended families will continue to absorb children who are orphaned. Another reason could be related to children's legal status. Despite their rights, children are often not in a position to voice their needs and concerns or enforce their rights. Furthermore, the conventional interpretation of the right may not reflect the realities in many African societies, such as the states' genuine inability to provide foster care, adoption or institutionalised care to all children who are deprived of

¹⁵⁷ See CRC Concluding Observations (n 104 above).

family environment; and the increasing number of children who are deprived of their family environment but for whose best interests cannot be placed in a conventional form of alternative care.

South Africa developed a comprehensive legal framework to protection children's rights, including children who are deprived of their family environment. The innovative feature of the South African model is that it has legally defined a 'child-headed household' and included protection and support measures for such households. The South African legal framework is a valuable example to other African countries facing similar challenges: an increasing number of children in need of alternative care and the limited human and material resources to provide conventional alternative care to those children. Especially, there is an increasing trend in Africa looking to recognised child-headed households in their legal framework. For instance, in Uganda, amendments to the existing Children's Act are drafted to include a definition of 'child-headed households', which is based on the South African Children's Act.¹⁵⁸ The draft Child Care and Protection Bill in Namibia also provides support to child-headed households.¹⁵⁹ The 2008 Child Act in Southern Sudan requires all levels of the government to register child-headed households and provides protection and assistance to such households.¹⁶⁰ Although the Act does not specifically include 'child-headed households' in the definition of 'children in need of special need and protection', but it includes children who are abandoned, orphaned or uncared for by their parents or guardians.¹⁶¹

The move towards legally recognising child-headed households as a placement of care for children deprived of care might be a step towards providing support and protection to such children. Nonetheless, it is a step that should not be hastily taken. Child-headed households should only be allowed to exist when all the necessarily conditions

¹⁵⁸ Correspondence with Professor J Sloth-Nielsen on 8 July 2010; The draft Child Care and Protection Bill in Namibia and the 2008 Child Act in Southern Sudan are discussed in detail in chapter 3.

¹⁵⁹ Information available at: <http://www.allbusiness.com/government/government-procedure-lawmaking-legislation/12708062-1.html> [accessed: 8 July 2010].

¹⁶⁰ Sec 117 of the Child Act 10 of 2008; available at: <http://www.unhcr.org/refworld/country,,,LEGISLATION,SDN,456d621e2,49ed840c2,0.html> [accessed: 8 July 2010].

¹⁶¹ Sec 126 of the Child Act (as above).

are met and mechanisms of state protection and assistance are firmly put in place. Furthermore, such measures to protect and support children in child-headed households should follow the principles of the children's rights.

The concept of children's rights is not new in Africa. All African states, except Somalia, have ratified the CRC. In addition to the CRC, in Africa, the ACRWC, which is ratified by 45 countries as of September 2009,¹⁶² came into force in 1999 to provide further protection to children on the continent. In many countries, children's rights are protected in their constitutions. Children are mentioned in constitutions of 28 African states in one way or another.¹⁶³ Also, several countries are in the process of developing a legal framework to protect children's rights or have already developed a comprehensive children's rights framework. In 13 African states, comprehensive legislation dealing with children's rights is either in force or in the various levels of the drafting process.¹⁶⁴ However, it should be noted that the development a legal framework to protection children's rights is a part of state obligation. The equally important obligation is to effectively implement the legal framework by putting in place an appropriate administrative and policy framework.

In the following chapter, the need of strengthening the legal and policy framework and intensify the government intervention to protect children who are deprived of

¹⁶² Signatory, accession and ratification table is available at: <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> [accessed: 28 September 2009].

¹⁶³ 28 states include Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Comoros, Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, Sao Tome & Principe, Senegal, Seychelles, South Africa, Sudan and Zambia.

¹⁶⁴ J Sloth-Nielson & B D Mezmur, 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 333, Ghana, Kenya, Madagascar, Nigeria, Uganda and South Africa have comprehensive children's rights in place. In Lesotho, Malawi, Mozambique, Namibia and Swaziland, a comprehensive children's rights law is either in drafting stage or in parliamentary process. The Malawian Parliament has drafted a CHILD (CARE, PROTECTION AND JUSTICE) BILL, 2003, which updates the previous Child and Young Persons Act and consolidates all child related legislations. In Lesotho, the Education Act was passed in 2010 protecting children's right to free and compulsory primary education. Botswana passed the Children's Act in 2009. Southern Sudan passed the Child Act 2008. The text is available at: <http://www.unhcr.org/refworld/country,,,LEGISLATION,SDN,456d621e2,49ed840c2,0.html> [accessed: 5 July 2010] South Africa has passed Children's Act no 38 of 2005 and some part of the Act came into force on 1 July 2007. The parts that are most relevant for the thesis, which are contained in the Children's Amendment Act came into force on 1 April 2010. Zambia is in the process of drafting the minimum standard document to regulate the standard of foster care.



their family environment has been explored. The chapter highlights the factors leading to the change of the role of the traditional Africa extended family network in the context of the HIV epidemic.